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Recent Developments

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RECENT DEVELOPMENTS

Labor Law—Supervisor-Member Exempt from Union Discipline for Acting in Furtherance of Employer's Interest

I. INTRODUCTION

Preservation of internal union solidarity through the exercise of disciplinary power over members has been recognized as an essential prerequisite to maintenance of a strong bargaining position vis-a-vis management.[1] Therefore, courts have afforded unions relative freedom to discipline members who violate rules of internal union government.[2] Somewhat different principles of union discipline, however, are applied to members who occupy supervisory positions with the employer.[3] The employee-member is loyal primarily to his union, but the loyalty of the supervisor-member ultimately is two-dimensional:[4] he is loyal to the union by virtue of his union membership and to the employer by virtue of his supervisory responsibilities. Because the dual loyalties can conflict, the NLRA expressly prohibits unions from restraining or coercing employers in the selection of supervisory representatives.[5] The NLRB

1. *See* Note, *The Right of Unions to Fine Members Who Have Engaged in Strikebreaking Activities After Resigning From the Union During a Strike*, 72 COLUM. L. REV. 1272, 1284 (1972).

2. *See* note 12 *infra* and accompanying text.

3. Coleman, *Union Discipline Under Section 8(b)(1)(A) of the National Labor Relations Act: The Emergence of a New Trilogy*, 45 ST. JOHN'S L. REV. 219, 249-51 (1970).

4. This dual loyalty was recognized by Congress and is embodied in the National Labor Relations Act [hereinafter referred to as NLRA]. First, "supervisor" is defined by § 2(11), 29 U.S.C. § 152(11) (1970) as "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." Section 14(a) of the NLRA, 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. . . ." While thus permitting the supervisor to belong to the union, the Act, in § 2(3), 29 U.S.C. § 152(3) (1970), also excludes the supervisor from the definition of "employee" covered by the Act: "The term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . ." The exclusion of supervisors from the protection of the Act is indicative of a congressional intent to ensure the employer freedom to hire and fire supervisors of its own choosing. Carpenters Dist. Council v. NLRB, 274 F.2d 564, 566 (D.C. Cir. 1959).

5. Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in

and the courts have extended this protection by proscribing union discipline of a supervisor-member for actions undertaken in the course of his normal supervisory duties, because the existence of such forms of discipline would constitute indirect interference with the employer's right to control freely its supervisory representatives.[6] The supervisor-member is subject, nevertheless, to discipline for violation of internal union government rules,[7] and the courts have refrained from interfering with union administration of disciplinary measures in this area.

In two recent decisions the Court of Appeals for the District of Columbia Circuit extended the scope of the supervisor-member's immunity from union discipline. In *Meat Cutters Local 81 v. NLRB*,[8] the court held that the supervisor's loyalty to the employer is absolute when he is discharging his normal responsibilities. Soon thereafter, in *IBEW Local 134 v. NLRB*,[9] the court reasoned that, on the basis of the emphasis in *Meat Cutters* on the supervisor's paramount loyalty to the employer, the supervisor-member is immune from union discipline for activities that are in furtherance of the employer's interest. This Comment will focus on the trend toward greater judicial restriction of union disciplinary power that is manifested by the instant cases, and on the implications of this trend for union efforts to maintain internal solidarity during collective bargaining negotiations.

II. The Role of Union Discipline in National Labor Policy

Majority rule in union organization traditionally has been recognized as one of the most important principles of national labor policy,[10] because from a practical standpoint the individual employee's economic and social status is best improved through collective action. The effectiveness of collective action, however, depends largely on the union's ability to command the loyalty of all members once the majority has

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the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances."

6. *See* NLRB v. Lithographers Local 15-P, 437 F.2d 55, 57 (6th Cir. 1971); Mailers Local 18, 1968-2 CCH NLRB Dec. 25,346, 25,347 (1968).

