

stantial threat" test, and federal action would necessarily be made contingent on the inadequacy of state action, in harmony with the design of Congress.

GARY H. BARNES

Labor Law—National Labor Relations Act—Section 8(b)(1)(B)—Union Discipline of Supervisory Employees for Strikebreaking Activities—*IBEW v. NLRB (Ill. Bell Tel. Co.)*¹—The members of Local 134, IBEW, initiated an economic strike against their employer, the Illinois Bell Telephone Company.² In an effort to combat the effects of this strike, Bell strongly encouraged its foremen and supervisory employees to remain at work during the strike.³ However, because of a contractual union security provision that required supervisory employees to be union members, Bell felt that any decision to work or to respect the strike should be left to the personal discretion of the foremen.⁴ Although Bell did not discipline those supervisors who respected the strike, the company nevertheless left no doubt as to its real wishes.⁵ In an attempt to thwart any strikebreaking on the part of the foremen, the union, prior to the strike, informed them that they would be subject to union disciplinary action if they performed rank-and-file work during the work stoppage.⁶ In spite of the union's admonitions, several supervisors reported to perform rank-and-file work during the strike.⁷ In conformance with its pre-strike warning, the union initiated disciplinary proceedings against those supervisor-members who threatened the union's economic solidarity by engaging in rank-and-file work.⁸ Several fines, ranging from \$500 to \$1000, were imposed; the extent of each fine was determined by the degree of involvement in the strikebreaking activity.⁹

The Bell Supervisors' Protective Association, which had been formed by the foremen to protect the rights of those who chose to work during the strike, filed unfair labor practice charges with the National Labor Relations Board (NLRB) in response to the union's disciplinary measures.¹⁰ The Association alleged¹¹ that the imposition of the fines constituted a violation of section 8(b)(1)(B) of the National Labor Relations Act (NLRA), which provides that "[i]t shall be an unfair

¹ — F.2d —, 81 L.R.R.M. 2257 (D.C. Cir. 1972).

² Id. at 2258.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id. at 2259.

¹⁰ IBEW (Ill. Bell Tel. Co.), 192 N.L.R.B. No. 17, 77 L.R.R.M. 1610 (1971).

¹¹ 77 L.R.R.M. at 1611.

labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.”¹² The Board concluded that because the foremen’s duties conformed to the definition of “supervisors” contained within section 2(11) of the NLRA,¹³ the foremen were employer representatives within the meaning of section 8(b)(1)(B).¹⁴ The Board therefore found the union’s disciplinary actions violative of 8(b)(1)(B).¹⁵ The Board issued a cease and desist order and rescinded the fines.¹⁶ On review, the Court of Appeals for the District of Columbia, endorsing the Board’s decision, HELD: union discipline directed against foremen for performing rank-and-file work during a strike constitutes union restraint and coercion of the employer in the selection of the employer’s bargaining representatives in violation of section 8(b)(1)(B) of the NLRA.¹⁷ In reaching this decision, the court interpreted section 8(b)(1)(B) as proscribing not only direct union interference with an employer’s selection of its collective bargaining agent but indirect interference as well.¹⁸ Hence the court concluded that the imposition of these fines by the union, albeit for activity which was not literally supervisory in nature, constituted the type of restraint and coercion of the employer that section 8(b)(1)(B) was designed to prevent.¹⁹

To determine the validity of the court’s conclusions, this note will first examine the nature of permissible union discipline, utilizing both legislative and judicial developments to explore the limits of the doctrine that a union may legitimately enforce its internal rules upon its members unless such action contravenes an express element of national labor policy. This initial discussion will provide a foundation for the second part of the note which will examine the often ambiguous status of supervisors and will demonstrate that the national policy of protecting supervisors from union discipline is operative only when the employer’s agent is acting in a supervisory capacity. It will be submitted that the majority’s definition of supervisory responsibilities is excessively broad and that accordingly the national labor policy of

¹² 29 U.S.C. § 158(b)(1)(B) (1970).

¹³ Section 2(11) provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

²⁹ U.S.C. § 152(11) (1970).

¹⁴ 77 L.R.R.M. at 1612-13.

¹⁵ *Id.*

¹⁶ *Id.* at 1612.

¹⁷ 81 L.R.R.M. at 2260.

¹⁸ *Id.*

¹⁹ *Id.*

immunizing supervisors from union discipline is inapplicable in this case.

