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Labor Law - The District of Columbia and Seventh Circuits Split Over Whether Union Discipline of Supervisor-Members for Crossing Picket Lines to Perform Rank-and-File Struck Work Is an Unfair Labor Practice

Richard J. Conn

LABOR LAW — THE DISTRICT OF COLUMBIA AND SEVENTH CIRCUITS SPLIT OVER WHETHER UNION DISCIPLINE OF SUPERVISOR-MEMBERS FOR CROSSING PICKET LINES TO PERFORM RANK-AND-FILE STRUCK WORK IS AN UNFAIR LABOR PRACTICE.

IBEW v. NLRB (D.C. Cir. 1973)

NLRB v. Local 2150, IBEW (7th Cir. 1973)

Although under section 8(b)(1)(B) of the National Labor Relations Act (the Act) a union may not compel an employer to retain a union member as a foreman or supervisor,[1] many supervisory personnel in fact do retain their union membership upon promotion. During an economic strike, the supervisor who is also a member of a union (supervisor-member) must choose between conflicting loyalties. He may side with management and help keep the enterprise in operation, or he may refuse to cross the picket line. If he crosses the picket line and performs rank-and-file struck work the union may find him deserving of discipline.

In three recent cases (*Electrical Workers*), *IBEW, Local 2150 (Wisconsin Electric Power Co.),*[2] *IBEW, Local 134 (Illinois Bell Telephone Co.),*[3] *IBEW System Council U-4 (Florida Power and Light Co.),*[4] the National Labor Relations Board (the Board) found that locals of the International Brotherhood of Electrical Workers committed unfair labor practices by disciplining supervisor-members who crossed picket lines and performed rank-and-file work during a lawful economic strike. One case[5] was appealed to the United States Court of Appeals for the Seventh Circuit which enforced the Board's order *holding* that such discipline, in the form of fines and suspension, restrained or coerced an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances, and as such was an unfair labor practice in violation of section 8(b)(1)(B).[6] *NLRB v. Local 2150, IBEW,* 486 F.2d 602 (7th

1. *See* International Typographical Union, Local 38 v. NLRB, 278 F.2d 6 (1st Cir. 1960), *aff'd in part and rev'd in part,* 365 U.S. 705 (1961).

2. 192 N.L.R.B. 77 (1971).

3. 192 N.L.R.B. 85 (1971).

4. 193 N.L.R.B. 30 (1971).

5. *Wisconsin Electric Power Company,* the facts of which were as follows: The company and the union enjoyed a collective bargaining relationship since the 1930's. During an economic strike in 1969 virtually all the company's supervisor-members reported for work. There was no suggestion in the record that the company had given the supervisors an option of whether or not to cross the picket line. Following the strike the union preferred charges against 60 supervisors and after a trial found all guilty, imposing on each a $100 fine and a year's suspension — the sentence to be suspended if no similar offense was committed within two years.

None of the supervisors involved was a member of the bargaining unit, but the collective bargaining agreement provided that, upon his promotion to a supervisory position, an employee would be entitled to participate in pension and insurance plans as a holder of a union "withdrawal card." All other benefits of membership, including the right to attend union meetings, were denied.

6. Section 8(b)(1)(B) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

29 U.S.C. § 158(b)(1)(B) (1970).

Cir. 1973), *petition for cert. filed* 42 U.S.L.W. 3375 (U.S. Dec. 25, 1973) (No. 73–887). Two cases[7] were heard by the United States Court of Appeals for the District of Columbia Circuit which, in an en banc decision, denied enforcement and remanded the cases to the Board with instructions to dismiss the complaints *holding* that the unions did not commit unfair labor practices under section 8(b)(1)(B), *IBEW v. NLRB,* 487 F.2d 1143 (D.C. Cir. 1973), *cert. granted,* 42 U.S.L.W. 3422 (U.S. Jan. 22, 1974) (No. 73–795).

Early Board decisions were equivocal as to the status of supervisors and the protections afforded them under the Act as enacted in 1935.[8] In *Packard Motor Car Co. v. NLRB*[9] the Supreme Court decided the major issue by holding that foremen were literally within the statutory term "employee" and thus covered by the Act.[10] Congress, however, believed statutorily mandated unionization of supervisors was inconsistent with the purposes of the Act, which were, *inter alia,* to assure workers freedom

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7. *Florida Power and Light Co.* and *Illinois Bell Telephone Co.* were the two cases heard by the District of Columbia Circuit. The facts of *Florida Power and Light Company* were as follows:

Since 1953 the company had maintained a collective bargaining agreement with the IBEW, under which union membership was voluntary for all employees. Although the company was not so required (*see* notes 13–17 and accompanying text *infra*), it recognized the union as the exclusive bargaining representative for many of its supervisory employees. The case involved high ranking supervisors who, though union members, were not represented by the union for collective bargaining purposes.

In 1969 the union engaged in a lawful economic strike, and many supervisors crossed the picket line and performed rank-and-file struck work. Because of a clause in the collective bargaining agreement, the union did not fine those supervisors who crossed the line solely to perform their usual supervisory functions, but it did fine those who performed struck work, and expelled most from the union. Those expelled lost their right to continue in pension, disability, and Death Benefit Funds.

