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The Right to be a Recalcitrant Union Member

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NOTES

The Right to be a Recalcitrant Union Member

In 1954, the United States Supreme Court considered the problem of union discipline in the case of *Radio Officers' Union v. NLRB*.[1] The Court clearly stated that the policy of the National Labor Relations Board (NLRB) insures the right of each employee who chooses to join a union to be a "good, bad, or indifferent" member.[2] Although the validity of this phrase seems to be generally accepted,[3] it has never been enforced as an affirmative right. The purpose of this Note is to analyze the embryonic right to be a recalcitrant union member. Since most studies have examined this area in terms of the validity of union discipline against the member,[4] this Note will necessarily assume a different approach. The question is what affirmative rights does a member have to subvert union authority. In order to examine this question more thoroughly, the scope of this Note will be limited to an analysis of the legal developments in two areas:[5] (1) union restrictions on employee production; and (2) union discipline for filing with the NLRB.[6] Following this analysis, decisions of both the NLRB and the courts will be examined to determine the existence and scope of the right to be a recalcitrant union member.

I. PRODUCTION QUOTAS

A. Development of the Law Prior to Scofield

In 1947, the Labor-Management Relations Act (Taft-Hartley Act) amended section 7 of the Wagner Act by granting employees the right to

1. 347 U.S. 17 (1954) (unions cannot enforce fines against members by reducing seniority).

2. *Id.* at 40.

3. This language was quoted with approval in Scofield v. NLRB, 394 U.S. 423, 429 n.5 (1969). The *Scofield* Court, however, qualified the phrase to permit unions to discipline its members. *Id. See* Brief for Petitioner at 23, Scofield v. NLRB, 394 U.S. 423 (1969).

4. *E.g.*, Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727 (1969); Kovarsky, *Union Discipline*, 19 LAB. L.J. 667 (1968); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951); Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175 (1961); Symposium, *Union and Its Membership*, 21 N.Y.U. CONF. LAB. 335 (1968).

5. There are many available courses of action that a union member may employ to undermine the union's authority. One which will not be discussed in this Note is the refusal of a member to participate in an economic strike. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

6. This area is a 2-part problem: (1) filing unfair labor practice charges and (2) filing decertification petitions.

refrain from the exercise of concerted activities.[7] Section 8(b)(1)(A) implemented this policy by providing as follows:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . 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* . . . .[8]

The major purpose of section 8(b)(1)(A) was to prohibit violence[9] and job discrimination[10] in union attempts to organize non-union workers.[11] With the enactment of the proviso to section 8(b)(1)(A), however, Congress manifested a clear intent to allow unions to regulate "the acquisition or retention of [union] membership."[12]

The scope of the proviso was soon litigated, and the Seventh Circuit found that it enabled a union to expel or suspend union members.[13] Subsequently, in *Minneapolis Star & Tribune Co.*,[14] the NLRB concluded that a union could impose a fine on a member for his failure to participate in concerted activities without violating section 8(b)(1)(A). The Board reasoned that the proviso precluded any such interference with the internal affairs of a labor organization.[15] Several cases, however, held that any union discipline precipitating employer discrimination against one of its members violated section 8(b)(1)(A).[16] In these instances, the union discipline affected the member's status as an employee, not merely as a member. The judicial capstone of this era

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7. Ch. 120, § 101, 61 Stat. 136 (1947), *amending* 29 U.S.C. §§ 151-66 (Supp. 1, 1935).

8. 29 U.S.C. § 158(b)(1)(A) (1964) (emphasis added).

9. *See, e.g.*, Lane v. NLRB, 186 F.2d 671 (10th Cir. 1951) (union agent threatening nonmembers with violence held coercive).

10. *See, e.g.*, NLRB v. Newspaper Deliverers' Union, 192 F.2d 654 (2d Cir. 1951), *enforcing* 86 N.L.R.B. 951 (1949) (union pressuring publisher to assign work to union members held coercive).

11. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 186 (1967).

12. Senator Taft (R-Ohio) predicted that § 8(b)(1)(A) would have little effect on a union's authority over its members: "The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fine any members they wish to fine, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fine a member for some reason other than nonpayment of dues, they cannot make his employer discharge him from his job and throw him out of work." 93 CONG. REC. 4193 (1947).

13. American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951), *aff'd on other grounds*, 345 U.S. 100 (1953).

14. 109 N.L.R.B. 727 (1954).

15. *Id.* at 729.

