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Labor Law—Labor Management Relations Act—Section 8(a) (3)—Employer Burden of Proof.—NLRB v. Great Dane Trailers, Inc.

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pay his debt to the bankrupt in full and to realize in return only a dividend.[42] It has already been concluded that Manhattan and Superior were debtor and creditor and although the money Manhattan setoff was not its to keep, it would seem equally unfair and unjust to require Manhattan to sacrifice its own business interests and receive nothing in return.

If, then, the propriety of allowing a setoff is to be finally governed by equitable considerations, the result obtained from balancing the equities of the unpreferred policyholders against those of Manhattan and the preferred policyholders would seem to be that any advantage would rest on the side of Manhattan and the preferred policyholders. Therefore, already having obtained literal compliance with the setoff provision of the Bankruptcy Act, there appears to be no substantial reason for disallowing Manhattan's setoff.

In conclusion, although it appears that the majority undeservedly emphasized the accounting setoff during the regular course of business, its final decision was a correct one. The determination of the agent and insurer's relationship is the crucial issue in this kind of case. It is well established that a finding of a trustee-beneficiary relationship forbids an agent's setoff. On the other hand, since there is no substantial imbalance of equities to favor the unpreferred policyholder, a finding of a debtor-creditor relationship should give approval to such a setoff. As indicated, the business arrangement which allowed Manhattan to deposit the premium collection in its own general business account and which allowed Superior to look to Manhattan alone for payment of the premiums in full seemed to clearly warrant the majority's finding of a debtor-creditor relationship and, therefore, Manhattan's setoff of the unearned premiums was properly sustained.

THOMAS R. MURTAGH

Labor Law—Labor Management Relations Act—Section 8(a)(3)—Employer Burden of Proof.—*NLRB v. Great Dane Trailers, Inc.*[1]—Great Dane Trailers, Inc. (hereinafter called Great Dane) and the Boilermakers' Union entered into a collective-bargaining agreement effective by its terms until March 31, 1963. The agreement included a commitment by the company to pay vacation benefits to employees who, in the preceding year, had worked at least 1525 hours. The agreement also provided that, in the case of a "layoff, termination, or quitting," employees who had served more than 60 days during the year would be entitled to pro rata shares of their vacation benefits. This agreement was temporarily extended beyond its termination date. On April 30, 1963, the union gave the required 15 days' notice of intention to strike over issues still unsettled. Subsequently, on May 16, 1963, approximately 350 of the company's 400 employees commenced a strike which lasted until December 26, 1963. During the strike the company continued to oper-

[42] See In re Gravure Paper & Board Corp., 150 F. Supp. 613, 614 (D.N.J. 1957); see also Prudential Ins. Co. of America v. Nelson, 101 F.2d at 443.

[1] 388 U.S. 26 (1967).

ate by use of nonstrikers, replacements, and original strikers who abandoned the strike. On July 12, 1963, a number of strikers demanded their accrued vacation pay from the company. The company rejected this demand on the ground that all contractual obligations had been terminated by the strike and that, therefore, none of the company's employees had a right to vacation pay. Soon thereafter, however, the company announced a new unilateral policy granting vacation pay, in the same amounts and under the same conditions prescribed by the expired agreement, to all employees who had reported for work on July 1, 1963.

The union filed an unfair-labor-practice complaint with the National Labor Relations Board charging violations of Sections 8(a)(3) and (1) of the Labor Management Relations Act[2] by the payment of vacation benefits to nonstrikers and the non-payment to strikers. After a hearing, the trial examiner held that the company had violated sections 8(a)(3) and (1). The examiner recommended that Great Dane be ordered to cease and desist from its unfair labor practice and to pay the accrued vacation benefits to strikers. The Board reviewed the record and adopted the trial examiner's conclusions and remedy.[3]

The United States Court of Appeals for the Fifth Circuit denied enforcement of the Board's order on the ground that there had been no affirmative showing by the NLRB of an unlawful motivation to discourage union membership or to interfere with the exercise of protected employee rights.[4]

Granting certiorari[5] to address the motivation issue,[6] the Supreme Court reversed. HELD: Once it is proved that an employer has engaged in discriminatory conduct which could have some adverse effect upon employee rights, the burden is upon the employer to assert that it was motivated by "legitimate and substantial business justifications. . . ."[7] Since Great Dane

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[2] 29 U.S.C. §§ 158(a)(1), (3) (1964). Section 8(a) provides:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [Section 7 of the Labor Management Relations Act];
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> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[3] Great Dane Trailers, Inc. 150 N.L.R.B. 438, 58 L.R.R.M. 1097 (1964).

