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# NLRB v. International Brotherhood of Electrical Workers, Local 340: Abolition of the Reservoir Doctrine in Union Unfair Labor Practice Cases

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## ***NLRB v. International Brotherhood of Electrical Workers, Local 340: Abolition of the Reservoir Doctrine In Union Unfair Labor Practice Cases***

The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth “logical” extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the “line drawing” familiar in the judicial, as in the legislative process: “thus far but not beyond.”<sup>1</sup>

Unions are generally free to discipline their members by expulsion, fine, or other penalty for any conduct that violates a valid union rule.<sup>2</sup> When discipline is imposed on a union member who holds a supervisory position with his company, the employer may challenge the legality of that discipline. The basis of the employer’s challenge is that the union is attempting to restrain the employer from choosing the disciplined supervisor as the employer’s bargaining representative in violation of section 8(b)(1)(B) of the National Labor Relations Act (“the Act”).<sup>3</sup>

In *NLRB v. International Brotherhood of Electrical Workers, Local 340 (IBEW)*<sup>4</sup> the United States Supreme Court ruled on the legality of union disciplinary action against one of its members when that member’s employer had no current bargaining relationship with the Union. The Court sharply “drew the line” on the evolutionary development of the construction of section 8(b)(1)(B) by the National Labor Relations Board (NLRB). After the decision in *IBEW*, an employer may no longer use section 8(b)(1)(B) to charge a union with unfair labor practices unless the employer is currently engaged in a bargaining relationship with that union. The Supreme Court’s restriction on the use of this provision abolished the long-standing NLRB “reservoir doctrine,” under which the Board or reviewing courts had recognized that *present* union conduct might effectively coerce an employer’s *future* selection of its bargaining representative in violation of section 8(b)(1)(B).

This Note examines the development of the reservoir doctrine in section 8(b)(1)(B) cases and analyzes the Supreme Court’s abolition of the doctrine in *IBEW*. It concludes that the Court’s rejection of the doctrine was incidental rather than integral to the holding in *IBEW*, and was inconsistent with prior judicial construction of section 8(b)(1)(B). The Note further concludes that the

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1. *NLRB v. International Bhd. of Elec. Workers, Local 340*, 107 S. Ct. 2002, 2016-17 (1987) (Scalia, J., concurring) (quoting *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 127 (1973)).

2. T. KEELINE, *NLRB AND JUDICIAL CONTROL OF UNION DISCIPLINE* 95 (1976).

3. Section 8(b)(1)(B) provides: “It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.” 29 U.S.C. § 158(b)(1)(B) (1982).

4. 107 S. Ct. 2002 (1987).

legislative intent of section 8(b)(1)(B)—to protect against union attempts at coercing the employer in his choice of a bargaining representative—will not be fully realized under the Supreme Court's narrow construction of the provision.

In 1982, the International Brotherhood of Electrical Workers, Local 340 ("the Union") fined two of its members,<sup>5</sup> Albert Schoux and Ted Choate when it found them guilty of violating the Union's constitutional prohibition against working for any employer who did not have a collective bargaining relationship with the Union. The Union Constitution forbade members to "[w]ork for, or on behalf of, any employer whose position is adverse or detrimental to the [Union]." <sup>6</sup> Schoux's employer, Royal Electric Company, and Choate's employer, Harold E. Nutter, Inc., were both electrical contractors, who at the time of the IBEW violations had adopted a collective bargaining agreement negotiated by their multi-employer unit with a rival union.<sup>7</sup> In response to the fines Royal Electric and Nutter filed unfair labor practice charges against the IBEW, claiming that the imposition of the fines had restrained or coerced the employers in their selection of the disciplined employees as bargaining representatives, and thus violated section 8(b)(1)(B).<sup>8</sup>

The NLRB adopted the administrative law judge's evidentiary findings<sup>9</sup> that both employees were "supervisors" within the definition of section 2(11) of the Act.<sup>10</sup> Thus, under the reservoir doctrine, both employees were prospective bargaining representatives within the purview of section 8(b)(1)(B).<sup>11</sup> Under the reservoir doctrine, the NLRB and the courts had recognized that supervisors—as part of a "reservoir" from which the employer is most likely to choose his future bargaining representatives—are "representatives" under section 8(b)(1)(B).<sup>12</sup> The Board additionally found that, even without resort to the reservoir doctrine, one of the fined employees was a bargaining representative

5. Schoux and Choate were fined \$8,200 and \$6,000, respectively. A third Union member, Melvin Miller, was fined \$7,683.20 for a similar violation. The Board rejected his employer's subsequent § 8(b)(1)(B) complaint on the ground that Miller did not hold a supervisory position—a precondition to finding a § 8(b)(1)(B) violation—at the time of the discipline. *Royal Elec. Co.*, 271 N.L.R.B. 995, 998 (1984), *enforcement denied*, *NLRB v. International Bhd. of Elec. Workers, Local 340*, 780 F.2d 1489 (9th Cir. 1986), *aff'd*, 107 S. Ct. 2002 (1987).

6. *IBEW*, 107 S. Ct. at 2005 n.1 (quoting the Union Constitution).

7. *Royal Electric*, 271 N.L.R.B. at 996.

8. *IBEW*, 107 S. Ct. at 2005.

9. *Royal Electric*, 271 N.L.R.B. at 995, 996-97, 998. In an unfair labor practice case, once a charge has been filed with and investigated by the Board's regional office, the General Counsel issues a complaint on behalf of the complaining party. K. MCGUINNESS & J. NORRIS, *HOW TO TAKE A CASE BEFORE THE NLRB* §§ 12.4, 12.10, 15 (5th ed. 1986). An administrative law judge conducts a hearing on the complaint and drafts a written decision, in accordance with Board precedent, on the evidence presented. *Id.* §§ 16.1, 17.1. The Board may adopt, reject, or modify the evidentiary findings and legal conclusions and recommendations of the judge. *Id.* § 17.11.

10. Section 2(11) of the Act defines a "supervisor" as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1982).

11. *Royal Electric*, 271 N.L.R.B. at 997-98.