16. *See, e.g.*, Printz Leather Co., 94 N.L.R.B. 1312 (1951). *See generally* Union Starch & Ref. Co. v. NLRB, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951). When a valid union shop exists, however, a union may lawfully request the employer to discharge a member for nonpayment of dues or initiation fees. 29 U.S.C. §§ 157, 158(b)(2) (1964).

came in 1958 when the Supreme Court expressly recognized the union's authority to discipline its members and indicated that federal law had not entered the area of internal union affairs.[17]

This void was partially filled by Congress in 1959 with the enactment of the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act),[18] which was the first legislative attempt to regulate the internal affairs of unions. Relative to union discipline, section 101(a)(4) of the Act provided:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined *except* for nonpayment of dues by such organization or by any officer thereof *unless* such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.[19]

The safeguards provided in the Landrum-Griffin Act,[20] however, do not provide substantive standards to measure the scope of permissible union discipline. Consequently, the problem of the valid exercise of union discipline was not solved by the 1959 amendments.

B. Scofield Appears on the Scene

The policy questions involved in an evaluation of union discipline under the coverage of section 8(b)(1)(A) were considered in the context of union production quotas in *Scofield v. NLRB.*[21] The case involved the imposition of production quotas on 50 percent of the production employees of the Wisconsin Motor Company, who were compensated on a piecework basis. Since 1938, the union had unilaterally imposed a production ceiling on its members, which was enforced by fines or expulsion. If a union member produced more than the ceiling, the company "banked" the over-production and paid it to the employee for days he did not reach the ceiling. After a random check, the union

17. Machinists v. Gonzales, 356 U.S. 617 (1958). "[T]he protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied." *Id.* at 620.

18. 29 U.S.C. §§ 401-531 (1964). *See* Etelson & Smith, note 4 *supra.*

19. 29 U.S.C. § 411(a)(5) (1964) (emphasis added).

20. The Landrum-Griffin safeguards for employees have been capsulized by Professor Cox and Dean Bok: "Certain provisions required that elections be held periodically for local and national union officers and that union members be assured a right to vote, to nominate candidates, to run for office, to comment upon candidates for union office, etc. Every union member was given an equal right to attend membership meetings and to participate in the voting and deliberations at such meetings." A. COX & D. BOK, CASES ON LABOR LAW 136-37 (6th ed. 1965).

21. Local 283, UAW, 145 N.L.R.B. 1097 (1964), *aff'd sub nom.* Scofield v. NLRB, 393 F.2d 49 (7th Cir. 1968), *aff'd*, 394 U.S. 423 (1969) (commonly referred to as *Scofield*).

discovered that Scofield, as well as other union members, had exceeded the ceiling. The members were fined 50 to 100 dollars and suspended for a year. Scofield refused to pay the fine, and the union brought suit in state court to collect the debt. Scofield responded by filing an unfair labor practice charge, alleging a violation of section 8(b)(1)(A).[22]

In his examination of the charge, the Trial Examiner addressed himself to the issue of whether the union, "in assessing fines on certain of its members . . . for exceeding certain production ceilings established under a rule of the Union, and in thereafter instituting civil suit in a State court to collect them, violated section 8(b)(1)(A) of the Act."[23] The Trial Examiner first analyzed the scope of the section 8(b)(1)(A) proviso and concluded that the controlling doctrine was represented by *American Newspaper Publishers Association*[24] and *Minneapolis Star & Tribune Co.*[25] These two cases stand for the proposition that not all coercive union activity violates section 8(b)(1)(A). The proviso protects expulsion or the imposition of fines as methods to enforce a union's internal rules,[26] however, the proviso's immunity is lost when a union attempts to enforce a rule that does not pertain to membership status.[27]

After reviewing the controlling authority as to the scope of the proviso, the Trial Examiner examined the effect of the union's disciplinary action upon Scofield's status as an employee and as a union member. He concluded that as an employee, Scofield was free not only to ignore the production ceiling rule but also to refuse to pay the resulting fine.[28] As a member, however, he was subject to the union production ceiling since the NLRB did not regulate the incidents of the union-member relationship.[29] The Trial Examiner concluded that if the discipline relates to internal union affairs, it is valid, but if it affects the member's status as an employee, it is invalid.[30] The NLRB affirmed the

22. The facts of the *Scofield* case were taken from the Supreme Court's opinion reported in Scofield v. NLRB, 394 U.S. 423 (1969).

23. Local 283, UAW, 145 N.L.R.B. 1097, 1112 (1964).

24. 193 F.2d 782 (7th Cir. 1951), *aff'd*, 345 U.S. 100 (1953). *See* note 13 *supra* and accompanying text.

25. 109 N.L.R.B. 727 (1954). *See* notes 14-15 *supra* and accompanying text.

26. 145 N.L.R.B. at 1113-14.

27. *Id.* at 1114.