7. Painters Local 453, 1970 CCH NLRB Dec. 28,271 (1970) (union fine of supervisor-member who failed to comply with union's post strike registration rules upheld). *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.

8. 458 F.2d 794 (D.C. Cir. 1972).

9. 81 L.R.R.M. 2257 (D.C. Cir. 1972).

10. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180-83 (1967). *See generally* Gould, *supra* note 7, at 1072; Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333-34 (1958).

chosen a particular course of action.[11] As a result, the courts and the NLRB have recognized the validity, and generally have protected the exercise, of union disciplinary power as a means for ensuring membership adherence to a union position.[12] The legal rationale advanced by the courts to uphold union disciplinary power is popularly known as the "contract theory" of union membership.[13] This theory provides that by becoming a member of a union,[14] an employee enters into a contract, the terms of which are the provisions of the union constitution and by-laws. Thus, a member's violation of these provisions constitutes a breach of contract, and union disciplinary action against the offending member can be enforced judicially as a basic contract law remedy.[15] Courts have been particularly willing to enforce disciplinary measures imposed on members who violate antistrikebreaking rules, because the union's need for solidarity is most pronounced during a lawful economic strike.[16]

Despite the general judicial support of union authority over members, the scope of this authority has been the subject of both legislative

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11. A certain degree of individual sacrifice to the will of the majority is required if the full henefits of collective bargaining are to be realized. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). *See also* Gould, *supra* note 7, at 1072; 85 HARV. L. REV. 1669, 1672-73 (1972).

12. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967). *See also* Harrison, *Union Discipline and the Employer-Employee Relationship*, 22 LAB. L.J. 216, 219-21 (1971).

13. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181-83 (1967); Booster Lodge No. 405 v. NLRB, 459 F.2d 1143, 1150-51 (D.C. Cir. 1972); *see* Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187, 190 (1969). The contract theory of union membership, however, has been criticized severely as an unfounded legal fiction: "The contract of membership is even more of a legal fabrication than the property rights in membership. . . . In short, membership is a special relationship. It is as far removed from the main channel of contract law as the relationships created by marriage, the purchase of a stock certificate, or the hiring of a servant." Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1055-56 (1951).

14. Under the contract theory membership is held to be the key to the union's authority to discipline; as under any contract, the employee incurs no contractual obligations and cannot therefore be disciplined for breach thereof until he actually becomes a member. Booster Lodge No. 405 v. NLRB, 459 F.2d 1143, 1151 (D.C. Cir. 1972); *see* Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U.L. REV. 227, 269 (1968).

15. For a critical discussion and case study of court application of the contract theory see Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175, 179-84 (1960).

16. The Supreme Court in *Allis-Chalmers* stated that the union's power to discipline members for rules violations "is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . .'" 388 U.S. at 181 (footnote omitted).

and judicial controversy. In 1947 Congress enacted the Taft-Hartley Act,[17] recognizing that union power, if left totally unchecked, could submerge entirely the individual rights of union members. Consequently, section 8(b)(1)(A)[18] of the Act specifically prohibits union interference with the basic individual rights guaranteed by section 7 of the Act.[19] Congress, however, intended the provision to apply only to union discipline that is coercive in nature and therefore attached a proviso to section 8(b)(1)(A) that preserves the union's right to exercise lawful disciplinary power.[20] The proviso has been construed by the courts to mean that unions are to be accorded wide discretion in the use of disciplinary powers in relation to matters of strictly "internal union affairs."[21] The term "internal union affairs" in this context refers to the relationship between the member and the union, and the exercise of union discipline—even though inherently coercive in its effect on an individual member—is legitimate when it affects only that relationship.[22] The doctrine was approved expressly by the Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*,[23] in which maintenance of internal solidarity through fines for strikebreaking was found to be a matter of internal union affairs, and thus was upheld as a valid disciplinary action. Moreover, fines levied against members who exceeded a piecework production ceiling were upheld in *Scofield v. NLRB*,[24] on the theory that the union has a right to promulgate and enforce internal rules of conduct to strengthen its bargaining position.[25] The Supreme Court, however, has recognized that an otherwise valid internal rule

17. 29 U.S.C. §§ 151 *et seq.* (1970).

