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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.

Mitchell J. Sikora

Robert S. Bloom

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).

Section 8(b)(1)(A) of the Act which forbids such restraint or coercion.[5] The Board dismissed the complaint on the ground that the fines were a matter of union internal affairs and were therefore protected by the proviso to section 8(b)(1)(A) which preserves the union's right to regulate "the acquisition or retention of membership" in the union without regard to the prohibitions of the section.[6] A three-judge panel of the Seventh Circuit affirmed. After a rehearing en banc, the Seventh Circuit held (4-3) that, under a literal reading of section 8(b)(1)(A), fines against union members exercising their section 7 right to refrain from concerted activity restrained or coerced them in the exercise of that right. In so doing, the court rejected the Board's use of the proviso by narrowly reading it to immunize from the prohibitions of section 8(b)(1)(A) only expulsion from the union as a permissible form of union discipline.[7] On certiorari the Supreme Court was faced with the following questions: (1) Did the union fines, including the one enforced in court, violate section 8(b)(1)(A) by restraining or coercing employees in the exercise of their section 7 right to refrain from concerted activities; and (2) if so, are such fines protected by the proviso. The Court

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[5] 29 U.S.C. § 158(b)(1)(A) (1964).

Section 8 provides in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (1) to restrain or coerce (A) 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 . . . .

Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1964).

[6] Local 248, UAW, 149 N.L.R.B. 67 (1964).

The trial examiner recommended to the Board dismissal of the complaint on the ground that the case was governed by Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097 (1964). In that case a union fined members who had exceeded production ceilings set by the union. The Board ruled that such a fine was protected by the proviso to § 8(b)(1)(A) because it involved an area concerning the status of a union member in his capacity as a member rather than as an employee. In the earlier case of Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954), the Board ruled that a union fine upon a member for not attending meetings and performing picket duty during a strike was not prohibited by § 8(b)(1)(A) because the proviso immunizes such internal affairs.

It has been argued that these cases are inconsistent with several others in which the Board labeled union fines imposed for the failure of a member to exhaust internal union remedies prior to filing charges with the Board as restraint or coercion within the meaning of § 8(b)(1)(A). See Comment, 8(b)(1)(A) Limitations upon the Right of a Union to Fine Its Members, 115 U. Pa. L. Rev. 47, 74-83 (1966); H.B. Roberts, 148 N.L.R.B. 674 (1964), aff'd, 350 F.2d 427 (D.C. Cir. 1965); Local 138, Int'l Union of Operating Eng'rs (Charles S. Skura), 148 N.L.R.B. 679 (1964). These cases, however, are clearly distinguishable as resting upon "the overriding public interest" in preserving access to the Board's processes. See id. at 682.

[7] Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656 (7th Cir. 1966).

answered the first question negatively, and thus, did not have to answer the second. HELD: A court-enforced union fine for nonparticipation in a strike is not an unfair labor practice within section 8(b)(1)(A) where the fined employees enjoyed full union membership under a union-shop provision.[8] In a strong dissent, Mr. Justice Black, joined by Justices Douglas, Harlan and Stewart, asserted that union fines did constitute restraint or coercion and that in seeking to enforce the fines through court action the union had stepped beyond the activities protected by the proviso.

In reaching its decision, the Supreme Court rejected the literal reading by the court of appeals of section 8(b)(1)(A) and particularly took issue with its interpretation of the words "restrain or coerce" as unambiguously covering union fines for strikebreaking. Relying on the legislative history of the Taft-Hartley Act, the majority concluded that section 8(b)(1)(A) was not intended by Congress to regulate internal union discipline and that in prohibiting restraint or coercion the primary concern of Congress was strong-arm organizational tactics, not fines of employees already within the union.[9] Thus the Court decided that a union fine for strikebreaking was not restraint or coercion within the meaning of section 8(b)(1)(A).

