

Act. The Court's reaffirmation of the consumer-protective four installment rule can be welcomed as having several possible salutary effects. The preservation of the rule will serve as a boon to the aware consumer anxious to put credit information to use in making purchase decisions, will leave open the invitation to the presently apathetic consumer to change his ways, and, at the very least, will clarify the scope of the Federal Reserve Board's authority for all future courts faced with Truth in Lending issues. However, by rendering so important a decision on the basis of a fact situation which is at best largely unrevealed and at worst beyond the scope of Truth in Lending altogether, the Court may have left future decision-making bodies the frustrating heritage of a rule now firmer because of judicial recognition of its necessity, but no clearer in range of application than before the matter reached the Supreme Court.

WILLIAM B. ROBERTS

Labor Law—Reasonableness of Union Disciplinary Fines—NLRB v. Boeing Co.¹—Upon expiration of the collective bargaining agreement between Booster Lodge No. 405 of the International Association of Machinists and Aerospace Workers (IAM or Machinists) and the Boeing Company, the union called a lawful economic strike. During the strike, 143 of the 1900 production and maintenance employees crossed the union picket lines to work. Of these 143 employees, all were union members when the strike commenced, but 61 submitted written resignations before they crossed the picket lines and an additional 58 resigned after they had first crossed the lines.² After the strike ended, the union charged the 143 employees with violating the IAM constitution which provided penalties (including fines) for "improper conduct" such as "[a]ccepting employment . . . in an establishment where a strike . . . exists."³ In accordance with union disciplinary procedures, including notice and opportunity for a hearing, the union fined each of the 143 workers \$450 and barred them from holding union office for five years.⁴

¹ 412 U.S. 67 (1973), rev'g *Booster Lodge 405, Machinists v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972), rev'g *Booster Lodge 405, Machinists*, 185 N.L.R.B. 380, 75 L.R.R.M. 1004 (1970).

² 412 U.S. at 69 n.2.

³ *Id.* at 69.

⁴ *Id.* There had been no warning before or during the strike that members would be subject to disciplinary action for their strikebreaking activity. *Id.* at 80 (dissenting opinion). In addition, the local union had not fined any of its members in its two-year history. Brief for *Booster Lodge No. 405, Machinists as Intervenor* at 31, *Booster Lodge No. 405, Machinists v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972).

The fines of thirty-five employees who appeared at the union trial, apologized for their conduct, and pledged loyalty to the union were reduced to 50% of their strikebreaking earnings. 412 U.S. at 70 n.4.

In an attempt to compel payment of the fines,⁵ the union threatened to, and in the case of nine employees did, commence legal proceedings in state court to collect the fines plus attorney's fees⁶ and interest. Boeing then filed an unfair labor practice charge with the National Labor Relations Board (NLRB or the Board), alleging that the fines imposed upon employees who had not resigned from the union were unreasonable in amount and therefore violated section 8(b)(1)(A) of the National Labor Relations Act (NLRA),⁷ which prohibits a union from restraining an employee in the exercise of his right, guaranteed by section 7 of the NLRA,⁸ to refrain from concerted activities.⁹

Upon a hearing, the trial examiner found that the union had committed an unfair labor practice because the fines were impermissibly excessive,¹⁰ but his determination on that issue was set aside by the Board, which held in *Booster Lodge 405, Machinists*¹¹ that the legality of union fines under the NLRA does not depend on their reasonableness. In so holding, the Board relied upon its decision in *Machinists Local 504 (Arrow Development)*,¹² issued the same day,

⁵ Eighteen of the members who received reduced fines paid in full, but none of the \$450 fines were paid. 412 U.S. at 70 n.4.

⁶ In at least one case, the union filed suit in state court for \$450 plus \$180 in attorney fees. *Booster Lodge No. 405, Machinists*, 185 N.L.R.B. 380, 386 (1970) (trial examiner's decision).

⁷ 29 U.S.C. § 158(b) (1970) provides in part:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *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; . . .

⁸ 29 U.S.C. § 157 (1970) provides:

Employees shall have the right to 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 or protection, 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 158(a)(3) of this title.

⁹ 412 U.S. at 70. The Boeing company also charged that the union had committed an unfair labor practice by fining members who resigned from the union. *Id.* That issue was resolved by the Supreme Court in a companion case to *Boeing*, *Booster Lodge 405, Machinists v. NLRB*, 412 U.S. 84 (1973), where it held that the union violated § 8(b)(1)(A) of the NLRA when it sought court enforcement of fines imposed upon employees who had engaged in strikebreaking activities after resigning from the union. *Id.* at 85. The validity of the fines imposed upon members who resigned from the union is beyond the scope of this note. For a discussion of the Court's decision in *Booster Lodge 405*, see Comment, *Union Power to Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1543-45 (1973). At the appellate level and the NLRB level, the two cases had been joined under the name of *Booster Lodge 405, Machinists*. *Booster Lodge 405, Machinists v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972); *Booster Lodge 405, Machinists*, 185 N.L.R.B. 380, 75 L.R.R.M. 1004 (1970).

¹⁰ 185 N.L.R.B. at 398 (trial examiner's decision). The trial examiner's decision is reported following the Board's opinion, in *id.* at 384.

¹¹ 185 N.L.R.B. 380, 383 n.16, 75 L.R.R.M. 1004, 1007 n.16 (1970).

¹² 185 N.L.R.B. 365, 75 L.R.R.M. 1008 (1970), rev'd sub nom. *O'Reilly v. NLRB*, 472

where it was held that the Board was not empowered by Congress to examine the severity of otherwise lawful union discipline.¹³ The Board in *Arrow Development* reasoned that Congress did not intend that the Board regulate union fines imposed pursuant to a legitimate union rule, and consequently that Congress intended that the Board neither evaluate the severity of fines nor establish standards as to their reasonableness.¹⁴ Further, the NLRB reasoned that local courts are the logical tribunal for assessing the reasonableness of fines because the legal enforceability of fines is "grounded in contract theory," and because the question of reasonableness is "of an equitable nature rather than of the character of restraint and coercion with which the National Labor Relations Act treats."¹⁵

The Board's decision in *Booster Lodge* was appealed to the Court of Appeals for the District of Columbia, which rejected the Board's assertion that the amount of a fine is immaterial to its legality under the NLRA and directed the Board to determine the reasonableness of the fines.¹⁶ The appellate court relied upon two prior cases, *NLRB v. Allis-Chalmers Manufacturing Co.*¹⁷ and *Scofield v. NLRB*,¹⁸ in which the Supreme Court had upheld court-enforceable union disciplinary fines imposed pursuant to a valid union rule. In *Booster Lodge*, the court of appeals inferred from the Supreme Court's repeated use of the qualification "reasonable" in both *Allis-Chalmers* and *Scofield* that only such fines were protected.¹⁹ In addition, since in *Allis-Chalmers* a reasonable fine for strikebreaking was found to be legitimate because it imposed a less

F.2d 426 (9th Cir. 1972). The court of appeals remanded that case to the Board for a determination as to the reasonableness of the union fines. See also *Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972).