28. *Id.* at 1124. It is interesting to note the Trial Examiner's language in discussing the Act: "The result . . . as the Supreme Court put it in the *Radio Officers'* case, is to 'insulate the employee's job from his organization rights' by leaving him free *as an employee* to be a 'good, bad, or indifferent' member subject only to his obligations under a union-security contract to tender the requisite dues and initiation fees." *Id.; see* Radio Offieers' Union v. NLRB, 347 U.S. 17, 40 (1954).

29. 145 N.L.R.B. at 1124.

30. *Id.* at 1134.

Trial Examiner's findings and acknowledged that the legislative intent behind section 8(b)(1)(A) was to protect employees from union as well as employer duress.[31] It then found that Congress did not authorize the Board to review union penalties imposed on members when the penalties did not impair a member's status as an employee,[32] and concluded that the union discipline related to Scofield only in his role as a union member. The practical effect of this decision is to allow unions, under the protection of the 8(b)(1)(A) proviso, to coerce their own members so long as the coercion relates to the acquisition or retention of membership.[33] One Board member dissented, reasoning that the Board's decision could be used to convert any requirement relating to employment into an internal union affair merely by passing a by-law making the requirement a condition for membership.[34] Looking to the nature of production quotas, the dissent concluded that the union was regulating production and wages, which were clearly related to employment and not to union membership.[35]

C. Subsequent Case Development: 1964-1969

A situation similar to the one in *Scofield* was presented in 1965 in *Associated Home Builders, Inc. v. NLRB*,[36] but a different result was reached. The union had unilaterally imposed fines for exceeding production standards. If a member committed an infraction, the union would apply his dues to payment of the fine[37] rather than institute court proceedings. The Board held that the practice of applying dues payments to fines was an 8(b)(1)(A) violation, but that the fines themselves were permissible under the section.[38] On appeal, the Ninth Circuit circumvented the issue and held that the union violated section 8(b)(3),[39] which requires the union to bargain with the employer about terms and

31. *Id.* at 1100.

32. *Id.* at 1104.

33. 37 U. CIN. L. REV. 845, 847 (1968); *see* Note, *Union Disciplinary Power and Section 8(b)(1)(A) of the National Labor Relations Act: Limitations on the Immunity Doctrine*, 41 N.Y.U.L. REV. 584, 588 (1966).

34. 145 N.L.R.B. at 1112 (Leedom, dissenting).

35. *Id.* at 1111.

36. 352 F.2d 745 (9th Cir. 1965).

37. The union had negotiated and was operating under a union shop contract. Brief for Appellant at 3, Associated Home Builders of the Greater East Bay, Inc. v. NLRB, 352 F.2d 745 (9th Cir. 1965). Therefore, if the fined members failed to pay both dues and fines, their jobs would be endangered. Note, *8(b)(1)(A) Limitations Upon the Right of a Union to Fine Its Members*, 115 U. PA. L. REV. 47, 76 (1966).

38. 352 F.2d at 747.

39. 29 U.S.C. § 158(b)(3) (1964).

conditions of employment, since it had unilaterally established the production ceilings.[40] Consequently, the finding of an unfair labor practice was based on the union's violation of its good faith bargaining duty by unilaterally imposing the production ceiling.

The significant decision of *NLRB v. Allis-Chalmers Manufacturing Co.*,[41] although not a production quota case, provides a useful example of the Supreme Court's interpretation of section 8(b)(1)(A). The issue before the Court was "whether a union which . . . imposed fines [20 to 100 dollars], and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, commited [an 8(b)(1)(A) violation]."[42] The Court concluded that the expulsions for nonpayment of fines were not unfair labor practices, since the proviso to 8(b)(1)(A) preserved the union's right to impose fines, and that by implication the right of expulsion was available as a means of discipline for nonpayment. The majority found that the legislative history did not show a design to limit the union's authority to discipline its members for matters involving internal affairs.[43] Four dissenting Justices, however, indicated that the underlying reason behind the majority's holding was the protection of weak unions. According to the dissent, the power of expulsion alone is not enough for a weak union to keep its members from challenging it; the power to impose enforeeable fines on strikebreaking members also is needed.[44]

40. "The rules relating to the limitation of production are plainly rules adopted for the purpose of establishing the terms and conditions of employment of union members. The rule is not directed merely to the employees; it has a direct impact on the employer. It fixes the conditions and terms under which he procures the services of his employees." 352 F.2d at 750.

41. 388 U.S. 175 (1967).

42. *Id.* at 176.

43. Congress intended to impose only one limitation on the union's powers over its internal affairs: a union could not enforce internal regulations that affect a member's status as an employee. *Id.* at 185. The NLRB, in its determination of the case, had reached a similar conclusion. Local 248, UAW, 149 N.L.R.B. 67 (1964), *rev'd sub nom.* Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967). The NLRB, attempting to clarify *Scofield*, formulated a test for reviewing union discipline as follows: "[W]hether, in enforcing the rule, the union goes outside the area of union-member relationship and enters the area of employer-employee relationship." 149 N.L.R.B. at 70.