Having concluded that a union fine for strikebreaking was not an unfair labor practice per se, the Court turned to the argument that the *means* used to enforce the fine, specifically court enforcement, made the union action illegal. Looking to the history of section 8(b)(1)(A), the Court noted that the "contract theory" of union membership widely prevailed at the time of passage of the Taft-Hartley Act. Under this theory, employees who become members of a union bind themselves to a contract, consisting of the union constitution and by-laws, which may be enforced in court. The Court pointed out that there was not one word of legislative history showing any concern with the permissible or impermissible *means* of enforcement of union fines, although Congress, operating within the context of the contract theory, must have been aware of the fact that a lawsuit for breach of contract was available to unions as a means of enforcing union fines. The majority also reasoned that to permit fines, but without court enforcement, would visit upon the member of a strong union the potentially more severe punishment of expulsion, "while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or deplete its ranks."[10] Turning

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[8] 388 U.S. at 190-92, 196. Although the Supreme Court used the term "full member" in the *Allis-Chalmers* case, it never fully defined the term. The term "full union member" has been called an "undefined concept." Legal Memorandum prepared by John L. Waddleton, Chief Counsel for Allis-Chalmers.

[9] These conclusions are consistent with an earlier decision by the Court in which Justice Brennan referred to the terms "restrain" and "coerce" in § 8(b)(1)(A) as "nonspecific, indeed vague, words" and stated that "[t]he note repeatedly sounded [in the legislative history] is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal." NLRB v. Teamsters Local 639, 362 U.S. 274, 286, 290 (1960).

Although a substantial part of the majority and dissenting opinions dealt with the legislative history of § 8(b)(1)(A), this note will not discuss the relative merit of the conclusions reached by either side on this question.

[10] 388 U.S. at 292.

to the fact that all the fined employees were full members of the union, the majority held that they were subject to union disciplinary measures, including the court-enforced fine. In other words, by becoming fully participating members, they were deemed to have waived[11] their section 7 right to refrain from concerted activity to the extent that this right was modified in the contract by provisions for majority rule. This conclusion clearly strengthens majority rule within labor unions which, the Court emphasized, is fundamental to our national labor policy.[12]

There was no disagreement on the Court as to the validity of union rules against strikebreaking and the use of expulsion to enforce such rules.[13] Indeed, the proviso to section 8(b)(1)(A) clearly permits such action.[14] The Court, however, did not use the proviso as did the Board to authorize the action of the union in fining its members and enforcing these fines in court—"Our conclusion that § 8(b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the Board holding that the proviso protected such actions."[15] Thus, although the Court stated that "the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion . . . ,"[16] this statement was not an integral part of the Court's holding.

Writing for the dissent, Justice Black also delved into the legislative history, but, unlike the majority, concluded that Congress intended section 8(b)(1)(A) to protect union as well as nonunion employees from coercive union tactics. Consequently, he preferred a strictly literal reading of "restrain or coerce" as used in section 8(b)(1)(A) so as to encompass union fines against strikebreakers. It was, however, chiefly on the issue of the consequences of court-enforced fines, as distinguished from fines enforced by the

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[11] In delineating the majority holding, Justice Black in the dissent stated "the Court in characterizing the union-member relationship as 'contractual' and in emphasizing that its holding is limited to situations where the employee is a 'full member' of the union, implies that by joining a union an employee gives up or waives some of his § 7 rights." 388 U.S. at 200.

See 80 Harv. L. Rev. 683 (1967) for a discussion of "waiver" in *Allis-Chalmers*.

[12] " 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' " 388 U.S. at 180, quoting Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1333 (1958).

In the well-known case of DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947), cert. denied, 333 U.S. 876 (1948), a union fine against Cecil B. DeMille for refusing to pay one dollar for financing a union campaign in opposition to a state right-to-work law was upheld. The court held that, as a member, DeMille was bound by the will of the majority of the membership as lawfully expressed under the union constitution and by-laws. DeMille had been forced to join the union by virtue of a closed-shop provision, which was then legal.

[13] "Thus, neither the majority nor the dissent in this case questions the validity of the union rule against its members crossing picket lines during a properly called strike, nor the propriety of expulsion to enforce the rule." 388 U.S. at 198 (White, J. concurring).

[14] The Seventh Circuit narrowly read the proviso to immunize from the prohibitions of § 8(b)(1)(A) only expulsion from the union as a permissible form of union discipline. Even Allis-Chalmers conceded that under the Act, the union could expel the offending members. See 358 F.2d at 667-68.

[15] 388 U.S. at 192, n.29.

