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Recent Decisions: Labor Law--Labor-Management Relations Act--Union Power to Fine Members for Overworking [*Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968)]

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we noted at the outset, that atmosphere has been purified through injections of egalitarian vapors. Today, the court's actions are complemented by other agencies both state[48] and federal[49] which have been commissioned to eliminate discrimination in all its ugly forms, and to do so by *policing* the daily interactions of workers, unions, and their employers. The increasing pressures from private civil rights organizations, noted in the instant case, complement the governmental activity. These agencies and organizations can do much to insure that what starts as grudging compliance will eventually blossom into cooperation and that unions and employers who are on the verge of tidying up their own practices will do so without the need for formal intervention. The experience in the educational sector demonstrates that with concerted efforts progress can be made in eliminating discrimination but that the way will be fraught with frustration and delay.

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LABOR LAW — LABOR-MANAGEMENT RELATIONS ACT — UNION POWER TO FINE MEMBERS FOR OVERWORKING

Scofield v. NLRB, 37 U.S.L.W. 4276 (U.S. Apr. 1, 1969).

At its inception, the National Labor Relations Act (NLRA)[1] was intended to provide an atmosphere in which the labor unions could develop as viable bargaining representatives.[2] To effectuate this purpose, it was necessary to restrict the overpowering influence and control management exerted over the individual worker.[3] Under the NLRA unions developed as powerful bargaining agents.[4] As a consequence of this increased union power, the need arose to protect against union violation of the rights of the union members.[5] Thus, Congress amended the NLRA in order to delineate the rights of the employee with regard to his union membership[6] and to restrict the union's ability to interfere with the exercise of those

[48] *See* Jenkins, *supra* note 3, at 281, for a rather pessimistic appraisal of the prospects for a significant contribution from these state agencies.

[49] *See* note 11 *supra*. Because of the unique suitability of discrimination problems to agency rather than judicial control, it can only be hoped that Congress will strengthen the powers of the EEOC so that that body can press forward more efficiently the cause of equality of opportunity.

rights.[7] The Supreme Court's recent decision in *Scofield v. NLRB*,[8] particularly in view of the Court's 1967 decision in *NLRB v. Allis-*

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[1] 29 U.S.C. §§ 151-68 (1964) [hereinafter cited as NLRA].

[2] Congressional findings and policies are succinctly set forth in section 1 of the NLRA which provides in part:

> Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or working conditions, and by restoring equality of bargaining power between employers and employees. NLRA § 1, *id.* § 151.

[3] *See* NLRA § 8(a), *id.* § 158(a) where the employer's unfair labor practices are delineated.

[4] Between 1935 and 1947 union membership tripled, passing the 15,000,000 mark in 1947. The impact upon the public was widely felt as a result of the large number of strikes during this period. These strikes stemmed primarily from the young, militant, inexperienced unions asserting their newly realized strength at the bargaining table. *See* R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW CASES AND MATERIALS 41-48 (4th ed. 1968).

[5] The need is best illustrated by the comments of Senators Taft and Ball in their presentation of the 1947 amendments. Both the additional rights granted to employees in section 7 and the correlative restrictions imposed upon the unions in section 8(b), were a result of the unions' abuse of the power granted to them under the original NLRA. Senator Ball pointed out several of an increasing number of National Labor Relations Board (NLRB) cases which accused unions of engaging in unfair labor practices. *See, e.g.*, Corn Prods. Ref. Co., 58 N.L.R.B. 1441 (1944) (absolutely false statement in a pre-election campaign that the CIO affiliated unions were not recognized by the NLRB, held not ground to set aside the election); Curtiss-Wright Corp., 43 N.L.R.B. 795 (1942) (union in pre-election campaign falsely stated that it was exempt from the no-strike pledge given by the President during the war, held not a ground on which the election could be set aside). In these instances, had the employer made similar statements, he would have been guilty of coercing employees in their free choice of a bargaining agent. *See* 93 CONG. REC. 4016 (1947) (remarks of Senator Ball). It is clear from the Senators' comments that there was a need to place restrictions upon unions similar to those placed upon employers in the 1935 Act.

