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Labor Policy Judicial Enforcement of Fines After Allis-Chalmers

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NOTES

LABOR POLICY: JUDICIAL ENFORCEMENT OF FINES AFTER *ALLIS-CHALMERS*

Section 7 of the Labor Management Relations Act[1] declares that employees have the right to refrain from concerted collective bargaining activities. Section 8(b)(1)(A)[2] seeks to protect that right by creating the unfair labor practice of restraining or coercing employees in the exercise of section 7 rights. The two sections were considered by the Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*,[3] when a union sought state court enforcement of a fine levied against a member who crossed its picket line. The Supreme Court held that such a fine was not a violation of section 8(b)(1)(A).

Fines for breach of union rules, traditionally enforced by threat of expulsion, generally did not entail loss of employment or any other financial loss.[4] After *Allis-Chalmers*, however, a union member cannot afford to defy union mandates; he now faces the direct economic sanc-

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1 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964) [hereinafter cited as LMRA].

2 The statute reads: (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

LMRA § 8(b), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964).

3 388 U.S. 175 (1967).

4 If the union expelled a member for reasons other than failure to tender his periodic dues and initiation fees, the employee did not lose his job.

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been 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 . . . .

LMRA § 8(b), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964). *See* Kingston Cake Co., 97 N.L.R.B. 1445 (1952), *rev'd*, 206 F.2d 604 (3d Cir. 1953); Union Starch & Refining Co., 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

tion of a court-enforced fine. Although this concededly strengthens the union as an effective and orderly bargaining representative, by allowing state courts to enforce union fines on members, the Court implicitly authorized the development and application of diverse state common law. Thus, *Allis-Chalmers* may have a detrimental impact on the frequently expressed desire for national labor policy uniformity.[5] Because the door to use of state law is open, the adequacy of state protection of union members and the value of variations in such protection among the states should be examined.

I

INADEQUACY OF PRESENT PROTECTIONS

A. *Federal Law: Section 8(b)(1)(A), Taft-Hartley and the Landrum-Griffin Act*

Early national labor legislation was designed to afford the growing union an opportunity to successfully challenge powerful management.[6] With the Taft-Hartley Act,[7] the first significant restraints were placed on unions, but there was little reference to the rights of individual union members.[8] The Landrum-Griffin Act[9] was the first national legislation that principally protected individual union members.

The *Allis-Chalmers* opinion never clearly defined the full scope of employee protection against abuse of internal union discipline. The Court stressed that congressional intent in adding 8(b)(1)(A) was to protect employees from abuses occurring during a union's *organizational* campaign.[10] Because 8(b)(1)(A) was not aimed at internal union discipline, the Court reasoned, the section was not directed to the means by which internal discipline was enforced.[11] If fines are matters of internal union discipline, they may never come within the section. In addition, since court enforcement does not by itself invoke the section, 8(b)(1)(A) may never be used as a defense by a member sued by his union.

This narrow interpretation of 8(b)(1)(A) is supported by a line of

5 *See* p. 1099 *infra*. The Court in *Allis-Chalmers* expressly did not decide the "extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law." 388 U.S. at 197 n.37.

6 *See* C. GREGORY, LABOR AND THE LAW 223-52 (2d rev. ed. 1961).

7 LMRA, 61 Stat. 136 (1947).

8 *See* C. GREGORY, *supra* note 6, at 557-63.

9 Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959).

10 388 U.S. at 184-92.

11 *Id.* at 192.

NLRB cases[12] and by the Court's previous construction of the section in *NLRB v. Teamsters Local 639*.[13] There the Court restricted the use of 8(b)(1)(A) as a device for limiting organizational activities that presumably are not matters of internal union discipline, holding that the section was aimed at tactics involving either violence or intimidation. The Court relied upon previous NLRB decisions, particularly *Perry Norvell Co.* in which the Board held:

> By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other *organizational activities* of employees were conducted peaceably by persuasion and propaganda . . . .[14]

However, a very narrow reading of *Allis-Chalmers* suggests some limits on a union's disciplinary power. The suit did not restrain or coerce the member in the exercise of his section 7 rights because it was the enforcement of a contractual obligation *voluntarily* undertaken.[15] Those employees who choose only to pay the required dues and initiation fees in a union or agency shop could not, without more, be classified as full members, as they never fully align themselves with the union. They should, then, escape court-enforced fines as a matter of federal law. Since the non-full member is forced to give the union limited support, enforcing union rules against him would be a "coercion" under 8(b)(1)(A); and because the non-full member never becomes a full participant in union affairs, court enforcement of a fine would not be a matter of traditional internal union discipline.