[16] Id. at 191-92.

union itself, that the Court was divided. Justice Black stated, "Even on the assumption that § 8(b)(1)(A) permits a union to fine a member as long as the fine is only enforceable by expulsion, the fundamental error of the Court's opinion is its failure to recognize the practical and theoretical difference between a court-enforced fine, as here, and a fine enforced by expulsion or less drastic intra-union means."[17] In pointing out this "practical difference," Justice Black attacked the majority's statement that a fine is a "lesser" penalty than expulsion. He asserted that if a weak union is involved and union membership has little value the court enforcement of a fine may be far more effective punishment than expulsion. The dissent concluded that the Court's decision amounts to a policy judgment that weak unions need the power of court enforcement of fines in order to effectively pursue their roles as collective-bargaining representatives.[18]

Justice Black also strongly disagreed with the majority's application of the contract theory of union membership to the facts of this case. He stressed that the contract theory is essentially a fiction—"Particularly is that so where the 'contract' between the union and the employee is the involuntary product of a union shop. . . . I doubt that even an ordinary commercial contract is enforceable against a party who entered into it involuntarily."[19] In order to appreciate the force of this argument by the dissent, it is necessary to understand the implications of a union-shop provision. The statutory provision of the Taft-Hartley Act which authorizes the union shop limits the compulsory obligations of a union member to the payments of dues and initiation fees.[20] A union-shop agreement thus gives the employee the option of either becoming a "full member,"[21] one who participates in union affairs beyond mere dues paying such as by voting in union elections, or of becoming what might be called a "nominal member," one who does no more than pay his required dues and initiation fees. The majority in *Allis-Chalmers* recognized the existence of such an option by refusing to rule whether fines could be imposed on members whose membership is in fact limited to paying dues.[22] Although this refusal to rule on the matter suggests that an employee might be able to escape judicial enforcement of the fine by showing that he was not a "full member" of the union, Justice Black replied that "few employees would have the courage or the financial means to be willing to take that risk."[23] Thus a basic objection of the dissent to the holding of the

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17 Id. at 203-04.

18 Id. at 201.

19 Id. at 207-08.

20 Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

Section 8(b)(2) makes it an unfair labor practice for a union to attempt to cause an employer to discharge an employee whose membership in the union was denied or terminated "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(b)(2) (1964).

21 See note 8 supra.

22 "Whether those prohibitions [of the Taft-Hartley Act on the use of fines] would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view." 388 U.S. at 197.

23 Id. at 204.

Court was that according to the decision an employee in a union shop is forced to join a union or to enter a "contract," at least to the extent of paying dues and initiation fees; and the contract theory is then invoked to justify court enforcement of union fines when the employee attempts to exercise his section 7 right to refrain from engaging in concerted activities. In other words, the full member, who might have been unaware of the fact that in a union shop he could limit his membership to dues-paying, no longer has the right to refrain from taking part in a strike.

Consideration of the contract theory is fundamental to any analysis involving the issue of court-enforced fines in *Allis-Chalmers*. According to the theory, membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union. In consideration for his agreement to be bound by union rules the full member receives the benefits of the organization such as insurance, welfare benefits, use of union grievance procedures and participation in its democratic processes.[24] The characterization of union membership as a contract has been widely accepted in this country.[25] It is, however, well-recognized that the contract theory is essentially a fiction. The union constitution and by-laws are not really a negotiated contract; the constitution is often vague and one who accepts employment by joining a union has no choice but to abide by the terms existing when he joins.[26] Courts, nevertheless, will provide a remedy for breach of such contract by either member or union.[27] In this way the contract theory provides the courts a necessary means of both protecting individuals from abuse of union power and of enforcing the rules of the union so as to maintain a viable system of majority rule. In recognizing that the theory is a fiction, however, courts have freely interpreted the terms of the contract in order to reach the most equitable result.[28] Thus, courts have treated such typically vague language as "conduct unbecoming a union member," as in *Allis-Chalmers,* as little more than a mere framework from which the merits of a case are determined.[29]

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[24] Now under *Allis-Chalmers,* once the employee fully joins a union he relinquishes his rights under § 7 to the extent that he submits to the enforceable rules of the union. See id. at 197. See also NLRB v. International Union, UAW, 320 F.2d 12, 15 (1st Cir. 1963).

[25] "This contractual conception of the relation between a member and his union widely prevails in this country . . . ." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618 (1958) (Frankfurter, J.).

[26] See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1054-56 (1951); Wellington, supra note 12, at 1346. See Chafee, The Internal Affairs of Associations not for Profit, 43 Harv. L. Rev. 993 (1930) for a particularly critical view of the contract theory.