12. See *infra* notes 34-39 and accompanying text.

under section 8(b)(1)(B) because of his ongoing responsibility of handling personal grievances.<sup>13</sup> The Board upheld the administrative law judge's legal conclusion that because the foreseeable and intended result of the fines was the employee's resignation, the employer, consequently deprived of his representative's services, was restrained and coerced in his selection of that representative in violation of section 8(b)(1)(B).<sup>14</sup>

The Board petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its "cease and desist" order against the Union.<sup>15</sup> The court of appeals denied enforcement of the order on the grounds that union discipline could not constitute a section 8(b)(1)(B) violation when the union did not seek to represent the complaining company's employees.<sup>16</sup>

The Supreme Court in *IBEW* affirmed the appellate court's refusal to enforce the Board's injunctive order against the Union.<sup>17</sup> The Supreme Court first determined that the employees were not representatives under section 8(b)(1)(B).<sup>18</sup> The Court maintained that because union discipline of a supervisor-member would only result in a section 8(b)(1)(B) violation when that discipline would "adversely affect" the supervisor's future performance of his collective bargaining and/or grievance adjustment functions,<sup>19</sup> representative status required current engagement in those functions.<sup>20</sup> This "current engagement" re-

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13. The Board established that Schoux granted employees time off and resolved personal complaints and problems regarding job assignments. See *Royal Electric*, 271 N.L.R.B. at 997.

14. *Id.* at 995, 1000.

15. *NLRB v. International Bhd. of Elec. Workers, Local 340*, 780 F.2d 1489, 1490 (9th Cir. 1986), *aff'd*, 107 S. Ct. 2002 (1987). Section 10(e) of the National Labor Relations Act empowers the Board to petition the United States Court of Appeals in the circuit in which the unfair labor practice occurred for enforcement of its order. 29 U.S.C. § 160(e) (1982). The Board's order additionally required the Union to rescind and expunge from its records all disciplinary action taken against Schoux and Choate, and to post a notice of the Board's order at its business office and meeting halls. *Royal Electric*, 271 N.L.R.B. at 1003.

16. *IBEW*, 780 F.2d at 1492-93. The court of appeals deferred to the Board's findings of fact regarding the employee's representative status. *Id.* at 1491-92. In deciding the case, the court of appeals applied the rule promulgated by the Ninth Circuit Court of Appeals in a prior decision: "[W]hen a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives." *Id.* at 1492 (citing *NLRB v. International Bhd. of Elec. Workers, Local 73 (Chewelach Contractors, Inc.)*, 714 F.2d 870, 871-72 (9th Cir. 1980), *denying enforcement of* 231 N.L.R.B. 809 (1977)).

*IBEW's* collective bargaining agreement with the employers' bargaining group had expired 17 months prior to the first disciplinary action. *Royal Electric*, 271 N.L.R.B. at 995, 996-98. Fourteen months before that disciplinary action, the Union sent a letter to the multi-employer bargaining unit to which Schoux and Choate's employers belonged, disclaiming any interest in representing the unit's employees. The Board found that this disclaimer of interest was part of a Union scheme to represent these employees and to induce employers within the bargaining unit to bargain individually with the Union. See *id.* at 999-1000. The Ninth Circuit rejected this finding as "logically insupportable," and held that the Union's "discipline of [its] members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer." *IBEW*, 780 F.2d at 1492-93.

17. *IBEW*, 107 S. Ct. at 2015.

18. *Id.* at 2011-12. In his dissenting opinion in *IBEW*, Justice White maintained that the issue of Schoux and Choate's representative status was not properly before the Court because the Board had prevailed on that issue at the appellate level and therefore did not raise the issue in its petition for certiorari. *Id.* at 2017 n.1 (White, J., dissenting).

19. *Id.* at 2010; see also *id.* at 2008-09 (discussing history of adverse effect standard).

20. *Id.* at 2010.

quirement is blatantly inconsistent with any doctrine that recognized representative status based solely on a supervisor's *potential* ability to undertake collective bargaining. The Court thereby rejected use of the reservoir doctrine as a mechanism for finding that employees can be section 8(b)(1)(B) representatives.<sup>21</sup>

The Court in *IBEW* further held that the current engagement requirement precluded the finding of a section 8(b)(1)(B) violation when the Union did not currently have or seek to establish a collective bargaining relationship with the employer.<sup>22</sup> The Court rejected the employers' argument that the Union's discipline in this instance would "restrain" the employer by reducing the pool of willing supervisors from which the employer might choose its bargaining representatives. The Court instead contended that the legislative intent behind section 8(b)(1)(B) was not "to prevent enforcement of uniform union rules that may occasionally have the incidental effect of making a supervisory position less desirable."<sup>23</sup> The Court reasoned that without a collective bargaining agreement, the adverse effects on the manner of the supervisor-member's fulfillment of his prospective representation duties, if any, would be "too speculative" to support a finding of an unfair labor practice.<sup>24</sup> Absent such an agreement, there would also be no incentive for the Union to attempt to coerce the employer's selection, the danger contemplated by the protections of section 8(b)(1)(B).<sup>25</sup>

As the Supreme Court noted in *IBEW*, section 8(b)(1)(B) was enacted to protect the integrity of the grievance adjustment and collective bargaining processes by placing restraints on unfair union labor practices.<sup>26</sup> The provision

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21. *Id.* The *IBEW* Court also suggested that the Board's reliance on Schoux's personal grievance adjustment duties as an alternative basis for finding representative status did not constitute a proper reading of "grievance adjustment" within § 8(b)(1)(B). *Id.* at 2012 n.12.

22. *Id.* at 2012-13. Justice Scalia did not join in this portion of the majority's holding. In his concurring opinion, he stated,

[I]n my view it does not matter whether the Union intended to represent Royal or Nutter; and if it did matter, I would find inadequate basis for overturning the Board's factual finding of representational intent. I would affirm the Court of Appeals solely on the ground that the Union had no collective-bargaining agreement covering either Royal or Nutter.

*Id.* at 2015 (Scalia, J., concurring).

23. *Id.* at 2013.