Although non-full member status may provide immunity from a union suit, it is not an adequate limitation. The privileges and immunities of the non-full member are not clearly defined. If an employee engages in any union activities beyond paying his dues and initiation fees, has he become a full member? Is a formal oath of allegiance required? Further, many employees will not know that they may limit their status, few will know how to do so, and few will dare test their status by exposing themselves to union suits.[16]

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12 District 50, UMW, 106 N.L.R.B. 903 (1953); Medford Bldg. & Constr. Trades Council, 96 N.L.R.B. 165 (1951); Miami Copper Co., 92 N.L.R.B. 322 (1950); Local 74, Bhd. of Carpenters, 80 N.L.R.B. 533 (1948), *enforced*, 181 F.2d 126 (6th Cir. 1950), *aff'd*, 341 U.S. 707 (1951); Perry Norvell Co., 80 N.L.R.B. 225 (1948); National Maritime Union, 78 N.L.R.B. 971 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950).

13 362 U.S. 274 (1960).

14 80 N.L.R.B. at 239 (emphasis added).

15 388 U.S. at 196.

16 In his dissent Justice Black posed several problems concerning the non-full member status:

Few employees forced to become "members" of the union by virtue of the union

The Court expressly refrained from stating its view as to whether 8(b)(1)(A) proscribes arbitrary imposition of fines.[17] Since a monetary penalty is still a matter of internal union discipline, it is doubtful whether even an arbitrary fine is prohibited. The Court did mention that the imposition of a reasonable fine is not an unfair labor practice.[18] An unreasonable fine, therefore, might have been thought coercion within 8(b)(1)(A), had the Court not suggested that unreasonable fines were outside the purview of the section. The statement that "the state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship,' "[19] suggests that a member's relief is found not under 8(b)(1)(A), but in the state courts.

Although the scope of 8(b)(1)(A) was limited by the opinion, the union member is not without a remedy.[20] Since the power of the individual to determine his own relations with his employer has been diminished by the chosen statutory representative's power to act in the interest of all the employees, the duty of fair representation has been fashioned to prevent arbitrary union conduct harmful to individual members.[21] One possible way of using 8(b)(1)(A) to strike down an arbitrary fine is suggested by *NLRB v. Die & Toolmakers Lodge 113*.[22] A union threat to stop processing grievances for employees who violated a union rule was held to breach the duty of fair representation. Thus, the duty overrides the union's normal freedom to discipline internally.

In its brief mention of the duty of fair representation, the court in *Allis-Chalmers* cited *Vaca v. Sipes*.[23] The protection against arbitrary conduct in that case was confined to the union's duty in the con-

security clause will be aware of the fact that they must somehow "limit" their membership to avoid the union's court-enforced fines. Even those who are brash enough to attempt to do so may be unfamiliar with how to do it. Must they refrain from doing anything but paying dues, or will signing the routine union pledge still leave them with less than full membership? And finally, it 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. How many employees in a union shop whose names appear on the union's membership rolls will be willing to ignore that threat in the hope that they will later be able to convince the Labor Board or the state court that they were not full members of the union?

Id. at 215-16.

17 *Id.* at 195.

18 *Id.* at 192-93.

19 *Id.* at 193 n.32 (brackets in original), *quoting* Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1078 (1951).

20 388 U.S. at 181.

21 *Id.*

22 231 F.2d 298 (7th Cir.), *cert. denied*, 352 U.S. 833 (1956).

23 386 U.S. 171 (1967).

text of enforcement of grievance and arbitration procedures in a collective bargaining agreement.[24] Since the duty of fair representation appears in the employee-union relationship only when the union is acting in its representative capacity with the employer,[25] an internal disciplinary measure must, of itself, breach the duty of fair representation in order to warrant sanction.[26]

In support of a restrictive reading of 8(b)(1)(A), Justice Brennan argued that not until the Landrum-Griffin Act did Congress undertake to regulate internal union affairs. If 8(b)(1)(A) applied to internal union discipline, Congress would have preceded the act by pervasive NLRB supervision of internal union discipline under the Taft-Hartley Act.[27] This argument suggests that a union member must turn to the Landrum-Griffin Act if he seeks *federal* protection from abusive internal union discipline.