[27] See, e.g., Sanders v. International Bridge Workers, 235 F.2d 271 (6th Cir. 1956); UAW Local 756 v. Woychik, 5 Wis. 2d 528, 93 N.W.2d 336 (1958). In *Allis-Chalmers* the union warned the fined members of the possibility of court enforcement of the fines by informing them of the *Woychik* case in which the Wisconsin Supreme Court held such fines enforceable. 388 U.S. at 177-78, n.2. See Annot., 13 A.L.R.3d 1004 (1967).

[28] See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 180-184, 222 (1960).

[29] 388 U.S. at 177. Courts often apply a restrictive interpretation to a harshly used

A basic assumption of the contract theory, that an employee joins a union and thereby willingly binds himself to a "contract," breaks down when membership is not voluntary. In short, a union should not be able to enforce in court a fine against one who has not voluntarily bound himself to the constitution and by-laws of the union.[30] It thus follows that when a union-shop situation exists a major objection to using the contract theory to impose court-enforced fines is that the employee was forced to enter a "contractual relationship" with the union as a condition of employment.

This objection is especially strong where a "nominal member" is deemed to have entered a contractual relationship with a union he is forced to join. A nominal member of a union should not be subject to court-enforced fines since he has not voluntarily entered a contract with the union; he is a "member" in name only. In the controversial case of *Union Starch & Ref. Co. v. NLRB*, [31] the Seventh Circuit held that an employee's refusal in a union shop to conform to union regulations, in this case a refusal to take an oath of allegiance to the union constitution, may not result in the employee's discharge from employment except where he has failed to tender periodic dues and fees.[32] It has been argued that under the rule in this case employees are not compelled to "join" a union but merely to pay dues;[33] others have disagreed arguing that under *Union Starch* "membership" is still required in a union shop.[34] The controversy is merely a semantic one over the word "membership." Under the *Union Starch* interpretation of the Taft-Hartley Act, employees in a union shop are compelled only to become nominal members of the union. Recent cases clarify the situation by suggesting that there is little more than a semantic difference between the agency shop, in which all employees must pay dues to the union and in which "membership" is a voluntary additional step, and the union shop, in which all employees must pay dues and are called "members" even if only dues payers. In upholding the legality of the agency shop under the Taft-Hartley Act the Supreme Court stated:

> Of course, if the union chooses to extend membership even though the employee will meet only the minimum financial burden, and refuses to support or "join" the union in any other affirmative way, the employee may have to become a "member" under a union shop

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disciplinary provision to find that a union member's conduct did not come within the meaning of the clause under which he was prosecuted. See, e.g., Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958) (expulsion for "dual unionism" in criticizing incumbent officers during an election was held to be against public policy); Leo v. Local 612, Int'l Union of Operating Eng'rs, 26 Wash. 2d 498, 174 P.2d 523 (1946) ("causing dissension" did not include soliciting members for a rival union).

[30] See text accompanying note 19 supra.

[31] 186 F.2d 1008 (7th Cir. 1951), cert. denied, 342 U.S. 815 (1951).

[32] See NLRB v. Leece-Neville Co., 330 F.2d 242 (6th Cir. 1964); NLRB v. Biscuit & Cracker Workers Local 405, 222 F.2d 573 (2d Cir. 1955).

[33] Summers, Freedom of Association and Compulsory Unionism in Sweden and the United States, 112 U. Pa. L. Rev. 647, 686 (1964); Toner, The Taft-Hartley Union Shop Does Not Force Anyone to Join a Union, 6 Lab. L.J. 690 (1955).

[34] Cogen, Is Joining the Union Required in the Taft-Hartley Union Shop? 5 Lab. L.J. 659 (1954); 52 Mich. L. Rev. 619 (1954).

> contract, in the sense that the union may be able to place him on its rolls. The agency shop arrangement proposed here removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for the present purposes it is more formal than real.[35]

As to the issue of court-enforced fines the difference between the union and agency shop is also "more formal than real." Although the agency shop makes "membership" voluntary while the union shop requires it, compulsory nominal membership in the latter is no different from nonmembership in the former.[36]

The unreal nature of the differences between the union and agency shop becomes even more clear in *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*[37] in which the Supreme Court held that the agency shop is within Section 14(b) of the Taft-Hartley Act which allows state "right-to-work" laws to prohibit "agreements requiring *membership* in a labor organization as a condition of employment . . . ."[38] (Emphasis added.) Since under the Taft-Hartley Act the union-shop clause is merely a provision for requiring compulsory dues, there is no more reason for permitting court-enforced fines against a nominal member in a union shop than there would be for enforcing such fines against a nonmember who pays dues in an agency shop. In neither case does the employee enter a contract with the union to the extent of doing more than he is legally required to do.