[4] NLRB v. Great Dane Trailers, Inc. 363 F.2d 130 (5th Cir. 1966). Although the company itself had not introduced evidence of a legitimate purpose for its discriminatory action, the court of appeals speculated that it might have been motivated by a desire "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods." Id. at 134.

[5] 385 U.S. 1000 (1967).

[6] 388 U.S. at 31.

[7] Id. at 34.

did not come forward with *any* evidence, it simply failed to meet its burden of proof.

In dissent Justices Harlan and Stewart contended that, according to the leading cases, the employer bore the burden of proving proper motive only in those cases where his discriminatory conduct was "inherently destructive" of union rights. Otherwise the Board carried the burden of producing independent evidence of antiunion motive. The dissent also argued that the majority's language requiring the employer to prove "substantial" as well as "legitimate" business ends implied a new and heavier burden of proof.

The *Great Dane* case focuses upon the necessity of an antiunion motive for a violation of section 8(a)(3). The majority opinion would seem to require a multi-stage process governing the proof of such motive: first, the NLRB must determine whether the objective conduct, divorced from all motive, carries discriminatory impact upon statutorily protected union rights; the employer must then assert the "legitimate objectives" which motivated its conduct; next, the conduct is categorized as either inherently destructive or slightly destructive of union rights; finally, in the case of the slightly destructive conduct, the Board must independently prove an unlawful employer motive.

The presence of hostile employer motive is determinative of a violation once the Board finds that the employer's conduct has discriminatory impact, and thus that it has the effect of discouraging union membership.[8] "Discouraging membership" within the meaning of section 8(a)(3) includes discouraging participation in concerted activities, for example, a legitimate strike.[9] Thus, in *Erie Resistor Corp. v. NLRB*,[10] the Supreme Court found the employer's super-seniority credit to strike replacements and returning strikers to be so destructive of the collective-bargaining process because of its crippling effect upon the strike and union solidarity, that it held the conduct to be "inherently discriminatory." In the 1965 lockout cases,[11] *NLRB v. Brown*[12] and *American Ship Bldg. Co. v. NLRB*,[13] the employer's conduct, divorced from his motive, had a discriminatory impact upon union employees because it affected them solely by reason of their union membership. In

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[8] The purpose of the hostile motive requirement is two-fold: (1) to protect the employer's prerogative to select, discharge, lay off, transfer, promote, or demote his employees for any reason other than those proscribed by the Act; (2) to keep the Board's thumb off the bargaining scales in order to preserve free collective bargaining."

Oberer, The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails, 52 Cornell L.Q. 491, 516 (1967). The hostile motive requirement was developed by a series of leading Supreme Court decisions. E.g., NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); Radio Officers Union v. NLRB, 347 U.S. 17 (1954); Associated Press v. NLRB, 301 U.S. 103 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[9] NLRB v. Erie Resistor Corp., 373 U.S. at 233.

[10] 373 U.S. 221 (1963).

[11] For a discussion of the lockout cases see Ross, Lockouts: A New Dimension in Collective Bargaining, 7 B.C. Ind. & Com. L. Rev. 847 (1966); Comment, 1965-66 Annual Survey of Labor Relations Law, 7 B.C. Ind. & Com. L. Rev. 909, 978 (1966).

[12] 380 U.S. 278 (1965).

[13] 380 U.S. 300 (1965).

Brown, members of a multi-employer retail-store group locked out all the employees represented by the union which had struck one of its member stores. In *American Ship Bldg.*, the employer, upon reaching a bargaining impasse with the unions representing his employees, shut down one shipyard and drastically reduced employment at two others. In *Great Dane*, the Court first established the discriminatory impact of the employer's conduct. It found that payment of accrued benefits to one group of employees and denial of the same benefits to another group, distinguishable only by their participation in a protected concerted activity, discourages present or future concerted activity, and thus discourages union membership.

Once discriminatory impact is established the issue of section 8(a)(3) violation becomes one of employer motive. The problem raised by *Great Dane* is exactly who has the burden of proving the facts which allow the court to determine the employer's motive. The Court's treatment of this issue in *Great Dane* relies upon the language of the three leading cases: *Erie Resistor*, *Brown*, and *American Ship Bldg.* In order to determine the placement of burdens, the Court in each of these cases distinguished two types of employer conduct: (1) that which is inherently destructive of union rights; and (2) that which is only slightly destructive of union rights.