The Landrum-Griffin Act guarantees certain political and procedural rights to the union member, but, beyond this, does not limit union disciplinary power.[28] Section 101(a)(5) prohibits the discipline of a member "unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; [and] (C) afforded a full and fair hearing."[29] The Act also attempts to assure some semblance of democratic conduct in union affairs. The member has the rights of free speech and assembly, the right to vote in union elections, and the right to attend and participate in deliberations at union meetings.[30] The Act's political and procedural guarantees, however, do not fully protect union members from abuses of

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24 *Id.* at 173.

25 The area in which the duty of fair representation first arose concerned racial discrimination. Courts usually required the bargaining representative of a majority of employees to represent all the employees in the bargaining unit without racial discrimination. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Metal Workers Local 1, 147 N.L.R.B. 1573 (1964).

Other fair representation cases deal primarily with standards governing a statutory bargaining representative's duty to serve the unit he represents in dealings with the employer. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).

26 The union's duty of fair representation arises out of the collective bargaining relationship. It concerns the manner in which the union deals with the employer on behalf of those employees for whom the union is the bargaining agent. For analytical purposes, fair representation in collective bargaining can thus be distinguished from equitable treatment by the union of its members . . . .

Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO L.J. 39 (1961).

27 388 U.S. at 193-95.

28 *See* A. COX, LAW AND THE NATIONAL LABOR POLICY 97-98 (1960).

29 Labor-Management Reporting and Disclosure Act, § 101(a)(5), 73 Stat. 523 (1959), 29 U.S.C. § 411(a)(5) (1964).

30 *Id.* § 101(a)(2), 73 Stat. 522, 29 U.S.C. § 411(a)(2).

internal discipline by unions and their officers. It specifically points to the state courts as an independent source of substantive limitations on union discipline.[31] Congress was attempting only to provide minimum protection. More specific safeguards were to come from state law, whose content was "inevitably imprecisely known" to the national legislative body.[32]

B. *The State Courts*

Both the Landrum-Griffin Act and the Court in *Allis-Chalmers* refer to the state courts as protectors of the union member against union abuses. The Court stated that "a body of law establishing standards of fairness in the enforcement of union discipline grew up [in state courts] around [the] contract doctrine [of union membership]."[33] In support of the view that the states provide adequate protection, the Court cited, *inter alia*, articles by Professor Summers.[34] Although the Court correctly cited Summers for the proposition that "state courts . . . find ways to strike down 'discipline [which] involves a severe hardship,' "[35] it failed to note his criticism of state action in this field. Summers concedes that many jurisdictions afford adequate protection, but states that the contract theory is a fiction, without clear standards, and is subject to result-oriented manipulation.[36] The corollary is depressing:

> The courts, in deciding union discipline cases, have produced a bewildering tangle of inconsistent rules and results. This mass of contradictions is more than a difference of opinion among various courts, for a court will frequently evade even its own rules and precedents.[37]

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31 *Id.* § 103, 73 Stat. 523, 29 U.S.C. § 413.

32 Summers, *Pre-emption and the Labor Reform Act—Dual Rights and Remedies*, 22 OHIO L.J. 119, 152 (1961).

33 388 U.S. at 182-83.

34 The Court relied primarily on Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

35 388 U.S. at 193 n.32, *citing* Summers, *supra* note 34, at 1078.

36 Summers, *supra* note 34, at 1055.

37 *Id.* at 1050. The traditional reluctance of the courts to interfere with internal union affairs is probably one cause of this variance, and an effort has not been made to develop any genuine workable standards. *See* Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930). The tendency of the courts to shy away from internal affairs originally developed with their refusal to settle disputes within churches and social clubs and was soon applied to labor unions. *See id.* Unlike other private associations, the labor union has become a focus of national interest and its internal operations were exposed to our national labor laws with the Landrum-Griffin Act. It would seem, therefore, that such a reluctance should ouly be tolerated to the extent that such disputes might be settled internally. If they are not equitably settled, they should be subject to judicial scrutiny.