[6] Section 7 sets forth the rights of the employees:

> 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 8(a)(3).* NLRA § 7, 29 U.S.C. § 157 (1964) (emphasis added to indicate the portions added by the Labor-Management Relations Act (LMRA) which amended the NLRA).

[7] Section 8(b) was inserted to delineate the correlative restrictions upon the union. It provides in part:

> It shall be an unfair labor practice for a labor organization . . . (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 . . . . NLRA § 8(b)(1)(A), *id.* § 158(b)(1)(A).

[8] 37 U.S.L.W. 4276 (U.S. Apr. 1, 1969).

Chalmers Manufacturing Co.,[9] precipitates the need to clarify the precise interrelationship of these two concepts.

In *Allis-Chalmers* a union rule forbidding union members from crossing the picket line during a strike was challenged as constituting a violation of the members' right to refrain from participating in concerted activities.[10] The Supreme Court,[11] reasoning that the by-law was a proper regulation of the union's internal affairs, held that since the rule was duly adopted and was not the arbitrary fiat of a union officer, it was enforceable against voluntary union members by expulsion or reasonable fine.[12] In *Scofield* a collective bargaining agreement gave the employees the unrestricted right to earn and immediately collect wages in excess of the guaranteed or hourly machine rate.[13] A union by-law, however, imposed a ceiling on the amount of wages each member could receive. If a member earned amounts above the ceiling, the by-law required that he bank these excess earnings with the company.[14] A member violated the by-law if he demanded immediate payment of earnings in excess of the ceiling, or if his average earnings exceeded the ceiling rate when his banked amounts were returned. In 1961 six union members demanded and received immediate payment for earnings above the ceiling. They were charged with conduct unbecoming union members and fined following union trials.[15] The members filed charges with the National Labor Relations Board (NLRB) alleging that the union action had restrained and coerced them in the exercise of their section 7 right to refrain from participating in concerted union activities.[16] In a split decision the Board dismissed the complaint finding no un-

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[9] 388 U.S. 175 (1967).

[10] *See* note 6 *supra.*

[11] The Court split 4-1-4 and there was no unified majority. Mr. Justice Brennan wrote the majority opinion. Mr. Justice White concurred separately. Mr. Justice Black was joined in dissent by Messrs. Justices Douglas, Harlan and Stewart.

[12] 388 U.S. at 195.

[13] Russell Scofield, 145 N.L.R.B. 1097, 1118 (1964).

[14] In order to bank his excess wages, the employee was required to keep an account of his amount of excess work and report to the company where bookkeeping entries were made for the amounts earned above the ceilings. At a later date, when, for some reason, the employee could not work up to the production ceiling, he would draw upon his banked wages to make up the difference. *See* Russell Scofield, 145 N.L.R.B. 1097, 1117 (1964).

[15] The fines imposed ranged from $50 to $100. Two of the six members paid their fines. The union filed suit to collect the fines from the other four in the Civil Court of Milwaukee County, Wisconsin. The suit is still pending. Similar suits have allowed the unions to recover the fines under a contract theory. *See* Local 248, UAW v. Natzke, 36 Wis. 2d 237 (1967); Local 756, UAW v. Woychik, 5 Wis. 2d 528 (1958).

[16] NLRA § 7, 29 U.S.C. § 157 (1964).

fair labor practice,[17] and the seventh circuit affirmed the Board.[18] The Supreme Court, holding 7-1[19] that the union rule vindicated a legitimate union interest, and contravened no policy of the NLRA,[20] reasoned that the by-law was a proper regulation of the union's internal affairs.[21]

