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UNION DISCIPLINE UNDER SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT: THE EMERGENCE OF A NEW TRILOGY

FRANCIS T. COLEMAN*

INTRODUCTION

Last year, for the third successive term, the Supreme Court delivered an opinion examining the permissible ambit of union discipline under section 8(b)(1)(A) of the National Labor Relations Act (NLRA), as amended by the Labor-Management Relations Act (LMRA).1 Scofield v. NLRB,2 the most recent of the three decisions, and NLRB v. Allis-Chalmers Manufacturing Co.,3 decided two years earlier, deal with judicial enforcement of union fines levied against nonconforming members. Sandwiched between them is NLRB v. Local 22, Industrial Union of Marine and Shipbuilding Workers,4 a case dealing with the expulsion of union members for their having failed to first exhaust internal union procedures before filing unfair labor practice charges against their union. Together, these cases provide an interesting if not definitive commentary on the controversial subject of accommodating the institutional needs of unions with the freedom of the individual union member.

Section 8(b)(1)(A) provides that

[i]t shall be an unfair labor practice for a labor organization or its agents — . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .

The section 7 rights to which reference is made include

the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid to protection,

* A.B., Georgetown University, 1961; J.D., Georgetown University, 1964; LL.M., Georgetown University, 1970.


and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(5).

Structurally, section 8(b)(1)(A) resembles its 8(a) counterpart which was enacted twelve years earlier. Indeed, except for the deletion of the word "interference" and the inclusion of a provision, 8(b)(1)(A) is linguistically identical to the comparable prescription of unlawful employer activities. Substantively, however, the two sections have experienced a much different judicial history. In general, the types of employer conduct forbidden by the statute have remained relatively uniform, whereas in recent years Board and court decisions have greatly enlarged the types of union conduct proscribed by the Act.

The first Supreme Court decision to scrutinize the scope of 8(b)(1)(A)'s prohibitions was NLRB v. Teamster Local 639 (Curtis Brothers). In that case, the Court refused to stretch 8(b)(1)(A)'s prohibitions to include peaceful organizational picketing. After reviewing the legislative history of the 1947 Taft-Hartley amendments, the Court held that the underlying intent of 8(b)(1)(A) was to outlaw union-engineered violence or direct economic reprisal designed to coerce employees into enlisting behind a union banner or involuntarily participating in their activities. Peaceful picketing, the Court concluded, did not fit the mold of these pressure tactics, and consequently, did not violate 8(b)(1)(A).

In the years following Curtis Brothers, however, it became apparent that physical threats and intimidation were not the only types of union abuses that needed curbing. Under the NLRA, exclusive bargaining status is accorded unions representing a majority of the employees in an appropriate unit. This right of exclusivity has, over the years, enabled organized labor to wield tremendous leverage, not only vis-à-vis management, but vis-à-vis employees as well. Eventually, patent abuse of this power led first the NLRB and then reviewing
cours courts to reexamine the narrow dimensions which Curtis Brothers had placed upon 8(b)(1)(A).

In Miranda Fuel Co., the Board, for the first time since passage of the Taft-Hartley Act, construed 8(b)(1)(A) to proscribe a union's failure to fully and fairly represent its constituents. Such a result was achieved by reading this duty of fair representation into section 9(c) and then transporting it into section 7 for inclusion as an employee protected right. This decision greatly expanded NLRB control over areas which had theretofore been considered matters exclusively within the province of internal union administration and policy. Subsequent Board and court decisions have followed this liberalized interpretation and have sought to further scrutinize internal union conduct which tends to undermine employee rights protected by the statute.

Now, 8(b)(1)(A) is again in the spotlight. This time, the inquiry,

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12 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).
13 In a series of decisions dating back twenty-six years, the Supreme Court has recognized that the right to exclusive bargaining status conferred by section 9 of the Labor-Management Relations Act, entails a corresponding duty on the part of labor organizations to fairly serve the interests of all those they represent. See Syres v. Local 23, Oil Workers Int'l, 350 U.S. 892, rev'g mem. 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). It was not until Miranda Fuel Co., however, that the Board first recognized a breach of this duty as an unfair labor practice.
16 This interpretation which validates the finding of an 8(b)(1)(A) violation based upon breach of the duty of fair representation has been the subject of criticism by Member Fanning, former Chairman McCulloch and others. In particular, this criticism is based upon the fact that there is no legislative or historical foundation for placing the right to fair representation among the rights protected by section 7. See NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963) (dissenting opinion); Local 12, United Rubber Workers, 150 N.L.R.B. 312, 324 (1964) (dissenting opinion); Hughes Tool Co., 147 N.L.R.B. 1573, 1578 (1964) (dissenting opinion); Miranda Fuel Co., 140 N.L.R.B. 181 (1962) (dissenting opinion); see also Fanning, Individual Rights in the Negotiation and Administration of Collective Bargaining Agreements, 19 LAB. L.J. 224 (1968); Note, Administrative Enforcement of the Right to Fair Representation: The Miranda Case, 112 U. PA. L. REV. 711, 718 (1964). But see Vaca v. Sipes, 385 U.S. 171 (1967) wherein the Supreme Court assumed arguendo that the Board was correct in holding breach of the duty of fair representation to be an unfair labor practice.
17 See, e.g., Baltimore Luggage Co., 162 N.L.R.B. 1230, enforced, 387 F.2d 744 (4th Cir. 1967); Red Ball Motor Freight, 157 N.L.R.B. 1297 (1965), enforced, 379 F.2d 137 (D.C. Cir. 1967); Aristocrat Linen Supply Co., 150 N.L.R.B. 1448 (1965); Archer Laundry Co., 150 N.L.R.B. 1427 (1965); Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), enforced, 388 F.2d 12 (5th Cir. 1965); Galveston Maritime Ass'n, 148 N.L.R.B. 897 (1964), enforced, 368 F.2d 1010 (5th Cir. 1965); Hughes Tool Co., 147 N.L.R.B. 1573 (1964).
18 It might be added that one appellate court has now come full circle by holding that an employer is also guilty of violating his employees' section 7 rights if he discriminates against them because of racial considerations. See United Packinghouse Int'l v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), enforcing as modified, 169 N.L.R.B. No. 70, 67 L.R.R.M. 1266 (Jan. 25, 1968).
broadly phrased, is: to what extent does 8(b)(1)(A) limit a union's ability to control its membership? The three Supreme Court cases and their aftermath, which form the subject matter of this paper, attempt to shed some light on the vexing questions raised by this inquiry. Unfortunately, as has often been the case with controversial Court cases, these decisions have raised as many questions as they purport to resolve, and subsequent Board and Court decisions are still in the process of completing the Court's unfinished business. Because of the significance of these decisions, time may well prove these three cases worthy of the label the "new trilogy," in obvious reference to the Supreme Court's celebrated arbitration decisions of the early sixties which had such a profound impact on labor contract enforcement.\(^\text{19}\)

Chronologically, the cases were argued before the Supreme Court in the following order: Allis-Chalmers, Shipbuilding Workers and Scofield. Although Scofield was the first of the three cases to come to the attention of the Board,\(^1\) it is appropriate to begin the discussion with the Allis-Chalmers case because it was the first to receive Supreme Court review and, consequently, provided the framework into which its successors were to be fitted.

**Allis-Chalmers**

The facts in Allis-Chalmers are quite simple. Certain UAW members employed at two of Allis-Chalmers' Wisconsin plants refused to honor picket lines set up by their local unions during economic strikes at their respective plants and continued to work. At the strike's conclusion, these members were tried and found guilty of "conduct unbecoming a union member" and fined sums ranging from twenty to one hundred dollars. Some refused to pay and the union brought suit for collection in a Wisconsin state court. The company filed unfair labor practice charges against the union, claiming that court enforcement of the fines constituted "restraint and coercion" within the meaning of 8(b)(1)(A). The General Counsel of the Board issued a complaint which the Board set aside on the ground that the fines and their collection were permissible under 8(b)(1)(A)'s proviso allowing unions to make their own rules regarding union membership.\(^2\)

\(^{19}\) See United Steelworkers v. Enterprise Wheel Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). Together, these cases dearly delineated the respective roles of courts and arbitrators in the resolution of disputes over grievances between parties who had contracted to settle such disputes through arbitration.

\(^{20}\) 145 N.L.R.B. 1097 (1964). The case was decided on January 17. The next case of the trilogy to come before the NLRB was Allis-Chalmers, decided on October 23, 1964.

\(^{21}\) 149 N.L.R.B. 67 (1964).
In dismissing the complaint, the Board distinguished between union discipline that affects a member in his status as an employee and that which affects him only in his capacity as a union member. The Board held, that though the former, with certain limited exceptions, was clearly outlawed, the latter form of discipline was authorized by the proviso. Judicial enforcement of fines was thus protected, according to the Board's majority, since such a measure left job rights unimpaired. Furthermore, they maintained, a rule requiring union members to refrain from working during a strike was vital to the achievement of legitimate trade union objectives and was not otherwise violative of labor law policy.\textsuperscript{22}

In dissent, Member Leedom noted that any fine is by its very nature coercive and that enforcement through legal recourse exceeds anything permitted by the proviso's exemption. Even accepting the distinction between employment and membership rights fashioned by the majority, Mr. Leedom was convinced that the fines in issue, since designed to inhibit members from working, directly affected employment rights, not merely membership ones.\textsuperscript{23} Thus, in his opinion, the issuance of the complaint should have been upheld.