24. *Id.* at 2012. In his dissenting opinion, Justice White objected to the majority's interpretation of the legislative intent of § 8(b)(1)(B), and to the majority's exclusive focus on the adverse effect of union discipline on the supervisor's subsequent performance of his representative duties: "By its plain language, § 8(b)(1)(B) protects an employer's right to *select* grievance adjustment and collective-bargaining representatives, and does not merely ensure that union control does not affect the manner in which a selected representative thereafter performs his or her duties." *Id.* at 2017 (White, J., dissenting). Justice White cited the prior Supreme Court decision in *American Broadcasting Co. v. Writer's Guild*, 437 U.S. 411 (1978), in which the Court approved the Board's disposition of a claim "virtually identical" to the claim in *IBEW*, as evidence of the continued viability of § 8(b)(1)(B) liability when discipline affects a supervisor's willingness to serve as a collective bargainer or grievance adjuster. *IBEW*, 107 S. Ct. at 2018 (White, J., dissenting) (citing *New Mexico Dist. Council of Carpenters & Joiners of America (A.S. Horner, Inc.)*, 177 N.L.R.B. 500 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972)).

25. *IBEW*, 107 S. Ct. at 2012.

26. *Id.* at 2015; see 93 CONG. REC. 3837 (Apr. 23, 1947) (statement of Senator Taft).

was enacted in 1947 as one of the Taft-Hartley amendments<sup>27</sup> to the Wagner Act.<sup>28</sup> Under the Wagner Act, labor practice regulations were limited solely to employer conduct, and were designed to protect union organization and collective bargaining from unfair employer influence.<sup>29</sup> Unions flourished under the protections of the Act,<sup>30</sup> and prior to the Taft-Hartley amendments, often abused their influence. This abuse took the form of demanding that employers bargain through representatives preselected by and presumably predisposed to the interests of the union, that employers bargain only through a multi-employer bargaining group, and that employers terminate supervisors whom the union determined were too harsh on its members.<sup>31</sup>

The Board and courts of review adopted a two-part inquiry for use in applying section 8(b)(1)(B) to cases involving union disciplinary action such as the imposition of fines in *IBEW*.<sup>32</sup> The Board or the reviewing court inquired, first, whether the disciplined supervisor-member was a "bargaining representative" under section 8(b)(1)(B) and, second, whether the disciplinary action restrained and coerced the employer in his selection of that representative.<sup>33</sup> The reservoir doctrine, which stated that a supervisor within the meaning of section 2(11) of the Act<sup>34</sup> was part of the "logical reservoir" from which an employer was likely to select its collective bargaining and grievance adjustment representatives,<sup>35</sup> emerged as a means for the Board to satisfy both parts of this inquiry.<sup>36</sup>

The National Labor Relations Board has consistently relied on the reservoir doctrine in an effort to recognize representative status in those employees who, although lacking current grievance adjustment duties, enjoyed a level of

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27. Labor Management Relations (Taft-Hartley) Act, § 8(b)(1)(B), ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 158(b)(1)(B) (1982)).

28. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

29. Section 1 of the Wagner Act cites as the impetus for its enactment the "denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining," and asserts that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes." *Id.* § 1.

30. See 93 CONG. REC. 3582 (1947) (statement of Congressman Mackinnon on need for legislative amendment to Wagner Act).

31. See 93 CONG. REC. 4143 (1947) (statement of Senator Ellender).

32. Union disciplinary action against a supervisor-member may constitute "indirect" coercion of the employer in his selection of that supervisor as its bargaining representative. For a discussion of both the Board's and the Supreme Court's initial application of § 8(b)(1)(B) solely to claims of "direct" union coercion, and the evolution of that application to encompass claims of indirect coercion, see *Florida Power & Light Co. v. International Bhd. of Elec. Workers*, 417 U.S. 790, 798-802 (1974); Comment, *Section 8(b)(1)(B), National Labor Relations Act: When Does Union Discipline Constitute Restraint or Coercion of the Selection of Employer Representatives?*, 1976 WIS. L. REV. 866, 869-73.

33. See, e.g., *Erie Newspaper Guild, Local 187 v. NLRB*, 489 F.2d 416, 419-20 (3d Cir. 1973) (applying two-part test to § 8(b)(1)(B) claim arising from union discipline of strike breaking supervisors).

34. 29 U.S.C. § 152(11) (1982).

35. *IBEW*, 780 F.2d at 1491.

36. The Board's decision in *Toledo Blade Co.*, 175 N.L.R.B. 1072, 1079 (1969), enforced, 437 F.2d 55 (6th Cir. 1971), has been credited with the creation of the doctrine. See *Erie Newspaper Guild*, 489 F.2d at 420.

supervisory contact with fellow employees.<sup>37</sup> Under this definition of "representative," which included supervisors who were "vested with theoretical power" to become the employer's representative,<sup>38</sup> the Board could address the second part of the section 8(b)(1)(B) inquiry by ascertaining whether the union's conduct restrained or coerced the employer contrary to its right to rely on the availability of these supervisors to serve as representatives when the occasion arose.<sup>39</sup>

The Board's steadfast adherence to the reservoir doctrine in assessing section 8(b)(1)(B) claims was first shaken by the Supreme Court's decision in *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*.<sup>40</sup> The Court in *Florida Power* held that union discipline of a supervisor-member who crossed a picket line to perform the rank-and-file work of striking employees was not a section 8(b)(1)(B) violation.<sup>41</sup> The Court promulgated a new standard for reviewing the legality of union discipline: A union's discipline of one of its members who is a supervisory employee can constitute a violation of section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.<sup>42</sup> According to a subsequent decision of the United States Court of Appeals for the Second Circuit,<sup>43</sup> the *Florida Power* standard effectively undermined the conceptual basis of the reservoir doctrine by mandating current engagement in collective bargaining activities as a prerequisite to finding representative status.<sup>44</sup> The Board disagreed with the Second Circuit's interpretation of the effect of *Florida Power* on the viability of the reservoir doctrine.<sup>45</sup> Nonetheless, the NLRB began to present alternative grounds for finding representative status—usually by applying a broad definition of "grievances" handled by the disciplined supervisor—in cases in which it would previously have asserted only the application of the reservoir doctrine.<sup>46</sup>

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37. See *Northwest Publications Co.*, 263 N.L.R.B. 778, 779 n.6 (1982); *Detroit Free Press*, 192 N.L.R.B. 106, 110 (1971); *Toledo Blade*, 175 N.L.R.B. at 1079.