Union Discipline

The controversial question of permissible union discipline was dealt with extensively by the Supreme Court in *NLRB v. Allis-Chalmers*.²⁰ That case attempted to resolve many of the ambiguities arising out of the apparently conflicting provisions of section 7 of the NLRA,²¹ which permits a union member "to refrain from" concerted activity, and the proviso to section 8(b)(1)(A),²² which allows a union to promulgate internal rules and regulations which may sometimes infringe upon the rights guaranteed by section 7. In *Allis-Chalmers*, the Court found that a union which imposed fines and then brought suit for their collection against members who had violated a picket line and had continued to work during a duly authorized strike did *not* violate section 8(b)(1)(A), which makes it an unfair labor practice for unions to restrain or coerce employees in the exercise of their section 7 right to refrain from concerted activities.²³ The NLRB had found that the union's conduct was legitimate because the proviso to section 8(b)(1)(A) states that section 8(b)(1)(A) "shall not impair the right of a labor organization to prescribe its own rules"²⁴ of membership.²⁵ On review, the Seventh Circuit had reversed the Board, finding that the fines did indeed constitute "restraint and coercion" within the meaning of 8(b)(1)(A) and that the proviso sanctioned *only* union discipline in the form of expulsion from the labor organization.²⁶ In rejecting that holding, the Supreme Court found the Seventh Circuit's reading of the pertinent sections of the Act in isolation inappropriate and pointed out that section 8(b)(1)(A) "is only one of many interwoven sections in a complex Act . . ."²⁷ The Court then asserted that if national labor policy is to be implemented effectively, a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . ."²⁸ To preserve the viability of labor's bargaining representative, it was felt necessary to allow the union adequate and reasonable disciplinary powers to preserve its

²⁰ 388 U.S. 175 (1967).

²¹ 29 U.S.C. § 157 (1970).

²² Section 8(b)(1)(A) provides:

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 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.

²⁹ U.S.C. § 158(b)(1)(A) (1970).

²³ 388 U.S. at 176.

²⁴ The text of § 8(b)(1)(A) is set out in note 22 *supra*.

²⁵ 388 U.S. at 178.

²⁶ *Id.* at 178-79.

²⁷ *Id.* at 179.

²⁸ *Id.* at 180.

status against the threat posed by violations of the rules and regulations governing union membership.²⁹ The Court then explicitly singled out the importance of preserving the economic strike as "the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . ."³⁰ The Court also noted that "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . ."³¹

Thus the Supreme Court recognized that the preservation of the strike as an economic weapon was an integral element of national labor policy and that strikebreaking activity was therefore an appropriate area for legitimate union discipline. Discipline, in such circumstances, was not "restraint or coercion." Here it must be interjected that it is this point that makes *Allis-Chalmers* vitally important to the instant case, *Electrical Workers*. The words "restraint or coercion" are common to section 8(b)(1)(B), the focal point of *Electrical Workers*,³² and to 8(b)(1)(A), which *Allis-Chalmers* examined. Hence the latter decision's restrictive reading of the phrase—a reading that excludes from classification as "restraint or coercion" discipline necessary to fulfillment of a national labor policy—will be relevant to the analysis of *Electrical Workers* given below.

In reaching its decision in *Allis-Chalmers*, the Supreme Court relied heavily upon the legislative history of the Act regarding the limits of permissible union discipline. If section 8(b)(1)(A) were read as prohibiting the fining of members for strikebreaking activity, the Court reasoned, a union would be precluded from exercising a power necessary to the discharge of its role as the bargaining representative of its members.³³ No longer would a union be able to use the economically powerful strike weapon in an unimpeded fashion.³⁴ Moreover, such an interpretation, if made in conjunction with a literal reading of the proviso to section 8(b)(1)(A), which allows unions full control over rules of membership, would result in an anomalous situation: a union would be permitted to use the drastic remedy of expulsion but not the less onerous penalties of financial discipline.³⁵ In the Court's opinion, such an extraordinary interpretation of 8(b)(1)(A) could be supported only by an express confirmation contained within the Act's legislative history.³⁶ The legislative history, however, contains no such confirmation. Indeed, the Court felt that the statements of Senator Robert Taft, the principal architect of the amended NLRA, supported its endorsement of a union's right to fine strikebreakers.³⁷ Refuting the contention

²⁹ Id. at 181.

³⁰ Id.

³¹ Id.

³² See text at notes 64-66 *infra*.

³³ 388 U.S. at 183.

³⁴ Id.

³⁵ Id.

³⁶ Id. at 184.

³⁷ Id. at 185, citing 93 Cong. Rec. 4193 (1947), II Legislative History of the Labor Management Relations Act [hereinafter Leg. Hist. LMRA] 1097 (1947).

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that section 8(b)(2) of the NLRA³⁸ would interfere in a union's internal affairs and "deny it the right to protect itself against a man in the union who betrays the objectives of the union,"³⁹ Taft asserted:

The pending measure [section 8(b)(2)] does not propose any limitation with respect to the internal affairs of unions. They will still be able to fire any members they wish to fire, and they still will be able to try any of their members. All they will not be able to do, after the enactment of this bill, is this: If they fire a member for some other reason than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.⁴⁰

To the majority in *Allis-Chalmers*, the congressional emphasis that section 8(b)(2) did not preclude union fines or in any way limit union authority over internal affairs, was strong evidence that section 8(b)(1)(A) should not be read as severely infringing upon a union's internal disciplinary authority, including its right to fine members.⁴¹ The Court found further support for the same conclusion in the legislative history of section 8(b)(1)(A), which tended to support the union's right to enforce financial disciplinary measures. Indeed, as the Court noted, the legislative history of the NLRA indicates that the "restraint or coercion" prohibited by section 8(b)(1) refers only to coercive union activity involving organizational campaigns;⁴² as Senator Ball said during the congressional debate: "It was never the intention of the sponsors of the pending amendment [section 8(b)(1)(A)] to interfere with the internal affairs or organization of unions."⁴³ Thus the Court found in the congressional debate a clear indication that 8(b)(1)(A) was not intended either to intrude upon the domain of internal union affairs or to impair excessively a union's ability to enforce its rules through legitimate disciplinary measures.