44. 388 U.S. at 204 (Black, Douglas, Harlan, & Stewart, JJ., dissenting). Justice Black, in dissent, noted that "[j]ust because a union might be free, under the proviso, to expel a member for crossing a picket line does not mean that Congress left unions free to threaten their members with fines." 388 U.S. at 203.

D. *Scofield Reaches the Supreme Court*

The Supreme Court granted certiorari to hear the *Scofield* case[45] after the Board's decision had been enforced by the Seventh Circuit.[46] Justice White, writing for the majority, adopted the interpretation of section 8(b)(1)(A) as articulated in *Allis-Chalmers* and *Minneapolis Star & Tribune*. The Court, therefore, distinguished valid internal enforcement of union discipline from invalid external enforcement.[47] The majority reasoned that this interpretation of section 8(b)(1)(A) was reinforced by the Landrum-Griffin Act of 1959.[48] Notwithstanding this conclusion, the Court recognized that in certain instances[49] a union may not enforce a rule that "invades or frustrates an overriding policy of the labor laws."[50] Thus, the internal-external distinction must be qualified by public policy considerations. The Court formulated the test as follows:

> Under this dual approach, section 8(b)(1)(A) 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.[51]

Applying this test to the facts, the Court concluded that the union did not violate section 8(b)(1)(A) by enforcement of its production ceiling.

II. FILING WITH THE NLRB

A. *The Traditional Rule*

Recognizing the power of unions to regulate their internal affairs, the NLRB, in an early series of administrative rulings, held that union discipline of a member for filing charges with the Board before

45. The NLRB contended that the petition for certiorari was not timely filed. The Supreme Court rejected this position. Scofield v. NLRB, 394 U.S. 423, 427 (1969). *See* Brief for Petitioner at 26-31.

46. Scofield v. NLRB, 393 F.2d 49 (7th Cir. 1968). For a discussion of the Seventh Circuit's decision see 37 U. CIN. L. REV. 845 (1968).

47. Justice White emphasized that "[a]s an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union-security contract." 394 U.S. at 429 n.5. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

48. "[A]lthough [the Landrum-Griffin Act] dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, [it] did not purport to overturn or modify the Board's interpretation of 8(b)(1)(A)." 394 U.S. at 429.

49. For example, Local 138, Operating Eng'rs, 148 N.L.R.B. 679 (1964) (commonly referred to as *Skura*), involved a union rule requiring the exhaustion of intra-union remedies before filing an unfair labor practice charge with the NLRB.

50. 394 U.S. at 429. In all likelihood, this quoted language will be a touchstone for future decisions.

51. 394 U.S. at 430.

exhausting union remedies was not a violation of the NLRA.[52] In 1959, Congress codified these rulings in section 101(a)(4) of the Landrum-Griffin Act,[53] but qualified the traditional rule with a controversial proviso. Stated simply, this section prohibits unions from restricting a member's access to a court or administrative agency, but allows them to require members to exhaust reasonable union procedures before commencing legal or administrative proceedings. The proviso has generated voluminous comment[54] because it can be interpreted as either a restraint upon the judiciary or upon the unions.[55] Not surprisingly, early case law was divided on this point. One group of decisions accepted the union's contention that the proviso limited judicial intervention and granted the unions power to discipline members who failed to exhaust union appellate procedures.[56] These cases emphasized the statutory recognition of the union's interest in maintaining control over its internal affairs.[57] The second line of cases espoused the view that the proviso acted as a restraint on the union by conferring discretionary power on the agency or court to dismiss the action until the member had exhausted union procedures.[58] This view underscores the protection of the employee's right to file charges against his employer or his union.

52. NLRB Gen. Counsel Admin. Ruling, Case No. K-103, 37 L.R.R.M. 1103 (Nov. 3, 1955) (permitting fine without first exhausting union remedies); NLRB Gen. Counsel Admin. Ruling, Case No. 1059, 35 L.R.R.M. 1167 (Nov. 19, 1954) (permitting suspension of a member for filing an unfair labor practice charge).

53. "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings. . . ." 29 U.S.C. § 411(a)(4) (1964).

54. *E.g.*, Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1455-63 (1963); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 839-41 (1960); O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act*, 14 CATHOLIC U.L. REV. 215 (1965); Thatcher, *Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act*, 52 GEO. L.J. 339, 350-55 (1964).