Although Taft-Hartley does allow the employee a choice between full membership and mere dues-paying, full membership is in reality compulsory for most employees, since they do not realize that they have such a choice. As a practical matter an employee's signature to a membership card and application is merely a matter of routine. Only the most knowledgeable and contentious employee would retain a lawyer to advise him of the ramifications of full union membership.[39] In discussing the compulsory nature of union membership under a union-security provision, Justice Black effectively argued that if the union uses the union shop to compel employees to

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[35] NLRB v. General Motors Corp., 373 U.S. 734, 743-44 (1963). The Court continued, "To the extent that [the difference] has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent." Id. at 744.

[36] It has been argued that the agency and union shops are the same. Rose, The Agency Shop v. the Right-to-Work Law, 9 Lab. L.J. 579 (1958). But see Jones, The Agency Shop, 10 Lab. L.J. 781 (1959). In contending that the agency shop is different from the union shop, Jones incorrectly anticipates that state right-to-work laws which prohibit union shops cannot prohibit agency shops. Id. at 788. Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 373 U.S. 746 (1963), aff'd on rehearing, 375 U.S. 96 (1963) proved this statement to be incorrect.

[37] 373 U.S. 746, aff'd on rehearing, 375 U.S. 96 (1963); see 5 B.C. Ind. & Com. L. Rev. 440 (1964).

[38] 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1964).

[39] See Brief for New York Times Display Advertising Salesmen Steering Committee as Amicus Curiae at 14, 388 U.S. 175 (1967).

pay dues, calls these employees members, and then uses their membership to impose court-enforced fines upon those employees unwilling to join a union strike, it is using the union shop to coerce employees to join in concerted activity, a purpose other than to compel payment of dues and fees.[40] This result is clearly contrary to an earlier case in which the Supreme Court stated, "[t]his legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees."[41] Justice Black rejected the majority argument that the employees involved waived their section 7 right to refrain from concerted activity by accepting full membership:

> Few employees forced to become "members" of the union by virtue of the union security clause will be aware of the fact that they must somehow "limit" their membership to avoid the union's court-enforced fines. . . . [I]t is clear that what restrains the employee from going to work during a union strike is the union's threat that it will fine him and collect those fines from him in court. . . . By refusing to decide whether § 8(b)(1)(A) prohibits the union from fining an employee who does nothing more than pay union dues as a condition to retaining his job in a union shop, the Court adds coercive impetus to the union's threat of fines. Today's decision makes it highly dangerous for an employee in a union shop to exercise his § 7 right to refrain from participating in a strike called by a union in which he is a member by name only.[42]

As Justice Black indicated, the decision of the Court goes too far and leaves too many questions unanswered. Since the majority did not consider what motivated an employee's full membership to be relevant,[43] any full member of a union is now subject to court-enforced union fines for strikebreaking. Employees who merely pay union dues are left uncertain as to whether they are subject to fines particularly those that may be enforced in court.[44] It

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[40] 388 U.S. at 215.

[41] Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954). The Court continued:

> Thus Congress recognized the validity of the unions' concern about "free-riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

Id.

[42] 388 U.S. at 215-16.

[43] "But the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed his union's picket line." Id. at 196.

In his opinion, dissenting from the decision of the Seventh Circuit, Chief Justice Hastings maintained that full membership was voluntary and not compulsory in *Allis-Chalmers*; thus, the full members, he reasoned, were bound to union rules against strikebreaking. 358 F.2d at 662.

[44] It follows logically from the Court's opinion that union fines without court enforcement would be permissible even against nominal members. The proviso to § 8 (b)(1)(A) clearly allows expulsion from the union of such members, and therefore

will require future litigation to determine whether a nominal member of a union is subject to court-enforced fines.