18. *Id.* § 158(b)(1)(A): "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 . . . ."

19. *Id.* § 157 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 . . . ."

20. "*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 . . . ." *Id.* § 158(b)(1)(A).

21. *See* Scofield v. NLRB, 394 U.S. 423, 428 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 185-90 (1967); Silard, *supra* note 13, at 188.

22. "Some union practices which are inherently coercive under § 8(b)(1)(A) such as fining or expulsion, are permissible under the proviso if they are within the legitimate interests of the union and do not contravene any other public policy enunciated in the Act." NLRB v. Molders Local 125, 442 F.2d 92, 94 (7th Cir. 1971).

23. 388 U.S. 175 (1967).

24. 394 U.S. 423 (1969).

25. *Id.* at 435.

should not be enforced if it frustrates an overriding national labor policy, such as free access by employees to the NLRB's procedures for settlement of grievances.[26] Similarly, the method by which the union enforces its rules is valid only if it does not adversely affect the rights of parties other than the union and the employee-member, particularly the rights of the employer.[27]

The foregoing principles of union discipline have developed, for the most part, in the context of the relationship between the union and its rank-and-file employee-membership. A different problem has arisen, however, when the relationship at issue is that between the union and the supervisor-member.[28] Section 2(11)[29] of the NLRA defines "supervisor" as one who has authority to act as the employer's representative in matters of hiring, discharging, and disciplining other employees. Since these job responsibilities are closely associated with management functions, section 2(3)[30] excludes supervisors from coverage under the Act. The Act nevertheless permits supervisors to belong to the union,[31] thus creating a dual personality for supervisors who are union members—the supervisor-member apparently is subject to the authority of the union in the same manner as any rank-and-file member; but congressional recognition of the employer's right to control its supervisory personnel[32] clearly indicates that the supervisor also owes a duty of loyalty to the employer. The dual loyalties conflict when, in the course

26. NLRB v. Marine Workers Local 22, 391 U.S. 418, 424 (1968); *see* Scofield v. NLRB, 394 U.S. 423, 430 (1969); NLRB v. Molders Local 125, 442 F.2d 92, 94 (7th Cir. 1971). *See generally* Silard, *supra* note 13, at 191; Note, *Limits of Union Disciplinary Power Under Federal Law*, 24 U. FLA. L. REV. 308, 312-14 (1972).

27. The statutory basis for this principle is 29 U.S.C. § 158(b)(2) (1970), which provides: "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee . . . ." This principle received early NLRB support. *See* Minneapolis Star & Tribune Co., 109 N.L.R.B. 727, 728-29 (1954). The Taft-Hartley Act was also intended to protect rights of other parties: "[I]n safeguarding the regulation of union membership from Labor Board review Congress did not authorize unions to violate with impunity the protected rights of other parties—particularly of employers, of neutrals, and the public." Silard, *supra* note 13, at 196. Some courts have approached this question in terms of the "external impact" of the disciplinary action. *See, e.g.*, Scofield v. NLRB, 394 U.S. 423, 432 (1969). *See also* Christensen, *supra* note 14, at 271. Eventually this approach was extended by some courts, which held that discipline is valid if the underlying dispute giving rise to the disciplinary action is between the union and the employee, but invalid if the dispute is between the union and the employer. *See* NLRB v. Sheet Metal Workers Local 49, 430 F.2d 1348, 1350 (10th Cir. 1970); District Council of Carpenters, 177 N.L.R.B. 500, 502 (1969).

28. *See* note 12 *supra*.

29. *See* note 4 *supra*.