55. For an interesting and extensive discussion of the 2 views see O'Donoghue, *supra* note 54.

56. Sheridan v. Carpenters Local 626, 306 F.2d 152 (3d Cir. 1962); Detroy v. American Guild of Variety Artists, 189 F. Supp. 573 (S.D.N.Y. 1960), *rev'd*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

57. *Cf.* Local 283, UAW, 145 N.L.R.B. 1097, 1100 (1964) (internal union disciplines not among the restraints intended to be encompassed by § 8(b)(1)(A)).

58. Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961). *See, e.g.*, Ryan v. Electrical Workers Local 134, 361 F.2d 942 (7th Cir.), *cert. denied*, 385 U.S. 935 (1966); Deluhery v. Cooks Union, 211 F. Supp. 529 (S.D. Cal. 1962).

B. *Filing an Unfair Labor Practice Charge with the NLRB*

1. *The Skura Case.*—The dispute over the proper interpretation of the proviso to section 101(a)(4) as it relates to the filing of unfair labor practice charges was resolved in a 1964 decision.[59] The case arose because Charles Skura was dissatisfied with his union and joined a union reform group. In furtherance of the group's objectives, he filed an unfair labor practice charge against the union. The Regional Director decided not to issue a complaint, and Skura withdrew the charge. The union, relying upon its internal procedures, levied a fine on Skura for not exhausting intra-union remedies before filing a charge with the NLRB. After the union refused Skura's offer to pay his dues until he discharged his outstanding fine, Skura then filed another unfair labor practice charge. The NLRB overruled its prior administrative position and held that the union had violated section 8(b)(1)(A) when it fined Skura.[60] This drastic departure from its prior rulings had the effect of enabling a union member to file with the Board before exhausting normal union remedies. The union had advocated two contentions to support its position: (1) the fine was an internal union matter that was protected by the union discipline proviso; and (2) the union could require exhaustion of union remedies under the proviso to section 101(a)(4) of the Landrum-Griffin Act.[61] The Board rejected the first contention by noting that union discipline of a member who files with the NLRB before exhausting union remedies cannot be considered an internal union matter. Rather, the justification for administrative protection of the member can be found in the public policy favoring free access to the Board.[62] The union's second contention was rejected through a restrictive interpretation of Landrum-Griffin's section 101(a)(4) proviso. The NLRB concluded that union members "may be required" to exhaust union remedies and that the "courts, not the union, were vested with the power to require exhaustion."[63] Significantly, the NLRB reached its decision without the support of analogous case law.[64] Instead of reasoning from precedent, it balanced section 7 and section 8(b)(1)(A)

59. Local 138, Operating Eng'rs, 148 N.L.R.B. 679 (1964) (commonly referred to as *Skura*).

60. *Id.* The Board reached the same conclusion in a companion case, H.B. Roberts, 148 N.L.R.B. 674 (1964), *aff'd sub nom.* Roberts v. NLRB, 350 F.2d 427 (D.C. Cir. 1965). In *Roberts* the appellate court concluded that the § 8(b)(1)(A) provision did not protect the union discipline since the imposition of the fine was "too remote from a rule with respect to the acquisition or retention of membership to be protected by the mere language of the proviso." 350 F.2d at 428 n.2.

61. 148 N.L.R.B. at 681.

62. *See* Note, *supra* note 33, at 590.

63. *See* 1969 UTAH L. REV. 140, 145.

64. *See* Note, *supra* note 33, at 591.

rights. The Board was not confined by the union's definition of its internal affairs, but looked to the nature and objective of the union rule, as compared with the public interest.[65]

2. *Marine Workers: The Issue Reaches the Supreme Court.*—Although strengthened by a series of administrative decisions,[66] the NLRB's position in *Skura* was not reviewed by the Supreme Court until 1968, when the case of *NLRB v. Marine Workers*[67] presented the Court with facts substantially similar to those in *Skura*. Once again the union had expelled a member for filing unfair labor practice charges before exhausting intra-union remedies. The Court of Appeals for the Third Circuit upheld the union's disciplinary action,[68] but the Supreme Court reversed. Relying upon *Skura*, the Court held that union discipline limiting access to the NLRB violated section 8(b)(1)(A). Justice Douglas, writing for the majority, reaffirmed the two reasons underlying the *Skura* decision: (1) the proviso to section 101(a)(4) of the Landrum-Griffin Act gives discretionary power to the courts and not the unions; and (2) the public policy protecting free access to the NLRB makes union discipline for filing charges external to the normal union affairs.[70] Furthermore, the Court indicated that if the union's position were upheld, the rights of members who object to noninternal matters would be coerced.[71]

Two interesting facets of the *Marine Workers* decision should be noted. First, the Court in dictum indicated that the public policy argument overrides the proviso to section 8(b)(1)(A) only when the nature of the complaint touches on matters outside the internal workings of the union. The Court reasoned, however, that a complaint implicating the employer was sufficient to extend the cause of action beyond the internal affairs of the union.[72] Secondly, Justice Harlan, in a concurring opinion, rejected this dictum and expressly stated that a union cannot

65. *See* 1969 UTAH L. REV. 140, 145.