38. *Cork Insulating Co. of Wis.*, 189 N.L.R.B. 854, 857 (1971). Some courts, including the Supreme Court in *IBEW*, 107 S. Ct. at 2006, have stated the doctrine as automatically granting representative status to all § 2(11) supervisors. The Board, however, has traditionally required the employer to present "credible evidence" that the supervisor is part of a class from which management naturally might seek its representative. See *Erie Newspaper Guild*, 489 F.2d at 420-22; *Detroit Free Press*, 192 N.L.R.B. at 110; *Cork Insulating*, 189 N.L.R.B. at 857. But see *Royal Palm Dinner Theatre, Ltd.*, 275 N.L.R.B. 677, 682 n.8 (1985) (dictum granting representative status automatically by virtue of supervisory rank).

39. See *Toledo Blade*, 175 N.L.R.B. at 1079.

40. 417 U.S. 790 (1974).

41. *Id.* at 803-05.

42. *Id.* at 804-05.

43. *NLRB v. Rochester Musicians' Ass'n Local 66*, 514 F.2d 988 (2d Cir. 1975).

44. *Id.* at 992-93.

45. See generally *Stone & Webster Eng'g Corp.*, 283 N.L.R.B. No. 114 (Apr. 24, 1987) (available on LEXIS) (discussing Board's continued adherence to reservoir doctrine after *Rochester Musicians' Ass'n*, 514 F.2d at 992-93).

46. See, e.g., *id.* (asserting supervisor's grievance adjustment duties as alternate grounds for representative status); *Hulse Elec.*, 273 N.L.R.B. 428, 439 (1984) (stating that even without resort to reservoir doctrine, supervisor was § 8(b)(1)(B) representative because of handling of employee complaints and personal conflicts); *Suburban Sheet Metal Co.*, 273 N.L.R.B. 523, 526 (1984) (supervisor authorized to resolve employee disputes and problems is § 8(b)(1)(B) representative without solely relying on reservoir doctrine); see also *Pride Elec. Inc.*, 283 N.L.R.B. No. 8 (Feb. 26, 1987) (noting

Four years after *Florida Power*, the Supreme Court's decision in *American Broadcasting Co. v. Writers Guild of America*<sup>47</sup> did little to support the assertion of the Second Circuit Court of Appeals that the reservoir doctrine was no longer a viable mechanism for bringing supervisors within the purview of section 8(b)(1)(B). The Court in *American Broadcasting* adopted the *Florida Power* "adverse effects" test in assessing a claim that union discipline of a supervisor-member who elected to cross a picket line to perform supervisory work constituted illegal coercion of the employer.<sup>48</sup> The *American Broadcasting* Court also recognized, however, that "[s]ection 8(b)(1)(B) obviously can be violated by attempting coercively to control the choice of the employer's representative, before, as well as after, the representative has actually dealt with the grievance."<sup>49</sup> If *Florida Power* did in fact undermine the conceptual basis of the doctrine by requiring a supervisor's current engagement in representative functions, *American Broadcasting* arguably reinstated the basis of the reservoir doctrine by judicial recognition that prospective representative status fell within the realm of section 8(b)(1)(B).<sup>50</sup> *American Broadcasting's* reinstatement of the doctrine, though, was arguably limited to instances in which a supervisor had previously been authorized to perform grievance adjustment duties.<sup>51</sup>

Although the reservoir doctrine has retained some vitality in finding representative status under section 8(b)(1)(B), the Board and the courts have not cited the reservoir doctrine per se in finding that union conduct coerced the employer in his selection of a bargaining representative in violation of section 8(b)(1)(B). Still, the conceptual basis for the doctrine has appeared as the rationale in many cases for such a finding, most notably those cases in which the defendant union

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tendency of Board to interpret "grievance" broadly in applying § 8(b)(1)(B)); *Desert Inn Hotel, Country Club & Spa*, 281 N.L.R.B. No. 65 (Sept. 10, 1986) (citing Supreme Court decision in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 832 n.9 (1984), for support of reliance on broad definition of "grievance" in finding § 8(b)(1)(B) violation).

47. 437 U.S. 411 (1978) (holding that threats of discipline as well as the imposition of union discipline on supervisor-member for crossing picket line to perform supervisory duties violated § 8(b)(1)(B)).

48. See *id.* at 430. The *American Broadcasting* Court applied the "adverse effect" test to gauge the effect of the union discipline on the manner in which the supervisors subsequently performed their grievance adjustment duties. *Id.* at 432-35. For a comparison of the Court's application of the test with its original application in *Florida Power*, see Comment, *Section 8(b)(1)(B) of the National Labor Relations Act and Union Discipline of Supervisor-Members After Writers Guild: Equipose or Imbalance?*, 1978 S. ILL. U.L.J. 453, 462-74.

49. *American Broadcasting*, 437 U.S. at 427 n.25. This recognition was the basis for the Court's holding that, in addition to the actual imposition of union discipline on strike breaking supervisors, the mere threat of discipline, which dissuaded many supervisors from reporting to work, constituted a § 8(b)(1)(B) violation by depriving the employer of "the opportunity to chose these particular supervisors as his collective-bargaining or grievance-adjustment representatives." *Id.* at 432. The Court noted that both the disciplined supervisors and the supervisors who were restrained from reporting to work were authorized and available to adjust grievances when and if the occasion arose. *Id.* at 427 n.25, 431-32.

50. See *NLRB v. International Bhd. of Elec. Workers (Drexel)*, 703 F.2d 501, 504-05 (11th Cir.) (citing *American Broadcasting* as support for holding that discipline of supervisor "deprived" employer of potential bargaining representative and therefore violated § 8(b)(1)(B)), *cert. denied*, 464 U.S. 950 (1983); see also *IBEW*, 107 S. Ct. at 2013 n.15 (noting as dictum and disavowing the *American Broadcasting* Court's recognition of coercion when supervisor was subsequently unwilling to serve as representative).

51. See *American Broadcasting*, 437 U.S. at 427 n.25, 431-32, 435.



did not currently have a collective bargaining agreement with the complaining company.