Finally, the Court found additional support for its conclusions in the 1959 Landrum-Griffin amendments to the NLRA.⁴⁴ In these amendments, Congress explicitly provided that a union member may be "fined, suspended, expelled or otherwise disciplined"⁴⁵ and disclaimed any intent "to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution"⁴⁶ According to the ma-

³⁸ 29 U.S.C. § 158(b)(2) (1970).

³⁹ 388 U.S. at 185, citing 93 Cong. Rec. 4193 (1947), II Leg. Hist. LMRA 1097 (1947).

⁴⁰ Id., citing 93 Cong. Rec. 4193 (1947); II Leg. Hist. LMRA 1097 (1947).

⁴¹ 388 U.S. at 185.

⁴² Id.

⁴³ Id. at 187, citing 93 Cong. Rec. 4272 (1947); II Leg. Hist. LMRA at 1200.

⁴⁴ 73 Stat. 523 (1959), 29 U.S.C. §§ 401-531 (1970).

⁴⁵ 29 U.S.C. § 411(a)(5) (1970).

⁴⁶ 29 U.S.C. § 411(a)(2) (1970).

jority in *Allis-Chalmers*, the principles enunciated in these amendments supported the validity of the union's disciplinary action.⁴⁷ The court concluded:

Thus, this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in light of the repeated debates on Section 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.⁴⁸

Thus, in upholding the use of union discipline in *Allis-Chalmers*, the Supreme Court relied not merely on the proviso to section 8(b)(1)(A) but on a broad interpretation of the words "restraint or coercion" of section 8(b)(1) and the very substantial legislative history dealing with union discipline.

The legal principles embodied in the majority opinion in *Allis-Chalmers* were broadened in *Scofield v. NLRB*.⁴⁹ In *Scofield*, the union levied fines upon some of its members who had violated a union rule limiting the amount of piecework production which could be performed in a single day.⁵⁰ Because the rule vitally affected the interests of the entire union membership, the Court refused to view the fines as violative of section 8(b)(1)(A).⁵¹ Although the Court recognized that union discipline could not be used as a device to affect a member's employment status or to frustrate an overriding policy of the national labor laws, it emphasized that section 8(b)(1) left a union free to adopt rules which would protect legitimate union interests.⁵² In the opinion of the majority, the fines involved pertained solely to the internal affairs of the union and were intended to sanction an historic union animus against unlimited piecework pay systems.⁵³

Of particular relevance to the *Electrical Workers* case is the discussion in *Scofield* of the external ramifications of the union rule limiting piecework production. In *Scofield*, the Court explicitly noted that the union's enforcement of its piecework rules through fines affected not only the union and its members but the employer as well.⁵⁴ In the Court's opinion, however, these external ramifications did not auto-

⁴⁷ 388 U.S. at 193-94.

⁴⁸ 388 U.S. at 195.

⁴⁹ 394 U.S. 423 (1969).

⁵⁰ *Id.* at 425.

⁵¹ *Id.* at 426.

⁵² *Id.* at 428.

⁵³ *Id.* at 431.

⁵⁴ *Id.* at 431-32.

matically create a violation of section 8(b)(1)(A) because the union membership as a whole was vitally dependent upon the enforcement of this rule.⁵⁵ Similarly, in *Electrical Workers*, the court's finding that the union discipline was objectionable because it was designed to affect primarily the union-employer relationship and only secondarily the union-membership relationship⁵⁶ did not necessarily guarantee a finding of an 8(b)(1)(B) violation. Indeed, the true test is not whether the union's action has external ramifications but rather whether it violates an express component of the national labor policy.⁵⁷

Despite the ample power afforded unions to enforce internal disciplinary rules, there are instances when the overall national labor policy must preclude such enforcement. The facts of *NLRB v. Marine Workers*⁵⁸ presented such a situation. In that case, in violation of a provision of the union constitution, an employee bypassed established intraunion grievance procedures and filed an unfair labor practice charge against the union with the NLRB.⁵⁹ Because of this violation of established grievance procedures, the union expelled the employee from membership and thus opened the way for the ex-member to file an 8(b)(1)(A) charge against the union.⁶⁰ Although recognizing that the proviso to section 8(b)(1)(A) assures a union the freedom to regulate its legitimate internal affairs, the Court pointed out that a union rule which penalizes a member for filing an unfair labor practice charge with the Board is in direct conflict with the national labor policy of allowing unimpeded access to the Board.⁶¹ Since the maintenance of that policy is essential to effectuation of the NLRA, a union rule which obstructs the implementation of the policy is beyond the scope of permissible union discipline.⁶² As the Court said, "the proviso in Section 8(b)(1)(A) . . . is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union."⁶³

Whether the discipline involves internal union affairs, then, has been a cardinal question in the decisions concerning union discipline.⁶⁴ Where disputes have arisen primarily out of matters of internal union concern and there is no danger of a conflict with any express policy of the national labor laws, labor organizations have long been successful in avoiding serious governmental restrictions on the union's disciplinary powers. Accordingly, had *Electrical Workers* involved exclusively in-

⁵⁵ Id. at 432.