¹³ 185 N.L.R.B. at 368, 75 L.R.R.M. at 1011. Accord, *American Newspaper Guild* (Washington Post Co.), 186 N.L.R.B. 877, 75 L.R.R.M. 1438 (1970); *Communication Workers Local 2100* (Chesapeake & Potomac Tel. Co.), 186 N.L.R.B. 873, 75 L.R.R.M. 1441 (1970); *Communication Workers Local 6222* (Southwestern Bell Tel. Co.), 186 N.L.R.B. 312, 75 L.R.R.M. 1324 (1970); *Local 488, UAW* (General Motors Corp.), 185 N.L.R.B. 890, 75 L.R.R.M. 1242 (1970).

¹⁴ 185 N.L.R.B. at 368, 75 L.R.R.M. at 1010.

¹⁵ Id. Former Chairman McCulloch dissented in *Arrow Development* on the ground that the imposition of a disproportionately large fine would warrant the inference that the union's purpose was not legitimate, and would constitute a total restraint on an employee's right to refrain from concerted activities under § 7. Id. at 370-71, 75 L.R.R.M. at 1012-13. Moreover, Member McCulloch stressed the need for uniformity as opposed to a doctrine of "reverse preemption" whereby states would develop diverse standards as to reasonableness. Id. at 371, 75 L.R.R.M. at 1013.

¹⁶ 459 F.2d 1143, 1155-56, 1159 (D.C. Cir. 1972). Accord, *O'Reilly v. NLRB*, 472 F.2d 426 (9th Cir. 1972); *Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972). But see *U.O.P. Norplex v. NLRB*, 445 F.2d 155, 158 (7th Cir. 1971) (dictum). See generally Note, 1973 Duke L.J. 328; Note, 6 Ga. L. Rev. 631 (1972); 1971-1972 Annual Survey of Labor Relations Laws, 13 B.C. Ind. & Com. L. Rev. 1347, 1435 (1972).

¹⁷ 388 U.S. 175 (1967).

¹⁸ 394 U.S. 423 (1969).

¹⁹ 459 F.2d at 1156-57. The qualification "reasonable" was repeatedly used by the court in *Allis-Chalmers*, 388 U.S. at 181, 183, 192-93, and in *Scofield*, 394 U.S. at 428, 430, 436. For a discussion of these two cases, see text at notes 29-36 infra.

onerous penalty than that imposed by expulsion from union membership,²⁰ the court of appeals in *Booster Lodge* reasoned that an excessive fine would not be protected under section 8(b)(1)(A) and would constitute an unfair labor practice since it could place a greater burden on the employee than mere expulsion.²¹ Despite the court's recognition of the traditional role of state courts in adjudicating matters of internal union discipline and of the potential for conflict between the Board and state courts which, in any event, will have to examine the reasonableness of fines in suits brought to enforce them, the court maintained that the Board was a proper tribunal to exercise review.²² The court buttressed its legal arguments with a discussion of the policy factors that favor Board review—the need for uniform national labor standards, the prohibitive cost of litigation at the state level, and the Board's experience in the related areas of assessing the reasonableness of union initiation fees.²³

On certiorari, the Supreme Court in *NLRB v. Boeing Co.* reversed the court of appeals and, with three justices dissenting, HELD: the Board is justified in refusing to evaluate the reasonableness of fines imposed by a union upon members who crossed the picket lines during a lawful strike, because the severity of an otherwise valid fine is an internal union affair not affecting the employee-employer relationship and not otherwise violative of the policies of the NLRA.²⁴ Justice Rehnquist, speaking for the Court, further ruled that assessing the reasonableness of disciplinary fines is a matter for the state courts to determine under the law of contracts and voluntary association in proceedings brought to enforce the fine.²⁵

This note will first briefly examine *Boeing* in relation to the three major decisions in which the Supreme Court has considered the relationship of section 8(b)(1)(A) and its proviso to the enforcement of union disciplinary rules: *NLRB v. Allis-Chalmers Manufacturing Co.*,²⁶ *Scofield v. NLRB*²⁷ and *NLRB v. Marine & Shipbuilding Workers*.²⁸ The Court's decision in *Boeing* will then be discussed in terms of the policy factors which pertain to whether reasonableness should be reviewed by state courts or by the Board. Finally, the need for a uniform standard of reasonableness will be

²⁰ 388 U.S. at 191-92.

²¹ 459 F.2d at 1156.

²² *Id.* at 1157.

²³ *Id.* at 1158. Section 8(b)(5) of the NLRA directs the NLRB to assess the reasonableness of initiation fees in terms of "the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected . . ." 29 U.S.C. § 158(b)(5) (1970).

²⁴ 412 U.S. at 78.

²⁵ *Id.* at 74.

²⁶ 388 U.S. 175 (1967).

²⁷ 394 U.S. 423 (1969).

²⁸ 391 U.S. 418 (1968).

demonstrated and the various standards of reasonableness available to the courts will be examined.

An analysis of *Boeing* in the context of prior Supreme Court decisions dealing with the validity of union disciplinary rules must begin with the 1967 *Allis-Chalmers* decision. There the Court held that court enforcement of a reasonable fine imposed by a union for crossing a picket line during a lawful strike did not restrain or coerce the fined member in violation of section 8(b)(1)(A).²⁹ The Court found it unnecessary to rely on the proviso to that section, which guarantees a union the right to prescribe rules governing union membership, but instead cited it as "cogent support" for the proposition that Congress, in enacting section 8(b)(1)(A), did not intend to interfere with the internal affairs of unions.³⁰ The Court emphasized the strong federal labor policy favoring union maintenance of strike discipline because such discipline is essential to the union's ability to bargain collectively.³¹

Although *Allis-Chalmers* was delivered by a closely divided Court, its doctrine was explicitly reaffirmed by a 7-1 majority in *Scofield*. There the Court sustained union fines imposed for violations of a union bylaw prescribing production ceilings for piece-rate workers. The Court noted that the union rule reflected a legitimate union interest—preventing industrial speed-ups—and more importantly, it did not contravene national labor policy or law.³² In contrast, the Court in *Marine & Shipbuilding Workers* found that the union's expulsion of a member for failure to exhaust internal union remedies before filing an unfair labor practice charge with the Board was a section 8(b)(1)(A) violation because of the overriding statutory policy of securing unimpeded access to the Board.³³

In this trilogy, the Court refused to follow a simplistic approach of invalidating all fines because they are "coercive" under section 8(b)(1)(A) and of upholding all expulsions from union membership on the basis that the proviso has been interpreted to sanction such action.³⁴ Instead, the Court determined that union disciplinary ac-

²⁹ 388 U.S. at 195 (four justices dissenting). For more extensive discussions of *Allis-Chalmers* and its implications, see Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of *Allis-Chalmers*, 1970 Duke L.J. 1067; Harrison, Union Discipline and the Employer-Employee Relationship, 22 Lab. L.J. 216 (1971); Silard, Labor Board Regulation of Union Discipline After *Allis-Chalmers*, *Marine Workers* and *Scofield*, 38 Geo. Wash. L. Rev. 187 (1969); Note, 53 Cornell L. Rev. 1094 (1968).