30. *Id.*

31. *Id.*

32. *See* note 5 *supra*.

of performing his supervisory duties, the supervisor must decide a question on which the union and the employer hold opposing views. Courts generally have resolved such conflicts in favor of the employer, discerning in the statutory provisions and the legislative history of the Taft-Hartley Act a congressional intent that the supervisor's loyalty to the employer should prevail when it conflicts with his union obligations.[33] Section 8(b)(1)(B) of the NLRA[34] expressly restricts union power over supervisors by prohibiting union restraint on coercion of the employer in the selection of its supervisory personnel for collective bargaining purposes. This section has been construed to prohibit not only direct obstruction of the employer's selection right, such as refusal to negotiate with a particular representative of the employer,[35] but indirect interference as well.[36] Indirect interference initially took the form of disciplinary action against supervisors for specific acts of contract interpretation or grievance adjustment.[37] The rationale behind this view limiting indirect interference is that, since the supervisor acts as the employer's representative when performing supervisory duties, he cannot realistically place the employer's interests above his union obligations[38] if the union can discipline him for interpreting a contract or adjusting a grievance in a manner that displeases the union. Courts have found that this type of discipline in effect constitutes an attempt by the union to force the employer to substitute persons subservient to the union's will for those who represent management's views,[39] thus depriving the employer of the free control of supervisors that section 8(b)(1)(B) was intended

33. *See, e.g.*, District Council of Carpenters, 177 N.L.R.B. 500, 502 (1969). In a 1959 decision the D.C. Circuit said: "Congress was aware of the potential confliet between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of union obligations." Carpenters Dist. Council v. NLRB, 274 F.2d 564, 566 (D.C. Cir. 1959).

34. *See* note 5 *supra*.

35. *E.g.*, NLRB v. Teamsters Local 294, 284 F.2d 893 (2d Cir. 1960).

36. NLRB v. Lithographers Local 15-P, 437 F.2d 55, 57 (6th Cir. 1971). The NLRB stated in Mailers Local 18, 1968-2 CCH NLRB Dec. 25,346, 25,347 (1968) "[t]hat [the union]. . . may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. . . . In all the circumstances, therefore, we find that [the union's] acts constitute restraint and coercion of the [employer] in the selection of its representatives within the meaning of Section 8(b)(1)(B) of the Act."

37. *See* Mailers Local 143 v. NLRB, 445 F.2d 730 (D.C. Cir. 1971); Mailers Local 18, 1968-2 CCH NLRB Dec. 25,346 (1968).

38. *See* note 33 *supra*.

39. District Council of Carpenters, 176 N.L.R.B. 797, 798 (1969); Mailers Local 18, 1968-2 CCH NLRB Dec. 25,346 (1968). *See also* Coleman, *supra* note 3, at 250.

to protect. The concept of indirect interference has been extended to proscribe union fines for supervisory actions other than contract interpretation or grievance adjustment.[40] Courts have reasoned that if the union may discipline the supervisor for performance of his normal duties, the supervisor will be intimidated by the union in future instances of contract interpretation or grievance adjustment.[41] Immunity from union discipline for performing his supervisory duties, however, does not preclude disciplinary action against a supervisor for violation of valid union rules of internal government.[42] Although courts have proscribed union discipline of a supervisor-member for performing his normal duties even during a strike by the union,[43] the question whether a supervisor-member can be fined for performing rank-and-file work during a strike has not yet been resolved.

III. MEAT CUTTERS LOCAL 81 v. NLRB AND IBEW LOCAL 134 v. NLRB

In *Meat Cutters*, the employer ordered a manager of a grocery store meat department to discontinue the customary procedure of ordering certain meats in bulk from the warehouse and preparing them at the retail store, and to begin ordering the meat in prepared form. Despite union orders to the contrary,[44] the supervisor continued to follow his employer's instructions and subsequently was fined and expelled by the union. The court applied the principle of *Mailers Local 18*[45] to these facts and held that section 8(b)(1)(B) prohibits, as an indirect interference with the employer's right to control its supervisory representatives, union discipline of a supervisor-member for actions indigenous to his supervisory position. The court went on to discuss and reject two other union arguments. First, the union asserted that section 14(a),[46] which

40. Typographical Local 87, 1970 CCH NLRB Dec. 28,137 (1970) (union fined supervisor for hiring nonunion members); NLRB v. Sheet Metal Workers Local 49, 430 F.2d 1348 (10th Cir. 1970) (union fined foreman for operating crane himself rather than directing employee to do it).