⁵⁶ 81 L.R.R.M. at 2264.

⁵⁷ In *Allis-Chalmers*, the Supreme Court indicated that union discipline of strike-breakers was itself a vital element of the national labor policy. See text at notes 30-36 supra.

⁵⁸ 391 U.S. 418 (1968).

⁵⁹ Id. at 420-21.

⁶⁰ Id. at 420.

⁶¹ Id. at 423-24.

⁶² Id. at 424.

⁶³ Id. at 425.

⁶⁴ For a full discussion of these cases, see text at notes 20-57 supra.

ternal union problems the majority opinion would appear clearly erroneous. However, unlike *Scofield* and *Allis-Chalmers*, the *Electrical Workers* case was concerned with the interpretation of section 8(b)(1)(B), which deals with the union-employer relationship, not with section 8(b)(1)(A), which refers to the union-employee relationship.⁶⁵ The *Electrical Workers* majority recognized that the Supreme Court's holdings in *Allis-Chalmers* and *Scofield* relied not on the express language of the proviso to section 8(b)(1)(A) but rather on a restrictive interpretation of the words "restraint or coercion" which are common to both subsections of section 8(b)(1).⁶⁶ It would seem, then, that the rationale of those decisions would apply to the 8(b)(1)(B) issue in *Electrical Workers*. However, because the *Electrical Workers* majority felt that the Court had also drawn "cogent support" for its decisions from the proviso to section 8(b)(1)(A), it concluded that the principles in *Allis-Chalmers* and *Scofield* were inapplicable to the situation in *Electrical Workers*.⁶⁷

The majority in *Electrical Workers* felt that in *Allis-Chalmers* and *Scofield* the principal relationship involved was that between the union and its members, whereas in *Electrical Workers* the impact of the disciplinary measures primarily affected the union-employer relationship.⁶⁸ Such external ramifications placed the union's actions beyond the scope of permissible activity as outlined by the Supreme Court in *Allis-Chalmers* and *Scofield*.⁶⁹ The court also felt that because section 8(b)(1)(B) was intended to regulate external relationships, any discussion of the right of a labor organization to govern its own internal affairs, such as that found in *Allis-Chalmers* and *Scofield*,⁷⁰ would be irrelevant on the facts of *Electrical Workers*.⁷¹ Although the majority thus grounded its decision on a test looking to whether the effects of the union discipline were external or internal—an erroneous test⁷²—the result in *Electrical Workers* arguably is correct if one accepts that the union discipline of the supervisor-strikebreakers violates national labor policy.⁷³

In a well-reasoned dissent, Judge Skelly Wright successfully—it is submitted—refuted the majority's rationale. In the first place, he found *Allis-Chalmers* applicable since the Supreme Court had based its holding on its interpretation of the words "restraint or coercion," which are common to subsections (A) and (B) of section 8(b)(1).⁷⁴ While

⁶⁵ 81 L.R.R.M. at 2263.

⁶⁶ *Id.*

⁶⁷ *Id.* at 2264.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See discussion in text at notes 33-41 *supra*.

⁷¹ 81 L.R.R.M. at 2264.

⁷² *Scofield v. NLRB*, 394 U.S. 423, 431-32 (1969). See text at notes 54-57 *supra*.

⁷³ *NLRB v. Marine Workers*, 391 U.S. 418, 423-24 (1968). See text at notes 85-130 *infra*.

⁷⁴ 81 L.R.R.M. at 2276.

recognizing that internal union rules could not take precedence over clearly defined national labor policy, Wright asserted that there is "no overriding policy of the labor laws which prohibits reasonable union fines against members who cross a lawful picket line to perform rank-and-file struck work."⁷⁵

The majority in *Electrical Workers* had drawn support for its dismissal of *Allis-Chalmers* from the Supreme Court's utilization of the 8(b)(1)(A) proviso permitting a union to prescribe its own rules of membership—a factor clearly inapplicable in *Electrical Workers*. The dissent found this distinction highly chimerical, especially in light of the Supreme Court's explicit disclaimer of any reliance on the proviso.⁷⁶ As Justice Black pointed out in his dissent in *Allis-Chalmers*: "Since the union resorted to the courts to enforce its fines instead of relying on its own internal sanctions such as expulsion from membership, the Court correctly assumes that the proviso to 8(b)(1)(A) cannot be read to authorize its holding."⁷⁷ It should also be noted that Judge MacKinnon, the author of the majority opinion in *Electrical Workers*, had sanctioned this interpretation of the *Allis-Chalmers* rationale in his earlier opinion in *Booster Lodge No. 405 v. NLRB*.⁷⁸ Describing this rationale, he stated: "Instead of relying on the express language of the proviso, . . . the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.'"⁷⁹ Thus, the majority's attempt to distinguish *Allis-Chalmers* from *Electrical Workers* on the basis of the proviso to section 8(b)(1)(A) is on very weak ground.