There was no record as to whether the supervisors crossed the picket line voluntarily or at the request of the company.

The facts of the *Illinois Bell Telephone Co.* case differed as follows:

Certain supervisors including foremen were required to be union members under a union security clause, while others, high ranking supervisors, could maintain union membership although they were not part of the bargaining unit. All supervisor-members received substantial union benefits.

During an economic strike in 1968, the company imposed no penalty upon supervisor-members who refused to work, but the union warned them that they would be subject to discipline if they performed rank-and-file work. During the strike some of the supervisor-members crossed picket lines and performed struck work. They were fined $500 by the union, but were not expelled or denied benefits.

8. 49 Stat. 449 (1935), *as amended* 29 U.S.C. 141–87 (1970). The Board first held that supervisors were "employees" entitled to the protections of the Act. Union Collieries Coal Co., 41 N.L.R.B. 961 (1942). One year later the Board reasoned that the failure of Congress to expressly include or exclude supervisors in the statutory definition of the term "employee," indicated that the determination was to be left to the administrative discretion of the Board, and the Board proceeded to deny organizational rights to supervisors. Maryland Dry Dock Co., 49 N.L.R.B. 733 (1943). Subsequently, the Board again changed its position and permitted supervisors mandatory collective bargaining under the Act. *See* Jones and Laughlin Steel Corp., 66 N.L.R.B. 386 (1946); Packard Motor Car Co., 61 N.L.R.B. 4 (1945), *enforced,* 157 F.2d 80 (6th Cir. 1946), *affirmed* 330 U.S. 485 (1947).

9. 330 U.S. 485 (1947).

10. The decision in *Packard,* although statutorily correct, was deemed to be poor policy by Congress. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 14 (1947), *quoted in* NLRB, I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 305 (1948) [hereinafter cited as LEGIS. HIST.].

from domination in their organizing and bargaining activities and to protect the employer's right to loyal management,[11] and, in response, amended the Act in 1947 by including in the Labor-Management Relations Act (Taft-Hartley Act)[12] sections 14(a),[13] 2(11),[14] and 2(3),[15] which excluded supervisors from the protections of the Act by excluding them from the statutory definition of "employee."[16] Supervisors were *permitted* to organize, although an employer could lawfully refuse to consider supervisors as employees for the purposes of any law relating to collective bargaining.[17]

The Taft-Hartley Act also created union unfair labor practices,[18] including section 8(b)(1)(B) which made it an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."[19] The subsection was provided so that a union could not legally coerce an employer into joining or resigning from an employer association which negotiates labor contracts, and could not dictate who would represent the employer in the collective bargaining process.[20] Until 1968, typical application of section 8(b)(1)(B) had found union unfair labor practices in situations in which a union had attempted to force an employer to hire only union foremen,[21] to fire a

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11. *Id.*

12. 29 U.S.C. §§ 141-87 (1970).

13. Section 14(a) 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 or employees, for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. § 164(a) (1970).

14. 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 responsibility 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).

15. Section 2(3) provides in pertinent part that "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . ." *Id.* § 152(3).

16. Early judicial interpretation of the Act supports this view:

> Before the adoption of this amendatory legislation, it was of course true, as the Supreme Court said in its *Packard* opinion, that there was nothing in the National Labor Relations Act which indicated that Congress intended to deny its benefits to foremen as employees. It is now unmistakably clear, however, that the 80th Congress intended to deny, and has denied, the benefits of the Act to "supervisors."

L.A. Young Spring & Wire Corp. v. NLRB, 163 F.2d 905, 906 (D.C. Cir. 1947), *citing* S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947).

17. National Labor Relations Act [hereinafter cited as the NLRA] § 14(a), 29 U.S.C. § 164(a) (1970).

18. NLRA § 8, 29 U.S.C. § 158 (1970).

19. 29 U.S.C. § 158(b)(1)(B) (1970).

20. S. REP. No. 105, 80th Cong., 1st Sess. 21 (1947), *quoted in* I LEGIS. HIST. at 427.

21. International Typographical Union, Local 38 v. NLRB, 278 F.2d 6 (1st Cir. 1960), *aff'd in part and rev'd in part*, 365 U.S. 705 (1961).

supervisor because of his dispute with a union,[22] or had refused to bargain with a properly chosen representative of an employer.[23]

In 1968, the Board expanded the application of section 8(b)(1)(B) to include situations in which a union had disciplined supervisor-members. In *San Francisco-Oakland Mailers' Union No. 18*,[24] the Board was confronted with the action of a union which had cited and subsequently fined a supervisor-member for failing to appear before a union executive committee investigating the supervisor's alleged violations of the collective bargaining agreement in assigning work. The Board held the union's conduct to be an unfair labor practice because of the implied threat of disciplinary action if the committee disagreed with the foreman's interpretation of the agreement. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative, the Board found the activity to be within the proscriptions of section 8(b)(1)(B) since discipline of the supervisor-member could change the employer's representative from one representing management's viewpoint, to one responsive or subservient to the union's will.[25]

Since *Oakland Mailers*, the Board and the courts have used its rationale when finding unfair labor practices in a variety of situations in which a supervisor-member had been disciplined for the manner in which he performed his management functions.[26] In *Meat Cutters, Local 81 v. NLRB*,[27] the District of Columbia Circuit gave its approval to this line of cases.[28]

In *Meat Cutters* a union had fined and expelled an employer's meat department manager because the union thought that the manner in which he had carried out his employer's directives regarding meat procurement

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22. Local 207, Iron Workers v. Perko, 373 U.S. 701 (1963).