41. Denouncing the union's fines of 2 foremen for performing their normal tasks, the Sixth Circuit Court of Appeals in NLRB v. Lithographers Local 15-P, 437 F.2d 55, 57 (1971) stated: "This conduct of the union would further operate to make the [supervisory] employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired."

42. *See* note 7 *supra*.

43. *E.g.*, NLRB v. Lithographers Local 15-P, 437 F.2d 55 (6th Cir. 1971); IBEW Local 2150, 1971 CCH NLRB Dec. 30,094 (1971).

44. As a result of this new procedure the work of 7 or 8 union members under the supervisor's control was shifted to the warehouse where it was done by members of another union; hence the source of Local 81's opposition. 458 F.2d at 797 n.7.

45. 1968-2 CCH NLRB Dec. 25,346 (1968).

46. *See* note 4 *supra*.

allows supervisors to be union members, manifests a congressional intent to subject the supervisor to full union control. In response to this contention, the court stated that if section 14(a) is construed in conjunction with other provisions of the Act, particularly sections 2(3)[47] and 8(b)(1)(B),[48] the sections collectively evidence a legislative design to make the supervisor-member's loyalty to the employer absolute and that section 8(b)(1)(B)'s specific purpose is to prevent the union from undermining this loyalty.[49] Secondly, the union contended that its action was supported by the precedent of *Allis-Chalmers* and *Scofield*; the court, however, distinguished these cases as protecting only legitimate internal affairs, in which the primary relationship affected was that between the union and employee-members. Since the underlying dispute in the instant case was whether the new meat procurement policy violated the collective bargaining agreement, the court held that the relationship most affected was that between the union and the employer, and thus the disciplining of the supervisor was not within the protection of the "internal union affairs" rule.[50]

In *IBEW Local 134* several foremen reported to work at the employer's request[51] and performed rank-and-file tasks during a lawful union strike;[52] the foremen subsequently were fined by the union.[53] The court reaffirmed its *Meat Cutters* holding that the union cannot discipline a supervisor for acts performed in the course of his supervisory duties, but implicitly acknowledged that *Meat Cutters* could not control the instant case, because the fined supervisors had performed rank-and-file work instead of their normal supervisory tasks. To resolve the issue the court first examined the legislative history of section 8(b)(1)(B) and found—as it had in *Meat Cutters*—that the supervisor owes absolute allegiance to the employer. Following this finding, the court reasoned

47. *Id.*

48. *See* note 5 *supra*.

49. 458 F.2d at 799-800.

50. *See* note 27 supra and accompanying text. The union also argued that its action was a permissible means of preserving bargaining unit work, but the court rejected this argument by saying that the union could not use internal disciplinary power to force its interpretation of the contract on the employer. 458 F.2d at 801-02.

51. The employer did not order the foremen to work during the strike; rather it requested them to do so. It was emphasized to them that no discrimination would ensue whether they worked or not; some foremen who chose not to work were subsequently promoted. 81 L.R.R.M. at 2258.

52. Some of the foremen who chose to work formed the Bell Supervisors Protective Association to protect their interests during the strike. The union subsequently levied separate fines against the individuals who had been most instrumental in forming the association, but the fines were invalidated by the instant court. 81 L.R.R.M. at 2258, 2265-67.