Judge Wright also rejected the majority's use of the internal-external distinction to support the finding of an 8(b)(1)(B) violation.⁸⁰ The union rule upheld in *Allis-Chalmers*, he asserted, had an external effect upon the employer.⁸¹ By deterring strikebreakers, the rule assured union solidarity and thereby allowed the union to bring greater economic pressure upon the employer.⁸² Indeed, as the dissent noted, the very purpose of a union is to affect the external relationship existing between the employer and his employees as it expresses itself in the

⁷⁵ Id. See discussion in text at notes 30-48 supra.

⁷⁶ 81 L.R.R.M. at 2277, citing 388 U.S. at 184.

⁷⁷ 388 U.S. at 200 (emphasis added).

⁷⁸ 459 F.2d 1143, 79 L.R.R.M. 2443 (D.C. Cir. 1972).

⁷⁹ Id. at 1149, 79 L.R.R.M. at 2446. See also Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of *Allis-Chalmers*, 1970 Duke L.J. 1067, 1128-29. Gould asserts that the failure of Congress to attach the proviso to § 8(b)(1)(B) does not establish the conclusion that a union's internal affairs are excluded from consideration under that subsection. Gould also feels that the Court's reliance on words common to both subsections 8(b)(1)(A) and (B) indicates that unions may legitimately fine supervisor-members for the performance of rank-and-file work during a strike.

⁸⁰ 81 L.R.R.M. at 2277.

⁸¹ Id.

⁸² Id.

adversarial process of collective bargaining.⁸³ In *Scofield*, the Supreme Court explicitly recognized that the union fines affected the interests of the employer as well as the union and its members.⁸⁴ In sum, it is submitted that the irrelevance of the internal-external test, as well as the strong national policy of permitting a union to discipline its members for strikebreaking activity, requires the conclusion that the fines in *Electrical Workers* should have been upheld. However, because supervisory employees are immune from union "restraint or coercion" when acting in their managerial capacity, it is necessary to examine in detail the circumstances under which they may legitimately be disciplined by a labor organization.

Supervisory Personnel

Supervisors, as occupiers of an intermediate position between labor and management, have continually upset the equilibrium of the national labor policy insofar as the subject of union discipline is concerned. To the sponsors of the Taft-Hartley Act,⁸⁵ the position of the supervisor in labor-management relations posed particular problems. Although supervisors had been regarded as part of management before the passage of the Taft-Hartley amendments to the NLRA in 1947, labor organizations had waged successful campaigns to force supervisors to join unions.⁸⁶ The supervisors were then in the awkward position of being obligated to maintain membership in organizations composed of workers whom they had been hired to supervise.⁸⁷ This situation undermined the balance of power in the collective bargaining process,⁸⁸ insofar as the unions were able to coerce their supervisor-members into subordinating management's interests to those of the union whenever a conflict arose between management and rank-and-file workers.⁸⁹ Employers were subject to deprivation of many important rights, including the undivided loyalty of their foremen: "They [employers], as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize . . . they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."⁹⁰

The addition of section 8(b)(1)(B) by the 1947 amendments was designed to prevent unions from dictating to an employer who should be the employer's representative in either the collective bargaining process or the settlement of employee grievances.⁹¹ No longer would a union be

⁸³ *Id.*

⁸⁴ 394 U.S. at 431-32.

⁸⁵ 61 Stat. 136, 29 U.S.C. § 141 (1970).

⁸⁶ S. Rep. No. 105, 80th Cong., 1st Sess. 1 (1947); I Leg. Hist. LMRA 407 (1947).

⁸⁷ S. Rep. No. 105, *supra* note 88, at 3; I Leg. Hist. LMRA at 409.

⁸⁸ *Id.*; I Leg. Hist. LMRA at 409.

⁸⁹ *Id.* at 5; I Leg. Hist. LMRA at 411.

⁹⁰ H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947); I Leg. Hist. LMRA at 305 (1947).

⁹¹ 93 Cong. Rec. 4266 (1947); II Leg. Hist. LMRA at 1077.

permitted to force an employer to change foremen or to assert a veto power over the appointment of a management representative who, in the union's view, was too strict with his subordinates.⁹² However, as Senator Taft noted, the added protection from union discipline which section 8(b)(1)(B) gave to supervisory employees did not limit the power of the unions to regulate their own internal affairs.⁹³ This power, of course, was inherently in tension, if not in conflict, with the limits placed on that power by section 8(b)(1)(B) vis-à-vis supervisory employees. The position of those employees remained necessarily ambiguous.