23. NLRB v. Local 294, Teamsters, 284 F.2d 893 (2d Cir. 1960); NLRB v. ILGWU, 274 F.2d 376 (3d Cir. 1960).

24. 172 N.L.R.B. 2173 (1968).

25. *Id.* The Board reasoned:

> That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically the Employer would have to replace its foremen or face *de facto* non-representation by them.

Id.

26. *See, e.g.*, NLRB v. New Mexico Dist. Council of Carpenters, 454 F.2d 1116 (10th Cir. 1972) (supervisor fined for working for employer who was not making payments into the union health and welfare fund); Dallas Mailers, Local 143 v. NLRB, 445 F.2d 730 (D.C. Cir. 1971) (supervisor-member disciplined for manner in which he directed employee); NLRB v. Toledo Locals 15-P & 272, Lithographers & Photo-Engravers, 437 F.2d 55 (6th Cir. 1971) (union did not follow grievance settlement procedures in disciplining supervisor-members who, the union claimed, violated the provisions of the collective bargaining agreement by continuing to work during a strike in a work crew smaller than the agreement provided); NLRB v. Sheet Metal Workers, Local 49, 430 F.2d 1348 (10th Cir. 1970) (supervisor-member disciplined for performing work prior to the beginning of the regular workday and for jurisdictional violations). *But see*, Local 453, Bhd. of Painters (Syd Gough & Sons, Inc.), 183 N.L.R.B. No. 24, 74 L.R.R.M. 1539 (1970) (no section 8(b)(1)(B) violation where union fined supervisor-member for failing to register with the union as required by union rules before returning to his job after a strike settlement).

27. 458 F.2d 794 (D.C. Cir. 1972).

28. *Id.* at 798.

had violated the collective bargaining agreement.[29] The court found that section 8(b)(1)(B) proscribed indirect, as well as direct, interference with management's choice of representatives[30] and that the union had violated the Act when it fined and expelled the supervisor in retaliation for his performance of management duties.[31] The court further stated that a supervisor's union obligations cannot detract from the absolute loyalty owed to his employer when performing a management function.[32] However, the court was careful to note that it was not adopting a per se approach, and that a union could legally discipline a supervisor-member for acts not performed in furtherance of the individual's obligations as the employer's representative.[33]

Concurrent with the formulation of the *Oakland Mailers* doctrine was the development of the law regarding union discipline of members within the statutory term "employee."[34] *NLRB v. Allis-Chalmers Manufacturing Co.*[35] concerned union members who had crossed a picket line during a lawful economic strike and had been found guilty of "conduct unbecoming a union member" by the union and fined from $20 to $100. The members did not pay the fines and the union sought court enforcement. Allis-Chalmers filed unfair labor practice charges against the union alleging violation of section 8(b)(1)(A).[36] The Supreme Court held that reasonable fines and their subsequent court enforcement were an allowable sanction and not a restraint or coercion violative of section 8(b)(1)(A).[37] The Court found that the power to fine or expel strikebreakers was essential to a union if it was to be an effective bargaining agent,[38] and that Congress did not intend to regulate union self-government through section 8(b)(1)(A).[39] While drawing "cogent support" from the proviso to section 8(b)(1)(A),[40] the Court, significantly for analysis of section 8(b)(1)(B) problems, did not *rely* on it.[41] Rather the Court found union discipline

29. *Id.* at 797.

30. *Id.* at 798, *citing* San Francisco-Oakland Mailers Union No. 18, 172 N.L.R.B. 2173 (1968).

31. 458 F.2d at 798–99.

32. *Id.* at 800.

33. *Id.* at 798 n.12. *See also* Local 453, Bhd. of Painters (Syd Gough & Sons, Inc.), 183 N.L.R.B. No. 24, 74 L.R.R.M. 1539 (1970).

34. *See* notes 15 & 16 and accompanying text *supra.*

35. 388 U.S. 175 (1967).

36. NLRA § 8(b)(1)(A) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .

29 U.S.C. § 158(b)(1)(A) (1970).

37. 388 U.S. at 195. *See* NLRB v. Boeing Co., 93 S. Ct. 1952 (1973), concerning the reasonableness of union fines.

38. 388 U.S. at 181, *citing* Summers, *Legal Limitations on Union Discipline,* 64 HARV. L. REV. 1049 (1951).

39. 388 U.S. at 195. In the Court's view, the federal policy of promoting labor organization mandated that a union be permitted to protect against erosion of its status through reasonable discipline of members, especially during a strike. *Id.* at 181.

40. *Id.* at 191.

41. *Id.* at 192 n.29. *See* note 36 *supra.*

for violation of internal union rules not to be the type of "restraint or coercion" proscribed by the Taft-Hartley amendments.[42] The restraint or coercion language is common to sections 8(b)(1)(A) and (B).