In *Erie Resistor*, the Court considered for the first time conduct the very nature of which implied the existence of antiunion animus.[14] Thus specific evidence of a subjective illegal intent was not considered an indispensable element for proving a violation.[15] Instead, improper motive was found to be implicit in the inherently discriminatory or destructive nature of the conduct itself, and the burden of proving legitimate business objectives was placed upon the employer. As the Court explained in *Erie Resistor:*

> The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out.[16]

Further, in *Brown* and *American Ship Bldg.*, the Court considered certain conduct as being so "inherently destructive of employee interests" that it may be held proscribed without further proof of any underlying antiunion motives.[17] Therefore, in terms of evidentiary burdens, where the employer's discriminatory conduct is "inherently destructive" he must come forward with proof of business justifications to overcome the inference of improper motive derived from the conduct itself.

The second category of employer conduct refers to situations where the adverse effect of the conduct on employee rights is "comparatively slight and the employer's conduct is reasonably adapted to achieve legitimate

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[14] The concept of inherently destructive conduct was explicitly enunciated for the first time in Radio Officers Union v. NLRB, 347 U.S. at 44-45.

[15] 373 U.S. at 227.

[16] Id. at 228.

[17] 380 U.S. at 287; 380 U.S. at 311.

business ends or to deal with business exigencies . . . ."[18] Here, the burden lies upon the Board to produce specific independent evidence of antiunion motive. If antiunion motive is proved, an otherwise ordinary business act is converted into an unfair labor practice.

The *employer's burden* in cases of slightly destructive conduct is made explicit for the first time in *Great Dane*. As the Court stated, "if the adverse effect . . . on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[19] Thus, the Court concluded, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.[20]

The facts of the three leading cases illustrate the two categories of employer conduct. In *Erie Resistor* the employer's super-seniority practice was held inherently destructive of his employees' right to strike because of its discrimination between strikers and nonstrikers, both during and after the strike, and because of its crippling impact upon the strike and union activity.[21] The Court upheld the Board's determination that the employer's asserted business purpose—to maintain production by attracting replacements and returning strikers—could not justify this inherently destructive impact on the union's right to strike. In *Brown*, the employer established that the purpose of the lockout and the continuation of business with temporary replacements was the protection of the integrity of the bargaining group against the union's whipsaw strike.[22] The company's conduct was deemed not inherently destructive of union rights, and the Board failed to

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[18] NLRB v. Brown, 380 U.S. 278, 287-88 (1965). The authority quoted in the text develops two prerequisites for legality when the employer's conduct falls within this second category. First, the conduct must be slightly destructive of union rights. As the Court in *Brown* stated:

> When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent.

380 U.S. at 289. Second, the conduct must have been undertaken for a legitimate business end. The case development of the rule requiring a legitimate business end was first enunciated in NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938). For a discussion of the case development after *Mackay* see Note, 4 B.C. Ind. & Com. L. Rev. 438 (1963).

[19] 388 U.S. at 34.

[20] Id.

[21] The Court enumerated certain extremely destructive characteristics of the company's super-seniority plan including the permanent division created within the plant between those who stayed with the union and those who abandoned the strike to gain super-seniority. "This breach . . . stands as an ever present reminder of the dangers connected with striking and with union activities in general." 373 U.S. at 230-31.

[22] In the classic case of a whipsaw strike the union breaks off negotiations with a multi-employer bargaining association and attempts to force an agreement with one of the employer members of the association by calling a strike against him. Lab. Rel. Rep. (Expediter) 532 (1966).

meet the burden of showing independent evidence of an antiunion motive. Similarly, in *American Ship Bldg.*, an employer's lockout was held not to be inherently destructive of employee rights. After a bargaining impasse, the employer temporarily shut down his plant and laid off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position. Specifically, the employer established that it had locked out its employees to avert especially harmful economic consequences threatening it and its customers if a strike were called during its busy season.

The allocation of evidentiary burdens with respect to categories of employer conduct prepares the court for the task of balancing competing interests. The employer must show the required business justifications which then must be balanced against either the implications of the conduct itself or the independent evidence of unlawful intent produced by the Board. If the employer's asserted business interests do not outweigh the harm to protected employee rights, his conduct is violative of section 8(a)(3). The Court acknowledged this balancing process in *Erie Resistor:*

> As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employers' conduct.[23]

The significance of this underlying balancing process is its necessary implication that the employer must bring to his side of the scale at least *some* assertion of legitimate purpose. Such an assertion is necessary regardless of whether the employer's conduct is inherently destructive of employee rights or only slightly destructive.