On appeal, a three-judge panel of the Court of Appeals for the Seventh Circuit rejected the Board's reliance on 8(b)(1)(A)'s proviso, but nonetheless upheld its conclusion.\textsuperscript{24} A review of 8(b)(1)(A)'s legislative history led the court to adopt the restricted interpretation espoused by the Supreme Court in \textit{Curtis Brothers}, i.e., that 8(b)(1)(A)'s sanctions were aimed at the "specific evils of force, violence and threats thereof, . . . [rather than at] fines collectible by legal process."\textsuperscript{25} Since the fines did not fall within the body of the statute, it was unnecessary to rely on the proviso's language to sustain them. Even more fundamental, the panel believed, was the principle of majority rule. Once the organization has made the decision to strike, it is incumbent on all members to adhere to it; those failing to do so being properly subject to discipline.\textsuperscript{26}

\textsuperscript{22}The Board emphasized the fact that when the strike and picket line are lawful, it is certainly within a union's province to seek recourse against members who undermine their collective efforts. \textit{Id.} at 69.

\textsuperscript{23}It will come as a surprise to the affected individual when he is told that a union fine designed to induce him to respect picket lines and stay away from his job does not touch him as an employee, but only as a union member. One of the indispensable factors in any employment relationship is the employee's willingness to come to work. \textit{Id.} at 73 (dissenting opinion).

\textsuperscript{24}Allis-Chalmers Mfg. Co. v. NLRB, No. 14,853 (7th Cir. Sept. 13, 1965).

\textsuperscript{25}\textit{Id.}

\textsuperscript{26}A union is a form of industrial government, and the rights and duties of a member are similar to those of a citizen in a democratic society. . . . The employees . . . in this case had the right, under Section 7, to strike or not to strike. But once
Slightly less than six months later, however, the panel's decision was reversed by the Seventh Circuit sitting en banc.\textsuperscript{27} Ironically, two of the three panel members who had earlier voted to uphold the fines reversed themselves, thereby creating a 4-3 majority to overturn the Board's, as well as their own, previous decision. Adopting a different analysis of the union-member relationship than the panel, the full court declared that "[a]ll the protections which Congress has seen fit to throw about the union member operate to diminish the authority and power of the union to police its members by coercion and to that degree impose on the union the burden of achieving its ends by persuasion, rather than by penal exaction."\textsuperscript{28} Using this premise, the court went on to hold that substantial fines can be just as coercive on union member rights as other less subtle forms of force and coercion. The coercive aspect of fines is particularly apparent in cases such as this one, the full court observed, where the fines had been assessed against members whose membership was the product of a union security clause.\textsuperscript{29} In light of these considerations, the court was disinclined to abandon a literal reading of the statute, which even the panel agreed would have covered court enforcement of fines, in favor of an interpretation which would subvert the freedom of individual union members.

The Supreme Court, by a 5-4 margin, reversed the Seventh Circuit and affirmed the Board's dismissal of the complaint.\textsuperscript{30} The majority opinion, written by Mr. Justice Brennan, found it "highly unrealistic" to regard the terms "restrain or coerce" used in section 8(b)(1)(A) as unambiguously applicable to court enforcement of union fines. Rather, after an extended examination of the legislative history, the majority concluded that 8(b)(1)(A)'s drafters never intended that it apply to union discipline in general or disciplinary fines in particular.\textsuperscript{31}

the union voted to strike, the employees who were union members were bound by the limitations that union membership placed on their right not to strike. It would be difficult to accept the proposition that a union should be the one secular society in our nation which one may enter without being bound by majority rule and without submission to some limitations on rights for the common good. Upon entering, union members must take not only the benefits but the burdens also.

\textit{Id.}

This conclusion, the court maintained, was fortified by the proviso to section 102 of the Landrum-Griffin Act, 29 U.S.C. § 412 (1964), which safeguards the right of unions to pass and enforce reasonable rules as to its members with respect to their union responsibility. "[W]hat greater responsibility could a union member have to the union as an institution than to support a lawful strike called by the majority?" \textit{Id.}

\textsuperscript{27} 358 F.2d 656 (7th Cir. 1966).
\textsuperscript{28} Id. at 660.
\textsuperscript{29} Id. at 660-61.
\textsuperscript{30} 388 U.S. 175 (1967).
\textsuperscript{31} Id. at 186.
Furthermore, the statute's history exhibited no desire on the part of Congress to treat court enforcement of fines any differently than their enforcement through expulsion, a method explicitly sanctioned by 8(b)(1)(A)'s proviso. Drawing such a distinction would be patently unfair to weaker unions, the Court maintained, since expulsion, while a powerful weapon in the hands of strong unions, was an impotent device in the hands of weaker unions. Moreover, from strictly a policy standpoint, it was emphasized that depriving unions of the right to fine strikebreakers would significantly impair labor's cherished strike weapons which the courts had theretofore gone to great lengths to protect.

Finally, the Court observed that at the time 8(b)(1)(A) was adopted, the contract theory of the union-membership relationship was vogue, with the rights and duties arising therefrom subject to judicial enforcement. Since the disciplined UAW members were full-fledged union members, not mere dues payers, their acceptance of the responsibilities incident to union membership could not be brushed aside as involuntary and, hence, they were therefore properly subject to union discipline. Thus, without reliance on the proviso, the majority held that 8(b)(1)(A) did not ban judicial enforcement of validly imposed fines, at least where they serve to protect legitimate trade union interests.

Mr. Justice White concurred, but on the more restricted basis that in many cases, "certainly in this one . . . expulsion would . . . be a far more coercive technique for enforcing a union rule and for collecting a reasonable fine than the threat of court enforcement." Under his analysis, the greater penalty, the right to expel, which was expressly authorized by the proviso, included the lesser right of enforcement through fines which was not expressly authorized.

The four dissenters made their own independent survey of 8(b)(1)(A)'s history and concluded that, because of its brevity, ambiguity and inconclusiveness, a departure from the literal language of the statute was unwarranted. Mr. Justice Black, the dissent's author, claimed that court collection of union fines was clearly coercive within the plain meaning of the statute and that this interpretation comported with both legislative and judicial history. In his eyes, the majority's analysis was but a subterfuge for subordinating the rights of individual union members to the need of weak unions to effectively deter strikebreaking. Such an "unarticulated premise," he asserted, was an argu-

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32 Id. at 192.
33 Id. at 198 (concurring opinion).
34 Justices Black, Douglas, Harlan and Stewart.
35 388 U.S. at 217 (dissenting opinion).
ment properly addressed to Congress, not one cognizable by a court confronted with a clear statutory mandate.\

**SHIPBUILDING WORKERS**

Slightly less than a year after *Allis-Chalmers*, the second case of the new trilogy, *Shipbuilding Workers*, was decided by the Supreme Court. In this case, the union sanction involved not court collection of a fine, but expulsion from union membership, the mode of discipline which the Justices unanimously agreed would have been upheld in the context of *Allis-Chalmers*.

Again, the facts are uncomplicated. Holder, a member of the Shipbuilding Workers Union, filed unfair labor practice charges against his local union and its president without having first exhausted his internal union remedies. As a result, Holder was tried, convicted and expelled by his local union for violation of the international constitution, which required members with complaints against the union to exhaust their union remedies before resorting to outside courts or tribunals.\(^7\) Thereupon, Holder once again filed charges with the NLRB, this time claiming the union’s action had coerced his exercise of rights guaranteed by the Act.

The Board, adopting the trial examiner’s finding, unanimously held that Holder’s expulsion violated 8(b)(1)(A).\(^8\) This conclusion was said to be dictated by their earlier decision in *Charles S. Skura*.\(^9\) In that case, the Board had struck down a fine imposed for the same reasons, and it could now find no reason why expulsion should be treated any differently.\(^4\) If a fine is by its nature coercive, then expulsion being the ultimate, not merely an intermediate step in the union disciplinary chain, is even more coercive.

On appeal, the Court of Appeals for the Third Circuit, in a well reasoned opinion, denied enforcement.\(^4\) Initially, the court concluded that, from the record it could not be determined whether Holder’s charge alleged a deprivation of section 7 rights.\(^4\) Absent such a finding,

\(^{36}\) *Id.* at 202 (dissenting opinion).

\(^{37}\) Section 5 of the international constitution provided that every member ... considering himself ... aggrieved by any action of this Union, the [General Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union.

\(^{38}\) 159 N.L.R.B. 1665 (1966).


\(^{40}\) 159 N.L.R.B. at 1669.

\(^{41}\) 379 F.2d 702 (3d Cir. 1967).