In comparing *Allis-Chalmers* and *Scofield*, it is important to realize that the right to strike is a fundamental concept to a union's existence[22] because a union which is unable to use a strike for leverage loses its efficacy as a collective bargaining unit. In *Allis-Chalmers* the members' attempt to exert their section 7 rights represented a frontal assault upon the union's power to effectually maintain its position as a bargaining agent. Since the purpose of the NLRA was to enable unions to develop as viable bargaining representatives,[23] the Court was justified in finding that the collection of union fines was a proper regulation of internal union affairs because it constituted an attempt to preserve the union's bargaining status. In *Scofield* the union members argued that the union, rather than entertaining an interest in preserving its bargaining position, was circumventing the negotiation process by using internal union regulation to recoup benefits it failed to derive from collective bargaining. The Court rejected this argument, reasoning that the ceiling rate, though fixed by the union, was indirectly involved in union-management negotiations on the machine rate,[24] and that the employer had acquiesced in the union rule by failing to bargain for union abandonment of the rule.[25] More significantly, the Court held that since

[17] Russell Scofield, 145 N.L.R.B. 1097 (1964) (split decision, one member dissenting and one concurring in separate opinion).

[18] Scofield v. NLRB, 393 F.2d 49 (7th Cir. 1968).

[19] Mr. Justice White wrote the majority opinion. Mr. Justice Black dissented. Mr. Justice Marshall took no part in the decision.

[20] 37 U.S.L.W. at 4280.

[21] *Id.* at 4279.

[22] The Court is very sensitive to the preservation of the right to strike. The Court's regard of the strike as fundamental to a union's bargaining status is illustrated in NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), in which the Court said:

> This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.
>
> While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits in exacting detail . . . . *Id.*, at 233-34 (footnotes omitted).

[23] *See* text accompanying note 2 *supra.*

[24] 37 U.S.L.W. at 4279.

[25] *Id.* The Court further cited the company's cooperation in the administration of

such regulations advanced historically legitimate union interests, the union was justified in imposing the ceiling on its members' incentive pay earnings.[26]

However, assuming that production ceilings derive from traditional union interests,[27] there remains the more important question of whether these work limitations are internal affairs within the proviso of section 8(b)(1)(A) which protects the union in its right "to prescribe its own rules with respect to the acquisition or retention of membership therein."[28] The Court in *Allis-Chalmers*, distinguishing between internal and external union regulation, held that Congress proposed no limitations with respect to the internal affairs of unions, but specifically barred enforcement of a union's internal regulations to affect a member's status as an employee of the company.[29] Thus, a union by-law regulating the conduct of its members during a strike involves primarily the relationship between the union member and his union.[30] Production ceilings, however, cannot be characterized as purely internal union affairs concerning only the member's status within the union. Rather, ceilings are a condition of employment directly effecting all three entities of the employment relationship — the union, the member-employee, and the employer.[31] Thus, it seems

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the rule by keeping the books and honoring requests by employees to bank their pay for over-ceiling work.

[26] Production ceilings are a traditional union goal serving as a counterpart to management-imposed incentive pay systems. Unions favor ceilings and contend that they (1) prevent employees from working themselves out of jobs, (2) limit the amount of jealousies among the workers, (3) keep a greater number of workers on the job, and (4) prevent health hazards incurred from over-working or being under too much pressure to produce. Employers naturally dislike work limitations because they can prevent an individual employee from producing as much as he wishes. Work limitations can also amount to work "slow-downs" and in many instances create a situation where the employer is actually financing a work stoppage. Although ceilings have been judicially criticized, they have been traditionally recognized as valid terms of collective bargaining agreements. *See, e.g.*, Dragwa v. Federal Labor Union, 136 N.J. Eq. 172, 176, 41 A.2d 32, 34 (Ch. 1945); *In re* Ampco Metal, Inc. and Employees' Mut. Benefit Ass'n, 16 Lab. Rel. Rep. 1569 (1945); *In re* Ford Motor Co. and United Auto Workers (CIO), 14 Lab. Rel. Rep. 2625 (1944). *See generally* S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT (1941); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

[27] *See* S. SLICHTER, *supra* note 26, at 315-28.

[28] *See* note 7 *supra*.