The power of a union to discipline its members is derived from a supposed contractual relationship between union and employee.[38] The contract, the terms of which are in the union constitution and bylaws, is entered when the member joins the union. The member consents to suspension, expulsion, or fine according to the contract provisions.[39] The provisions certainly are not "bargained for"; more realistically, they are dictated. Also, the union is not bound by the provisions since it usually retains the power to amend contract terms.[40] A union suit to enforce a fine would, under these circumstances, be similar to a suit to enforce a penalty clause—unenforceable under ordinary contract law.[41]

The membership contract may not be a real source of limits on union disciplinary power, since the "contract" may not contain any standards or, if there are clear standards, they may not be fair. The constitutional provisions, particularly those governing discipline, are often so vague that they fall far short of ordinary contract requirements.[42] For example, how does one define or limit "conduct unbecoming a union member"? Even when the constitution or bylaws do not prohibit the particular conduct, some courts will uphold disciplinary measures on the theory that the union has an implied power to discipline inherently detrimental acts.[43] On the other hand, if the provision is explicit, strict enforcement of the "contract" may lead to unjust results. For example, prior to the Landrum-Griffin Act, if the union constitution clearly prohibited criticism of officers, some courts following the contract theory gave officers the freedom to punish all opposi-

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A similar reluctance has been seen on the part of some federal courts in the application of the Landrum-Griffin protections.

> The courts, in applying Title I of the Labor-Management Reporting and Disclosure Act of 1959, commonly styled the Landrum-Griffin Act, have been reluctant to discard the doctrine of non-interference in the internal affairs of "voluntary" organizations. In light of the legislative intent to guarantee fundamental civil liberties to union members and to enable them to rid themselves of corrupt leadership, this judicial trend presents an unduly restrictive interpretation of the title.

Rosenberg, *Interpretive Problems of Title I of the Labor-Management Reporting and Disclosure Act*, 16 IND. & LAB. REL. REV. 405 (1963).

38 *See* Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931).

39 *Id.*

40 *See* Dyer v. Occidental Life Ins. Co., 182 F.2d 127 (9th Cir. 1950); Horwitz v. Milk Wagon Drivers' Local 753, 341 Ill. App. 383, 94 N.E.2d 95 (1950).

41 *See* S. WILLISTON, CONTRACTS §§ 769-811 (3d ed. W. Jaeger 1967).

42 Summers, *supra* note 34, at 1055.

43 *See* Polin v. Kaplan, 257 N.Y. 277, 283, 177 N.E. 833, 834 (1931). For a classic example of this implied power, see Otto v. Journeymen Tailors' Union, 75 Cal. 308, 17 P. 217 (1888).

tion.[44] Since membership contracts provide no effective standards, state courts have used different tests to determine the limits of internal discipline. Some courts test the union's good faith.[45] Others require that punishment be based on a cause within the union's jurisdiction,[46] or use more abstract public policy arguments.[47] Faced with cases of unjust discipline, courts frequently give clauses in union constitutions a strained construction.[48] Although, as a practical matter, the protection of members may sometimes be adequate, it does not result from established standards of fairness, but rather from state judges consciously preventing abuse of union discipline. Such result-oriented jurisprudence produces inconsistent rules and results and impairs predictability. A union member does not know what protections will be afforded him by a particular judge in a particular jurisdiction.

C. *A Hypothetical Application of Present Law*

Suppose a member of an international union has displeased several union officers and subsequently fails to attend some union meetings. The officers might find his failure to attend to be a violation of a bylaw proscribing "conduct unbecoming a union member," impose a fine, and seek enforcement in a state court. Since this is internal union discipline under *Allis-Chalmers,* the member will probably not be able to assert an 8(b)(1)(A) charge against the union or use that section as a defense against the union action. If the union complied with the procedural requirements of the Landrum-Griffin Act, and did not violate any political right guaranteed therein, the member will not find a remedy in that Act. In the state court, the member argues his contractual relationship with the union. Unlike most contracts, vague provisions of union constitutions will sometimes be enforced. If the union bylaws specifically demand presence at union meetings, a variety of results is possible. Some courts will find such a provision inequitable,