The Court in *American Broadcasting*, for example, recognized that union pressure which affects the supervisor's willingness to serve in a grievance adjustment or collective bargaining capacity "impermissibly coerces the employer in his choice of representative."<sup>52</sup> In support of this interpretation of section 8(b)(1)(B), the Court cited the nine-year-old National Labor Relations Board decision in *New Mexico District Council of Carpenters & Joiners of America (A.S. Horner, Inc.)*.<sup>53</sup> In *A.S. Horner* the Board held that the imposition of a fine on a supervisor-member would violate section 8(b)(1)(B), notwithstanding the absence of a current collective bargaining agreement between the employer and union.<sup>54</sup> A violation occurred because compliance with the union's demands would require the employee to leave his job and thereby deprive the employer of the services of its selected representative.<sup>55</sup> Buoyed by the *American Broadcasting* Court's endorsement of the decision,<sup>56</sup> the Board has continuously adhered to *A.S. Horner*,<sup>57</sup> and has found additional support in decisions of the United States Courts of Appeals for the Eleventh,<sup>58</sup> Fifth,<sup>59</sup> Seventh,<sup>60</sup> and District of Columbia Circuits.<sup>61</sup> Despite such widespread support, the *A.S. Horner* rationale has been criticized in some jurisdictions. The United States Court of Appeals for the Ninth Circuit, in *NLRB v. International Brotherhood of Electrical*

52. *Id.* at 436.

53. 177 N.L.R.B. 500 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972).

54. *Id.* at 502.

55. *Id.*

56. *American Broadcasting*, 437 U.S. at 436 n.36.

57. See, e.g., *Valley Mechanical, Inc.* 281 N.L.R.B. No. 89 (Sept. 22, 1986) (§ 8(b)(1)(B) violation when union disciplined member who worked for company with whom union did not have or seek a collective bargaining relationship); *Royal Palm Dinner Theatre, Ltd.*, 275 N.L.R.B. 677, 683 (1985) (union discipline of supervisor violated § 8(b)(1)(B) in absence of collective bargaining relationship between union and employer); *Hulse Elec.*, 273 N.L.R.B. 428, 440 (1984) (union discipline of supervisor-member for working for nonsignatory employer violates § 8(b)(1)(B)); *West Coast Contractors*, 254 N.L.R.B. 1123, 1126-27 (1981) (dictum citing *A.S. Horner* as controlling in § 8(b)(1)(B) cases when union does not represent complaining company's employees); *Chewelah Contractors, Inc.*, 231 N.L.R.B. 809 (1977) (§ 8(b)(1)(B) violation for union discipline of supervisor when union did not currently seek to represent employer's employees), *enforcement denied*, 621 F.2d 1035 (9th Cir.), *amended on reh'g*, 714 F.2d 870 (9th Cir. 1980); *Skippy Enterprises, Inc.*, 218 N.L.R.B. 1063, 1064 (1975) (citing *A.S. Horner* in support of finding § 8(b)(1)(B) violation for union discipline for infraction of "no contract no work" rule), *enforced*, 532 F.2d 222 (7th Cir. 1976); see also *Suburban Sheet Metal Co.*, 273 N.L.R.B. 523, 526 (1984) (applying *A.S. Horner* rationale to find § 8(b)(1)(B) violation only when evidence showed that union sought to represent the company's employees); *Bergelectric Corp.*, 271 N.L.R.B. 25 (1984) (§ 8(b)(1)(B) violation when discipline would have effect of "depriving the [c]ompany of its chosen supervisors").

58. *NLRB v. International Bhd. of Elec. Workers (Drexel)*, 703 F.2d 501, 504-07 (11th Cir.) (union discipline of member for working as supervisor for nonunion employer violated § 8(b)(1)(B)), *cert. denied*, 464 U.S. 950 (1983).

59. *International Longshoreman's Ass'n v. NLRB*, 539 F.2d 554, 560-61 (5th Cir. 1976), (finding § 8(b)(1)(B) violation when rival supervisor's union picketed to pressure employer to replace current union), *cert. denied*, 434 U.S. 828 (1977).

60. *NLRB v. International Bhd. of Elec. Workers, Local 2150*, 486 F.2d 602, 607 (7th Cir. 1973) (§ 8(b)(1)(B) violation for union discipline of supervisor who reported to work during strike occurring after expiration of bargaining contract with employer), *vacated*, 418 U.S. 902 (1974).

61. *International Longshoreman's Ass'n, Local 1740 v. NLRB*, 486 F.2d 1271, 1274 (D.C. Cir. 1973) (finding § 8(b)(1)(B) violation by union who picketed employer to pressure discharge of employer's representatives, who were members of a rival union), *cert. denied*, 416 U.S. 956 (1974).

*Workers, Local 73 (Chewelah Contractors, Inc.)*,<sup>62</sup> rejected the rationale of *A.S. Horner*. The same court that would reject use of the reservoir doctrine as a basis for finding illegal restraint in *IBEW* noted that when a union neither has nor sought a collective bargaining relationship with the employer, union discipline of that employer's supervisor-members did not represent coercion under section 8(b)(1)(B).<sup>63</sup> In these instances, the court of appeals noted that the union had no incentive to influence the employer's choice of a representative, nor did it have the power to affect the representative's subsequent loyalty to that employer.<sup>64</sup>

*IBEW* brought to an abrupt halt the prolonged judicial disagreement over the relative impact of *Florida Power* and *American Broadcasting* when current union conduct resulted in section 8(b)(1)(B) claims of wholly *prospective* restraint and coercion of an employer's choice of bargaining representative.<sup>65</sup> Under *IBEW*, union discipline of a supervisor-member will now constitute a section 8(b)(1)(B) violation only when that discipline has been imposed for an act or omission that occurred while the member was engaged in collective bargaining, grievance adjustment, or some other closely related activity.<sup>66</sup> The *IBEW* Court explained that this standard derived from the "implicit" limitations the *Florida Power* Court placed on permissible applications of its "adverse effects" test.<sup>67</sup> In allegiance to this standard as the exclusive basis for finding a section 8(b)(1)(B) violation, as well as in deference to what it deemed the legislative intent behind the scope of the provision, the *IBEW* Court maintained that it was obligated to abolish the reservoir doctrine.<sup>68</sup> With this abolition, the Court overruled, in whole or in part, almost twenty years of Board decisions that had relied to some degree on the doctrine to find that a supervisor had the requisite representative status to sustain his employer's section 8(b)(1)(B) claim.<sup>69</sup> De-

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62. 714 F.2d 870 (9th Cir. 1980), *denying enforcement of* 231 N.L.R.B. 809 (1977)).

63. *Id.* at 871-72.

64. NLRB v. International Bhd. of Elec. Workers, Local 73 (Chewelah Contractors, Inc.), 621 F.2d 1035, 1037 (9th Cir.), *amended on reh'g*, 714 F.2d 870 (9th Cir. 1980).