66. Cannery Workers Union, 159 N.L.R.B. 843 (1966), *enforced*, 396 F.2d 955 (9th Cir. 1968); Typographical Union, 158 N.L.R.B. 1018 (1966); Local 238, Lathers, 156 N.L.R.B. 997 (1966).

67. 391 U.S. 418 (1968). *See* 1969 UTAH L. REV. 140.

68. Local 22, Marine Workers v. NLRB, 379 F.2d 702 (3d Cir. 1967). The circuit court concluded that a union has the right to correct its own errors before the member should have a right of access to the Board. For a discussion of the Third Circuit's decision see 21 VAND. L. REV. 157 (1967).

69. NLRB v. Marine Workers, 391 U.S. 418, 428 (1968).

70. *Id.* at 424.

71. *Id.* at 425, 428; *see* Comment, *The Union Fine as a Disciplinary Measure: A Means—End Analysis*, 6 HOUSTON L. REV. 792, 806 (1969).

72. 391 U.S. at 425.

discipline a member who files before exhausting union remedies even though the complaint is not a matter of public interest.[73] This reasoning explicitly rejects the normal internal-external distinction.

Two commentators have suggested that the basis for the holding in *Marine Workers* was that the employer, as well as the union, was involved in the complaining member's unfair labor practice charge.[74] Consequently, the internal union remedies would not have adequately protected the rights of the parties. One critic of the *Skura* and *Marine Workers* holdings has noted that the effect of these decisions will be to encourage distrust of union hearings.[75] In any event, it seems that the Supreme Court will in the future protect a member's access to the NLRB to the detriment of the union's power to require completion of internal remedies.

C. Filing a Decertification Petition with the NLRB

1. *A Rule is Formed: The Tawas Case.*—Section 9(c)(1)(A)(ii) of the NLRA gives union members, among others, the right to file a decertification petition.[76] The policy behind this section is that a union member has the right to challenge the very status of the union as the bargaining representative. Consequently, the Board reached an early conclusion that members had the right to protest and question union policies.[77] The Board's position on the conflict between this policy and the policy favoring union discipline, however, was not crystallized until the *Tawas Tube Products, Inc.* decision.[78] In that case, a union member filed an unfair labor practice charge against the union, alleging a violation of section 8(b)(1)(A), after he was expelled from the union for filing a decertification petition with the NLRB. Rejecting the Acting Regional Director's contention that the *Skura* decision was controlling, the Board found no violation since the union action was protected by the union discipline proviso.[79] The Board raised two points to justify its conclusion. First, the disciplinary action involved the charging party's

73. *Id.* at 429; *see* Comment, *supra* note 71, at 806.

74. Etelson & Smith, *supra* note 4, at 760.

75. Kroner, *Title I of the LMRDA: Some Problems of Legal Method and Mythology*, 43 N.Y.U.L. REV. 280, 301-03 (1968).

76. 29 U.S.C. § 159(c)(1)(A)(ii) (1964). This section empowers the Board to conduct elections to decertify incumbent bargaining agents, which have been previously certified, when an employee or other designated individual files a decertification petition with the NLRB.

77. Nu-Car Carriers, Inc., 88 N.L.R.B. 75 (1950), *enforced*, 189 F.2d 756 (3d Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

78. 151 N.L.R.B. 46 (1965); *see* Note, *supra* note 33, at 592-94.

79. 151 N.L.R.B. at 47; *see* notes 9-13 *supra* and accompanying text.

status as a member and not as an employee.[80] Secondly, the proviso permits a union to expel members who attack the union's very existence through the decertification procedure.[81] The *Skura* decision was therefore distinguishable, because in that case the Board had sought only to protect the member's access to the NLRB for prompt redress of union infringement of section 7 rights. In *Tawas*, however, union members resorted to the Board "for the purpose of attacking the very existence of their union rather than as an effort to compel it to abide by the Act."[82] Another possible basis for distinction is that *Skura* involved a fine and *Tawas* involved expulsion.[83]

The Board was faced with a situation similar to *Tawas* in *Richard C. Price*,[84] and again, the General Counsel relied upon the strict *Skura* interpretation of the section 8(b)(1)(A) proviso. The Board, however, applied *Tawas* in finding no violation and reaffirmed the distinction between filing unfair labor charges and deeertification petitions.[85] On appeal, the Ninth Circuit addressed itself to the question of the extent of the proviso's protection as it relates to union discipline for filing a decertification petition. The court held that the union's expulsion of Price was not a violation of section 8(b)(1)(A)[86] since he was attacking the union's very existence as a bargaining agent, rather than accusing it of violating the law.[87]