\(^{42}\) The court observed that before a charge alleging infringement of employee section
the court held that it was powerless to uphold an 8(b)(1)(A) violation. A remand to the Board was deemed unnecessary, however, since the proviso to section 101(A)(4) of the Landrum-Griffin Act,\textsuperscript{43} coupled with 8(b)(1)(A)'s proviso, required dismissal of the complaint. The court interpreted the former as permitting unions to discipline their members for failing to first exhaust reasonable internal union procedures prior to seeking Board or court relief, at least where such procedures did not require a delay in excess of four months. The latter permits unions to adopt their own rules for acquiring or forfeiting membership. Reading these sections together, the court reasoned that the two provisions enable labor unions to enact and enforce reasonable rules, and the exhaustion rule, in the court's estimation, fell within this category. Thus, the Third Circuit's reading of congressional intent, gleaned from both the Taft-Hartley Act and the Landrum-Griffin Act, was that unions were free to require under threat of disciplinary action that their members first internally process complaints against their union before resorting to outside avenues of relief.

Brushing aside the acuity of the Third Circuit's reasoning, the Supreme Court, by an 8-1 margin, reversed the appellate court's decision and affirmed the decision of the Board.\textsuperscript{44} Mr. Justice Douglas, the majority spokesman, stated the crucial question as "whether consistent with the applicable federal statutes a union [could] penalize one of its members for seeking the aid of the Board without [first] exhausting all internal union remedies."\textsuperscript{45} The majority's answer was an emphatic "no." The policy of keeping access to the Board unimpeded, especially where public rights were involved, was so fundamental to the "functioning of the Act as an organic whole" that it

\textsuperscript{7} Rights could be upheld, it must first be shown that the union has in some way interfered with the type of activity protected by that section. Since section 7 says nothing about an employee's right to file charges with the Board and since there was no showing that Holder's original charges alleged union misconduct which violated his rights guaranteed by that section, the court found no basis on which it could predicate a violation of 8(b)(1)(A).

\textsuperscript{43} Section 101(A)(4), 29 U.S.C. § 411(a)(4) (1964), provides:

Protection of the Right to Sue. — No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, of the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

\textsuperscript{44} 391 U.S. 418 (1968).

\textsuperscript{45} Id. at 421.
overrode the lesser policy of allowing unions the opportunity to initially review charges levelled against them.\footnote{Id. at 424.} Neither section 8(b)(1)(A)’s proviso, nor the proviso to section 101(A)(4) of the Landrum-Griffin Act required a contrary result, the Court maintained. The former, in authorizing unions to fashion their own rules regarding membership qualifications, did not enable them to penalize members for invoking the assistance of a public agency created for the very purpose of hearing complaints against unions and their officers. The latter proviso merely conferred upon courts the discretion to refrain for a four-month period from hearing a case pending internal union disposition. It did not confer on unions the right to punish those who refuse to await the lapse of this four-month period before taking legal action. Thus, at least in instances where an employee’s complaint is directed at his employer as well as at his union, the Court concluded that union members may take their complaints directly to the Board or the courts without fear of retaliation, union rules to the contrary notwithstanding. Mr. Justice Harlan concurred, though he criticized the majority’s opinion for its failure to explicitly extend protection to complaints involving strictly intra-union matters.\footnote{Id. at 428-29 (concurring opinion).} The dissent of Mr. Justice Stewart agreed with the logic of the Third Circuit’s opinion.

**Scofield**

The most recent Supreme Court 8(b)(1)(A) case and the last in the new trilogy is *Scofield*, decided on April 1, 1969. Like *Allis-Chalmers*, a case with which it shared many similarities, *Scofield* also involved a UAW local which had gone to court to collect fines assessed against some of its members. The local union involved had been the recognized collective bargaining representative at the charging party’s Wisconsin motor plant since 1937. Under the contract in effect at the time the case arose, an incentive plan had been established covering about half the company’s production employees. Employees under this plan were guaranteed a minimum hourly rate known as the machine rate, but had the opportunity to earn additional compensation if they produced in excess of the quotas fixed by the contract. However, for many years the union had established its own productivity ceiling, thereby controlling the earnings which their members could make. These members could still produce as much as they wished, but if they sought immediate pay for production in excess of the established ceilings, they subjected
themselves to fines ranging as high as one hundred dollars for each offense.\(^4\) Instead of reporting their total output and subjecting themselves to fines, union members had the option of "banking" all production above their quotas, with the right to draw upon this overage wherever their production fell below the maximum limits allowed under the ceiling.

The company conceded that the ceiling had been the subject of bargaining and that it had cooperated over the years in the union's policing of the rule by making its books available for inspection, paying union stewards for time spent engaged in checking compliance and banking earnings in conformity with the rule itself. The company argued, however, that the contract made no mention of the ceiling, its administration or enforcement, and that it had at all times refused to recognize any limitation of the amount an individual could earn, paying each employee the full amount that their production report warranted.

In February 1961, the union discovered that certain employees had accepted pay in excess of that permitted by the ceiling. As in Allis-Chalmers, these members were tried and convicted on charges of conduct unbecoming a union member and fined. Several refused to pay the fines and were sued in a Wisconsin state court.\(^4\) Thereupon, these members filed charges with the NLRB. A complaint issued, which the Board, agreeing with the trial examiner, subsequently dismissed.\(^5\) The Board's majority, with little discussion of the legitimacy of the production ceiling rule or its relationship to the bargaining process, held that 8(b)(1)(A) had never been intended to reach a union's enforcement of a production ceiling rule. Even without regard to the proviso, the Board concluded that 8(b)(1)(A) was inapplicable to court enforcement of internal union rules of this nature, since it was obvious that this type of conduct did not fall within the intendment of the statute.

Logically, this should have ended the majority's inquiry. They felt constrained, however, to refute the dissenter's literal interpretation of

\(^4\) The penalties contained in a February 1961 union by-law provided that any member violating the production ceiling is "guilty of conduct unbecoming a union member and subject to a fine of $1.00 for each violation." The by-law also provided that in case of persistent ceiling violations, the offender would be charged with "conduct unbecoming a union member." If a member were found guilty of such conduct, he could be assessed with a maximum fine of one hundred dollars (enforceable within a specified time by automatic suspension or expulsion) or suspended or expelled from membership.

\(^5\) Six members were fined in all; two at the sum of thirty-five dollars, which they paid. The remaining members, whose fines ranged from fifty to one hundred dollars each, refused to pay. Consequently, the union filed suit for collection in the Civil Court of Milwaukee County, Wisconsin.

\(^{145}\) N.L.R.B. 1097 (1964).
the proviso.\textsuperscript{51} The proviso, they continued, specifically protected the unions' right to enact rules affecting the membership status of their members, though it conferred no right to affect their employment status. Fines for disobeying union rules did not interfere with the latter, and hence, even had they been initially subject to 8(b)(1)(A), would have been excepted by its proviso.

There was considerable delay before the Board's decision was reviewed by the Seventh Circuit.\textsuperscript{52} In the meantime, the Supreme Court had issued its \textit{Allis-Chalmers} decision, overturning the Seventh Circuit's literal interpretation of 8(b)(1)(A). On the basis of this decision, which the court now termed "the authoritative construction" of the statute, the production quota fines were upheld.\textsuperscript{53} By a 7-1 vote, the Supreme Court vindicated the Seventh Circuit's reliance.\textsuperscript{54}

Mr. Justice White, writing for the majority, emphasized the distinction between internal and external means of enforcement. Internal means, which include disciplinary measures not jeopardizing members' employment status, are with few exceptions beyond the pale of 8(b)(1)(A); whereas external means, which affect a member's job status, contravene section 8(b)(1)(A) and several other sections besides.\textsuperscript{55} This

\textsuperscript{51} The Board adhered to the distinction they had drawn in \textit{Allis-Chalmers}, \textit{i.e.}, between rules which affect employees as union members and those which affect them as employees. Obviously, they declared, production and wages were related to employment, but this did not alter the fact that the fines were imposed on the employees as \textit{union members} and not as \textit{employees}. They went on to conclude that the Board was not "empowered" by Congress to police a union decision concerning a member's good standing or lack of same. Moreover, they could not pass judgment on the penalties a union may impose on a member as long as the penalty does not impair the member's status as an employee. \textit{Id.} at 1104.

However, dissenting Member Leedom narrowly interpreted the proviso to except "from the ambit of § 8(b)(1)(A) only such restraint or coercion that results from a union's application of its rules relating to 'the acquisition or retention of membership.'" Consequently, fines for exceeding production involved more than strictly an internal union matter.

But even assuming that the proviso has a broader reach than I would ascribe to it, I would still disagree that the matter here involved is one that is merely a matter of internal union regulation. Employees may occupy a dual status: first, is their status as \textit{employees}; second is their status as \textit{union members}. Those matters affecting employees as \textit{union members} may appropriately be referred to as internal union affairs. Those matters which affect employees as employees are not internal union affairs. Of course, it is quite possible that some matters may affect both the employment relationship and the membership relationship, but to the extent they involve the former, they are not internal union affairs. \textit{Id.} at 1111.