[29] 388 U.S. at 195.

[30] By virtue of the position of the union in the employment relationship, every union rule will have some effect upon the employer. Thus, the distinction becomes one of degree of effect. In *Allis-Chalmers* this effect is negligible.

[31] This distinction becomes critical since the *Allis-Chalmers* decision relies so heavily on protecting the union's right to regulate its internal affairs. *See* 388 U.S. at 195. The scope of the term "internal affairs" must be defined for a clear resolution of *Scofield*. It is submitted that conditions of employment, such as production ceilings, clearly fall outside the internal affairs concept.

that *Scofield* is outside the *Allis-Chalmers* rationale. Mr. Justice White, conceding that the rule "[had] and was intended to have an impact beyond the confines of the union organization,"[32] stated that this alone did not render the rule in violation of section 8(b)(1)(A).[33] Extracting the broadest possible interpretation of *Allis-Chalmers*, he held that even when the union rule goes beyond the confines of internal regulation it is valid "unless some impairment of a statutory labor policy can be shown."[34] However, even under this reading of the *Allis-Chalmers* rule, it is arguable that the union's actions in *Scofield* are violative of the strictures of this test. The *Scofield* Court reasoned that the employer, rather than acquiescing to the union's rule, should have pressed the issue to impasse at the bargaining table following up with a strike or lockout.[35] The effect is to shift a fundamental burden from the union to the employer. Instead of requiring the union to press for acceptance of the production ceiling at the negotiations, the employer now bears the formidable responsibility of using his economic weapons to force the union to abandon its use of the work limitation. This peculiar result seems to reflect the judiciary's attempt to further increase the power of organized labor. More important, the Court's suggestion that the employer's proper alternative is to use his economic weapons contravenes a fundamental purpose of the act — to promote peaceful settlement of industrial disputes and avoid all possibilities of industrial strife.[36] The peculiar facts of *Scofield* probably justify the Court's decision, since the employer's conduct during the 25 year existence of the union rule convincingly indicates acquiescence. Thus, in condoning the union regulation, the possible disruptive effects upon the industrial community are minimal.

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[32] 37 U.S.L.W. at 4279.

[33] *Id.*

[34] *Id. See, e.g.*, Industrial Union Marine & Shipbuilding Workers, 159 N.L.R.B. 1065 (1966); Local 138, Int'l Union of Operating Eng'rs, 148 N.L.R.B. 679 (1964). In both *Skura* and *Marine Workers*, the Board was concerned with union rules requiring a member to exhaust union remedies before filing an unfair labor practice charge with the Board. In the Board's view, that rule frustrated the enforcement scheme established by the statute. The union would commit an unfair labor practice by fining or expelling members who violated the rule. The *Marine Workers* case came before the Supreme Court which upheld the Board's ruling and agreed that the rule in question was contrary to the Act's policy of keeping employees completely free from coercion against making complaints to the Board. Frustrating this policy was beyond the legitimate interest of the labor organization, at least when the member's complaint concerned conduct of the employer as well as the union. *See* NLRB v. Industrial Union Marine & Shipbuilding Workers, 391 U.S. 418 (1968).

[35] 37 U.S.L.W. at 4274.

[36] *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

There remains, however, the consideration of the most important individual in the tripartite employment relationship, the employee-union member. Section 7 of the NLRA[37] grants workers the right to refrain from participating in any or all concerted union activities.[38] The union members in both *Allis-Chalmers* and *Scofield* sought to assert this right against the unions' by-laws, and in both instances their rights were swept aside. There can be no doubt that the unions' actions in both cases represent concerted activities. Mr. Justice Black, dissenting for the same reasons in both cases,[39] proposed that a literal reading of section 7 can only lead to the result that these workers are guaranteed the right to choose to refrain from participating in the strike or the production ceiling. The majority in *Allis-Chalmers* discounted this right in light of the over-riding policy considerations supporting the right to strike.[40] In light of those considerations, the ruling there seems justifiable and necessary. The *Scofield* Court, rather than balancing competing policy considerations, indicated that the Court is now focusing on the concept of voluntary versus involuntary union membership. The Court reasoned that the *Scofield* employees joined the union in the face of the alternative of leaving the union and obtaining whatever benefits may result from working without a production ceiling.[41] This suggests the curious conclusion that when a worker joins a union, he surrenders his section 7 rights to refrain. Pure logic, however, seems to necessitate a contrary result. The Act not only gives the employee the choice of joining or not joining, but gives him the right to be a "good, bad, or indifferent" union member.[42] It cannot fairly be said that by joining the union one forfeits all rights expressly given him by the Act, when the