53. The union instituted suit in state court to collect some of the fines, but the employer reimbursed all supervisors who paid any part of the fines. 81 L.R.R.M. at 2259.

that the language of section 8(b)(1)(B) prohibiting union restraint or coercion must be given a broad, rather than a narrow, technical reading to accurately reflect congressional intent. Secondly, the court held that *Allis-Chalmers* and *Scofield* were inapplicable, since they dealt with discipline of employee-members rather than supervisor-members. The court concluded that the "legitimate internal affairs" protection that these cases accorded to union disciplinary power[54] is not available when the union disciplines a supervisor for actions that "further the employer's interests," because such discipline adversely affects the supervisor-employer relationship. The court elaborated on the "furtherance of the employer's interest" principle, stating that in any dispute between the employer and the union, a supervisor who places the employer's interests above those of the union acts as he should reasonably be expected to act as a representative of management and therefore should be immune from union discipline. Applying this standard to the facts of the instant case, the court held that the strengthening of the employer's bargaining position by lessening the economic impact of the strike legitimately advanced the employer's best interests. Therefore, the court concluded that since the foremen were lessening the impact of the strike by performing rank-and-file struck work, the union's discipline was improper.[55] The dissent[56] strongly criticized the majority's holding, characterizing it as an unwarranted "major shift in federal labor policy"[57] and a misinterpretation of the legislative history of section 8(b)(1)(B). Moreover, according to the dissent, because the majority failed to define adequately the parameters of the doctrine, the "furtherance of interest" doctrine conceivably could encompass any action of supervisor-members, thus freeing them from all union penalty. The dissent concluded that by allowing supervisors to perform rank-and-file struck work, the majority in essence had sanctioned a form of strike-breaking by union members that is contrary to established principles of national labor policy.

IV. The Changing Role of Union Discipline

Immediately following *Allis-Chalmers* and *Scofield* the prevailing

54. *See* notes 23 & 24 *supra* and accompanying text.

55. The court then invalidated the fines imposed against the supervisors who had formed the protective association, holding this imposition of fines to be a separate 8(b)(1)(B) violation. *See* note 52 *supra*. The court also affirmed the NLRB's ruling that the International Union violated § 8(b)(1)(B) by officially approving the fines, but reversed the NLRB's finding of monetary liability. 81 L.R.R.M. at 2268.

56. 81 L.R.R.M. at 2270-71.

57. *Id.*

judicial attitude toward union disciplinary power was that the union could exercise almost unlimited control over its members in matters of internal union affairs. This attitude was particularly evident from continued court enforcement of fines levied against members for violation of antistrikebreaking rules. The instant cases, however, signal a significant shift in this judicial position. The *Meat Cutters* decision synthesized *Mailers Local 18* with other cases dealing with union discipline of supervisors to enunciate clearly the proposition that the supervisor, although a union member, owes absolute fealty to the employer in the performance of his supervisory duties. The decision, however, did not identify specifically which actions are within the supervisor's normal course of duties, and thus are beyond the reach of the union's disciplinary power. The same court addressed that issue in *IBEW Local 134* by articulating the furtherance of interest doctrine,[58] which expands the supervisor's immunity from union discipline to encompass any action undertaken by the supervisor to further the employer's interest, even if the action includes performance of rank-and-file struck work. Whether the enlargement of the supervisor's immunity, as propounded by these cases, gains acceptance in other circuits and ultimately the Supreme Court will depend largely on first, the viability of the "furtherance of interest doctrine" as the conceptual standard governing the relationship of the union and supervisor, and secondly, on the persuasiveness of the rationale employed by the court in the instant cases.