In *NLRB v. Industrial Union of Marine & Shipbuilding Workers*[43] the Court further defined its position on union discipline, holding that the Board was warranted in finding that a union's action in fining a member for filing a charge against the union with the Board, without first exhausting all intra-union remedies, constituted an unfair labor practice under section 8(b)(1)(A).[44] The Court stated that section 8(b)(1)(A) assures a union freedom of self-regulation as far as its legitimate internal affairs are concerned, but that the policy of preserving a member's freedom to complain to the Board would override even legitimate union interests.[45]

In *Scofield v. NLRB*[46] the Court synthesized its position on union discipline of employee-members, and held:

> [S]ection 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.[47]

The Court recognized that enforcement of any union rule affects the interests of all three participants in the labor-management relation — employer, employee, and union[48] — but made it clear that impact beyond the labor organization does not make a rule violative of section 8(b)(1)(A) unless it impairs some statutory labor policy.[49]

Thus the lines of cases represented by *Oakland Mailers* and *Allis-Chalmers* meet in the instant cases, the issue being whether the *Oakland Mailers* proscription of discipline of supervisor-members should be extended to strikebreaking, clearly an area of legitimate union interest under *Allis-Chalmers*. In close decisions, the District of Columbia Circuit, en banc, and a Seventh Circuit panel took widely divergent views with respect to the applicability of section 8(b)(1)(B) to union discipline of supervisor-members who cross picket lines to perform rank-and-file struck work.

The Seventh Circuit rejected the four principal arguments raised by the union and found the same discipline to be an unfair labor practice.[50]

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42. 388 U.S. at 195.
43. 391 U.S. 418 (1968).
44. *Id.* at 428.
45. *Id.* at 424.
46. 394 U.S. 423 (1969).
47. *Id.* at 430. The Board may find that a union commits an unfair labor practice in seeking court enforcement of fines imposed for strike breaking activities by employees who have resigned from the union. NLRB v. Granite State Joint Bd., Textile Workers, 409 U.S. 213 (1972). *See also* Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB, 93 S. Ct. 1961 (1973).
48. 394 U.S. at 431. *Cf.* NLRB v. Boeing Co., 93 S. Ct. 1952 (1973).
49. 394 U.S. at 432. The Court then held that a union rule against violating piecework ceilings could be enforced by reasonable fines. *Id.* at 436.
50. NLRB v. Local 2150, IBEW, 486 F.2d 602, 610 (7th Cir. 1973). For the facts of the case, see note 6 *supra*.

First, the court refused to construe section 8(b)(1)(B) as prohibiting only direct coercion of the employer. The court adopted the *Oakland Mailers* rationale that section 8(b)(1)(B) proscribes coercion in the form of indirect as well as direct pressure. The court stated:

> [The] employer's right to select those representatives whom he chooses would be worthless if the Union could accomplish the functional equivalent of restraining or coercing him in that selection by applying pressure upon those whom the employer has already selected so as to compromise their loyalty.[51]

The union's second contention was that section 8(b)(1)(B) only prohibits discipline of supervisor-members for exercising management responsibilities, and that the performance of struck work is not a management responsibility.[52] The Seventh Circuit, however, opted for a broader interpretation of management duties. The court reasoned that since an employer reasonably expected such aid and since it could be vital to preservation of the enterprise, performance of struck work is, de facto, representation of the employer for the purposes of collective bargaining.[53]

Third, the court rejected the union's attempts to bring the case within *Allis-Chalmers*.[54] While the court agreed that discipline of ordinary members was a significant union interest not inconsistent with section 8(b)(1)(A),[55] it stated that when discipline of a supervisor-member is at issue, section 8(b)(1)(B) evidenced congressional intent to protect the employer's right to undiluted loyalty from his representatives. Therefore, *Allis-Chalmers* was found inapposite.[56]

The Seventh Circuit also rejected the union's argument that the company, by allowing its supervisors to retain union membership, in effect agreed to some dilution of the loyalty of its representatives and to some measure of discipline by the union. The court stated that if there is to be such a waiver it must be in clear and unmistakeable terms.[57]

Thus, the Seventh Circuit agreed with the Board that the purpose of section 8(b)(1)(B) is to guarantee that the employer's representatives

51. 486 F.2d at 607, *quoting* San Francisco-Oakland Mailers Union No. 18, 172 N.L.R.B. 2173 (1968).

52. 486 F.2d at 605–06.

53. The Court stated:

> Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. Indeed, in a real sense they are representing the employer for the purpose of collective bargaining, for "the use of economic pressure by the parties to a labor dispute . . . is part and parcel of the process of collective bargaining."

486 F.2d at 608, *quoting* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 495 (1960).

54. *See* notes 35 to 42 and accompanying text *supra*.

55. 486 F.2d 608–09.

56. *Id.* at 609. The Seventh Circuit thus applied the rule enunciated in *Scofield* (*see* notes 47–49 and accompanying text *supra*) and found that the union interest in enforcing a rule against its member's crossing a picket line was outweighed by an overriding interest in protecting a policy which the Court believed Congress had imbedded in the labor laws.