\textsuperscript{52} Before the Seventh Circuit reached the substantive issues, the Supreme Court had granted certiorari with regard to the procedural question of whether charging parties had the right to appeal adverse decisions of the NLRB. The Court eventually held that they did and the case therefore reached the circuit court on the charging party's petition for review. 382 U.S. 205 (1965).

\textsuperscript{53} 393 F.2d 49, 51 (7th Cir. 1968).

\textsuperscript{54} 394 U.S. 423 (1969).

\textsuperscript{55} \textit{Id.} at 428-29.
was a distinction, the Court noted, that the Board had drawn as early as 1954,\(^6\) and this dichotomy was reinforced by the passage of the Landrum-Griffin Act, wherein Congress, although specifically addressing itself to internal union regulation, deliberately refused to alter this long-standing policy regarding union discipline. The majority hastened to add that in certain cases where union rules thwart vital labor law policy, as in *Shipbuilding Workers*, their enforcement will be subject to attack as an unfair labor practice, even if internally enforced.\(^7\) Therefore, under what the majority termed “this dual approach,” unions remain free to enforce by reasonable methods legitimate rules properly adopted, as long as they flaunt no congressional labor policy and are applied to voluntary union members.\(^8\) The UAW’s production ceiling rules, the Court concluded, met these standards.

In enacting the rule limiting production, the Court noted that the union was merely following traditional labor union policy of opposing incentive pay systems as a menace to the workingman. It was recognized that historically unions had fought such systems as a disguised wage depressant which generated competitive pressures and animosities among employees working under it. Manifestly, then, limiting the effectiveness of incentive programs was well within the union’s legitimate sphere of interest. Moreover, in implementing its attack on the company’s incentive program, the union had not circumvented the bargaining process, as the petitioner claimed, but had acted consistently with it. In this, the Court accepted the Board’s findings that the ceiling rule had been the subject of bargaining between the parties and had survived all the company’s attempts to have it eliminated. In the final analysis, there could be discerned “no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table.”\(^9\) For these reasons, the Court concluded that the production quota rule was not contrary to basic labor policy and, consequently, its enforcement by a reasonable fine did not violate the statute.\(^10\)

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\(^7\) Although the Board’s construction of section 8(b)(1)(A) emphasized the sanction imposed rather than the rule itself, the Court observed that even the Board has made it clear that “if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1).” In support of its position, the Court cited both the *Skura* and *Shipbuilding Workers* decisions. 394 U.S. at 429-30.

\(^8\) Id. at 430.

\(^9\) Id. at 433.

\(^10\) Id. at 436.
THE NEW TRILOGY: ITS MEANING AND IMPLICATIONS

Generalizations about union discipline and its relation to 8(b)-(1)(A) are easy to formulate. Particularizing, as the cases bear out, is much more difficult. As a starting point, the Supreme Court appears to have put to rest, for the time being at least, the literal approach to the statute espoused by both the Seventh Circuit and its own dissenters in Allis-Chalmers. As each of the Court's three opinions make clear, disciplinary fines, even when enforced by judicial rather than internal union means, such as expulsion, are not in themselves necessarily coercive, as that term is used in 8(b)(1)(A). Only by examining union discipline as administered in each case and the objective behind its enforcement can such a determination be made. Thus, the Court has flatly rejected any literal approach which would automatically have equated judicially enforced fines with economic coercion. In retrospect, this result is hardly surprising, considering the Court's traditional reluctance to follow "mechanistic approaches" to labor legislation. In place of a literal approach to the statute, the Court substituted a graduated one, borrowing the "dual approach" previously followed by the Board and adding new criteria of its own.

Legitimacy of the Means Employed

The threshold question posed by the trilogy is now the same one traditionally asked by the Board: was the discipline in question directed at the employment status of the union members on whom it was imposed? If so, then further inquiry becomes unnecessary, for any such action plainly violates not only 8(b)(1)(A), but in all probability sections 8(b)(1), 8(a)(2) and 8(a)(3) of the Act as well. If the penalty, however, does not entail loss of employment rights, then at least with respect to the means of enforcement, the discipline cannot be said to violate the Act.

As the Court indicated in Scofield, this basically is the same approach the Board has followed for the past sixteen years, since its 1954 decision in Minneapolis Star & Tribune Co. In that case, the Board held that, while it was an unfair labor practice for a union to secure an employee's discharge or to have his seniority reduced for failure to per-

62 These sections, according to Scofield, "form a web of which § 8(b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." 394 U.S. at 429.
form picket duty during a strike, the imposition of a five hundred dollar fine for the same reason was not. The latter, according to the Board, was protected by 8(b)(1)(A)'s proviso, which recognized the right of labor organizations to make their own rules regarding "acquisition or retention of membership." 64

Accordingly, distinguishing between disciplinary measures that affect employment rights and those that do not is a highly critical determination in the Court's, as well as the Board's analysis. The test, as enunciated by the Court in Scofield, is not whether the disciplinary measures have an impact which surpasses the bounds of strict employee-union relationship, but whether the union has reached beyond the means at its disposal to enforce the rules, and has induced the employer "to use the emoluments of the job to enforce the union's rules." 65

Simply stated, this means that where a union relies on its own internal resources in disciplining rule violators, including the commencement of a law suit, 8(b)(1)(A) is not violated, at least from the standpoint of enforcement. 66 Conversely, however, if employer assistance is sought as a means of depriving members of their job rights, employee section 7 rights are violated.

It is not clear, however, in light of the recent decision in Blackhawk Tanning Co. 67 whether the Board would concur in the absoluteness of the foregoing dichotomy. In that case, the Board held that, although expulsion of a union member for filing or circulating a decertification petition would be upheld against an 8(b)(1)(A) challenge, fining a member for engaging in the same conduct would not. In arriving at its conclusion, the Board stated that it would not be bound by "routine application of a formula: if expulsion is lawful so is a fine, or if expulsion is unlawful so is a fine." 68 It went on to conclude that there is a qualitative difference between an expulsion and a fine, the former being said to be purely defensive in the decertification context, while the latter was termed punitive, having the effect of discouraging members from seeking access to the Board's processes. Thus, despite the

64 Id. at 728.
65 394 U.S. at 429.
66 The Court specifically recognized in Scofield that a union rule relating to production affects the interests of all three participants in the labor-management relationship: employer, employee and union. It further recognized that, although this rule was enforced by what it termed internal means, the rule and its enforcement were clearly intended to have an effect beyond the confines of the union organization. Nonetheless, since it violated no statutory labor policy and since the employer's assistance in enforcement was not utilized, neither the rule nor its enforcement violated 8(b)(1)(A).
68 178 N.L.R.B. No. 25 at 3, 72 L.R.R.M. at 1050.
fact that fines involve only internal means of enforcement and Mr. Justice White's intimation in *Allis-Chalmers* that the more severe penalty of expulsion included the lesser penalty of fines, the Board felt that these two different types of penalties required different results when aligned against 8(b)(1)(A) in a decertification context.

Thus, the upshot of this new trilogy is that, with the possible exception of the *Blackhawk Tanning Co.* situation, judicial enforcement of union fines are now afforded the same protection as expulsion or threats of expulsion, the more traditional means of union discipline. Consequently, the dilemma which had formerly confronted many unions, *i.e.*, having either to expel members to obtain compliance with union rules or to tolerate insubordination, may well be eliminated.

**Legitimacy of Union Rules as Enforced**

Although judicial enforcement of fines as a means of fostering obedience to internal union regulations received Supreme Court approval in both *Allis-Chalmers* and *Scofield*, the Court was quick to caution that the mode of enforcement was only one of the criteria bearing on the legitimacy of union discipline under 8(b)(1)(A). As the Court stressed in *Shipbuilding Workers*, even where discipline is enforced purely by internal means, such as expulsion, an unfair labor practice may still lie if the rule being enforced conflicts with other deep-seated federal labor policies or impinges on the protected third-party rights.69 Again, the Court was merely following the lead of the Board, whose earlier decisions had recognized the possibility of such a conflict and ruled accordingly.70

The question of whether or not a particular union rule is contrary to national labor policy or conflicts with recognized third-party interests is not always an easy one, and like so many other questions under the Taft-Hartley Act, the answer can only be arrived at by weighing the competing objectives. If the policy reasons in opposition to enforcement of the rule are strong, and the need for the rule less than convincing, then its enforcement, in all likelihood, will be proscribed. Conversely, if policies with which the union regulation is said to conflict are of no great import, while the rule's enforcement goes to the core of effective collective action, as the Court thought it did in *Allis-Chalmers*, the chances of the rule being upheld are much improved.

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69 388 U.S. at 202.
70 See, e.g., Cannery Workers Union, 159 N.L.R.B. 843 (1966); see also National Tea Co., 181 N.L.R.B. No. 116, 73 L.R.R.M. 1529 (Mar. 27, 1970) wherein the Board recently reaffirmed its *Shipbuilding Workers* rationale.
In short, courts confronted with questions of this nature must attempt to reconcile the conflicting public and union policies in issue in an attempt to reach a proper accommodation. A brief review of the cases confirms this procedure and, at the same time, points out the fine distinctions which the Board and reviewing courts often draw in this area.