³⁰ 388 U.S. at 191.

³¹ Id. at 180-81.

³² 394 U.S. at 436.

³³ 391 U.S. at 424, 428.

³⁴ The Court in *Allis-Chalmers* explicitly rejected a literal reading of §§ 7 and 8(b)(1)(A) in favor of recourse to the legislative history, stating: "When the literal application of the imprecise words 'restrain or coerce' Congress employed in § 8(b)(1)(A) produces the extraordinary results we have mentioned we should determine whether this meaning is confirmed in the legislative history of the section." 388 U.S. at 184.

tion was a section 8(b)(1)(A) violation only if it offended an overriding public policy imbedded in the federal labor laws.³⁵ These cases strongly indicate that the validity under the NLRA of internal union rules, intended by Congress to be outside Board regulation, is to be defined not on the basis of the form or severity of the union disciplinary action, but on the basis of whether the rules are consistent with national labor policies.³⁶

Although *Allis-Chalmers* established the validity of a union rule, enforceable by fine in a civil suit, requiring its members to refrain from strikebreaking, it did not reach the specific question presented in *Boeing*—given the validity of the rule, should the Board decide whether the size of the fine is excessive and whether as such it is a section 8(b)(1)(A) violation?³⁷ Both the majority and the dissent in *Boeing* read *Allis-Chalmers* as supporting their positions. The three dissenters in *Boeing*, as well as the court of appeals, considered it implicit in *Allis-Chalmers* and *Scofield* that the enforceability of a fine depends on its reasonableness.³⁸ While this interpretation is not inconsistent with the language of the cases,³⁹ it ignores the underlying rationale of the decisions. It is submitted that the result in *Boeing* is consistent with the reasoning of those earlier cases for three major reasons.

First, although the fines in both *Allis-Chalmers* and *Scofield* were conceded to be reasonable,⁴⁰ they were not upheld because of their reasonableness or non-coerciveness, but, as noted by the *Boeing* majority, because Congress did not intend that section 8(b)(1)(A) apply to internal union affairs not affecting a member's employment status.⁴¹ The Court in *Allis-Chalmers* made extensive use of the legislative history to demonstrate that section 8(b)(1)(A) was not meant to apply to "traditional internal union discipline in general, or disciplinary fines in particular,"⁴² but rather that the section was

³⁵ See Gould, supra note 29, at 1070-77; Silard, supra note 29, at 192-93.

³⁶ This analysis is consistent with the Board's interpretation of these Supreme Court cases as indicated in *Arrow Development*, 185 N.L.R.B. 365, 75 L.R.R.M. 1008 (1970). There, the Board distinguished the fine for strikebreaking in *Arrow Development* from the fine invalidated by the Supreme Court in *Marine & Shipbuilding Workers* by saying "it was the reason for the discipline (fining of members who had filed charges with the Board) rather than its severity which made the discipline unlawful." Id. at 366 n.5, 75 L.R.R.M. at 1009 n.5. See also Schlossberg & Lubin, Union Fines and Union Discipline Under the National Labor Relations Act, 23 N.Y.U. Conf. on Labor 207, 214 (1971); Silard, supra note 29, at 191.

³⁷ The Court in *Allis-Chalmers* did not address this issue since the fines were not challenged as being excessive. 388 U.S. at 192-93 n.30. In addition, the Court stated: "Whether § 8(b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader, are matters not presented by this case, and upon which we express no view." Id. at 195.

³⁸ 412 U.S. at 81 (dissenting opinion).

³⁹ See note 19 supra.

⁴⁰ 388 U.S. at 192-93 n.30; 394 U.S. at 430.

⁴¹ 412 U.S. at 73.

⁴² 388 U.S. at 186.

primarily concerned with union coercion during organizational drives and with union violence.⁴³ The *Boeing* Court correctly recognized that the premise of *Allis-Chalmers* that section 8(b)(1)(A) "was not meant to regulate the internal affairs of unions"⁴⁴ would be negated by Board review of fines, since it would require a searching inquiry by the Board into a union's internal affairs.⁴⁵ Board review would necessarily entail an examination of the union's motivation for imposing the fine,⁴⁶ its constitution, internal remedies and procedures, and the implementation of its rules. It appears that this result would be patently offensive to the intent of Congress as previously construed by the Court and the Board. The Board has consistently maintained:

[T]he Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee.⁴⁷

Secondly, the Court in both *Allis-Chalmers* and *Scofield* relied upon and endorsed the strong tradition of state court enforcement of union fines to sustain its interpretation of the NLRA. In *Allis-Chalmers*, the Court recognized that union discipline has historically been a question within the jurisdiction of state courts due to the contractual conception of the relationship between a member and his union.⁴⁸ Justice Brennan, speaking for the Court, indicated approval of state court jurisdiction by saying "state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship.'"⁴⁹ In *Scofield*, Justice White stated: "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law."⁵⁰

It follows from this emphasis on the state court's historical involvement in "establishing standards of fairness in the enforcement of union discipline"⁵¹ that the Court in these earlier decisions did not envision a disruption of the traditional allocation of functions between the Board and the state courts. To sanction Board review in *Boeing* would have had the practical effect of either

⁴³ Id. at 184-92.

⁴⁴ Id. at 186.

⁴⁵ 412 U.S. at 74.

⁴⁶ Id.

⁴⁷ Local 283, UAW (*Scofield*), 145 N.L.R.B. 1097, 1104 (1964), *aff'd sub nom. Scofield v. NLRB*, 394 U.S. 423 (1969).

⁴⁸ 388 U.S. at 182-83 & n.9.

⁴⁹ Id. at 193 n.32, quoting Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1078 (1951).

⁵⁰ 394 U.S. at 426 n.3. See also Gould, *supra* note 29, at 1133.