65. The Supreme Court granted certiorari for the express purpose of resolving this issue. *See IBEW*, 107 S. Ct. at 2007 & n.4.

66. *Id.* at 2010.

67. *Id.* at 2008-09.

68. *Id.* at 2010.

69. *See, e.g.*, *Stone & Webster Eng'g Corp.*, 283 N.L.R.B. No. 114 (Apr. 24, 1987) (available on Lexis) (asserting supervisor's grievance adjustment duties as alternative grounds for establishing representative status); *Desert Inn Hotel, Country Club & Spa*, 281 N.L.R.B. No. 65 (Sept. 10, 1986) (supervisor who sporadically handled grievances as representative without solely invoking reservoir doctrine); *Royal Palm Dinner Theatre, Ltd.*, 275 N.L.R.B. 677, 682 & n.8 (1985) (citing supervisor's handling of employee complaints and grievances, along with reservoir doctrine, in determining representative status); *Hulse Elec.*, 273 N.L.R.B. 428, 439 (1984) (holding that even without reservoir doctrine, supervisor's handling of personal complaints and conflicts were sufficient to establish him as representative under Board's broad interpretation of § 8(b)(1)(B) "grievance"); *Suburban Sheet Metal Co.*, 273 N.L.R.B. 523, 526 (1984) (supervisor authorized to resolve employee disputes is § 8(b)(1)(B) representative without relying solely on reservoir doctrine); *Northwest Publications Co.*, 263 N.L.R.B. 778, 779 n.6 (1982) (reliance on reservoir doctrine to establish fined supervisor's representative status), *enforced*, 730 F.2d 768 (9th Cir. 1984); *Detroit Free Press*, 192 N.L.R.B. 106, 110 (1971) ("[A] substantial supervisor who is responsible for the day-to-day performance of employees in his area is a management representative within Section 8(b)(1)(B)."); *Toledo Blade Co.*, 175 N.L.R.B. 1072, 1079 (1969) (representative status in supervisors authorized to adjust grievances

spite the apparent logic of its rationale, the *IBEW* Court's dismissal of this longstanding NLRB doctrine appears cavalier. The Court admitted it was not necessary to reject the Board's grounds for finding Schoux and Choate's representative status to dispose of the case.<sup>70</sup> It was, therefore, unnecessary for the Court to reject application of the reservoir doctrine.<sup>71</sup>

The Court's exclusive recognition of the *Florida Power* standard in section 8(b)(1)(B) cases similarly precluded future application of the conceptual basis for the reservoir doctrine as a means of finding restraint and coercion.<sup>72</sup> The *IBEW* standard gauges restraint and coercion only by the degree of change in the representative's subsequent performance of the same collective bargaining functions that led to the disciplinary action. Application of this standard, therefore, prohibits the finding of a section 8(b)(1)(B) violation in two situations. First, no violation would occur if the employer had no collective bargaining relationship with the union.<sup>73</sup> Second, the *IBEW* standard prohibits finding a violation in any case in which the employer claims—as the employer successfully claimed in *American Broadcasting*—that the union's conduct restrained the employer's selection of a bargaining representative by effectively limiting the pool of supervisors available, willing, and qualified to perform those services.<sup>74</sup>

The *IBEW* Court may have correctly interpreted the scope of the test created and applied in *Florida Power*. Its reliance on that test as the exclusive standard for finding a section 8(b)(1)(B) violation and as a consequence its disavowal of the broader standard espoused in *American Broadcasting*, however, may have been inappropriate. The *Florida Power* Court considered the possible coercive effect of union discipline of an employer's preselected bargaining representative, which was imposed for the representative's performance of nonsupervisory duties during a strike. That Court's inquiry, and the scope of the test it promulgated to address that inquiry, was appropriately limited to an assessment of the circumstances under which discipline of a supervisor—already selected and currently engaged as a bargaining representative—might effectively restrain the employer in that selection by causing the representative to modify the manner in

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"even if it were found that neither [supervisor] then had or exercised such authority"), *enforced*, 437 F.2d 55 (1971).

70. See *IBEW*, 107 S. Ct. at 2012 n.12.

71. See *id.* at 2015 (Scalia, J., concurring) ("I find it unnecessary (as should the Court) to reach the 'reservoir doctrine' question . . ."); *id.* at 2017 n.1 (White, J., dissenting) (noting that issue of employees' representative status not properly before the Court since not raised in petition for certiorari).

72. The *IBEW* Court adopted the *Florida Power* "adverse effect" test and its "implicit" limitation to application in cases in which "an employer-representative is disciplined for behavior that occurs while he or she is engaged in § 8(b)(1)(B) duties." *Id.* at 2008. This limitation is inconsistent with the conceptual basis of the reservoir doctrine, which recognizes that any union discipline which affects the willingness or availability of the employer's supervisors to serve eventually as a bargaining representative coerces the employer's choice of representative in violation of § 8(b)(1)(B). See *supra* text accompanying notes 43-44.

73. See *IBEW*, 107 S. Ct. at 2012.

74. The *IBEW* Court characterized this portion of the *American Broadcasting* decision as dictum, *id.* at 2013 n.15, and disavowed the prior decision's recognition of coercion resulting from the discipline of a supervisor while engaged in nonrepresentative functions, *id.* at 2010 n.8. But see *infra* notes 76-78 and accompanying text (discussing that portion of *American Broadcasting* decision as integral to Court's holding).

which he subsequently performs his representative duties.<sup>75</sup>

In *American Broadcasting* the Supreme Court considered, as it had in *Florida Power*, the coercive effect of discipline of incumbent bargaining representatives on the subsequent performance of their duties. Another issue raised in *American Broadcasting* was whether an employer was coerced when the threat of union discipline dissuaded a supervisor vested with grievance adjustment authority from working altogether during a strike, thereby depriving the employer of a potential bargaining representative.<sup>76</sup> The *American Broadcasting* standard, which recognized illegal coercion when union pressure on supervisors affected either their willingness to serve as grievance adjusters or the manner in which they fulfilled those functions,<sup>77</sup> did not represent a departure from the *Florida Power* test. Rather, the *American Broadcasting* standard was a necessary extension of that test to address an additional section 8(b)(1)(B) claim—the type of claim at issue in *IBEW*.<sup>78</sup>

The *IBEW* Court explained its disavowal of the *American Broadcasting* standard on the grounds that the effect of union discipline on an employer's prospective choice of bargaining representatives is “minimal”<sup>79</sup> and “too speculative”<sup>80</sup> to have been contemplated by Congress in its formulation of section 8(b)(1)(B) protections.<sup>81</sup> This criticism failed to consider that Congress intended section 8(b)(1)(B) protections to extend not only against union conduct

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75. *Florida Power*, 417 U.S. at 804-05; see also *NLRB v. International Bhd. of Elec. Workers (Drexel)*, 703 F.2d 501, 504 (11th Cir.) (characterizing the issue in *Florida Power* as whether the court should extend § 8(b)(1)(B) protection to the employer whose supervisor is disciplined for performing nonrepresentative duties), *cert. denied*, 464 U.S. 950 (1983).