Although section 14(a) of the NLRA⁹⁴ allows supervisors to become union members, their position is not identical to that of the rank-and-file employee. For example, an employer is free to insist that his supervisory personnel be excluded from union membership.⁹⁵ Also, sections 2(3) and 2(11) of the NLRA indicate the different roles occupied by supervisors and rank-and-file employees.⁹⁶ These roles were examined in *Meat Cutters Local 81 v. NLRB*,⁹⁷ a case in which the union had fined several supervisors for implementing a new company policy which the union considered inimical to the interests of its membership.⁹⁸ The court rejected the union's contention that section 14(a) placed supervisor-members under the full control of their respective unions.⁹⁹ Recognizing the conflicting obligations of foremen as representatives of the employer on the one hand and as members of the union on the other, the court found that section 2(3) indicated a congressional intent that the obligations to the employer should be paramount.¹⁰⁰ Because section 2(3) excepted supervisors from the protection afforded by the NLRA, an employer was free to discharge any disloyal supervisory personnel.¹⁰¹ Thus the court concluded that

⁹² *Id.*

⁹³ 93 Cong. Rec. at 4318 (1947); II Leg. Hist. LMRA at 1097.

⁹⁴ Section 14(a), 29 U.S.C. § 164(a) (1970), provides:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

⁹⁵ *International Typographical Union v. NLRB*, 278 F.2d 6, 46 L.R.R.M. 2132 (1st Cir. 1960). In this case, the court found the union in violation of § 8(b)(1)(B) because of the union's attempt to compel the employer to agree to a clause which would have required all supervisory personnel to become members of the labor organization. *Id.* at 11-12, 46 L.R.R.M. at 2137.

⁹⁶ Section 2(3) provides, in part: "The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor . . ." 29 U.S.C. § 152(3) (1970). The text of § 2(11) is set out in note 13 *supra*.

⁹⁷ 458 F.2d 794, 79 L.R.R.M. 2309 (D.C. Cir. 1972).

⁹⁸ *Id.* at 796-97, 79 L.R.R.M. at 2310.

⁹⁹ *Id.* at 799, 79 L.R.R.M. at 2311.

¹⁰⁰ *Id.* at 800, 79 L.R.R.M. at 2312.

¹⁰¹ *Id.*

any fealty which a supervisor might owe his union must be relegated to a secondary position whenever it detracts from the absolute duty, evidenced by section 8(b)(1)(B), which the supervisor owes his employer when exercising his managerial prerogative.¹⁰²

However, the extent of loyalty owed an employer by a supervisor-member is absolute only when a matter of managerial concern is involved. In *Meat Cutters*, the majority explicitly avoided a flat prohibition against all union discipline of supervisory employees.¹⁰³ The court reasoned that only when the supervisor's obligations to the union conflict with the exercise of his managerial responsibilities did the prohibition embodied in section 8(b)(1)(B) come into play.¹⁰⁴ Thus the court in *Meat Cutters* issued an explicit caveat:

The rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has performed duties as a management representative.¹⁰⁵

As Judge Wright stressed in his dissent in *Electrical Workers*, a union can legally discipline a supervisor-member for acts which are *not* performed by the individual in the furtherance of his obligations as the employer's representative in the collective bargaining or grievance adjustment processes.¹⁰⁶

In *Electrical Workers*, however, there was no finding that the supervisors were disciplined with an intent to influence the exercise of their managerial responsibilities; rather, they were disciplined for performing rank-and-file work during a duly authorized strike.¹⁰⁷ It is submitted that this fact, together with the refusal on the part of Congress¹⁰⁸ and the NLRB¹⁰⁹ to promulgate a per se ban on all union discipline of supervisory employees, raises questions concerning the correctness of the majority opinion in *Electrical Workers*.

Section 8(b)(1)(B) has been successfully invoked to proscribe unacceptable union interference designed to influence the employer's selection of his supervisory personnel. In many instances, there is little doubt that the union is "restraining or coercing" the employer

¹⁰² *Id.*

¹⁰³ *Id.* at 799, 79 L.R.R.M. at 2311; see Brief for NLRB at 15, *Meat Cutters Local 81 v. NLRB*, 458 F.2d 794, 79 L.R.R.M. 2309 (D.C. Cir. 1972).

¹⁰⁴ 458 F.2d at 799, 79 L.R.R.M. at 2311.

¹⁰⁵ *Id.* at 798-99, 79 L.R.R.M. at 2311.

¹⁰⁶ 81 L.R.R.M. at 2273.

¹⁰⁷ *Id.* at 2272.

¹⁰⁸ Read together, § 8(b)(1), which permits a union to discipline its members, and § 14(a), which allows supervisors to become union members, indicate the permissibility of union discipline of supervisory employees. 29 U.S.C. §§ 158(b)(1), 164(a) (1970).