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44 Summers, *supra* note 34, at 1062-63. In Pfoh v. Whitney, 62 N.E.2d 744 (Ohio Ct. App. 1945), a member of the Railroad Trainmen was expelled for distributing circulars advocating the election of Wendell Wilkie after the union had voted to support President Roosevelt, because a union constitutional provision prohibited the distribution of circulars among members absent the consent of the union. The Landrum-Griffin Act would probably outlaw such a provision. *See* authorities cited notes 29-31 *supra.*

45 *See* Barnhart v. Local 669, UAW, 12 N.J. Super. 147, 79 A.2d 88 (App. Div. 1951); Davis v. Alliance of Theatrical Stage Employees, 60 Cal. App. 2d 713, 141 P.2d 486 (1943).

46 *See* Tesoriero v. Miller, 274 App. Div. 670, 88 N.Y.S.2d 87 (4th Dep't 1949); Spayd v. Lodge 665, Railroad Trainmen, 270 Pa. 67, 113 A. 70 (1921).

47 Local 2 v. Reinlib, 133 N.J. Eq. 572, 33 A.2d 710 (Ch. 1943); Snay v. Lovely, 276 Mass. 159, 176 N.E. 791 (1931).

48 Summers, *supra* note 34, at 1061-62.

especially if the court suspects an ulterior motive for the discipline, but others will mechanically enforce the fine. Some might find enforcement of certain fines a violation of public policy. Still others might hold that the union, as a voluntary association, does not have standing to sue.[49]

The intricacies of one state's contract law will differ from those of another. For instance, Wisconsin and Washington have differed over whether the judicial enforcement of fines must be explicitly set forth in the union constitution or bylaws.[50] A court might enforce all fines for fear of "interpos[ing] a [state] policy with respect to employees engaged in interstate commerce"[51] that would possibly conflict with federal labor law. This seems to have been the position adopted by the Wisconsin Supreme Court in the enforcement proceedings following *Allis-Chalmers*.[52] The court felt that since union enforcement of fines was federally "protected" under 8(b)(1)(A), a state court was preempted from applying state policy to defeat recovery.[53] The court reached this conclusion despite the Supreme Court's reference in *Allis-Chalmers* to state law as a source of protection, and despite the Landrum-Griffin Act's specific reference to state law as a supplement to federal law. Yet, even if particular jurisdictions establish clear standards governing the imposition of fines and their subsequent court enforcement, differing standards lead inevitably to differences in the protection afforded union members.

II

FEDERAL UNIFORMITY

Because of state diversity, the federal policy of uniformity in the area of labor relations, expressed by both the Supreme Court and Congress, could be frustrated. If some state courts fail to enforce a fine for crossing a picket line, union members in one state might flock across

49 *See* Marshall v. Longshoremen's Local 6, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962).

50 *Compare* Local 248, UAW v. Natzke, 36 Wis. 2d 237, 153 N.W.2d 602 (1967), *with* Glass Workers' Local 188 v. Seitz, 65 Wash. 2d 640, 399 P.2d 74 (1965).

51 Local 248, UAW v. Natzke, 36 Wis. 2d 237, 246, 153 N.W.2d 602, 606 (1967).

52 *Id.* The union instituted the action to collect the fine in the Milwaukee County Court. Judgment was entered for the union allowing recovery of the fine. Defendant appealed therefrom to the circuit court, which affirmed the lower court. Defendant appealed to the Wisconsin Supreme Court. In the meantime the NLRB had held that the fines imposed were protected under 8(b)(1)(A). When notified of these proceedings, the Wisconsin Supreme Court decided to withhold its decision until the legality of the fines had been determined by the federal courts.

53 36 Wis. 2d at 247, 153 N.W.2d at 607.

a picket line,[54] but in another situation they would not for fear of court enforcement of union fines. The strength of the bargaining position of either party could be greatly affected.