76. See *American Broadcasting*, 437 U.S. at 431-32; see also *NLRB v. International Bhd. of Elec. Workers (Drexel)*, 703 F.2d 501, 504 (11th Cir.) (citing *American Broadcasting* as holding in part that union pressure kept supervisors from reporting to work violated § 8(b)(1)(B) by depriving employer of opportunity to choose those supervisors as representatives) (quoting *American Broadcasting Co.*, 437 U.S. at 436 n.36), *cert. denied*, 464 U.S. 950 (1983); *IBEW*, 107 S. Ct. at 2018 (White, J., dissenting) (discussing the dual issues of supervisor availability and manner of performance in *American Broadcasting*).

77. See *American Broadcasting*, 437 U.S. at 436.

78. The Supreme Court in both *American Broadcasting* and *IBEW* addressed claims of union coercion when union discipline dissuaded a supervisor vested with grievance adjustment authority from reporting to work. See *IBEW*, 107 S. Ct. at 2018 (White, J., dissenting). Application of the *American Broadcasting* standard to the facts of *IBEW* may, however, yield a different result. Unlike the supervisors in *IBEW*, 107 S. Ct. at 2005, the supervisors in *American Broadcasting* were dissuaded from working during a strike, 437 U.S. at 413. This situation created a more imminent need for the services of the employer's bargaining representative.

79. *IBEW*, 107 S. Ct. at 2013-14.

80. *Id.* at 2012.

81. The Court also distinguished the holding in *American Broadcasting* on the ground that currently, in light of a post-*American Broadcasting* decision ensuring a union member's freedom to renounce union membership at any time, there is no longer any actual coercive effect of supervisor-member discipline. *Id.* at 2015 (citing *Pattern Makers v. NLRB*, 473 U.S. 95 (1985)). The dissent in *IBEW* challenged this distinction by noting that restrictions placed by unions on renouncement of membership was not a pivotal basis of the holding in *American Broadcasting*. *Id.* at 2019 (White, J., dissenting). The *American Broadcasting* Court, in fact, rejected the argument presented by the Writer's Guild that union discipline was not a § 8(b)(1)(B) violation because the employer could avoid the alleged coercion of its choice of representation by legally compelling an employee to renounce union membership prior to the employee's promotion to a supervisory position. *American Broadcasting*, 437 U.S. at 437. The Court noted that a contrary holding could not be reconciled with its prior decision in *Florida Power*. *Id.*

that actually coerces the employer in its choice of representatives, but also against union *attempts* at such coercion, whether or not such attempts succeed.<sup>82</sup>

The Supreme Court suggested that its holding in *IBEW* might have been different if the Union had been seeking to represent the complaining company's employees.<sup>83</sup> It is possible that the *IBEW* standard would not, however, allow the finding of a section 8(b)(1)(B) violation in this instance. The standard requires that the discipline, to be illegal, must be imposed while the supervisor is engaged in his representative capacity, which may require the existence of a current collective bargaining agreement between the employer and the union.<sup>84</sup> The standard appears inadequate when applied to these facts because union incentive to influence an employer's selection of bargaining representation would be no less pronounced, and perhaps even more pronounced, on the eve of establishing a bargaining agreement than after that agreement is in place.<sup>85</sup>

The Court in *IBEW* emphasized the legislative intent of section 8(b)(1)(B) as a rationale for dismissing the *American Broadcasting* Court's recognition of prospective restraint and coercion.<sup>86</sup> Given such an emphasis, it is particularly questionable why the *IBEW* Court nonetheless adopted the *Florida Power* standard for finding violations of the statute. A review of the legislative history of

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82. See 93 CONG. REC. 4143 (1947) (according to statement of Senator Ellender, "[S]ubsection 8(b)(1)(B) . . . makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a . . . supervisory official."). See generally *Florida Power*, 417 U.S. at 798-99 (citing with approval historical applications of § 8(b)(1)(B) and characterizing them as "attempts" to influence selection of representatives). The United States Court of Appeals for the Fourth Circuit, in applying the "restraint and coercion" language of § 8(b)(1)(A), focused its inquiry on the motive or purpose of the union conduct. See *Baltimore Rebuilders, Inc. v. NLRB*, 611 F.2d 1372, 1378 (4th Cir. 1979) (citing *Local 357 Teamsters v. NLRB*, 365 U.S. 667, 675 (1961)), *cert. denied*, 447 U.S. 922 (1980).

The *IBEW* Court in fact recognized that a union's coercive purpose (as opposed to effect) in selectively enforcing a facially uniform union rule might violate § 8(b)(1)(B). See *IBEW*, 107 S. Ct. at 2012 n.13 (citing dictum in *NLRB v. International Bhd. of Elec. Workers, Local 73 (Chewelah Contractors, Inc.)*, 714 F.2d 870, 872, *denying enforcement of* 231 N.L.R.B. 809 (1977)). Under the *IBEW* current engagement standard, however, the proposition that selective enforcement of union rules might constitute a § 8(b)(1)(B) violation is not viable if the employer has no current collective bargaining relationship with the union. See *supra* text accompanying notes 65-66.

83. See *IBEW*, 107 S. Ct. at 2012 (citing the Union's lack of incentive to influence choice of bargaining representative when union does not seek to establish bargaining relationship with employer as grounds for inapplicability of § 8(b)(1)(B)); see *id.* at 2015 (Scalia, J., concurring) (declining to join majority because of its recognition of the Union's intent to represent employees as a factor in determining applicability of § 8(b)(1)(B)).