57. 486 F.2d at 609–10.

will be completely faithful to his interests.[58] The court found that the thrust of *Oakland Mailers* was that when the underlying dispute is between the employer and the union, rather than between the union and the supervisor, the union is precluded from taking disciplinary action.[59] The court found the dispute in *NLRB v. Local 2150, IBEW* to be primarily between the employer and the union and the discipline thus proscribed by section 8(b)(1)(B).[60]

In *IBEW v. NLRB*[61] the United States Court of Appeals for the District of Columbia Circuit arrived at a very different conclusion on substantially similar facts.[62] The court, in a five-four decision, found that the clear purpose of section 8(b)(1)(B) was "to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances."[63] The legislative history, according to the court, showed that congressional intent at the time of passage did not encompass prohibition of union discipline and that Congress sought only to prohibit a union from dictating the identity of the employer's representative for bargaining or settlement of grievances, or forcing management to bargain through a multi-employer association.[64] The court thus believed that this case was outside the original parameters of section 8(b)(1)(B).

The District of Columbia Circuit recognized that the *Oakland Mailers* decision had expanded the scope of section 8(b)(1)(B) beyond that envisioned by Congress, but found that, when properly applied, its rationale was consistent with the purposes of the section.[65] The court agreed that management's right to the uncoerced selection of its representatives for the purposes of collective bargaining would be "hollow" if the union, through discipline, could control the manner in which a supervisor performed man-

58. *Id.* at 604–05, *citing* Toledo Locals 15-P & 272 of the Lithographers & Photo-Engravers (The Toledo Blade Co.), 175 N.L.R.B. 1072, 1080, *enforced,* 437 F.2d 55 (6th Cir. 1971).

59. 486 F.2d at 604–05.

60. *Id. But see* San Francisco-Oakland Mailers Union No. 18, 172 N.L.R.B. 2173 (1968), where the Board said that in *Allis-Chalmers* the relationship of the union to strikebreaking members was of *primary* importance to the union imposing discipline. *Id.* at 2174. Although *Allis-Chalmers* was concerned with persons within the statutory term "employee," it is submitted that the nature of the dispute between a strikebreaking supervisor and his union appears the same.

61. 487 F.2d 1143 (D.C. Cir. 1973).

62. For the facts of the cases before the District of Columbia Circuit, *see* note 7 *supra.*

63. 487 F.2d at 1152.

64. *Id., quoting* S. REP. No. 105, 80th Cong., 1st Sess. 21 (1947), *quoted in* I LEGIS. HIST. 427. *See also* 93 Cong. Rec. 3837 (1947) (remarks of Senator Taft), *quoted in* II LEGIS. HIST. 1012:

> This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." . . . . [U]nder this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally."

65. 487 F.2d at 1153. *Oakland Mailers* involved union discipline of a supervisor-member for the manner in which he interpreted the collective bargaining agreement. *See* notes 24 & 25 and accompanying text *supra.*

agement functions.[66] The court approved of the Board's language in *Oakland Mailers* where it was stated that section 8(b)(1)(B) is concerned with situations in which "'[t]he relationship between the Union and its members . . . [is] used as a convenient and, it would seem, powerful tool . . . to compel the Employer's foremen to take pro-union positions in interpreting the collective bargaining agreement.'"[67] However, the District of Columbia Circuit found the cases before it "critically different" from the progeny of *Oakland Mailers* in that "here the union has disciplined supervisors, not for the way in which they interpreted the collective bargaining agreement, not for being too strict with union members, but simply for crossing a picket line to perform rank-and-file struck work."[68] The court thus considered that in the instant cases the Board had gone beyond the rationale of *Oakland Mailers* and beyond the scope of section 8(b)(1)(B).

The court stated that when a supervisor crosses a picket line to perform *supervisory* work during a strike he remains immune from discipline but "when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline."[69] The court thus rejected any attempt to bring the case within its rationale in *Meat Cutters*,[70] stating that crossing a picket line to do struck work is not a management function protected by section 8(b)(1)(B).

According to Judge Wright, writing for the majority, the real basis for the Board's decision was its discovery of a policy in the Act that employers who permit supervisors to join unions are entitled to their undivided allegiance during any dispute with the union.[71] The court saw no basis for such a policy in the statutory language or the legislative history, and specifically rejected it.[72] Section 14(a) clearly permits a supervisor to retain his union membership. However, Congress also provided that an employer could refuse to hire union members as supervisors.[73] The court concluded that Congress had thereby effectively given the employer

66. 487 F.2d at 1154.

67. *Id., quoting* 172 N.L.R.B. at 2174.

68. 487 F.2d at 1155. The court also considered that the Board had overestimated the risk that discipline of this sort would affect the performance of subsequent grievance and bargaining functions after the strike. *Id.*

69. *Id.* at 1157. A similar conclusion was reached in NLRB v. San Francisco Typographical Union No. 21, 486 F.2d 1347 (9th Cir. 1973). The Ninth Circuit found that there is no reason to treat supervisors who refuse to honor the picket line any differently than non-supervisors. *Id.* at 1349. The court concluded that since the union did not punish the supervisors for exercising a management duty, the employer's right to select management representatives under section 8(b)(1)(B) was not affected. *Id.* The court found that a finding of an unfair labor practice in this type of case would be "an unjustifiable extension of the limited language of Section 8(b)(1)(B)." *Id.* at 1350.