One workable solution would be to make the membership contract enforceable in federal courts. This could be accomplished by an amendment to section 301 of the Labor Management Relations Act.[55] Another solution might be the expansion of the duty of fair representation. Also, any viable limitations afforded by state law would be available to supplement the present meager federal protection. In suits by unions against members, the court might use criteria similar to those suggested for application of section 301 in *Textile Workers Union v. Lincoln Mills.*[56] The court might also find direct violations of the Landrum-Griffin Act or the Taft-Hartley Act. Absent precise statutory guides, the problem could be resolved by reference to federal labor policy. State law could be resorted to for the applicable rule that best effectuates federal policy. Once applied, such state laws would become federal law and would no longer be an independent source of private rights.[57] Thus, a body of federal common law in the area of internal union discipline could be developed. State courts could entertain jurisdiction, but they would be bound by federal law.[58]

Admittedly there are no precise standards for this uniform federal law. Justice Douglas, dealing with section 301 in *Lincoln Mills,* noted, "The range of judicial inventiveness will be determined by the nature

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54 *See* Glass Workers' Local 188 v. Seitz, 65 Wash. 2d 640, 399 P.2d 74 (1965).

55 Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

LMRA § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964). With the passage of § 301, Congress was concerned with the refusal of some state courts to enforce collective bargaining contracts and thus implicitly declared it to be a uniform national policy that such contracts be enforceable against both parties.

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957), *citing* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

56 353 U.S. 448 (1957).

57 *Id.* at 457.

58 Such is the case with § 301 suits, convenience probably being a major consideration. *See* Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

of the problem."[59] If the duty of fair representation were expanded to encompass internal union discipline, the criteria applied would be similarly vague.[60] Undoubtedly, the union's duty would have to be expanded beyond fair representation to a more encompassing fiduciary relationship.

The Landrum-Griffin Act can be viewed as a first step toward uniform protection again some possible abuses of internal union discipline. However, nothing in the Act limited the rights and remedies of any member of a labor organization under state law.[61] At the time of its passage, the union's major disciplinary sanction was expulsion from union membership. With the added disciplinary power sanctioned by *Allis-Chalmers,* the effects of state diversity are magnified, and uniform rules governing internal union discipline are now in order.

In determining the effect of federal legislation on state court power to decide cases by applying state law, the Supreme Court found:

> Congress evidently considered . . . centralized administration of specially designed procedures . . . necessary to obtain uniform application of its substantive rules and to avoid . . . *diversities and conflicts* likely to result from a variety of local procedures and attitudes toward labor controversies.[62]

Thus, if an activity were arguably protected or prohibited by sections 7 or 8 of the Labor Management Relations Act,[63] and if there were no overriding state interest,[64] jurisdiction was preempted by the National Labor Relations Board.

The effect of section 301 of the Labor Management Relations Act was to make federal and state courts jurisdictionally equal in collective bargaining contract disputes. State courts were given jurisdiction to decide cases if conduct even arguably subject to sections 7 or 8 was involved.[65] But they are bound in this area by federal law.

Although uniform federal law substantially governs disputes be-

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59 353 U.S. at 457.

60 "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967).

61 Labor-Management Reporting and Disclosure Act § 103, 29 U.S.C. § 413 (1964).

62 Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953) (emphasis added).

63 *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), where the Court established this criterion to test whether the NLRB had exclusive jurisdiction; but it excluded cases where there was an overriding state interest such as conduct marked by violence and imminent threats to public order.

64 *See id.*; Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 61 (1966) (malicious libel held an "overriding state interest").

65 *See* Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

tween union and employer, the extent to which federal law presently governs disputes between member and union is unclear. In three particular instances, members have sued their unions asserting breaches of the membership contract as the basis of liability. In each case, the Supreme Court has reached a different result.

International Association of Machinists v. Gonzales[66] concerned state protection of a member wrongfully expelled from his union. The Supreme Court held that the state court could exercise its traditional jurisdiction and give "legal efficacy under state law to the rules prescribed by a labor organization. . . ."[67] Noting that "protection of union members . . . from arbitrary conduct by unions . . . has not been undertaken by federal law . . ."[68] the Court found no indication of congressional intent to strip a member of his traditional state protection. State jurisdiction and the application of state law were affirmed, even though, as a matter of wooden logic, the union conduct was arguably prohibited by section 8.[69]

In *Journeymen Local 100 v. Borden*[70] abuses in a union's hiring hall procedure were alleged. The Court found the dispute arguably subject to sections 7 or 8, and within the *"areas of conduct* which must be free from state regulation if national policy is to be left unhampered."[71] To support its holding that state jurisdiction was preempted by the NLRB, the Court attempted to distinguish *Gonzales* on the basis that the lawsuit there "was focused on purely internal union matters, *i.e.*, on relations between the individual plaintiff and the union . . . ."[72] *Borden* was different because it "focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment."[73] The distinction between purely internal matters and matters affecting employment may be unworkable.[74] However, *Borden* clearly stands for the proposition that state regulation may seriously interfere with matters requiring uniform regulation.