The *ratio decidendi* of *Great Dane* purports to be a consistent application of the formulae governing the proof of motive. The significance of *Great Dane* lies in whether it does, in effect, alter the location or the content of the burdens of proof. The Court, as Justice Harlan argued, may be raising a new "presumption" of an unlawful motive which the employer must now overcome before the Board has to produce independent evidence of unlawful intent even in cases of only slightly destructive conduct.[24] The issue is whether this preliminary presumption is a new burden upon the employer or whether it is a burden which has been implicit throughout the *Erie Resistor*, *Brown*, and *American Ship Bldg.* pronouncements. Certain dicta from the previous cases, taken alone, stress the Board's burden of producing independent evidence of improper motive when the discriminatory conduct is of the slightly destructive variety. In *Brown*, for example, the Court categorized the employer's conduct as slightly destructive in which case the "actual subjective intent is determinative, and . . . the Board must find from the evi-

[23] 373 U.S. at 228-29.

[24] 388 U.S. at 38 (dissenting opinion).

dence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus."[25] Similarly, dicta in *American Ship Bldg.* states, "To find a violation of § 8(a)(3), then, the Board must find that the employer acted for a proscribed purpose."[26] It is submitted that this language is not inconsistent with the *Great Dane* rationale. Nothing in the instant case relieves the Board of the burden of introducing independent evidence of unlawful motive in cases of only slightly destructive employer practices. On the contrary, the instant case merely requires that, regardless of the degree of harm that the conduct involves, the employer must assert a legitimate business purpose. The Board's burden and the employer's burden have never been held to be mutually exclusive; both may be operative in the same case. The teaching of *Great Dane* is that the employer's burden is a precedent burden in all section 8(a)(3) cases.

In addition to being consistent with the prior cases on the issue of the Board's burden of proof, *Great Dane* also appears to be consistent with those cases in its decision regarding the employer's burden of proving "legitimate objectives" in cases where the conduct is only slightly destructive of union rights. That such a burden was present, albeit implicit, in the previous cases is supported by the Court's statement in *Brown*:

> But where, as here, the tendency to discourage union membership is comparatively slight, *and the employers' conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies*, we enter into an area where the improper motivation of the employers must be established by independent evidence.[27] (Emphasis added.)

It is clear from this statement that proof of "legitimate ends" or "business exigencies" is necessary, and it may be inferred that since the employer is the party most likely to be familiar with such matters, the burden of presenting them lies with him. Seven members of the *Great Dane* Court apparently so construed the quoted language.

It is arguable that in the previous cases the emphasis on categories of conduct left the employer's burden inexplicit and perhaps lulled the Great Dane Company into a mistakenly passive strategy, but the wisdom of the company's failure to assert any positive business justifications remains questionable in view of the facts of the preceding cases. In *Erie Resistor* the employer insisted that his super-seniority practices were necessary to keep the plant open.[28] In *Brown* the employer successfully argued that use of the lockout weapon was justified to protect a multi-employer bargaining unit from disintegration threatened by a whipsaw strike.[29] In *American Ship Bldg.* the employer established that it locked out to avert the especially harmful economic consequences which would have fallen upon it and its customers if a

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[25] 380 U.S. at 288.
[26] 380 U.S. at 313.
[27] 380 U.S. at 287-88.
[28] 373 U.S. at 225.
[29] See 380 U.S. at 282-90.

strike were called later when the shipyard would be heavily occupied.[30] In contrast, the Great Dane company's explanation for discriminatory payment of vacation benefits was: (1) that the expired contract was no longer binding; and (2) that permanently replaced strikers were no longer of "employee" status and thus no longer entitled to benefits. The trial examiner rejected these explanations as any form of business justification.[31] Similarly, the Board's brief points to the relative insubstantiality of the company's allegations in comparison to the business ends asserted in the previous cases.[32]

Closely related to the question of which party shall bear the burden is the issue of the weight of the burden. The possibility has been raised that the Court may have increased the burden which the employer must bear and thus may have eroded the distinction between employer conduct which is inherently destructive and that which is slightly destructive of employee rights.[33] The source of concern is the majority's conclusion that even in instances of slightly destructive practices the Board must prove an antiunion motive only if the employer has come forward with evidence of "legitimate and *substantial* business justifications for the conduct."[34] (Emphasis added.) It is feared that the Board would be free to weigh the word "substantial" heavily in defining "business justifications" or "legitimate objectives," and that all business justifications or objectives held insufficiently "substantial" would be regularly outweighed by the union interest. In this way the Board might unduly restrict the employer's economic weapons in the collective-bargaining process. Possibly such a "substantial burden" would actually require the employer to prove a lack of antiunion animus on his part, instead of leaving the affirmative burden on the Board.