70. *See* notes 27–33 and accompanying text *supra.*

71. 487 F.2d at 1159. The Seventh Circuit agreed with the Board that there was such a policy.

72. *Id.* The District of Columbia court found that section 8(b)(1)(B) was not intended as a comprehensive solution to the conflict of loyalties problem as it only deals with those individuals who represent the employer for the purposes of collective bargaining or the adjustment of grievances. *Id.* at 1166–67.

73. *See* notes 13–15 *supra.*

a means of ensuring undivided loyalty through that option of whether or not to hire union supervisors.[74] If an employer permitted his supervisors to join a union, he could no longer claim undivided loyalty in any employer-union dispute.[75]

The District of Columbia Circuit also found that the Board ruling conflicted with the contractual nature of the relationship between member and union.[76] A supervisor not subject to union discipline could reap the benefits of membership without the accompanying responsibilities,[77] and could handicap the union's bargaining power by doing struck work. By remaining a union member, the court reasoned, a supervisor subjected himself to union discipline,[78] and the employer had to accept that fact or bargain for immunity for his supervisors in the collective bargaining agreement.

Thus, finding section 8(b)(1)(B) to be inapplicable to the issue presented in *Electrical Workers,* the court considered that the cases fall squarely within the rationale of *Allis-Chalmers.*[79] The court noted that in *Allis-Chalmers* proper union discipline was held not to be restraint or coercion within the meaning of section 8(b)(1)(A), and pointed out

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74. 487 F.2d at 1165. Judge Leventhal, in a concurring opinion, noted that mobility of union labor would be restricted if departure from the union meant surrender of present or prospective economic benefits. He characterized the option given by Congress to the employer as an accommodation to employers, enabling them to permit supervisors to remain as members of a union without surrender of economic benefits. The tension created by having foremen owing dual loyalties "may not be entirely felicitous so far as management is concerned, but when elected by the employer it reflects a trade-off, making it preferable to available alternatives." *Id.* at 1172 (Leventhal, J., concurring). *See also* Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers,* 1970 DUKE L.J. 1067, wherein it is asserted:

> If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign.

Id. at 1129.

75. 487 F.2d at 1166.

76. *Id.* at 1167. *See generally* Summers, *supra* note 38, at 1054. The contractual nature of the relationship between a member and his union was most recently stressed by the Supreme Court in NLRB v. Boeing Co., 93 S. Ct. 1952 (1973).

77. The supervisor-members in the *IBEW v. NLRB* received such benefits as participation in a System Council Death Benefit Fund, and eligibility for pension, disability, and death benefits under the International's constitution. They were permitted, in the event they lost their supervisory position, to return to active membership without paying an initiation fee. 487 F.2d at 1148. In *Illinois Bell,* supervisors in the bargaining unit benefited by having the union represent them for collective bargaining purposes. *Id.* at 1150. The court noted that:

> Those supervisor-union members who feel that the union is not adequately representing their interests, or who feel that they do not wish to be bound to support the union in its economic disputes with management, are free at any time to resign from union membership. As the Supreme Court recently made clear, once they do so, and once they voluntarily agree to relinquish the benefits of union membership, they are no longer subject to union discipline.

Id. at 1169. *See* NLRB v. Granite State Joint Bd., Textile Workers, 409 U.S. 213 (1972); Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB, 93 S. Ct. 1961 (1973).

78. 487 F.2d at 1167; *See generally* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967); Summers, *supra* note 38, at 1054.

79. 487 F.2d at 1166–67.

that section 8(b)(1)(B) contains the same "restrain or coerce" language.[80] The District of Columbia Circuit then tested the discipline in *Electrical Workers* against the standards announced in *Scofield v. NLRB*,[81] and found that it did not invade or frustrate an overriding policy of the labor laws, but was consistent with the policy, approved by the Supreme Court in *Allis-Chalmers*, of permitting unions to protect against erosion of their status by fining or expelling strikebreaking members.[82]

Thus the District of Columbia Circuit found that "the Board's interpretation of the statute [could] not be derived from the statutory language or from prior Board precedent . . . and that interpretation conflicted with Supreme Court precedent, with the legislative history, and with basic principles of fairness . . ." and concluded that section 8(b)(1)(B) could not be read to prohibit discipline of supervisor-members for performing rank-and-file struck work.[83]

The circuits sharply differed on several issues: (1) whether a supervisor is a part of management when performing rank-and-file struck work; (2) whether and to what extent the *Allis-Chalmers* rationale is applicable to section 8(b)(1)(B) problems; and (3) whether an employer who chooses a union member as a supervisor can still claim that individual's undivided loyalty.

There was unanimous agreement among the judges of both circuits that "section 8(b)(1)(B) prohibits union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties."[84] The conflict among them, of course, concerns the content of "managerial duties." The Seventh Circuit found that management has traditionally relied upon supervisors to perform rank-and-file work during a strike and, that in so performing, supervisors act as part of the management team.[85] In contrast, Judge Wright, for the District of Columbia Circuit, found the term "management function" to have no meaning except in *contrast* to the concept of rank-and-file work.[86]

The Seventh Circuit made the point that a supervisor's proper function might be quite different during a strike than when a full complement of employees is present.[87] Performance of struck work improves an em-

80. *Id.* at 1167–68. *See id.* at 1159–62; notes 35–42 and accompanying text *supra.*
81. 394 U.S. 423 (1969). *See* notes 48–51 and accompanying text *supra.*
82. 487 F.2d at 1160. The court rejected the Board's distinction of *Allis-Chalmers*, especially the argument that discipline of supervisors was an external rather than an internal matter, noting that the internal-external distinction was not concerned with the identities of the parties affected by union discipline, but rather with the manner of enforcement. The court stated:

> Union discipline is internal when it is enforced through fines or expulsion from the union. It becomes "external," and a violation of Section 8(b)(1)(A) as well as other sections of the Act, when the union seeks to have the employer fire or take other measures against the recalcitrant union member.