A third result was reached in *Vaca v. Sipes*.[75] The Court determined that a suit for breach of the duty of fair representation was, like

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66 356 U.S. 617 (1958).

67 *Id.* at 620.

68 *Id.*

69 *Id.* at 623-33 (Warren, C.J., dissenting).

70 373 U.S. 690 (1963).

71 *Id.* at 698, *quoting* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (emphasis added in *Borden*); *see* note 63 *supra*.

72 *Id.* at 697.

73 *Id.*

74 *Id.* at 698-700 (Douglas, J., dissenting).

75 386 U.S. 171 (1967).

a suit under section 301, subject to federal law. But the state court considered the obligation to be grounded in the contract, and therefore subject to state law. The Supreme Court, however, held that the complaint alleged union conduct which breached the duty of fair representation and that uniform federal law governed the cause of action. Most significantly, the decision implied that in the area of fair representation, the state courts were preempted from interpreting the membership contract according to state law.

The Supreme Court in *Allis-Chalmers* expressly did not decide the "extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law."[76] Therefore, if a member asserts in defense that the union disciplinary action violates section 8, the state court's jurisdiction may be preempted. For example, in the *Borden* situation, a union might fine a member for not finding employment through the hiring hall. The member could assert in defense that the enforcement of this hiring hall arrangement violates section 8. The state court might dismiss on the ground that its jurisdiction is preempted, since *Borden* can be viewed as treating union enforcement of fines in this situation as solely within the jurisdiction of the NLRB. Thus, the union may be denied relief, although in fact its hiring hall practice does not violate federal law. However, since the Supreme Court in *Allis Chalmers* found state court enforcement of fines not prohibited by the Labor Management Relations Act, state courts may have to determine initially whether an alleged unfair labor practice is a sufficient defense. In other words, state courts may have jurisdiction to decide, as a threshold question, if an unfair labor practice has in fact occurred. Some courts will assume jurisdiction, but others will claim they are preempted.

If our national labor laws were amended to federalize union membership contracts, in the same manner that section 301 federalized collective bargaining agreements, "the jurisdiction of the courts [would not be] destroyed by the fact that . . . it [is] necessary to prove an unfair labor practice . . . ."[77] Rather, uniform national law would govern the result. If state courts are allowed to decide the enforceability of fines by applying their own substantive law, diverse state treatment of the union-member relationship is inevitable.

Traditional state protections should be freed from their inadequate theoretical base in the contract theory. Valid protections should exist, but they should exist as a matter of federal labor policy. Thus, the type

[76] 388 U.S. at 197 n.37.

[77] Vaca v. Sipes, 386 U.S. 171, 186 (1967).

of fine imposed in *Allis-Chalmers* would probably be upheld because it helps to maintain the union as an effective bargaining unit.

There is no overriding state interest forestalling preemption of state law in these matters.[78] Unlike other private associations, such as churches and social clubs, the affairs of a labor union have national implications. Since many unions operate on a national level with members throughout the country, the problem of union discipline is not purely local. Also, the restrictions placed on employees by the union constitution and bylaws are many times national in scope.[79]

Uniform federal law could be established by incorporating the protection against arbitrary union discipline within the federal duty of fair representation. This would only federalize the defense, however, with the enforceability of the membership contract remaining a question of state law. The most desirable solution is to make the employee-union relationship a matter of federal law by an amendment of the national labor laws giving federal courts jurisdiction over suits between unions and union members. State courts would still be able to entertain jurisdiction, but in deciding cases they would have to apply federal law.[80]

Robert C. Kirk

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78 *See* notes 63-64 *supra.*

79 *See* A. Cox, *supra* note 28, at 86-111.

80 The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made.
Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 422 (1964).