The use of the word "substantial" in *Great Dane*, however, does not violate the continuity of the leading cases. The language of the Court is preserved from *Brown*. The majority opinion refers to "substantial and legitimate justifications" and finally to simply "legitimate objectives," both of which are basically the same as the original "substantial and legitimate business ends" requirement enunciated in *Brown*.[35] Therefore, the term "substantial" is not newly introduced in *Great Dane*, and there is no heavier burden upon the employer after *Great Dane* than there was previously. Rather the Board will bear the burden of an affirmative showing of illegal motive once the employer has asserted legitimate objectives. The word "substantial" has been part of the law since *Brown*; there should be no reason, therefore, to fear that the Board will interpret it so that the employer will,

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[30] 380 U.S. at 305.

[31] The trial examiner concluded his assessment of the restrictions saying,

> Stripped to its essentials, Respondent was in effect saying to all its employees: "Refrain from joining the strike, or having joined it, abandon the strike and return to work, and you will receive the vacation benefits due, but join or continue adherence to the strike, you will not receive the vacation benefits to which you would otherwise be entitled."

150 N.L.R.B. at 443.

[32] Brief for Petitioner at 14, n.11, 388 U.S. 26 (1967).

[33] 388 U.S. at 39 (dissenting opinion).

[34] Id. at 34.

[35] 380 U.S. at 289.

in effect, have to disprove an unestablished illegal purpose, rather than have to prove a legitimate objective.

The present case indicates that the Court will require the employer to assert *some* business justifications. It does not establish a new and arduous standard of substantiality. If substantial and legitimate ends denote some asserted business justifications, then the employer must look to *Erie Resistor*, *Brown*, and *American Ship Bldg.* for examples of such justifications. The fact that "legitimate objectives" are part of the balance-of-interest process should now illustrate to the employer his burden to produce some actual counterweight for his own side of the scale. The lesson of *Great Dane* is that an employer who offers no genuine countervailing interest to a section 8(a)(3) charge of discriminatory conduct will automatically lose his case. It is now apparently settled that the terms "business justifications" and "legitimate objectives" require more positive interests than those alleged in *Great Dane.*

MITCHELL J. SIKORA

Labor Law—Labor Management Relations Act—Section 8(b)(1)(A)—Court-Enforced Fines Under a Union-Shop Provision.—*NLRB v. Allis-Chalmers Mfg. Co.*[1]—Employees of Allis-Chalmers Manufacturing Company represented by locals of the United Automobile Workers under a union-shop provision[2] voted to strike at two Wisconsin plants. Despite union picket lines, several members of the union continued to work during the strike. Upon conclusion of the dispute, the union found the strikebreaking members guilty of "conduct unbecoming a union member" and fined them from $20 to $100.[3] When several refused to pay the fine, one of the locals successfully enforced the fines by bringing a test suit for collection in a state court against one of the strikebreakers who, prior to the strike, had fully participated in union affairs.[4] Allis-Chalmers then filed unfair-labor-practice charges with the National Labor Relations Board. The company asserted the right of the fined members to refrain from concerted union activity under Section 7 of the National Labor Relations Act; the fines, the company argued, restrained or coerced the workers in the exercise of that right and, therefore, violated

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[1] 388 U.S. 175 (1967).

[2] The collective-bargaining agreements contain a union-security provision which requires employees to become and " 'remain members of the Union to the extent of paying dues.' " Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656, 657 (7th Cir. 1966).

[3] The UAW constitution requires members to "support strike action" taken in accordance with the constitution (Art. 2, Sec. 3) and provides for sanctions for violations including reprimand, fines not to exceed one hundred dollars, and suspension or expulsion from the International Union (Art. 30, Sec. 10). Brief for Appellant at 4-5, 388 U.S. 175 (1967).

[4] Local 248, UAW v. Natzke, No. 313-673 (Cir. Ct. Milwaukee County March 3, 1964), aff'd, 4 CCH Lab. L. Rep. ¶ 12,251 (Wis. Sup. Ct. Oct. 31, 1967). In this test case brought by the union, the court held that the defendant became a member of the union for all purposes including attendance at union meetings, and had therefore assumed all of the duties of membership. But see Glass Workers, Local 188 v. Seitz, 65 Wash. 2d 640, 399 P.2d 74 (1965).