Although the court stated explicitly that the supervisor-member is not immune totally from union discipline,[59] these decisions in fact may preclude meaningful union discipline of supervisors in the future. If the supervisor is protected from union discipline for acts done in furtherance of the employer's interests, it is difficult to imagine a supervisor's action that would subject him to union discipline under this test, except for infractions of minor union rules, such as membership registration. Neither *Meat Cutters* nor *IBEW Local 134* indicate what conceptual limitations, if any, should be placed on this doctrine. Per se protection of supervisors is unwarranted, however, because the supervisor is ac-

58. The furtherance of interest test is not actually a new creation of the *IBEW Local 134* decision. It was implied in an earlier NLRB decision in which fines imposed on supervisors for doing tasks directed by the employer during a strike were held to violate § 8(b)(I)(B): "Here, the supervisors, by doing struck work, as directed by the Employer, were furthering the interests of the Employer in a dispute not between the Union and the supervisor-members but between the Employer and the Union." IBEW Local 2150, 1971 CCH NLRB Dec. 30,094, 30,096 (1971). Neither that case, nor any other case, however, propounded this test as a doctrine in the manner of the instant case.

59. 81 L.R.R.M. at 2262 n.28.

corded an unusually favored position vis-a-vis the union. The supervisor receives the benefits of union membership, particularly retention of his withdrawal card,[60] but unlike the employee-member, apparently is free from union obligations beyond payment of dues. This result is a departure from the traditional labor principle that the obligations imposed by union rules are part of the price expected of the individual for the benefits derived from union membership.[61] Secondly, although the court correctly stated that the employer has the right to control its supervisory employees and that the union should be prohibited from disciplining supervisor-members for performing their normal supervisory duties during a lawful strike, to allow the supervisor to perform rank-and-file struck work appears to lend judicial sanction to a form of strikebreaking heretofore not permitted under the NLRA. Lastly, the instant decisions will tend to impair the effectiveness of the union's ultimate weapon in the collective bargaining process—the strike.[62] Because the daily impact of a strike will be decreased by performance of rank-and-file work by supervisors, strikes necessarily will have to be lengthened to subject the employer to the same economic effect. As a strike continues, the enthusiasm of rank-and-file employee-members to remain on strike naturally tends to wane, thus limiting further the union's ability to maintain internal solidarity.

The court's reasoning in the instant cases is not persuasive for two reasons. First, in each case, the court relied substantially on an interpretation of the legislative history of section 8(b)(1) that stressed a congressional intent to make the supervisor-member's loyalty to his employer absolute and unconditional, despite any obligations imposed upon him by his union membership. The court in *IBEW Local 134* even perceived a congressional intent to extend the coverage of section 8(b)(1)(B) to performance by supervisors of rank-and-file struck work.[63] The dissenting opinion in that case, however, interpreted the same history to have a meaning virtually the opposite of the interpretation proffered by the majority.[64] Moreover, commentators do not agree on the true intent of Congress in passing the section.[65] The disagreement is attributable pri-

60. This card greatly facilitates the union member's obtaining another job in the same trade if he transfers out of the jurisdiction of his local.

61. *See* note 11 *supra* and accompanying text.

62. *See* note 16 *supra*.

63. 81 L.R.R.M. at 2266.

64. *Id.* at 2271, n. 1.

65. *See, e.g.*, Christensen, *supra* note 14, at 271; Silard, *supra* note 13, at 188. Professor Harrison appraised the reasons for different judicial interpretations of congressional intent with a candid statement, applicable to legal scholars as well as jurists: "The legislative history of these