⁵¹ 388 U.S. at 182.

terminating the established jurisdiction of state courts to provide relief in union disciplinary suits or diluting its effectiveness by creating the potential for conflict between the Board and the courts,⁵² each of which would be exercising concurrent jurisdiction in reviewing the same fine.⁵³

Finally, the *Boeing* Court reasoned logically from the prior cases when it rejected the argument that since reasonable fines are not an unfair labor practice, unreasonable fines are.⁵⁴ The Court in *Allis-Chalmers* recognized that court-enforceable fines do not "restrain or coerce" within the meaning of section 8(b)(1)(A), for to deter a union member from working during a lawful strike—labor's "ultimate weapon"—is consistent with federal labor policy.⁵⁵ It would be anomalous to say that a reasonable fine, presumably the minimum necessary to compel compliance,⁵⁶ does not affect a member's employment status, whereas an excessive fine does. Unless the union induces an employer to threaten the member with suspension or discharge as a means of collecting the fine, a member's employment status is unaffected, regardless of the size of the fine.⁵⁷

Thus, it is submitted that the holding in *Boeing* is mandated by the underlying rationale of the previous Supreme Court decisions regarding the validity of union disciplinary rules. If the Court in *Boeing* were to infer that only reasonable fines were protected under section 8(b)(1)(A), all arguably excessive fines would be subject to Board review, and as a result, the major thrust of prior decisions—that Congress did not intend for the Board to regulate the internal rules of labor unions unless they contravene national labor policy—would be undercut. In addition, to conclude that the Board should assess the reasonableness of fines would disrupt the traditional role of state courts in enforcing union disciplinary fines, a practice approved by the Court in both *Allis-Chalmers* and *Scofield*. For the Court in *Boeing* to extend "the implications of the dicta"⁵⁸ in these earlier cases would constitute a significant departure from their rationale.

Although the decision in *Boeing* is consistent with the legislative intent in regard to section 8(b)(1)(A), as construed by the Court in *Allis-Chalmers*, as well as with the rationale of prior Court decisions, it is also appropriate to evaluate the policy arguments favoring Board review of the severity of union fines. The Supreme Court dissenters in *Boeing* and the court of appeals presented several seemingly persuasive policy considerations in support of Board

⁵² See Silard, *supra* note 29, at 197.

⁵³ See text at notes 84-89 *infra*.

⁵⁴ 412 U.S. at 72-73.

⁵⁵ 388 U.S. at 178-82.

⁵⁶ See text at notes 106-11 *infra*.

⁵⁷ See Justice Browning's dissent in *Morton Salt Co. v. NLRB*, 472 F.2d 416, 425 (9th Cir. 1972).

⁵⁸ 412 U.S. at 72.

jurisdiction to determine reasonableness: the Board procedures would be less costly, since the agency absorbs the cost of prosecuting an employee's claim;⁵⁹ the Board could apply its specialized expertise;⁶⁰ and the Board would provide uniform standards for assessing reasonableness.⁶¹

Although at face value these arguments seem appealing, a further examination is necessary to assess their merits. As to the first policy argument—that Board jurisdiction would lessen the financial burden on the employee, since the agency bears the expense of litigation—it is curious to note that Justice Douglas, who made this argument in the *Boeing* dissent, dissented in *Amalgamated Association of Street Employees v. Lockridge*⁶² on the ground that forcing an employee from Idaho to go to the Board in Washington, D.C. for relief imposes a great financial hardship on him.⁶³ In *Lockridge*, Justice Douglas disparaged Board jurisdiction by stating that “there is not a trace of equity in this long-drawn, expensive remedy.”⁶⁴ In addition, if a union chooses to seek judicial enforcement of a fine imposed upon strikebreakers, a course of action which was sustained in *Allis-Chalmers*, the member will still be forced to defend a suit for collection of the fine in state court regardless of the availability of the Board as a forum. This duplication of procedures will be expensive for the employee, as well as time-consuming, especially in light of the Board's ever-increasing workload.⁶⁵ Furthermore, the expense involved in litigating in state court could be mitigated by an employer's providing counsel for the employees.⁶⁶

Concerning the second policy argument advanced—that the Board has the necessary expertise to police unions and to assess the reasonableness of fines—it is questionable whether the reasonableness of fines presents an issue for which specialized agency review is needed. State courts have been adjudicating disputes over union administration of internal discipline for more than half a century.⁶⁷ The Supreme Court has recognized: “The fairness of an internal union disciplinary proceeding is hardly a question beyond ‘the con-

⁵⁹ Id. at 82 (dissenting opinion).

⁶⁰ Id. at 83 (dissenting opinion).

⁶¹ Id. at 79 (dissenting opinion).

⁶² 403 U.S. 274 (1971).

⁶³ Id. at 303 (dissenting opinion).

⁶⁴ Id. at 304 (dissenting opinion).

⁶⁵ See Silard, *supra* note 29, at 194; Note, 1973 Duke L.J. 328, 332 n.27.

⁶⁶ In *Boeing*, the company undertook to defend the suits against individual employees by the union, but made no general communication of the policy to the workers. *Booster Lodge No. 405, Machinists*, 185 N.L.R.B. at 386 (trial examiner's decision). In addition, the Board has held in one instance that an employer may promise to pay the union fine. *Standard Plumbing & Heating Co.*, 185 N.L.R.B. 444, 444-45, 75 L.R.R.M. 1065, 1066-67 (1970). See generally Gould, *supra* note 29, at 1126.

⁶⁷ Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L.J. 175 (1960).

ventional experience of judges,' nor can it be said to raise issues 'within the special competence' of the NLRB."⁶⁸

The final policy argument—that only the Board could establish uniform standards—is by far the most compelling reason advanced in favor of Board review of the reasonableness of union fines. Chief Justice Burger, dissenting in *Boeing*, argues that the application of diverse state common law would be contrary to national labor policy, the fundamental purpose of which is to promote uniformity within the field of labor relations.⁶⁹ In support of this position, commentators have pointed out that due to the inappropriateness of applying contract law to the union-member relationship, state courts cannot be relied upon to establish uniform standards by which union disciplinary disputes may be resolved.⁷⁰ In rebuttal, the following section of this note will show that state courts will be forced to develop standards because they will be unable to rely on contract theory, and that the need for national uniformity, which can only be achieved by preempting the jurisdiction of state courts to assess the reasonableness of fines, is outweighed by the negative implications of invoking the preemption doctrine.