¹⁰⁹ Brief for NLRB at 15, *Meat Cutters Local 81 v. NLRB*, 458 F.2d 794, 79 L.R.R.M. 2309 (D.C. Cir. 1972).

in the selection of his collective bargaining representative.¹¹⁰ However, most section 8(b)(1)(B) cases do not involve clear-cut factual circumstances; rather, they necessitate intricate analyses of conflicting loyalties.¹¹¹ The problem, then, is to determine whether the employees' activity involves the exercise of supervisory responsibilities as delineated by sections 8(b)(1)(B) and 2(11) of the NLRA.¹¹²

It was this problem that faced the *Electrical Workers* court. According to the majority, the union's actions interfered with the absolute duty, evidenced by section 8(b)(1)(B), which the supervisor owes his employer when exercising his managerial authority.¹¹³ Although the employer did not *require* the supervisors to report to work during the strike, Bell clearly hoped that the supervisors would choose to break the strike and perform rank-and-file work in place of the striking employees.¹¹⁴ By reporting to work under these circumstances, the supervisors exhibited an attitude which placed the interests of the employer over that of the union.¹¹⁵ Discipline for such a choice, in the majority's opinion, constituted a violation of section 8(b)(1)(B).¹¹⁶ In essence, the union was attempting to interfere with the performance of duties to which the employer was entitled. To reach this conclusion, the court construed the activity as falling within the scope of supervisory responsibilities protected by section 8(b)(1)(B).¹¹⁷ During a strike, the ability to continue plant operations by assigning supervisory personnel to do rank-and-file work greatly enhances the employer's bargaining position.¹¹⁸ Thus, activity by supervisors which under ordinary circumstances could not possibly be considered managerial in scope, was encompassed in the majority's

¹¹⁰ See, e.g., *Los Angeles Cloak*, 127 N.L.R.B. 1543, 46 L.R.R.M. 1235 (1960). In this case, the Board found that a union strike designed to produce the removal of the employer's bargaining representative constituted a violation of § 8(b)(1)(B). 127 NLRB at 1544, 1547, 46 L.R.R.M. at 1235.

¹¹¹ A number of cases illustrate the difficulty that the courts and the Board face in determining whether there is a § 8(b)(1)(B) violation. See, e.g., *N.M. Carpenters*, 176 N.L.R.B. 797, 71 L.R.R.M. 1445 (1969); *Toledo Locals No. 15*, 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969); *San Francisco-Oakland Mailers*, 180 N.L.R.B. 33, 69 L.R.R.M. 1157 (1968). The majority in *Electrical Workers* relied heavily on *Oakland Mailers*, 81 L.R.R.M. at 2260-61. In that case, the Board found that the union's disciplinary measures were an indirect method of requiring the supervisory personnel to be more amenable to the union's viewpoint regarding the administration of the collective bargaining agreement. This union pressure constituted a violation of § 8(b)(1)(B). 180 N.L.R.B. at 39, 69 L.R.R.M. at 1158-59.

¹¹² Section 2(11) enumerates the characteristic duties of supervisory personnel, thus providing the Board and the courts with the statutory framework necessary to determine whether a particular action falls within the scope of managerial responsibility. The text of § 2(11) is set out in note 13 *supra*.

¹¹³ 81 L.R.R.M. at 2262.

¹¹⁴ *Id.* at 2265.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2266.

¹¹⁸ *Id.*

broad definition of supervisory responsibility for the purposes of section 8(b)(1)(B).

It is submitted, however, that because there is no per se ban on all union discipline of supervisor-members who violate union rules in areas unrelated to their managerial duties, the *Electrical Workers* court's interpretation of section 8(b)(1)(B) must be closely scrutinized. In his dissent in *Electrical Workers*, Judge Wright performed this detailed examination. He emphasized that union discipline of supervisory personnel in areas unrelated to their managerial duties is permissible despite the danger that such discipline could indirectly cause a supervisor to be more responsive to union demands than to his employer in the collective bargaining process.¹¹⁹ This position obviously runs counter to the majority's assertion that the supervisor owes his employer undivided loyalty in virtually all matters.¹²⁰ Yet, a flat prohibition against all union discipline of supervisors which would seem to flow from the position that the employer can demand undivided loyalty could produce inequitable results. The supervisor would have all the benefits of union membership without having to bear any of the responsibilities. Accordingly Judge Wright endorsed the argument made by the Board in its brief in *Meat Cutters* that "[i]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield."¹²¹ In Wright's opinion, the fines levied against supervisors for the performance of ordinary rank-and-file work could not possibly be considered within the ambit of typical managerial responsibilities.¹²² As the trial examiner in *Electrical Workers* had pointed out, the cases which have found section 8(b)(1)(B) violations were "readily distinguishable [from the situation] here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract."¹²³ Similarly, as Member Fanning said in his dissent to the Board's finding of a violation:

the supervisors were not fined because they gave directions to the work force, interpreted the collective bargaining agreement, adjusted grievances, or performed any other functions generally related to supervisory activities, in a manner in disfavor with Respondent Union. They were fined because they performed production work in the bargaining unit during a

¹¹⁹ Id. at 2272. See also *Painters, Local 453*, 183 N.L.R.B. No. 24, 74 L.R.R.M. 1539 (1970). Here the Board refused to invalidate union fines of several foremen for performing rank-and-file work. The Board said that an 8(b)(1)(B) violation was impossible when the union discipline stemmed from matters far removed from the general definition of supervisory responsibilities. 74 L.R.R.M. at 1540.