Id. at 1162.
83. *Id.* at 1171.
84. *Id.* at 1174 (MacKinnon, J., dissenting).
85. 486 F.2d at 608.
86. 487 F.2d at 1158.
87. 486 F.2d at 608.

ployer's bargaining position and is thus arguably part of the collective bargaining process. It is submitted, however, that such interests do not appear to be those protected by Congress in section 8(b)(1)(B).[88]

Section 8(b)(1)(B) was aimed at union coercion of employers in the selection of representatives, *i.e.*, their identity. The *Oakland Mailers* line of cases expanded the concept of coercion of an employer to include how his representatives think, or act, in supervisory functions. However, union action directed at persuading supervisors not to perform struck work does not coerce an employer to change his representatives. It is submitted that the only effect on the employer of supervisor refusal to perform struck work is that he will be forced to hire strikebreakers rather than rely upon supervisor-members to fulfill that role. As a strikebreaker, a supervisor does not really "represent" his employer any more than other help which crosses a picket line. Other strikebreakers doing rank-and-file work would not be considered part of management or come within the statutory definition of supervisor.[89] Therefore, it would appear that a supervisor performing rank-and-file struck work is not performing a management function as contemplated by the Act.

The District of Columbia Circuit's analysis of the attitude a disciplined supervisor-member would bring back to his job after a strike[90] is better reasoned than that of the Seventh Circuit. Union discipline, rather than "driving a wedge"[91] between the employer and the supervisor may in fact set the supervisor against his union and bring him closer in viewpoint to his employer.[92]

Thus, it would appear that since an employer is coerced neither by a union's act of disciplining an employee who crosses a picket line, nor by any resultant attitude, it requires an overly broad extension of section 8(b)(1)(B) and the *Oakland Mailers* doctrine to find an unfair labor practice on the facts of the *Electrical Workers* cases.

On the question of the applicability of *Allis-Chalmers*, the two courts disagreed completely. The Seventh Circuit found the decision inapposite while the District of Columbia Circuit thought that the *Electrical Workers* cases fell squarely within *Allis-Chalmers*. It is true that *Allis-Chalmers* is superficially distinguishable since it was premised on a different sub-

88. *See* note 64 *supra*.

89. *See* NLRA § 2(11), 29 U.S.C. § 152(11) (1970).

90. 487 F.2d at 1156.

91. 486 F.2d at 607.

92. Illinois Bell Tel. Co. permitted the supervisors themselves to decide whether or not to work during the strike and imposed no penalty on returning strikers. The company promoted many of the supervisors who, under threat of union discipline, refused to cross the picket line to perform rank-and-file struck work. 487 F.2d at 1153. The Court stated:

> The result of threatened union discipline was to turn the supervisors against the union, not to ingratiate them into the union fold. This is even clearer when we look at expulsion as a disciplinary measure. Those who are expelled are obviously going to be more loyal to the company and less loyal to the union in the future. *Id.* at 1156.

section of the Act, but if the policy behind *Allis-Chalmers* is valid, it should be equally applicable to "supervisors" as well as "employees."[93]

The *Allis-Chalmers* Court emphasized that the legislative history of section 8(b)(1)(A) contained nothing which evidenced that the congressional intent was to regulate traditional internal union discipline. The history of section 8(b)(1)(B) is similarly devoid of any such intention.[94] Moreover, the Court in *Allis-Chalmers* recognized that unions have a substantial interest in disciplining persons who cross picket lines.[95] That interest is strongly highlighted by the facts in *Electrical Workers*. In the power industry, a few strikebreaking supervisor-members could virtually destroy union bargaining strength by running a modern, automated plant.[96] The District of Columbia Circuit's point that it would be unfair for supervisor-members to be able to so destroy the strength of the unions which grant them benefits is well taken.[97]

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93. *See* Gould, *supra* note 74, at 1129.

94. The Supreme Court in *Allis-Chalmers* was of the opinion that the 1959 Landrum-Griffin amendments represented the first comprehensive congressional regulation of the conduct of internal union affairs, and concluded that "[t]he Eighty-sixth Congress was thus plainly of the view that union self-government was not regulated in 1947." 388 U.S. at 194. From this conclusion, the Supreme Court, looking to the debates on section 8(b)(1)(A) and other sections, reached its finding 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." 388 U.S. at 195. This analysis also seems applicable to section 8(b)(1)(B).