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[37] *See* note 6 *supra.*

[38] *Id.*

[39] 388 U.S. at 199; 37 U.S.L.W. at 4280. Mr. Justice Black regards the section 7 guarantee as absolute and considers any court-enforced union fine coercive when the alternative of expulsion from membership exists. Although based on what he regards as the plain meaning of the Act, this view ignores the practical effect of providing the union with a meaningless tool — a strike with no participants. One cannot read certain sections of the Act and not consider each in light of the overall scope and purpose. The Act sought to provide the union with a viable seat at the bargaining table. To enhance the persuasiveness of its position, the union was guaranteed the right to strike. Although the NLRA does not guarantee the union the right to receive total membership participation, it does secure the union with the right to regulate its own internal affairs. To read section 7 as permitting non-participation in lawful strikes works destruction on the existence of the union and the overall purpose of the Act.

[40] *See* text accompanying note 22 *supra.*

[41] 37 U.S.L.W. at 4280.

[42] Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

NLRA was presumably structured to allow him to join the union without the *fear* of losing those rights. In any event, membership cannot be said to be truly voluntary in *Scofield* because the employee had to either join the union or pay a service fee equivalent to dues. Moreover, even where there is no such agreement, the fact that a union may become the bargaining representative for an employee against his wishes, puts great practical pressure upon the employee to join the union in order to have a voice (as small as it may be) in his own terms and conditions of employment.[43]

Thus, rather than totally discounting the employees rights when he voluntarily joins the union, the most workable solution would seem to be a balancing approach which considers: the union member's rights as an individual employee; the union's need to protect its position as an effective bargaining agent; and the need to further the overall scope and purpose of the Act. In applying the test of *Allis-Chalmers*, the interests of the union as a whole and the purpose of the Act weigh more heavily than the right of the individual employee to refrain from participating in the strike. In *Scofield*, on the other hand, the interests weigh differently. While the NLRA provides an atmosphere in which the union can effectively bargain, it does not guarantee that every union demand will be met at the bargaining table.[44] The union in *Scofield*, unable to attain its desired goals at the bargaining table, chose to impose its own work limitations. For section 7 to be meaningful, the employee's right to refrain should weigh more heavily than the corresponding interest of the union.

While the peculiar fact patterns in both cases probably justify the conclusions reached, it is submitted that these decisions should not be read as establishing broad rules to be liberally interpreted in the future.[45] Union rules similar to those in *Scofield* have been struck

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[43] For a discussion of this issue, see Comment, 115 U. PA. L. REV. 47 (1966); Recent Decision, 9 B.C. IND. & COM. L. REV. 221 (1967).

[44] An understanding of this differentiation is essential. In the declaration of purpose and policies, the Act is clear in indicating its concern for the unions and their inability to deal on an equal par with management. The Act seeks to provide an atmosphere in which the union, through its own initiative, can develop as a viable bargaining agent. The Act goes no further. It is the responsibility of the union to develop allegiance among its members and to assert itself through its own experience as a persuasive force at the bargaining table. *See* NLRA § 1, 29 U.S.C. § 151 (1964).

[45] If the union believed the ceiling rule to be an implied term of the collective bargaining contract, one wonders why the union did not proceed against the employer under section 301 of the LMRA to enforce the contract. *Id.* § 185(a). This would seem to be a more effective approach than fining the individual employees. Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the