¹²⁰ 81 L.R.R.M. at 2273.

¹²¹ Id., citing Brief for NLRB at 15, *Meat Cutters Local 81 v. NLRB*, 458 F.2d 794, 79 L.R.R.M. 2309 (D.C. Cir. 1972).

¹²² 81 L.R.R.M. at 2273.

¹²³ 192 N.L.R.B. No. 17, 77 L.R.R.M. 1610, 1612 (1971).

strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. . . . If the fine of an employee-member for engaging in strike-breaking does not restrain or coerce within the meaning of Section 8(b)(1), I cannot see how the same restraint imposed upon a supervisor-member for the same activity can be broadened into restraint or coercion of the employer within the meaning of that section. All the restraint does, if successful, is deny the employer the use of the supervisor as a production worker during the strike.¹²⁴

The *Electrical Workers* majority never precisely defined the term "management function" which it used to identify activity protected by section 8(b)(1)(B).¹²⁵ The court stressed, however, that the proper test for such activity is not whether the supervisors acted pursuant to a management order, but rather whether their actions were undertaken *in the interests of management*.¹²⁶ To the extent that management and labor are viewed as adversaries, it is *always* in management's interest for supervisors to take actions which weaken the union. This broad application of section 8(b)(1)(B), the dissent argued, is inconsistent with the statutory, judicial, and common sense meanings of "managerial functions" which had previously been determinative in such cases.¹²⁷ According to the dissent, none of the activity for which the supervisors were fined falls within the description of supervisory functions contained within the NLRA.¹²⁸ Arguably, at the time of the infraction, these personnel were not supervisors within the meaning of the NLRA and hence not within the ambit of section 8(b)(1)(B). Also, it would seem that section 8(b)(1)(B) permits a union to insist that supervisor-members meet their obligations to the union in matters non-managerial in scope.¹²⁹

It is submitted, then, that the majority's exceedingly broad definition of "supervisory responsibilities" resulted in an improper finding of an 8(b)(1)(B) violation. Although supervisors are immune from union discipline when acting in managerial capacities, there is no national labor policy which forbids fines of the type levied in *Electrical Workers* when the supervisors are not acting in their roles of

¹²⁴ 77 L.R.R.M. at 1614.

¹²⁵ 81 L.R.R.M. at 2262, 2266.

¹²⁶ *Id.*

¹²⁷ *Id.* at 2279.

¹²⁸ *Id.* at 2274. Supervisory functions are described in § 2(11), the text of which is set out in note 13 *supra*.

¹²⁹ 81 L.R.R.M. at 2274.

employer representatives for the "purpose of collective bargaining or the adjustment of employee grievances."¹³⁰

Conclusion

It would appear that the result in *Electrical Workers* rests on inadequate reasoning regarding the scope of section 8(b)(1)(B) as determined by the Board and courts in earlier decisions. Although the majority hesitantly recognized the validity of union discipline in some cases involving supervisors, it insisted that the absolute duty of loyalty owed by supervisors in the exercise of managerial responsibilities, together with its finding that the performance of rank-and-file struck work constituted such an exercise, necessitated a finding of an 8(b)(1)(B) violation.

It is submitted, however, that the majority in *Electrical Workers* adopted an overly narrow view of the extent of permissible union discipline. As illustrated by the Supreme Court's decisions in *Allis-Chalmers* and *Scofield*, a union may legitimately enforce its internal rules and regulations unless such action would contravene an express element of the national labor laws. Although these cases involved an interpretation of section 8(b)(1)(A) rather than 8(b)(1)(B), the essential principles arguably remain the same for both since the decisions by the Supreme Court in *Scofield* and *Allis-Chalmers* rested upon the words "restraint or coercion" which are common to both subsections (A) and (B) of section 8(b)(1). Finally, it should be noted that the performance of rank-and-file work during a strike does not fall within the definition of supervisory responsibilities as contained in section 2(11) of the NLRA. Because the fines were levied by the union for activities not supervisory in nature, there can be no conflict with any provision of the national labor laws designed to protect supervisors from union discipline when acting in their managerial capacities. It is submitted that the majority in *Electrical Workers* erred when they allowed the supervisors to retain all the benefits of union membership without incurring any proportionate obligations.

DANIEL M. CRANE

Labor Law—Section 8(b)(7)(C) of the NLRA—Recognitional Picketing—Temporary Injunction Pursuant to Section 10(l) of the NLRA—*Samoff v. Building & Construction Trades Council (Samuel E. Long, Inc.)*.¹—Respondent labor organization² picketed a nonunion

130 29 U.S.C. § 158(b)(1)(B) (1970).

¹ 346 F. Supp. 1071, 80 L.R.R.M. 3358 (E.D. Pa. 1972).

² Respondent is an unincorporated association whose membership is comprised of delegates from craft unions and councils in the construction industry, and is a labor organization within the meaning of § 2(5) of the National Labor Relations Act, 29