It is also significant to note that under the 1959 amendments, 29 U.S.C. §§ 401–531 (1970), "employee" means *any* individual employed by an employer, 29 U.S.C. § 402(f) (1970), and "member" includes any person who has fulfilled the requirements for membership, 29 U.S.C. § 402(o) (1970). No distinction as to the union's ability to discipline supervisors as opposed to other union members is made. *See* 29 U.S.C. §§ 411(a)(1), (2), (5), 529.

95. The Board in *Oakland Mailers* distinguished *Allis-Chalmers* in language which would appear to distinguish the *Electrical Workers* cases from cases following the *Oakland Mailers* rule:

> The *Allis-Chalmers* case involved a union's fining of its members for crossing picket lines. The primary relationship there affected was the one between the union and its members, and the union's particular objective — solidarity in strike action — was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved. In contrast, in the present case, the relationship primarily affected is the one between the Union and the Employer, since the underlying question was the interpretation of the collective bargaining agreement. . . . [I]t fell outside the legitimate internal interests of the Union.

172 N.L.R.B. at 2174. The Board thus implied that if discipline *did* fall within the legitimate interests of the union it would *not* be proscribed by section 8(b)(1)(B).

96. The Seventh Circuit recognized the special situation in the power industry, but took a view protective of the public, rather than the union. The court stated:

> Assuredly here where the Company is an electric power company, holding a monopoly, its management has an especial obligation to continue to provide an indispensable public service during a time of strike.

486 F.2d at 608. This obligation would appear to run to the public at large and not the employer — the interest protected by section 8(b)(1)(B) — and would appear to be a moral obligation and not a legal duty.

97. A possible approach to this problem may be suggested by the Board's line of cases dealing with union discipline of employee-members who seek the decertification of their union. It has been shown that the Supreme Court's decision in *Marine Workers* proscribes union discipline which has a chilling effect on an employee's desire to resort to the Board. *See* notes 43–45 and accompanying text *supra*. However, where the employee-member files a decertification petition with the Board a distinction has been drawn as to whether union discipline is unlawful under section 8(b)(1)(A) based upon the *penalty* imposed by the union. The Board has held that

Cast in terms of Senator Taft's view of the purpose of section 8(b)(1)(B),[98] the Electrical Workers Union did not say to the employer that it did not like his representative and would not bargain with him, nor did it attempt to change the manner in which the representative performed management functions. The union, in effect, was saying it did not want its members to cross the picket line and destroy its bargaining power. The rationale of *Allis-Chalmers* as regards internal union rules thus would appear applicable.

In the final area of disagreement, the Seventh Circuit believed that Congress intended that supervisors who retained their union membership owe their undivided loyalty to their employer. The District of Columbia Circuit reasoned that an employer waived undivided loyalty by allowing supervisors to remain union members. The District of Columbia Circuit's "option"[99] theory would appear the more correct analysis of congressional intention regarding the role of supervisors under the Act. Congress clearly recognized that supervisor-members would inevitably be subject to some control by the union,[100] but nevertheless permitted employers to hire union supervisors.[101] If the employer chooses to hire only non-union supervisors, he will retain undivided loyalty in all situations, but may well be forced to provide additional compensation as a substitute for lost union benefits. If, on the other hand, union supervisors are employed, union benefits remain part of the employer's compensation package, but, in return, he must either accept the possibility that such supervisors will refuse to

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a union is prohibited from fining a member for seeking the Board's processes but it may expel a member for taking such action. International Molders' Union, Local 125 (Blackhawk Tanning Co.), 178 N.L.R.B. 208 (1969), *enforced*, 422 F.2d 92 (7th Cir. 1971); Tawas Tube Products, Inc., 151 N.L.R.B. 46 (1965). The Board relied on the proviso to section 8(b)(1)(A) (*see* notes 36 and 41–42 and accompanying text *supra*) and also reasoned that a union should be able to expel members who attack the very existence of the union by attacking its status as bargaining representative.

Thus, it could be found that the *union* has an "option." It could expel the supervisor-member if it finds him guilty of disloyalty in the union's time of crisis, or retain him as a member, but may not impose any other form of punishment. If the discipline in the instant cases is held to be restraint or coercion of an employer in his right to have management of his own choosing the above distinction could serve the purposes of section 8(b)(1)(B) and still allow the union some measure of protection. If a supervisor-member is fined, but remains a union member, it may serve as a warning to him that if he does not support a union position he may lose his union benefits. He may well be influenced by this union threat in the manner in which he performs management functions. Thus this form of discipline might be proscribed. If a supervisor-member is expelled he no longer has dual loyalties. *See* note 92 *supra*. This form of discipline may be within a union's prerogative.

98. *See* note 64 *supra*.

99. *See* notes 73–75 and accompanying text *supra*. The court concluded that "by expressly providing that foremen could unionize, and by indicating that employers who so desired could continue to bargain collectively with supervisors, Congress effectively gave employers an option." 487 F.2d at 1165. The House Report explained:

> What the bill does is to say . . . : That no one, whether employer or employee, *need* have as his agent one who is obligated to those on the other side. . . .

H.R. REP. No. 245, 80th Cong., 1st Sess. 17 (1947), *quoted in* I LEGIS. HIST. at 308 (emphasis added).

100. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 14–17 (1947), *quoted in* I LEGIS HIST. at 305–08.

101. NLRA § 14(a), 29 U.S.C. § 164(a) (1970).