Chief Justice Burger's contention that Board review will promote national uniformity⁷¹ reflects a frequently expressed policy consideration. The application of diverse state common law, it is argued, could have a detrimental impact on congressional intent, as expressed in the National Labor Relations Act, that labor disputes are to be regulated under a uniform federal law.⁷² Congressional labor legislation is designed to maintain a delicate balance of power between labor and management so as to prevent industrial strife and to guarantee the rights of the workers. This purpose could be frustrated if some state courts refused to enforce legitimate fines for crossing a picket line while those of other states sustained excessive fines. The imposition of unreasonable fines would provide unions with an excessively powerful disciplinary tool, while refusal to uphold anything but insignificant fines could undercut the effectiveness of otherwise valid union rules. In either case, the bargaining position of the union could be greatly affected,⁷³ and the existing balance of power between labor and management could be disturbed.

This argument that Board review of the reasonableness of fines is necessary to promote uniformity is buttressed by the frequent criticism of the ability of state courts adequately to enforce union

⁶⁸ *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 238-39 (1971).

⁶⁹ 412 U.S. at 79 (dissenting opinion).

⁷⁰ See authorities cited in note 74 *infra*.

⁷¹ 412 U.S. at 79 (dissenting opinion).

⁷² 29 U.S.C. § 141(b) (1970). See generally *The Developing Labor Law* 782-85 (C. Morris ed. 1971); Cox, *Labor Law Preemption Revisited*, 86 Harv. L. Rev. 1337 (1972).

⁷³ See Note, 53 Cornell L. Rev. 1094, 1102-03 (1968); Comment, *Union Power to Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1558-59 (1973).

discipline.⁷⁴ This criticism is based on the premise that the contract analysis of union membership used by courts to reach their results is a legal fabrication which provides no clear, workable standards for defining the limits on union discipline.⁷⁵ It is this failure of the state courts to establish standards that makes the multiplicity of forums especially troublesome.

The inability of state courts to define standards stems from the doctrinal inadequacy of contract theory. The power of the union to discipline its members is derived from a supposed contractual relationship between the union and its members. The union constitution and bylaws are deemed to be the contract. However, to view the union-member relationship as contractual is to imply that upon joining the union a worker consents to fines, suspension or expulsion⁷⁶ while the union, usually by majority vote, retains the right to amend any term at any time.⁷⁷ In practice, the terms of the contract are dictated by the union; a prospective member can only accept or reject those offered.⁷⁸ In addition, the union constitution and bylaws are often too general or vague to achieve the certainty ordinarily required by contract law. For these reasons, contract theory provides an inadequate framework for state courts to adjudicate internal union disciplinary disputes.

As a result of the inappropriateness of applying traditional contract theory to the relationship of the union to its members, courts have freely superimposed their own standards in an effort to avoid unjust results; courts often arrive at their decisions not from established standards of fairness but through result-oriented jurisprudence.⁷⁹ In addition, courts commonly obscure their reasoning with contract language or protestations of judicial neutrality, and as a result, "courts have produced a body of law which seems inconsistent in result and contradictory in principle."⁸⁰

However, in response to the argument that state courts operating in the context of contract theory are unlikely to define workable standards, it should be noted that the legal fiction of contract theory

⁷⁴ See, e.g., Johannesen, *Disciplinary Fines as Interference with Protected Rights: Section 8(b)(1)(A)*, 24 Lab. L.J. 268 (1973); Summers, *supra* note 67; Summers, *supra* note 49; Note, *supra* note 73; Note, 25 Wash. & Lee L. Rev. 273 (1968).

⁷⁵ Summers, *supra* note 67, at 180.

⁷⁶ It should be noted that a union's disciplinary powers are circumscribed to a limited extent by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1970). This Act guarantees certain political and procedural rights to a union member. For instance, § 101(a)(5) of the Act requires notice and a hearing before a union may fine, suspend or expel a member. 29 U.S.C. § 411(a)(5) (1970). The Act also attempts to protect certain individual activities from union discipline. A member has the rights of free speech and assembly, the right to attend and participate in deliberations at union meetings, and the right to vote in union elections. 29 U.S.C. §§ 411(a)(1), (2) (1970).

⁷⁷ Johannesen, *supra* note 74, at 274.

⁷⁸ See Summers, *supra* note 49, at 1055; Note, *supra* note 73, at 1100; Note, 25 Wash. & Lee L. Rev. 273, 277 (1968).

⁷⁹ See Summers, *supra* note 67. See also Note, *supra* note 73, at 1099.

⁸⁰ Summers, *supra* note 49, at 1100.

used by state courts in suits to collect fines could not realistically be relied upon in judging the reasonableness of fines. Despite the *Boeing* directive to decide the issue on the basis of contract theory,⁸¹ a fine is unknown in contract law except insofar as a fine can be equated with a penalty imposed under the guise of liquidated damages.⁸² It is submitted that contract analysis would not be applicable, since it would be impractical to determine if a fine is reasonable in terms of the actual damages suffered. A disciplinary fine is not imposed to compensate a loss, but rather to serve as a deterrent or a punishment. For this reason, courts will not be able to obscure the issue of reasonableness, as they have done when deciding whether to enforce the fine, and, in fact, those courts which have considered the reasonableness of union fines have not utilized commercial contract principles.⁸³ As a result, state courts will be compelled to face the issue squarely and to attempt to define equitable standards by which to judge fines.

Nonetheless, it is still arguable that the Board would be a better forum for determining the reasonableness of a fine in order to promote uniformity throughout the country. But as recognized by the *Boeing* majority, there are practical problems in achieving this result. Since state courts would continue to have jurisdiction to consider reasonableness when enforcing the fines, independent Board determination of reasonableness in an unfair labor practice context might result in conflict as to the same fine.⁸⁴ The only way to avoid this untenable conflict between the NLRB and the state courts, a problem ignored in both the *Boeing* dissent and the court of appeals decision, would be for the Supreme Court to hold that state courts are preempted from exercising jurisdiction as to the reasonableness of fines pending Board determination.⁸⁵

In *San Diego Building Trades Council v. Garmon*,⁸⁶ the Supreme Court held that where the conduct engaged in was arguably protected by section 7 or prohibited by section 8 of the National

⁸¹ 412 U.S. at 74.

⁸² See generally 5 S. Williston, *Law of Contracts* §§ 769-811 (3d ed. 1961).

⁸³ See, e.g., *Auto Workers Local 283 v. Scofield*, 76 L.R.R.M. 2433 (Wis. Sup. Ct. 1971); *North Jersey Newspaper Guild Local 173 v. Rakos*, 110 N.J. Super. 77, 264 A.2d 453, 74 L.R.R.M. 2487 (N.J. Sup. Ct. 1970); *Farnum v. Kurtz*, 70 L.R.R.M. 2035 (Los Angeles Mun. Ct. 1968).

⁸⁴ 412 U.S. at 77-78.