In Allis-Chalmers, for instance, the Court quoted Professor Summers\(^\text{71}\) for the proposition that "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent."\(^\text{72}\) Depriving unions of this right, according to the Court, would "impair the usefulness of labor's cherished strike weapon" and would consequently deprive unions of the powers necessary to properly fulfill their roles as exclusive bargaining agents.\(^\text{73}\) Against these compelling reasons in support of having unions invested with authority to fine strikebreakers, the Court could point to no countervailing policy of the Act. Hence, the balance under these circumstances was clearly in favor of union exercise of this power.

Likewise, in Scofield, the Court found the union rule in question to be in keeping with legitimate trade union objectives. It was observed that unions had historically fought against incentive systems for the reason that productivity increases resulting therefrom exert new pressures on employers to drive down the piecework rate. Such a process, the unions successfully argued, only triggered new cycles of increased productivity at lower piece rates, while engendering competitive pressures which endanger employees' health and exploit their jealousies. For these reasons, the Court concluded, the production limitations served to promote a valid trade union purpose.

Just as important to the Court was the fact that the institution of these production quotas, and their subsequent enforcement against union members, was not accomplished at the expense of undermining policies fostered by the Act. Contrary to the petitioner's contention, the Court found that the union's adoption of the quota system did not circumvent the bargaining process. These ceilings had been the subject of bargaining for many years and the company had always been unsuccessful in its attempts to have the quotas eliminated. Thus, it could hardly be said that the fines or their court enforcement infringed on the bargaining process. Again, the balance was clearly in favor of upholding the union rule.

Distinguishable from Scofield is the Ninth Circuit case of Associ-
ate Home Builders v. NLRB, wherein union members had also been fined for exceeding union production quotas. Unlike Scofield, however, the evidence before the court suggested that the quotas had been unilaterally imposed by the union. If this were true, the court observed, then the union was guilty of an 8(b)(3) refusal to bargain, since production rules were obviously "terms and conditions of employment" and, hence, involved mandatory subjects of bargaining. Therefore, the case was remanded to the Board for further findings consistent with the union's apparent failure to bargain in good faith. In this case, therefore, unlike Scofield, the method of establishing the production ceilings clashed with existing countervailing statutory requirements and could not be upheld.

In Shipbuilding Workers, the Court struck down a rule which was admittedly adopted in pursuit of a legitimate union objective. Nonetheless, the union objectives were outweighed in the Court's equation by the more important consideration of insuring unrestricted access to the NLRB. Any rule which would require employees to forego the Board's assistance, even temporarily, the Court held, must be struck down as interfering with the congressionally approved method for regulating union-management activities. Hence, in the Court's view, any procedure involving prior exhaustion of union remedies, even through purely internal means such as expulsion, contravened paramount public policy considerations and hence violated 8(b)(1)(A). In reaching this result, the Court was again following earlier Board precedent.

Determining exactly where national labor policy lies in a given case, however, is sometimes a formidable undertaking. A closer look at Shipbuilding Workers illustrates this point. In that case, the policy of allowing unions a reasonable amount of time to first rule on complaints from their members seemingly found statutory support in the Landrum-Griffin Act. Section 101(A)(4), specifically limiting restrictions that unions may place on their members' right to resort to federal and state agencies, contains the following proviso: "Provided that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings . . . ." Since the body of section 101(A)(4) is itself directed to unions, it was only logical to conclude that the language of the proviso likewise

74 352 F.2d 745 (9th Cir. 1965).
75 See cases cited at note 70 supra.
pertained to them, and, consequently, that unions had the recognized
to exhaust union procedures for four
months before resorting to the Board or the courts and to be in a
position to impose reasonable penalties for their failure to do so.
Indeed, this was precisely the interpretation which the Seventh Circuit
adopted.\textsuperscript{77}

The Supreme Court, however, disagreed, interpreting the pro-
viso as strictly a rule of judicial administration, allowing courts in their
discretion to refrain from entertaining suits by members against their
unions for up to a four-month period pending exhaustion of internal
union remedies. It was not, the Court maintained, a rule pertaining
to union discipline which would impliedly allow unions to punish
members who had not observed the four-month exhaustion period.\textsuperscript{78}

As one writer has stated, this construction of the proviso as an
independent substantive provision ignores the elementary rule of statu-
tory construction that a proviso only qualifies and relates to the sub-
stantive provision to which it is attached.\textsuperscript{79} Since the body of 101(A)(4)
is directed at union conduct, it is not only faulty construction, but
logical as well to make the proviso applicable to the courts, rather
than unions. This criticism of the Court's construction is, if anything,
augmented by the legislative history which on balance supports the
Seventh Circuit's position that the proviso allows unions, under threat
doing so. Nevertheless, the Supreme Court,
and the Ninth Circuit's \textit{Price v. NLRB}\textsuperscript{81} decisions.

\textsuperscript{77} Other cases have either explicitly or implicitly approved of this interpretation. \textit{See}
McGraw v. United Ass'n of Journeymen, 541 F.2d 705 (6th Cir. 1965); Detroy v. American
Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961); Mamula v. Steelworkers, 414 Pa. 294,
200 A.2d 806 (1964).

\textsuperscript{78} In support of this interpretation, the Court looked to the legislative history of the
section but was forced to concede that it "was not very illuminating." 391 U.S. at 427.

\textsuperscript{79} \textit{See} O'Donoghue, \textit{Protection of a Union Member's Right to Sue Under the Landrum-

\textsuperscript{80} 151 N.L.R.B. 46 (1965).

\textsuperscript{81} 373 F.2d 443 (9th Cir. 1967), cert. denied, 392 U.S. 904 (1968).
Both cases bear a marked resemblance to *Shipbuilding Workers*, but, in both instances, the latter was distinguished. In both *Tawas Tube* and *Price*, union members were deprived of their membership status as a result of having filed petitions to decertify their respective unions. Since the disciplined members' job rights remained intact, the penalties in both cases were upheld as falling within the protection of 8(b)(1)(A)'s proviso. *Shipbuilding Workers* was distinguished on the ground that decertification petitions, not unfair labor practice charges, were involved. Unlike an unfair labor practice charge, reasoned both the Board and the Ninth Circuit, a decertification petition does not charge the union with having violated its statutory obligations. Therefore, a member who is disciplined for filing a "decert" petition is not being punished for attempting to force his union to adhere to its legal requirements, but rather for attacking its very existence. Moreover, unless the union could expel such a member, "during the pre-election campaign, the member could campaign against the union while remaining a member and therefore privy to the union's strategy and tactics." Surely, both tribunals concluded, the proviso at least permits unions to suspend or expel members who seek to bring about their very destruction.

In neither of these decisions, however, was more than passing reference made to one of the NLRA's basic underlying policies, *i.e.*, granting employees a free and unrestrained choice in selecting their bargaining representatives. Nor was any mention made of the potential deterrent such discipline might have on members who might otherwise consider putting the question of a change in bargaining agents to the election test. In light of the Board's professed concern for insuring employee freedom of choice in election matters, this omission is particularly surprising. Similarly, neither the Board nor the Ninth Circuit made any attempt to reconcile the fact that an 8(a)(2) unfair labor practice charge may well have the same potentially disastrous consequences for a recognized union as a decertification petition.

Compounding the confusion that has resulted from the rigid distinctions that have been drawn between the *Shipbuilding Workers* situation and that in *Tawas Tube* and *Price* is *Blackhawk Tanning*...

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82 In *Tawas Tube*, the member was expelled, whereas in *Price* the discipline consisted of a five-year suspension from membership.
83 573 F.2d at 447.
Co. In *Blackhawk*, the Board characterized the rule permitting a union to expel a member seeking its decertification as "an exception to the rule prohibiting a union from penalizing a union member because he has sought to invoke the Board's processes." In the Board's words, such an exception was based on "the necessities of the situation, the right of the union to defend itself," whereas when a union fines a member because of his decertification efforts, it is no longer merely aiming to protect itself, but is actively engaged in thwarting access to the Board's processes. In truth, however, this rationale for distinguishing between fines and expulsion would appear to rest on a faulty premise. How many members who file decertification petitions against their incumbent union would, in reality, remain "privity to the union's strategy and tactics" during the course of the ensuing election campaign? Moreover, if, as the Board indicates, "the deterrent or punitive effect of expulsion in such circumstances is at most minimal," why should a union not be in a position to resort to stronger punitive measures, as *Allis-Chalmers* suggests? At any rate, the Board's approach in *Blackhawk* seems, as the dissenters point out, a clear departure from positions adopted by the Supreme Court and its own earlier decisions, and creates a distinction between fines and expulsion for 8(b)(1)(A) purposes where none previously existed.