It is submitted that the Court might better have safeguarded individual rights while still sustaining the validity of union fines for strikebreaking by ruling that a court-enforced fine for strikebreaking is an unfair labor practice only where the fined employee is a nominal member or where the employee joins the union as a full member without full knowledge that under a union-shop agreement he could have abstained from full membership by paying his dues and initiation fees while participating in no other union activity. To collect a fine in court, the burden would be on the union to prove that the full member knew or should have known of the choice between full and nominal membership available to him. Had the Court ruled in this way, the legitimacy of court-enforced fines under the contract theory would logically follow since courts would then be enforcing fines only against those employees who voluntarily bind themselves to union provisions for majority rule. The unions' power to promote solidarity and discipline within their ranks would be maintained without sacrificing the section 7 rights of the individual to refrain from the activities of the group. Since the collective-bargaining agreements in *Allis-Chalmers* contained informative union-shop provisions which required that employees join the union within thirty days after hiring and remain members to the extent of paying dues,[45] a court enforcing a union fine could find that these clauses alone, if clearly printed on a form signed by the employee, are sufficient to carry the union's burden of proof that the employee knew or should have known of his choice between full and nominal membership.

Under such a ruling, mere dues-paying nonmembers in an agency shop would not be subject to court-enforced fines; it is uncertain whether they now are subject to such fines. Judicial enforcement of fines, however, in all open-shop situations would be permissible since union membership in an open shop is voluntary.[46] Under union-shop provisions all those who accepted full membership voluntarily[47] would also be subject to court-enforced fines since they voluntarily entered a contract with the union and under its constitution and by-laws agreed to submit to majority rule.[48] Only those who chose to pay dues without accepting full membership and those whom the union failed to inform of their membership alternatives would not be subject to court-enforced fines. Some full members who were fined might temporarily benefit from the uncertain interim situation by claiming that they did

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should also protect mere fines which the Court reasoned were a "lesser penalty" than expulsion. This is especially so if the only way to punish nonpayment is expulsion as the ultimate sanction.

[45] See note 2 supra.

[46] An analysis by the Department of Labor of 1631 major collective bargaining contracts in effect for the years 1958-59 and covering a total of 7.5 million workers showed that 81% of those contracts contained union security arrangements. A prior study showed union shops alone to be 74% of the total. McDermott, Union Security and Right-to-Work Laws, 16 Lab. L.J. 667, 672 (1965).

[47] I.e., those who knew or should have known that they were free to limit membership to dues paying.

[48] See note 12 supra.

not know of any membership choice when they joined the union. Since it is likely, however, that litigation would eventually establish minimum standards for unions to meet in carrying the burden of proving that members knew or should have known of their membership choice, the group not subject to court-enforced fines because they were ill-informed would eventually disappear while all union members would be informed of their legal rights under a union-shop provision. It is also likely that the threat of social ostracism and the potential advantages of participation in union programs, including voting on union policy, would keep those who chose to pay only dues at a minimum. These nominal members would not be "free riders" nor would they be restrained or coerced into joining the concerted activities of the group in whose internal affairs they wished to take no part.[49]

ROBERT S. BLOOM

Labor Law—Labor Management Relations Act—Section 301(a)—State Court Injunction Against Strike—Removal to Federal Court.—***Avco Corp. v. Machinists Aero Lodge 735.***[1]—Plaintiff corporation, which is engaged in interstate commerce, had entered into a collective-bargaining agreement with defendant union. The agreement included both a no-strike clause and a binding-arbitration clause. Following a series of work stoppages which culminated in a plantwide strike, the corporation brought suit against the union in a state court, requesting both an injunction against the strike and "general relief." When the state court issued a temporary restraining order against violation of the no-strike clause, the union, pursuant to Section 1441(b) of the Removal Act,[2] removed the action to the federal district court, and there moved: (1) to dissolve the temporary injunction; and (2) to dismiss the action on the ground that the district court has no power to issue or maintain the injunction by reason of the restrictions of Section 4 of the Norris-LaGuardia Act.[3] The corporation moved to remand the action

[49] In the union answer to the rehearing petition of Allis-Chalmers at the court of appeals level, the union conceded that if the fined members had no obligation to the union beyond paying dues and fees they would not be subject to the union "'requirement of obedience to the common cause.'" 358 F.2d at 669.

[1] 376 F.2d 337 (6th Cir. 1967), cert. granted, 88 S. Ct. 103 (1967) (No. 445).

[2] 28 U.S.C. § 1441(b) (1965).

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

[3] 29 U.S.C. § 104 (1965).

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or