⁸⁵ For a discussion of preemption in the field of labor law, see *The Developing Labor Law* 785-94 (C. Morris ed. 1971); *Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev. 552 (1970); *Come, Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435 (1970); *Cox, Labor Law Preemption Revisited*, 86 Harv. L. Rev. 1337 (1972); *Gould, The Garmon Case: Decline and Threshold of "Litigating Elucidation,"* 39 U. Det. L.J. 539 (1962); *Isaacson, Federal Preemption Under the Taft-Hartley Act*, 11 Ind. & Lab. Rel. Rev. 391 (1958); *Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 Colum. L. Rev. 469 (1972); *Michelmann, State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641 (1961).

⁸⁶ 359 U.S. 236, 245 (1959).

Labor Relations Act, the doctrine of federal preemption precluded the exercise of state court jurisdiction. If the Court were to conclude that an excessive fine constituted an unfair labor practice, the fine would arguably be prohibited by section 8 pending a determination of its reasonableness by the Board. Due to this characterization of the fine, the state courts would be unable to enforce the fine until the Board had acted. But the Board could not act unless the employee or his employer filed a charge with the Board alleging an unfair labor practice. If state courts were ousted of their jurisdiction, there would be no incentive for the recalcitrant member or his employer to challenge the fine before the Board. The union would then be without a remedy,⁸⁷ a situation which, in other contexts, has provoked concern among members of the Supreme Court⁸⁸ and commentators.⁸⁹ Thus, the effort to achieve uniformity could have the effect of preventing the union from collecting its fine and would make meaningless the right sanctioned by *Allis-Chalmers*.

The union's "right without a remedy" dilemma would not be limited to fines for strikebreaking; whenever a union fined a member in order to enforce a valid union rule, the claim of excessiveness would prevent adjudication by the state courts until an employee or his employer filed a charge with the Board. In the unlikely event that a charge was filed, the Board would have to assess reasonableness prior to determining liability. Also, this would, contrary to the intent of *Allis-Chalmers*, involve the Board in every internal union dispute where a claim of unreasonableness was made. Thus, application of the preemption doctrine in *Boeing* would nullify the underlying rationale of the Supreme Court's decision in *Allis-Chalmers* and related cases involving union disciplinary disputes.

To summarize briefly, the majority in *Boeing* was correct to reject the three policy arguments presented by the dissenters and the court of appeals. Analysis reveals that the financial hardship to the employee would not be alleviated by Board review of the reasonableness of fines because the employee would still be forced to defend in state court a collection suit brought by the union. Secondly, the Board has no more expertise in this area than do the state courts which have long exercised jurisdiction in determining the propriety of union discipline. Lastly, in order to achieve uniform standards as to the reasonableness of fines, the Court would have to

⁸⁷ See Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of *Allis-Chalmers*, 1970 Duke L.J. 1067, 1135; Note, *supra* note 65, at 333-34.

⁸⁸ See, e.g., *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971). The dissenters in that case, Justices Douglas, White and Blackmun and Chief Justice Burger, all agreed that the preemption doctrine should not be allowed to leave a party to a labor dispute without an effective remedy. *Id.* at 303-05, 329-32 (dissenting opinions). The dissenters also agreed that the doctrine of preemption should not apply to union-member controversies. *Id.* at 305, 322-23 (dissenting opinions).

⁸⁹ Come, *supra* note 85, at 1437; Cox, *supra* note 85, at 1363; Gould, *supra* note 85, at 66-69; Michelman, *supra* note 85, at 645-48.

preempt the jurisdiction of state courts, and preemption would have the result of increasing Board involvement in internal union affairs contrary to the intent of Congress, and it could leave the union without a remedy. These consequences far outweigh any interest in uniformity.

Although the *Boeing* decision eliminates the possibility of the Board establishing uniform standards to judge the reasonableness of disciplinary fines, state courts might achieve uniformity and predictability, at least within their jurisdictions, if "reasonableness" can be satisfactorily defined. The first issue which the state courts must resolve is whether to define reasonableness on an individual, case-by-case basis or to develop standards that can be applied uniformly. If a standard is desired, then the acceptability of various standards must be evaluated, in terms of the likelihood that they will accomplish the legitimate purposes of a union fine.

The need for standards is clear. If the state courts were to articulate standards governing the imposition of fines, there would be guidelines for future court enforcement of strikebreaking fines.⁹⁰ This in turn would create uniformity at least within the jurisdiction and would facilitate the administration of justice. Standards will also provide a degree of predictability and notice to the unions and employees whose rights and obligations are at stake.⁹¹ The definition of equitable standards should help to deter a union from threatening its members with excessive fines,⁹² and at the same time prevent trial courts from upholding only the most minimal fines.⁹³ This latter possibility poses the more severe danger to the delicate employer-employee balance, since the failure to enforce reasonable fines could undercut the effectiveness of a union's ability to maintain strike solidarity which is intimately related to its capacity to bargain collectively.⁹⁴ The need for uniformity and impartiality should outweigh the countervailing desire to assess guilt on an individual, case-by-case basis. Although a uniform standard fails to allow for an examination of an individual's motivations or particular situation, the impracticality of this type of analysis is amply demonstrated by the *Boeing* case.

At the hearing in *Boeing*, the General Counsel urged the trial examiner to consider the financial effects of Hurricane Betsy on the fined members.⁹⁵ The trial examiner recognized that this could involve an evaluation of such variables as the amount of water in

⁹⁰ See *Booster Lodge No. 405, Machinists*, 185 N.L.R.B. 380, 392 (1970) (trial examiner's decision); *Rapore, Protected Rights and Union Sanctions under Section 8(b)(1)(A) of the NLRA*, 21 Lab. L.J. 728, 736 (1970).

⁹¹ 185 N.L.R.B. at 392 (trial examiner's decision).

⁹² This concern was expressed by Justice Black in his dissent in *Allis-Chalmers*, 388 U.S. at 204.

⁹³ See Comment, *supra* note 73, at 1559.

⁹⁴ *Id.*

⁹⁵ *Booster Lodge No. 405, Machinists*, 185 N.L.R.B. at 390 (1970) (trial examiner's decision).

the fined employee's basement, the number of dependent children and relatives, and the extent of his outstanding financial obligations.⁹⁶ The trial examiner rejected such folly and simply proposed a formula based on a percentage of the earnings of the strikebreakers.⁹⁷ It seems apparent that to consider the particularities of each fined individual's situation would not only be impractical, but also unjust, for many of the strikers may have also been subject to economic hardship due to the hurricane or sick relatives. It would be unrealistic for the trier of facts, in an effort to be even-handed, to review each member's economic situation, especially in a union of 1900 members, in order to weigh the burdens borne during the strike.