These remarks are not meant to suggest that the results reached in these two cases are necessarily wrong, but only to emphasize that enforcement of legitimate trade union rules often begets conflicts with other policies traditionally fostered by our existing labor laws. The cases give ample testimony to the elusiveness of national labor policy and problems inherent in making it a standard by which to gauge the legitimacy of union rules. Broad general policies in this field often come into conflict when carried beyond the bounds of their original application. Each case must be evaluated individually, with the ultimate solution calling for "discrimination, the weighing of the public policy in each situation against the union's right to regulate its internal affairs."
Unresolved Questions

In addition to the two-pronged test of union discipline, i.e., internal means of enforcement and legitimacy of object, both Allis-Chalmers and Scofield refer to other criteria which may have a bearing on the question of whether particular applications of discipline run afoul of the strictures of 8(b)(1)(A). In Allis-Chalmers, the Court emphasized that the UAW strike was lawful, had received prior approval by the membership in accordance with the union’s constitution, and that the members on whom the fines were levied were full-fledged, oath-taking members who had been fairly tried and convicted. The presence of these factors was also cited in Scofield. Therefore, in neither decision was it necessary for the Court to speculate on what effect, if any, the absence of one or more of these criteria might have had on their respective outcomes.

Shortly after Allis-Chalmers was decided, Arnold Ordman, the General Counsel of the Board, indicated that

in order to obtain clarification of this gray area of labor relations, [he intended] to submit for Board and Court adjudication not only questions relating to the legality of fines imposed upon employees with less than full union membership and fines for failure to support unprotected or unlawful strikes and picketing, but even cases where the issue turned on the alleged excessive of the fines.92

The number of charges that have issued since this intention was expressed indicates that the General Counsel has remained true to his word.93

Reasonableness of the Fine

By far, the largest number of 8(b)(1)(A) post-trilogy cases have focused on the question of whether the imposition and court collection of an unreasonably excessive fine constitutes an unfair labor practice, and if so, determining the criteria on which “reasonableness” determinations should be based. Most NLRB trial examiners assumed, in light of the new trilogy, that fines unreasonable in amount involved

the kind of coercion proscribed by the statute. Under this supposition, they went on to analyze the various factors which would, in their estimation, be pertinent in determining whether a given fine would exceed the bounds of "reasonableness." Included among the many factors alluded to in their discussions were the disciplined member's normal earnings, his earnings during the strike, his regular union dues and initiation fees, and contract gains won as a result of the strike.

It was only recently, in *Arrow Development Co.*, that the Board ruled directly on the question of whether the reasonableness of the fine is a relevant consideration in an unfair labor practice charge. After reviewing earlier Board decisions in the area of union discipline, the majority of the Board concurred with the respondent's contentions and those advanced by the unions filing amicus briefs, and held that fines, no matter how large, for crossing a legitimate picket line affect only membership status, thereby constituting internal union action not subject to Board regulation. Consequently, the Board majority declared that the dollar volume amount of the fine and its reasonableness or unreasonableness were internal union matters, which, by virtue of the proviso to 8(b)(1)(A), the Board was prohibited from examining. As for the Supreme Court's admonitions against unreasonable fines, raised so frequently in *Allis-Chalmers* and reasserted in *Scofield*, the Board concluded that they were "directed to enforcing courts, encouraging those courts to make an independent determination of the reasonableness of the fine in each case presented." Accordingly, the majority concluded that "as the legal enforceability of these fines is grounded in the contract theory," it was "obvious that the local courts are the more logical tribunals for the establishment of standards of reasonableness." The majority ruled, therefore, that the determination of the reasonableness was strictly the domain of the enforcing courts, not the NLRB.

Former Board Chairman McCulloch disagreed; rather than suggesting the conclusion reached by the majority, the Supreme Court cases indicated to him that, had the fines in those cases been unreasonable in amount, the Court would have found a statutory violation. Member McCulloch found that

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95 The decision was by a 3-1 vote, with Members Fanning, Brown and Jenkins in the majority, and Member McCulloch dissenting. Chairman Miller did not participate in the decision.
96 Amicus briefs were filed on behalf of the AFL-CIO, Teamsters and the UAW.
97 185 N.L.R.B. No. 22 at 7, 75 L.R.R.M. at 1010.
98 Id.
99 Id. at 9, 75 L.R.R.M. at 1011 (dissenting opinion).
[i]mplicit in the Court's analysis of this aspect of National labor policy is the concept that a union has a legitimate interest in imposing reasonable discipline upon a voluntary member if needed to protect its status as an institution for effective bargaining, even though such discipline also serves to restrain and coerce the member's exercise of his Section 7 right to refrain from engaging in concerted activities. The corollary is that where otherwise lawful discipline oversteps reasonable bounds of needed protection and becomes essentially punitive in nature, it impairs federal labor policy. And since no legitimate union interest is then served, it remains within the compass of Section 8(b)(1)(A).  

In this case, he observed that the fine imposed exceeded the net wages earned during the strike, and, therefore, in reality served as "a total restraint on the right to refrain from engaging in the concerted activity, different in form but in economic reality the same as if they had been blocked at the plant gate by unlawful violence or a mass picket line." Moreover, levying a fine that exceeded strike wages was, in McCulloch's opinion, tantamount to the union's causing the employer to suspend the disciplined employees for a brief period after the strike because they had worked during it. Clearly, such action would have violated 8(b)(1)(A), and there was no apparent reason why a fine in excess of strike wages should be treated differently.

In any event, the Board has now ruled that the Act does not allow it "to evaluate the fairness of the union discipline meted out to protect a legitimate union interest." It will be interesting to see if the courts of appeals concur in upholding the limited authority which the Board has staked out for itself in this area.

Necessity for Prior Warning that Fines Will Be Levied

Several trial examiners have ruled that, before a fine may be validly assessed, the union organization involved must first have explicitly warned its members that the conduct in issue would render them liable to fine. In these cases, both due process and elemental fairness were cited as requiring that members be advised that fines will be imposed on those who continue to work during a strike. One

100 Id.
101 Id. at 14, 75 L.R.R.M. at 1013.
102 Id. at 8, 75 L.R.R.M. at 1011. Two recent cases following the Arrow Development Co. decision are Local 488, UAW (Edward J. Hohmann), 185 N.L.R.B. No. 126, 75 L.R.R.M. 1242 (Oct. 9, 1970); Communications Workers of Am., Local 6222, 186 N.L.R.B. No. 50, 75 L.R.R.M. 1324 (Oct. 31, 1970).
examiner has further suggested that members should also be informed of the approximate limits of the fines, so that they may "determine whether their family obligations would warrant their continued earning of a salary notwithstanding the threatened fine, or whether the fine might not dissipate all or most of the earnings — or, even worse, . . . exceed the earnings." Thus far, however, the Board has not yet had occasion to rule on whether a prior warning is a concomitant requirement for union enforcement of fines against derelict members. In light of Arrow Development Co., however, it is unlikely that the Board will attempt to superimpose such a requirement on internal union procedures.

Arbitrary Imposition of Fines

Another question still unresolved is "whether 8(b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a [union leader's fiat]?" Prior to the decision in Miranda Fuel Co., it would have been difficult to respond affirmatively to this question, since unfair, discriminatory and invidious treatment at the hands of one's bargaining representative was not at that time considered an unfair labor practice. With the advent of Miranda, however, irregularities in the adoption of union rules or deficiencies in their application and enforcement may well constitute an unfair labor practice. Indeed, Miranda itself involved what the Board termed "nothing more than an arbitrary imposition of an ex post facto rule."

The precise boundaries of the fair representation duty, however, have not yet crystallized, and it may be that the Board and courts will stop well short of making all arbitrary union conduct and undemocratic practices unfair labor practices under the fair representation rationale. Even if this be the case, it is possible that such conduct may still constitute an unfair labor practice under the Shipbuilding Workers theory. Sections of the Landrum-Griffin Act enumerate specific guarantees of due process and proscribe certain arbitrary and undemocratic union practices. Union conduct which flaunts these protections would, ipso facto, defy established national labor law policy and, hence, under the Shipbuilding Workers approach, violate 8(b)-(1)(A).

105 388 U.S. at 195.
106 See notes 12-18 and accompanying text supra.
107 140 N.L.R.B. at 184.
As a policy matter, however, neither of the above arguments justifies the use of 8(b)(1)(A) as a vehicle for correcting internal union abuses. Title I of the Landrum-Griffin Act\textsuperscript{109} was passed precisely for the purpose of making internal union procedures comport with due process and overall fairness. Congress certainly would not have gone to the trouble of enacting a major piece of labor legislation to remedy internal union abuses if protection were already available more quickly and less expensively through the NLRB. Moreover, title I furnishes specific guidelines for determining whether the union action meets the minimal standards set by Congress, and a body of case law is already in the process of bringing these safeguards more clearly into focus.