84. The *IBEW* Court did not decide whether "grievance adjustment" order § 8(b)(1)(B) is limited to disputes over application of the collective bargaining contract. The Court did observe, however, that the *Florida Power* Court embraced a very limited definition of the term. *Id.* at 2012 n.12. If § 8(b)(1)(B) duties do not encompass the adjustment of personal grievances, satisfaction of the *IBEW* standard mandates a current collective-bargaining agreement. See *id.* at 2010 ("Clearly a supervisor cannot be disciplined for acts or omissions that occur during performance of § 8(b)(1)(B) duties if he or she has none."). The impossibility of this suggestion is evident when one considers that the *IBEW* Court embraced a definition of § 8(b)(1)(B) "grievance adjustment" that included only disputes over application of the contract. *Id.* at 2012 n.12.

85. Cf. *NLRB v. International Bhd. of Elec. Workers, Local 73 (Chewelah)*, 621 F.2d 1035 (9th Cir.) (recognizing potential for § 8(b)(1)(B) violation when union seeks to represent complaining company's employees without constraints of *IBEW* standard), *amended on reh'g*, 714 F.2d 870 (9th Cir. 1980).

86. *IBEW*, 107 S. Ct. at 2013.

section 8(b)(1)(B) reveals little support for construing the provision as a protective measure against anything except *direct* union attempts to coerce an employer's choice of bargaining representative.<sup>87</sup> The *Florida Power* standard limited but did not extinguish the potential for a section 8(b)(1)(B) violation when a union indirectly tries to coerce the employer in its choice of a representative by disciplining its supervisor-member. The legislative intent of section 8(b)(1)(B) therefore provides no greater support for the *Florida Power* standard than for the standard adopted in *American Broadcasting*.

Judicial line-drawing may indeed have been merited as a response to the Board's increasingly liberal interpretation of section 8(b)(1)(B).<sup>88</sup> Nevertheless, the *IBEW* Court, by abolishing the reservoir doctrine, has "drawn the line" in the wrong place. The Court neglected to acknowledge what may be the primary intent of section 8(b)(1)(B) by its refusal to recognize the *American Broadcasting* standard's protection against prospective coercion. Both the text of section 8(b)(1)(B) and legislative explanation of its scope referred to coercion in the "selection" of an employer's bargaining representative.<sup>89</sup> This language connotes section 8(b)(1)(B) applicability to any union conduct occurring prior to the employer's actual naming of a bargaining representative and prior to that supervisor's performance of any collective bargaining or grievance adjustment duties. This language, in addition, appears reasonably susceptible to the *Florida Power* Court's interpretation that a union may coerce an employer's selection by necessitating the removal of an incumbent representative.<sup>90</sup> This interpretation, however, should not prevail to the exclusion of an interpretation that the statute protects against union coercion prior to, or at the time of, the employer's selection of a representative.<sup>91</sup>

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87. The Senate Report described the import of § 8(b)(1)(B) as not allowing a union to "dictate" who shall represent the employer, or "to compel" the removal of a supervisor who has been delegated the function of settling grievances. S. REP. NO. 105, 80TH CONG., 1ST SESS. 21 (1947). See *IBEW*, 107 S. Ct. at 2008 (describing *Oakland Mailers*, 172 N.L.R.B. 2173 (1968), as extending § 8(b)(1)(B) by prohibiting indirect coercion); *id.* at 2012 n.13 (noting that direct coercion of a supervisor's selection will always be a § 8(b)(1)(B) violation).

The provision need only protect against direct attempts at coercion because an employer can effectively protect against a union's indirect attempts at coercion by requiring its employees to renounce union membership prior to their promotion to supervisory positions. See *American Broadcasting*, 437 U.S. at 437; see also *supra* note 81 (assessing the *IBEW* Court's treatment of the possibility of renouncing union membership as a factor in determining § 8(b)(1)(B) violations).

88. The restrictive *Florida Power* standard was developed in response to the evolution of the Board's and the Court's application of § 8(b)(1)(B). What began as a narrow proscription became a "general prohibition" against union disciplinary action, which was both imposed as a result of the manner in which the supervisor-member performed his grievance adjusting, collective bargaining, or any of his other supervisory functions, and imposed in an effort to influence the manner in which that supervisor subsequently performed his § 8(b)(1)(B) duties. See *Florida Power*, 417 U.S. at 800-02. The Board's application of § 8(b)(1)(B) to claims of union coercion when discipline has been imposed—other than for the manner in which the supervisor-member performs his duties—in an effort to affect the willingness of the supervisor subsequently to serve as bargaining representative, has similarly developed into a general prohibition against union discipline. A § 8(b)(1)(B) violation may occur even when the union has no interest in representing the complaining company's employees. See cases cited *supra* note 57.

89. See 29 U.S.C. § 158(b)(1)(B) (1947); 93 CONG. REC. 4143 (Apr. 28, 1947).

90. See 93 CONG. REC. 3837 (Apr. 23, 1947) ("[E]mployees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.'")

91. *American Broadcasting* recognized the incidence of illegal coercion occurring both prior

Justice Scalia, in his concurring opinion in *IBEW*, accused the majority of "construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute."<sup>92</sup> The *IBEW* Court does appear to have applied its reasoning to "an erroneous point of departure" from the original intent of section 8(b)(1)(B) by its continued recognition of a union's indirect coercion of an employer as a potential violation of the statute.<sup>93</sup> Even if justified in recognizing indirect coercion as a section 8(b)(1)(B) violation, the Supreme Court in *IBEW* made several such departures in abolishing the reservoir doctrine. The Supreme Court's exclusive espousal of the restrictive *Florida Power* standard and its misapplication of that standard to an unrelated fact situation, its disregard for the legislative foundations of the *American Broadcasting* Court's extension of that standard to encompass claims of prospective coercion in a case analogous to *IBEW*, and its allowance in section 8(b)(1)(B) inquiries for emphasis solely on the probable effects of union conduct rather than on the intent of that conduct, have earned it Justice Scalia's admonition.

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and subsequent to the actual naming of a bargaining representative and performance of that representative's duties. 437 U.S. at 436; see *supra* text accompanying note 49.

92. *IBEW*, 107 S. Ct. at 2016 (Scalia, J., concurring).

93. See *id.* at 2012 n.13 (distinguishing situations that necessitate application of the Court's standard from the imposition of absolute liability for direct coercion).