For similar reasons, it is submitted that the factors suggested by the District of Columbia Circuit in *Booster Lodge* would be unacceptable as standards. The factors proposed included: compensation received by the strikebreakers, the level of the strike benefits provided to strikers, the individual needs of the strikebreakers, the detrimental impact of strikebreaking upon the effectiveness of the work stoppage, the strength of the union, the availability of alternative remedies and the effect on an individual's employment status.⁹⁸ The Supreme Court in *Boeing* indicated tacit approval of these factors:

Inquiry by the Board into the multiplicity of factors that the parties and the Court of Appeals *correctly* thought to have a bearing on the issue of reasonableness would necessarily lead the Board to a substantial involvement in strictly internal union affairs.⁹⁹

But as the Board convincingly argued, the weighing and balancing of these factors would not result in standards or uniformity since the variables are so particularized and individualized.¹⁰⁰ In effect, the suggestions would result in complete discretion for the trier of facts and would necessitate a case-by-case analysis from which no guidelines could be extracted. It is unlikely that two persons assessing the strength of a union, the impact of violating the union rules, and the needs of individual strikebreakers would arrive at the same dollar figure for a reasonable fine. The calculations are too subjective to achieve the purposes, outlined above, to be served by establishing standards.

Nevertheless, it may be possible to devise a workable standard. It must first be recognized that in determining the reasonableness of a fine imposed for strikebreaking, courts are faced with the problem

⁹⁶ Id. at 391.

⁹⁷ Id. at 394.

⁹⁸ 459 F.2d at 1159.

⁹⁹ 412 U.S. at 74 (emphasis added).

¹⁰⁰ Brief for Petitioner at 14 n.14, *NLRB v. Boeing*, 412 U.S. 67 (1973).

of accommodating majority and minority interests.¹⁰¹ In effect, the court must strike a balance between protecting the union's interest in maintaining sufficient strike solidarity to enable it to bargain collectively and the individual's interest in refraining from "concerted activities."¹⁰² A member may wish to work during a strike for financial reasons; he may fear that he will lose his job;¹⁰³ or he may disagree with the purpose of the strike. In any case, a court-enforced fine, unlike expulsion, can virtually compel participation in the strike unless the member is willing to resign from the union.¹⁰⁴ But as Professors Bok and Dunlop point out:

[W]hat is wrong with giving this power to the union? Why should individuals be free to avoid the strike and thus endanger the objectives, and even the jobs, of the majority? After all, the minority must adhere to the terms of employment negotiated by the majority. Why should it not also be compelled to comply with a strike that is called to achieve these terms?¹⁰⁵

In weighing these competing interests, it is useful first to determine the purpose of a fine. It is argued by the union that a fine should be viewed as a punishment and as such should not be limited to the monetary benefit that a wrongdoer derives from his offense.¹⁰⁶ But this reasoning ignores the rationale of *Allis-Chalmers*. Implicit in that Court's analysis is the concept that a union has a legitimate interest in imposing a fine for strikebreaking in order to protect its status as an effective collective bargaining agent.¹⁰⁷ The fine was conceived by the Court as a means of preventing members from jeopardizing the "usefulness of labor's cherished strike weapon."¹⁰⁸ This reasoning implies that a fine should be imposed to compel an employee to adhere to a union's anti-strikebreaking rule; it should not be punitive but essentially deterrent in nature.¹⁰⁹ If it serves as a deterrent, the fine would be justifiable as protective of a legitimate union interest—assuring compliance with valid union rules—and not merely as retribution.

¹⁰¹ D. Bok & J. Dunlop, *Labor and the American Community* 105-06 (1970).

¹⁰² *Id.*

¹⁰³ See *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938), which permits an employer permanently to replace economic strikers.

¹⁰⁴ In *NLRB v. Textile Workers Local 1029 (Granite State)*, 409 U.S. 213 (1972), and *Booster Lodge 405, Machinists v. NLRB*, 412 U.S. 84 (1973), the Court held that a union violated § 8(b)(1)(A) if it sought to enforce fines against strikebreaking members who resigned from the union. A member may only be fined for activities occurring before his resignation.

¹⁰⁵ D. Bok & J. Dunlop, *supra* note 101, at 105-06.

¹⁰⁶ Brief for Booster Lodge No. 405, IAM as Intervenor at 22, *Booster Lodge No. 405, Machinists v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972).

¹⁰⁷ 388 U.S. at 180-81.

¹⁰⁸ *Id.* at 183.

¹⁰⁹ This is consistent with the view taken by the trial examiner in *Booster Lodge No. 405, Machinists*, 185 N.L.R.B. 380, 392 (1970).

As stated by former Chairman McCulloch in his dissent in *Arrow Development*:

[I]f the amount of a fine is such as to be inordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed on the member, not in vindication of a legitimate union interest, but as a reprisal¹¹⁰

Therefore, if a fine is in excess of the benefits earned during the strike, it constitutes a total restraint that is greater than necessary to enforce the rule and should not be sustained by the state courts.¹¹¹

Two ways have been suggested by Professors Bok and Dunlop for determining the "benefits" derived from strikebreaking. They propose that a reasonable fine should not exceed either the wages earned during the walkout (less any strike benefits that were provided) or the benefits that will be received over the term of the new agreement negotiated as a result of the strike.¹¹² As to the latter possibility, the authors admit that there would be practical problems in measuring the benefits, since the worth of the new agreement is often not translatable into dollar figures.¹¹³ For this reason, it is submitted that the size of the fine should be geared to the wages earned during the strike.

It is suggested that various standards of reasonableness may be acceptable as long as deterrence is assured. Total deterrence—the net wages earned while strikebreaking or the wages minus the available strike benefits—may be reasonable. A percentage of the wages earned could also be reasonable as long as the fine would serve to deter all but those willing to work for a pittance.¹¹⁴ In either case, according to this analysis, the \$450 fine imposed by the union in *Boeing* should be invalidated. A flat amount of \$450 is inequitable, for it discriminates between members at different wage levels as opposed to a fine geared to the salary earned.¹¹⁵ In addition, at the hearing, it was pointed out that the fine was more than four times the weekly earnings (excluding overtime and bonus time) of the lowest paid strikebreakers, and it was more than twice the

¹¹⁰ 185 N.L.R.B. at 370, 75 L.R.R.M. at 1012 (1970) (dissenting opinion). See note 15 supra.

¹¹¹ Comment, supra note 73, at 1560.

¹¹² D. Bok & J. Dunlop, supra note 101, at 106-07.