2. *The Distinction Is Refined: The Blackhawk Tanning Case.*—In *Blackhawk Tanning Co.*,[88] the union member belonged to a "financial core" of the union. Although she did not assume the responsibilities of full membership, she paid her dues and initiation fce as required under the union-security contract. After circulating a decertification petition, she was fined by the union; subsequently, she filed an unfair labor practice charge, alleging a violation of section 8(b)(1)(A). In its decision, the NLRB explicitly recognized the problem of reconciling the policy protecting access to the Board with the union's right to discipline under the section 8(b)(1)(A) proviso.[89] The Board noted that while a union may

80. Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954); 151 N.L.R.B. at 47-48.
81. 151 N.L.R.B. at 47-48.
82. *Id.* at 48.
83. Note, *supra* note 33, at 593.
84. 154 N.L.R.B. 692 (1965).
85. *Id.* at 696.
86. Price v. NLRB, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968).
87. *Id.* at 447.
88. 1969 CCH NLRB Dec. 27,005.
89. *Id.* at 27,006.

not fine or expel a member for filing an unfair labor practice charge,[90] it may expel a member who has filed a decertification petition.[91] The union discipline involved in this case, however, was not expulsion but imposition of a fine. Therefore, the issue was whether the Board should uphold the union's right to fine as well as expel a member who files or circulates a decertification petition. Contrary to the precedent of *Tawas* and *Price*, the NLRB held that the union violated section 8(b)(1)(A) for fining a member under these circumstances.

In *Tawas* and *Price*, the underlying general principle was that union discipline was protected by the proviso to section 8(b)(1)(A) and that *Skura* represented a narrow exception.[92] In *Blackhawk Tanning*, however, it was noted that the "rule permitting a union to expel a member seeking decertification is an exception to the rule prohibiting a union from penalizing a member because he has sought to invoke the Board's processes."[93] A significant basis to the *Blackhawk Tanning* decision is the fact that the punitive effect of expulsion is minimal, while a fine for filing a decertification petition is necessarily punitive. The Board's precise language should be noted:

> In short, where the union member is seeking to decertify the union, the Board has said that the public policy against permitting a union to penalize a member because he seeks the aid of the Board should give way to the union's right of self-defense. But when a union only fines a member because he has filed a decertification petition, the effect cannot be defensive and can only be punitive—to discourage members from seeking the Board's processes; the union is not one whit better able to defend itself against the decertification as a result of the fine. The dissident member could still campaign against the union while remaining a member and therefore be privy to its strategy and tactics.[94]

Clearly, the Board reached the conclusion that expulsion and fining are "qualitatively different;" therefore, fining but not expulsion is a violation of the Act. The dissenting members of the Board could not distinguish fining and expulsion. They would have held that in order to protect itself from attacks upon its existence, a union has the right to fine

90. *E.g.*, NLRB v. Industrial Union of Marine Workers, 391 U.S. 418 (1968); Local 138, Operating Eng'rs, 148 N.L.R.B. 679 (1964). *See* notes 65-71 *supra* and accompanying text.

91. *E.g.*, Local 4028, United Steelworkers, 154 N.L.R.B. 692 (1965), *petition to review denied*, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968); Tawas Tube Prods., Inc., 151 N.L.R.B. 46 (1965).

92. *See* Local 4028, United Steelworkers, 154 N.L.R.B. 692 (1965), *petition to review denied*, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968).

93. Molders, Local 125, 1969 CCH NLRB Dec. 27,005 (commonly cited as *Blackhawk Tanning Co.*).

94. *Id.* at 27,007.

members who file decertification petitions.[95] The dissenting members found justification for their position in the proviso to section 8(b)(1)(A).

III. The Right To Be a Dissident Member

A. Does It Exist?

By joining a union, an employee does not waive his section 7 rights, which permit him to refrain from any or all concerted activities carried on by the union.[96] It is clear that a member can enforce his right to be free of union coercion through section 8(b)(1)(A), but this right is qualified to the extent of the union's power to regulate its internal affairs under the proviso to that section.[97] This has been amply demonstrated by the production quota cases and the decertification cases. Thus the union, in order to be an effective bargaining agent, can marshal its strength through coercive discipline. Despite this power, a union cannot mete out discipline that has the effect of violating a public labor policy. When this occurs, the Board will protect a member's access to the administrative process, even though internal union procedures provide additional remedies. The *Marine Workers* decision provides a graphic example.