In\textit{ Lodge 455, International Brotherhood of Boilmakers v. Terry},\textsuperscript{110} the Fifth Circuit upheld an award of five hundred dollars damage to union members who had been disciplined by their union for crossing its picket line.\textsuperscript{111} The court held that the union’s failure to comply with its constitutional requirement that a strike vote be held prior to the calling of a strike or work stoppage resulted in a loss of its right to discipline members who refused to obey the strike call. Moreover, in disciplining members under these circumstances, the union violated its own bill of rights and subjected itself to suit under the provisions of the Landrum-Griffin Act.\textsuperscript{112}

As previously indicated, however, the wisdom of treating union conduct similar to that in\textit{ Terry} as an unfair labor practice would be questionable. The discipline involved in such cases is purely of an internal union nature. Under the reasoning of the new trilogy and\textit{ Arrow Development Co.}, it should therefore be treated as strictly an internal union affair, albeit one in which the union has exceeded the bounds of its authority. Indeed, it was precisely to remedy internal union abuses of this nature that the Landrum-Griffin Act was passed, and this congressional effort to define union obligations toward their members would be seriously eroded if the vague and ambiguous language of 8(b)(1)(A) now were to become the barometer of union fair play and due process. For these reasons, it is submitted that the Landrum-Griffin Act, rather than the NLRA, should be the sole means.

\textsuperscript{110} 398 F.2d 491 (5th Cir. 1968).
\textsuperscript{111} One member was fined twenty-five dollars; others received a flat fine of one hundred dollars plus twenty-five dollars for each week they continued to work for the picketed concern.
\textsuperscript{112} 29 U.S.C. §§ 411(a)(5) & 412.
by which improperly adopted or imposed union rules are legally subject to challenge.

Union Membership

Types of Union Membership

In both Allis-Chalmers and Scofield, the Court specifically noted that its decisions were limited to cases where the discipline was levied against full-fledged union members who had voluntarily elected to become union members in fact as well as name. Unanswered was the question of whether so-called “financial core” members, whose union participation was limited to paying uniform dues and fees required by a union security agreement, could be subjected to fines for infractions of union rules without violating 8(b)(1)(A).

The distinction drawn by the Supreme Court between voluntary members and mere dues payers has been criticized on the ground that most employees are unaware of the option to limit their union affiliation to the financial aspects of membership. As a practical matter, it has been pointed out, employees obligated to join a union under a union security clause are seldom informed of their right to refrain from accepting formal union membership. These observations, however valid, may prove academic if it is subsequently determined that “financial core” members are as susceptible to union discipline as other members. In order to test this point, the Board’s General Counsel has recently issued a complaint alleging that a fine assessed against a limited member violated 8(b)(1)(A).

In issuing this complaint, the General Counsel reasoned that even though the collection of fines against a “financial core” member might prove legally uncollectible because of the limited contractual obligation assumed by such members, nonetheless, the imposition of fines in such situations would effectively restrain those employees in the exercise of statutorily protected rights in violation of 8(b)(1)(A). This was so because a fine under such circumstances would force an individual into the onerous position of having to undertake the defense of a lawsuit if the union should attempt to collect through court action.

113 388 U.S. at 195.
116 Id. Despite the fact that the General Counsel conceded that a fine against a
Despite the force of these contentions, and the seemingly legal pregnancy of the Supreme Court's distinction between full members and mere dues payers, union opposition to treating "financial core" members differently than full members is not without support. The sole purpose of requiring employees under a union security arrangement to contribute to the financial support of the union is to eliminate free riders by making each unit employee bear his fair share of the expenses of representation. Tolerating free riders, however, would be far less of a burden for unions than forcing them to tolerate activity on the part of mere dues payers, which undermines basic union goals and objectives. Allowing nominal members to completely escape union sanction, no matter how devastating their conduct from a union viewpoint, would seriously impair a union's organizational effectiveness and severely handicap it in accomplishing its fundamental objectives.

Again, neither the Board nor reviewing courts have as yet grappled with the legal distinctions, if any there be, between "financial core" members and full-fledged, oath-taking ones. When they do, however, these tribunals will once again be confronted with the basic dilemma posed by these 8(b)(1)(A) disciplinary cases, i.e., balancing the union's need for effective control over its "membership" against the freedom of individual employees to dissent from concerted collective action.

Resignation from Union Membership

Another question directly related to the issue of union membership status is: can an employee by resigning his union membership avoid the reach of union disciplinary measures? The Board has long held that, in the absence of contrary by-law or constitutional provisions, an employee joining a voluntary labor union for an indefinite period may resign therefrom at will. It has further held that since the relationship between a union member and his union is contractual, an employee, by resigning, severs this contractual bond and thereby removes the underlying basis for his financial obligation to the union.

Both of these principles were reiterated in the Board's recent

"financial core member" might be uncollectible in a civil case, he claimed that the union-"financial core member" relationship was not so clear as to render the fine an empty gesture, particularly in view of the burden which a defense against a suit to collect might entail. He also noted that a fine under such circumstances could not be classified as an internal union matter and thus be protected under 8(b)(1)(A)'s proviso, since no union-member relationship had been established voluntarily.


decision in *The Boeing Co.* In that case, the Board reaffirmed the concept that once an employee tenders an unequivocal resignation his relationship with the union is thereby severed. Thereafter, such a "former member" is immune from union discipline, including fines for all conduct occurring subsequent to the resignation. If, under such circumstances, a union still persists in its attempt to impose and collect fines, it commits an unfair labor practice, even though a fine against a nonmember may not itself be legally enforceable in court.

The Board went on to caution, however, that a union retains the right to impose discipline for all conduct occurring during the period of union membership, and that an employee's resignation from the union does not serve to extinguish this right, regardless of the fact that its exercise is deferred until after submission of the resignation in question. As the Board observed, membership is the cornerstone upon which the union's authority to discipline its members rests.

In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right. But the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished.

**Illegal or Unauthorized Strikes**

Obviously, not all picketing or strikes are lawful in nature. Unions, nevertheless, have at their disposal the same disciplinary measures for insuring membership solidarity behind these endeavors, as the UAW locals had in *Allis-Chalmers* and *Scofield*. The question then arises whether such disciplinary measures as fines are subject to attack under 8(b)(1)(A) when the underlying strike activity which they support is

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120 This is so, the Board observed, because the coercion lies in the calculated threat [which makes the argument that the fines imposed were not collectible] besides the point. . . . Faced with the possibility of action against him, the employee may well be, for practical purposes, impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict. Or, should he choose to take that risk, he will find it necessary to hire counsel whose services he ordinarily would not require.
121 Id. at 4-5, 75 L.R.R.M. at 1005.
122 Id. at 9, 75 L.R.R.M. at 1007.
123 Id. at 6, 75 L.R.R.M. at 1006. The Board has subsequently relied on this rationale in several other cases. See *Communications Workers, Local 2108*, 136 N.L.R.B. No. 147, 75 L.R.R.M. 1441 (Dec. 8, 1970); *Washington-Baltimore Newspaper Guild, Local 35*, 186 N.L.R.B. No. 133, 75 L.R.R.M. 1438 (Dec. 3, 1970).
itself illegal. The significance of this question can be seen from three recent Board cases.

In *Weidman Metal Masters*,\(^{123}\) three union members were fined twenty-five dollars each for working behind a picket line which the Board later determined was itself in violation of section 8(b)(4)(B). As part of the 8(b)(4) remedy, the Board ordered the union to refund the fines. Thus, the discipline in this case was successfully challenged and restitution achieved by attacking the underlying legality of the strike, rather than through an 8(b)(1)(A) attack. Had the latter charge been filed, however, it would undoubtedly have achieved the same result, as Member Brown intimates in his dissent.\(^{124}\)

In *National Grinding Wheel Co.*,\(^{125}\) union fines were challenged under 8(b)(1)(A). The union had imposed fines against members who refused to participate in a strike called in violation of a no-strike clause. The Board held that fines under these circumstances offend the Act's policy of fostering adherence to collective bargaining agreements and under the rationale of *Charles S. Skura*\(^{126}\) and *Shipbuilding Workers*, lose all claim to legitimacy.

Likewise, in *Glaziers Local 1162*,\(^{127}\) the Board reaffirmed its position that union fines supporting a strike that breaches a no-strike agreement are violative of 8(b)(1)(A). Concurring with the trial examiner, the Board observed that the "public policy in favor of enforcement of collective bargaining agreements outweighs the union's right to discipline members for violating rules which were enforced to compel participation in a strike in breach of contract."\(^{128}\)

Under either of the above approaches, the underlying legality of the strike is a factor of critical significance. Relief is available either by attacking the illegality of the strike directly, as was accomplished in *Weidman*, or by attacking the imposition of discipline under 8(b)-(1)(A), as was the case in *Grinding Wheel* and *Glaziers Local 1162*. In each of these cases, despite the internal character of their enforcement, fines levied in support of an unlawful strike or picket line activity were held to be in unlawful conflict with overriding national labor policy.

These decisions do not reach the question of the fines' legality where the strike itself is legal but has not been authorized by the

\(^{123}\) 166 N.L.R.B. 117 (1967).
\(^{124}\) *Id.* at 118.
\(^{125}\) 176 N.L.R.B. No. 89, 71 L.R.R.M. 1311 (June 13, 1969).
\(^{127}\) 177 N.L.R.B. No. 37, 73 L.R.R.M. 1125 (June 30, 1969).
\(^{128}\) *Id.* at 18, 73 L.R.R.M. at 1125.
membership. This question would appear to be closely related to the arbitrary imposition of fines previously discussed. If strike authorization were required by the union's constitution or by-laws, failure to secure membership approval should provide an adequate defense to a later union attempt to punish members for nonobservance. Such a defense could be raised either during the union's disciplinary proceedings, a judicial appeal therefrom under the provisions of the Landrum-Griffin Act, or in opposition to the fines' collection during union enforcement proceedings, but, in any event, should not be grounds for an 8(b)(1)(A) charge.