¹¹³ Id. See also Gould, supra note 87, at 1124-25, where the author states that not only would it be difficult to calculate the benefits that are derived from a new contract, but more importantly, this rule would come close to creating two groups of employees—non-union as well as union—in the bargaining unit and could build the distinction directly into the workers' employment status by depriving one class of the benefits of the agreement.

¹¹⁴ Comment, supra note 73, at 1559-60. The trial examiner determined that a fine of 35% or less of straight time and 80% of bonus or overtime is "presumptively" reasonable. 185 N.L.R.B. at 394.

¹¹⁵ See Rapore, supra note 90, at 736.

versity Faculty of Law Association, which sought a separate unit for the full-time faculty members of the Law School. The two cases were combined for a hearing before the National Labor Relations Board (the Board or NLRB). Affirming the rulings of the hearing officer, the Board HELD: as part-time or adjunct faculty do not have a significant community of interest with full-time faculty members, they must be excluded from the bargaining unit of full-time faculty.² *University of New Haven, Inc.*³ and similar cases⁴ are overruled to the extent inconsistent with this decision.⁵ The Board also found that the law faculty at New York University (NYU) had special interests and allegiances different from those of the rest of the university faculty, so a separate unit was appropriate, although the overall unit would also be appropriate. Thus the law faculty could elect either to be part of a university-wide unit, to form a separate unit, or to have no representation at all.⁶ In addition, the Board found that professional librarians⁷ and department chairmen⁸ at NYU should be included in the overall bargaining unit. Chairman Miller and Member Fanning wrote strong dissenting opinions⁹ which criticized the decision to overrule *New Haven* and similar cases, which had enunciated the rule that part-time faculty should be included in the same unit as full-time faculty.¹⁰

New York University is an attempt by the NLRB to strengthen its guidelines for appropriate collective bargaining units in a university setting and to retreat from the confusion which prior holdings have generated with respect to part-time faculty members. The case follows previous Board policy on the issues of a separate law faculty

² Id. at 12, 83 L.R.R.M. at 1553. The Board uses the terms part-time faculty and adjunct faculty interchangeably. This note adopts the same usage.

³ 190 N.L.R.B. 478, 77 L.R.R.M. 1273 (1971).

⁴ Catholic University, 201 N.L.R.B. No. 145, 82 L.R.R.M. 1385 (1973); Florida Southern College, 196 N.L.R.B. No. 133, 80 L.R.R.M. 1160 (1972); Adelphi University, 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972); Manhattan College, 195 N.L.R.B. 65, 79 L.R.R.M. 1253 (1972); University of Detroit, 193 N.L.R.B. 566, 78 L.R.R.M. 1273 (1971); C.W. Post Center of Long Island University, 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

⁵ 205 N.L.R.B. No. 16 at 12 n.12, 83 L.R.R.M. at 1553 n.12.

⁶ Id. at 8, 83 L.R.R.M. at 1552. The procedure to be followed, detailed in Syracuse University, 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373, 1376 (1973), is thus different from a typical *Globe* (Globe Machine & Stamping Co., 3 N.L.R.B. 294, 1A L.R.R.M. 122 (1937)) election, in which employees vote in two groups, the minority group of skilled employees (the law faculty) having the option of voting for representation in a separate unit. If separate representation is not favored by the majority in the skilled unit, then their votes are pooled with those of the other voting group to determine the question of representation in the overall unit. The *Globe* procedure assures representation if a majority of the combined voting groups favor it, whereas the new procedure allows the law faculty to vote for no representation at all. For a criticism of this new procedure, see Syracuse University, supra at 15, 83 L.R.R.M. at 1377 (dissenting opinion), wherein Members Fanning and Penello question the wisdom of bestowing extraordinary status on the law faculty.

⁷ 205 N.L.R.B. No. 16 at 13, 83 L.R.R.M. at 1553.

⁸ Id. at 15-16, 83 L.R.R.M. at 1554.

⁹ Id. at 21, 23, 83 L.R.R.M. at 1555 (dissenting opinions).

¹⁰ See cases cited in note 4 supra.

weekly earnings of the highest paid strikebreakers.¹¹⁶ The fines, therefore, exceeded the legitimate interest of the union and merely served as retribution.

Despite the desirability of forming standards to judge the reasonableness of fines, it must be noted that there are inherent limitations to the foregoing scheme. The proposed standards are limited in scope and applicability, for they only apply to activities for which a member receives pay.¹¹⁷ Although fining a member for strikebreaking is a common form of union discipline, there are many union offenses which do not involve financial gain for the violator, such as dual unionism,¹¹⁸ refusal to perform picket duty,¹¹⁹ nonattendance at union meetings, or failure to pay dues in a timely manner. In these cases, the size of the fine cannot be measured in terms of the violator's monetary gain. It may be that the reasonableness of a fine imposed for such activities is not susceptible to being judged according to a standard, but rather that judgment must be made on an individual, case-by-case basis. Nonetheless, the impossibility of defining standards for all union violations does not detract from the need for standards as to fines for the serious union offense of strikebreaking.¹²⁰

ELLEN S. HUVELLE

Labor Law—Determination of the Appropriate Faculty Bargaining Unit in a Private University—*New York University*.¹—Petitioner, New York University Chapter, American Association of University Professors, sought a bargaining unit comprised of all full-time faculty members of the university, including professional librarians, as well as half-time faculty in the school of dentistry. The local chapter of the United Federation of College Teachers intervened, seeking to include all regular part-time faculty of the university in the appropriate unit. A second petitioner was the New York Uni-

¹¹⁶ 185 N.L.R.B. at 390 (trial examiner's decision).

¹¹⁷ See Rapore, *supra* note 90, at 736. Due to the limited applicability of a standard, Rapore suggests that the notice given to the member as well as the amount of the fine should be a criterion of reasonableness. He proposes that reasonable notice may require that a member be specifically informed that certain activities will subject him to fines which may be court-enforced. *Id.* at 737. The trial examiner in *Boeing* decided that the notice requirement had not been met since the members were not specifically informed that they would be subject to fines for working during the strike and that they were not informed as to the approximate amount of the fine. 185 N.L.R.B. at 397-98.

¹¹⁸ E.g., *Ballas v. McKiernan*, 74 L.R.R.M. 2647 (N.Y. City Civ. Ct. 1970).

¹¹⁹ E.g., *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727, 34 L.R.R.M. 1431 (1954).

¹²⁰ See Summers, *Disciplinary Powers of Unions*, 3 *Ind. & Lab. Rel. Rev.* 483, 489 & n.21 (1950), where the author observes that unions, during the "total war" of a strike, tend to treat any defection which benefits the employer "as clear treason," to be punished by whatever weapons the provisions of a union constitution may allow.

¹ 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973).