An examination of the cases has indicated that at the present time there is no affirmative right to be a recalcitrant union member. Rather, the union is able to exact member obedience through coercive discipline subject only to a public policy exception involving the protection of a member's access to the NLRB. The *Blackhawk Tanning* case,[98] however, may mark a significant departure from this doctrine. By finding that a union violated the NLRA by fining a member who circulated a decertification petition, the NLRB may have formulated a second exception. The decision is a retreat to some degree from the NLRB's position in *Tawas*, in which the Board found that the union could take action to protect itself from a member who filed a decertification petition, thereby attacking the union's status as a bargaining representative. It is significant that in *Blackhawk Tanning* the Board carefully examined the union's motives for levying a fine against its member. The result was that the Board clearly stated that

95. "[B]y permitting a union to suspend, expel or assess a reasonable fine on union members for decertification activities antithetical to the very existence of the Union, we would be giving proper weight and recognition to the Union's right to discipline its members where its very existence is threatened, a right clearly granted to it by Congress when it added the proviso to Section 8(b)(1)(A)." *Id.* at 27,009 (Fanning & Jenkins, dissenting).

96. 29 U.S.C. § 157 (1964).

97. *See* Comment, *supra* note 71, at 794.

98. *See* notes 92-97 *supra* and accompanying text.

fining a member for circulating a decertification petition is solely a punitive measure.[99] Therefore, the union unlawfully coerced the member in his exercise of section 7 rights and was not protected by the section 8(b)(1)(A) proviso.

The hope that the Board will respond more favorably in the future to an argument based on the right to be a bad union member is supported by an unarticulated policy that may underlie the *Blackhawk Tanning* decision. This policy makes it unlawful for a union to cause a member to be discharged from his employment.[100] Since the union in *Blackhawk Tanning* was operating under a union-security agreement, expulsion from the union would have resulted in the dismissal of the employee by his employer. Consequently, the only valid disciplinary measure the union could have taken against the member was a fine. By its holding that a fine violated the NLRA under those circumstances, the Board has destroyed the normal types of union discipline for circulating or filing a decertification petition when the union is operating under a union-security contract. In this situation, a union may neither fine nor expel a member. Thus, in this limited area, a member may act with impunity to subvert the union's authority.

Since the right to be a recalcitrant union member is both untested and untried in the judicial or administrative process, it is impossible to reach a convincing conclusion that an affirmative right exists. *Blackhawk Tanning*, however, may prove to be the harbinger of this development.

B. Should It Exist?

One commentator[101] recently suggested that the proviso to section 8(b)(1)(A) should be interpreted to permit substantive union discipline concerning internal matters.[107] According to his theory, the controlling principle should be as follows:

> Statutory freedom in internal union regulation generally exempts union discipline

99. The Board reasoned that expulsion of the dissident member has a defensive nature since the member would no longer be privy to the union's strategy. On the other hand, merely fining the member permitted him to campaign against the union while remaining a member. Thus, since the fine had no defensive merit, it was punitive. Blackhawk Tanning Co., 1969 CCH NLRB Dec. 27,005.

100. NLRB v. Painters Local 419, 242 F.2d 477, 481 (10th Cir. 1967); Printz Leather Co., Inc., 94 N.L.R.B. 1312, 1315 (1951).

101. The authority is John Silard, who argued before the Supreme Court on behalf of the union in Scofield v. NLRB, 394 U.S. 423 (1969) and NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

102. *See* Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, GEO. WASH. L. REV. 187 (1969).

> from Board intrusion unless the member would be required to transgress rights of others which the statute protects.[103]

Additionally, this commentator concluded that the NLRB should be a mediary, avoiding regulation of both the union's and employer's internal prerogatives.[104] In opposition to this view, a recent editorial in the Wall Street Journal argued that the union's disciplinary control should be limited.[105] It theorized that the need for strengthening the union's disciplinary procedures, and therefore its position at the bargaining table, appears to be waning in light of the advantageous collective bargaining agreements recently secured by many of the large unions. The editorial also proposed that the protection of the member's section 7 rights vis a vis the union should be both reexamined and reaffirmed.

On balance, it seems that in order to insure fairness to union members, either the Congress or the courts should recognize the right to be a recalcitrant union member. This right simply entails an examination of two factors: (1) "the necessity of the result sought by the discipline for the furtherance of union goals;" and (2) "the means through which the union alleges accession to that member's right."[106] The judicial or administrative body should determine the extent to which a member's section 7 rights have been violated, and any injury that is so great as to negate union justification must result in a finding in favor of the member. If the NLRB is not up to this task, then Congress should take the initiative.[107]

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103. *Id.* at 196.
104. *See id.* at 198.
105. WALL STREET JOURNAL, Feb. 6, 1970, at 8, cols. 1-2 (Eastern Ed.).
106. Note, *supra* note 33, at 594-601.
107. WALL STREET JOURNAL, Feb. 6, 1970, at 8, cols. 1-2 (Eastern Ed.).