marily to the lack of an extensive, identifiable legislative history for the provision. Section 8(b)(1) was not included in the Taft-Hartley bill when it was reported out of committee; rather it was added as an amendment from the Senate floor. Consequently, no committee reports or testimony exists which set forth the major policy considerations that prompted the drafting of the section. The only legislative history available is the transcript of the Senate floor debates that were held on the amendment upon its presentation.[66] Because of the apparent dearth of positive indicia of the true congressional intent, the court's extensive reliance on the legislative history of section 8(b)(1) tends to detract from the persuasiveness of its position. Secondly, the court in both decisions distinguished *Allis-Chalmers* and *Scofield* almost summarily by holding that *Allis-Chalmers*' enforcement of union fines against members who violate antistrikebreaking rules did not apply to the fining of supervisors. Finding that the Supreme Court in *Allis-Chalmers* relied on section 8(b)(1)(A)'s proviso, which preserved the union's power to enforce internal rules, the instant court stated that the proviso was enacted to limit only the protection accorded by section 8(b)(1)(A) to employees in the exercise of their section 7 rights and thus did not affect the immunity of supervisors provided by section 8(b)(1)(B). Most commentators agree, however, that the *Allis-Chalmers* holding was based primarily on the Supreme Court's finding that such fines do not "restrain or coerce" the employees' exercise of their section 7 rights;[67] because the term "restrain or coerce" appears in the body of section 8(b)(1) and is therefore applicable to subsection (B) as well as to subsection (A), the court's dismissal of the reasoning of *Allis-Chalmers* probably is not supportable. In addition, the instant court rejected *Allis-Chalmers* and *Scofield* because different relationships were affected by the union actions. The court reasoned that since *Allis-Chalmers* and *Scofield* focused on fines of employee-members only, the relationship affected was that between the union and its rank-and-file members, a subject properly within "internal union affairs."[68] The court found that that rule is not available to the union when supervisor-members are fined, because the underlying

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sections has left much to be desired in terms of the specific intent of Congress. In fact, the different opinions of judges and NLRB members . . . were often made on the basis of selective reliance on the legislative history of these sections." Harrison, *supra* note 12, at 217.

66. The Senate-House conference committee reports offer no help, because the Senate amendment was adopted without change. *See* Comment, *8(b)(1)(A) Limitations Upon the Right of a Union to Fine its Members*, 115 U. PA. L. REV. 47, 52 (1966).

67. The discussion of the section 8(b)(1)(A) proviso was only of secondary importance to the decision. *See, e.g.*, Gould, *supra* note 7, at 1128; Silard, *supra* note 13, at 190.

68. *See* note 21 *supra* and accompanying text.

dispute is that between the union and the employer. The discipline would affect primarily the union-employer relationship[69] and this, according to the court, would be outside the scope of internal union affairs. Since any lawful strike results from a dispute between the union and the employer, and union discipline of members for strike-related activities would seem to affect the union-employer relationship whether the members were rank-and-file employees or supervisors, the instant court's reasoning is not compelling.

Although not discussed in the instant cases, a legitimate basis for different treatment of discipline for employee-members and supervisor-members is suggested by the dicta in *Allis-Chalmers*. The Court in that decision distinguished between the "full union member," who participates fully in all union benefits and the "less-than-full member," whose only real connection to the union is his payment of initiation fees and periodic dues.[70] Because the full member in effect has pledged his allegiance to the union, he is properly subject to the full panoply of union rules and discipline for any violation thereof. On the other hand, one who only is associated with the "financial core" of membership does not participate in all benefits of union membership and should be exempt from union discipline, except for nonpayment of dues.[71] Therefore, if supervisor-members are classified as less-than-full members, there is a valid basis for the trend manifested by the instant cases to exempt supervisors from union discipline. If, however, the supervisor-member is allowed to participate freely in all union activities and to receive all the benefits of union membership,[72] it is difficult to justify disciplinary treatment that differs from that permissible for a full member.

V. CONCLUSION

Despite its relative position of favor and seeming stability following *Allis-Chalmers* and *Scofield*, union disciplinary power over members has been subjected to significant restriction by the instant cases in their application to supervisor-members. No longer is the supervisor's immunity from union discipline confined to actions performed to discharge

69. *See* note 27 *supra*.

70. 388 U.S. at 196-97.

71. *See* Note, *Labor Policy: Judicial Enforcement of Fines After Allis-Chalmers*, 53 CORNELL L. REV. 1094, 1096 (1968).

72. Professor Gould expressed opposition to exemption of supervisor-members from discipline for violation of antistrikebreaking rules, but this opposition proceeds from his assumption that supervisors participate fully in union benefits. If a supervisor did not, however, participate in union activites beyond mere financial support, Professor Gould might agree with the holding in *IBEW Local 134*. *See* Gould, *supra* note 7, at 1129.