**Union Discipline as a Mandatory Subject of Bargaining**

Another question often raised in connection with union discipline is whether such matters are mandatory subjects of bargaining. In light of *Allis-Chalmers* and *Scofield*, this question takes on added importance. If union fines and other disciplinary measures are held to be mandatory subjects of bargaining, an employer could in effect neutralize these weapons by conditioning any new labor contract following an economic strike on the union's willingness to drop all disciplinary action against members who refused to heed the strike call. Unions quite conceivably might be willing to forego the use of discipline in an effort to break the impasse, and, hence, the result reached in *Allis-Chalmers* and *Scofield* might be effectively circumvented.

Thus far, however, unions have not been confronted with this dilemma, since the Board has uniformly held that questions of union discipline are matters of internal union business and not a mandatory subject of bargaining. In the most recent case on the subject, the Board has held that an employer's insistence that the union fines against members who crossed its picket line be rescinded constituted refusal to bargain and transformed the economic strike into an unfair labor practice one.

**Fines Against Supervisors**

A spate of recent Board decisions has made clear that whatever the right of a union to fine its members who are in the bargaining unit, different criteria must be applied when attempts are made to fine

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129 See notes 105-12 and accompanying text *supra*.
supervisory personnel. In the majority of cases which have thus far been considered, both the Board and its trial examiners have ruled that such fines imposed on supervisory employees restrain or coerce an employer in the selection of his bargaining representative in violation of 8(b)(1)(B).\textsuperscript{132}

In what is probably the leading case on the subject, union fines imposed on foremen because their contract interpretation differed from the union's were held to violate the statute.\textsuperscript{133} Likewise, the Board has held that fines against supervisors who performed unit work during a strike violated 8(b)(1)(B) because the nub of the dispute was that the supervisors' action violated the contract. In both of these cases, the Board found that the fines were imposed as a result of the supervisors' acting as spokesman on behalf of management, which, of course, is the role of a supervisor. In \textit{A.S. Horner, Inc.},\textsuperscript{134} however, the Board seemingly went beyond the foregoing principle that a supervisor cannot be fined by his union, at least when the discipline is designed to inhibit his functioning as management's representative. In this case, the supervisor in question was fined for having signed a letter endorsing the company president's exhortation to employees to vote against the union in the coming election. Although distinguishable from the other cases in that the conduct for which the supervisor was fined was not directly related to his supervisory duties, the Board held that, in essence, the fine had been levied because the supervisor had placed the interests of the company ahead of the union. Obviously, the Board declared, such discipline was coercive "because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to Respondents [the union]."\textsuperscript{135}

Thus far, therefore, the Board has granted a wide immunity from union discipline to supervisors and foremen on the theory that their


\textsuperscript{134} 176 N.L.R.B. No. 105, 71 L.R.R.M. 1445 (June 18, 1969).

\textsuperscript{135} Id. at 4, 71 L.R.R.M. at 1446.
primary allegiance is to management, and any discipline against such "management representatives" would necessarily inhibit their freedom to function in this capacity and would interfere with management's selection and control over its own representatives.

**Statute of Limitations**

The Board has recently been called upon to determine when the six-month statute of limitations under section 10(b) begins to run in union-fine cases. In *Union Carbide Corp.* the Board at first held that a complaint alleging "excessive union fines" was untimely because it was filed more than six months after the union made its decision to impose discipline. The Board, after recently voting to reconsider this ruling, rejected the company's contention that the threat to collect fines previously adjudged and to institute legal action for such purpose are separate and independent illegal acts which start the limitation period anew, and adhered to its original decision. Furthermore, the Board has recently dismissed complaints as to fines which had become finalized more than six months before charges were filed.

**Conclusion**

The new trilogy and the Board cases following in its aftermath deal with only one limited aspect of union discipline, *i.e.*, whether its imposition and enforcement in a given case constitute the commission of an unfair labor practice. They do not purport to deal directly with the legal enforceability of union disciplinary measures as such or whether their imposition can be judicially challenged by the penalized member. Nonetheless, they do touch upon a highly delicate and sensitive area of labor relations law. As former Chairman McCulloch has astutely observed, the real reason that these cases have now suddenly become important is because "they are part of a new exploration of the dichotomy between the rights of an exclusive bargaining agent, which has been certified or recognized as the spokesman for all employees, and the right of an individual worker to disagree with and act independently of the bargaining agent and the group."

This struggle between the unions' need for unity and cohesiveness

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of action and the freedom of individual members to pursue an independent course of action is a conflict of long standing in which advocates of both positions can enlist policy arguments supporting their respective positions. Because of the intensity of opinion which marks both union and management camps on this issue, the floodgate of criticism with which these decisions were greeted was not wholly unexpected. The most vocal criticism has, as expected, come from management, though unions are not at all happy over the prospect of having union discipline challenged as an unfair labor practice. In short, these decisions have evoked a crescendo of criticism, which has all but drowned out the calmer, quieter voices of reason.

None of the decisions in the new trilogy broke new legal ground. Each decision merely reaffirmed and clarified existing law. Internal means of union discipline, which do not affect members' employment rights, had always been upheld against Taft-Hartley challenge, while attempts to affect job rights as a method for enforcing union discipline have consistently been held to violate 8(b)(1)(A) as well as other sections. It is true that the Court injected the element of legitimacy of trade union objective into the determination of the legality of discipline, but this is hardly surprising. The Court could not very well have allowed unions to enforce rules which had no bona fide objective, and which at the same time offended statutory labor policy. To have ruled otherwise would have been to abandon the very employees for whose protection the NLRA was passed. As for the other criteria to which the new trilogy refers, i.e., reasonableness, fairness and imposition against involuntary members, the Court itself has not yet given an indication as to what standards will eventually be required, although the Board, as we have seen, is now engaged in working out meaningful and practical accommodations in these areas. Thus, on the whole, rather than announcing a new doctrine, the new trilogy merely puts into sharper focus the principles that traditionally governed the relationship between union discipline and unfair labor practice charges.141

141 Indeed, former Chairman McCulloch has recently questioned the overall significance of these cases and their impact upon the future course of union discipline, indicating that the importance of this line of cases might be far less than their critical reception would suggest. Address by Frank W. McCulloch, An Overview of the National Labor Relations Board: Perspectives Old and New, Controversial and Routine, Industrial Relations Law & Human Behavior Seminar, University of Oklahoma, May 22, 1969. Quantitatively, in McCulloch's words, "these cases may not be especially important, for scarcely two dozen such cases have come before the National Labor Relations Board in its 34-year history." Id.

These remarks, while serving to place these cases in their proper perspective amid the rampant critical commentary, may have overshot the mark. It must be observed that the relative infrequency of these disciplinary cases thus far is undoubtedly due in large
The long-range importance of these cases lies in the impact they will have on the future course of union administration. First, the fine cases, Allis-Chalmers and Scofield, clearly establish, if not the full picture, at least the recognizable perimeters of discipline available to unions, and there is every reason to suspect that unions will be anxious to avail themselves of this newly confirmed area of authority. This will be doubly true if the Board's Arrow Development Co. decision survives appellate scrutiny, thereby affording unions the opportunity to recover fines large enough to warrant enforcement by lawsuit. Indeed, the number of cases involving "reasonableness of union fines" suggests that unions have already sharply increased their use of fines in the wake of the new trilogy. Secondly, in Shipbuilding Workers, the Court established a precedent whereby union members could challenge the discipline levied against them, without having to undertake the burden of bringing or defending a lawsuit. Consequently, before establishing rules governing members' conduct, unions must now consider the possibility that their enforcement may be challenged as an unfair labor practice if the discipline affronts federal labor policy.

In summary, the principles of the new trilogy present a double-edged sword. On the one hand, they open new avenues for strengthening the hand of weaker unions. At the same time, however, the Court has placed checks on the union's use of this newly confirmed disciplinary authority by permitting members to contest union penalties through unfair labor practice procedures. Whether these two countervailing results will tend to cancel each other out or whether one aspect will prove considerably more significant than the other is a question that only time and the multiple cases now before the NLRB can answer.

part to the fact that unions, as a practical matter, were unwilling to expend the time and expense of prosecuting a civil suit for the small dollar amounts usually involved in cases of this nature. Certainly, it is true that unions would prefer to collect and enforce these fines by suspension or expulsion, rather than through judicial methods. If a member is unwilling to comply with the organization's rules, most unions prefer to exclude such an individual from the group, rather than fining the troublemaker. With the advent of this new trilogy, however, there has been a tremendous upsurge in the number of union discipline cases coming before the Board, and forthcoming decisions in this area should have a significant effect on the volume of such cases for the future. Contrary to Mr. McCulloch's remarks, the thrust of these 8(b)(1)(A) disciplinary cases could well have a significant impact on future union disciplinary decisions.