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COMMENTS

CHANGING INTERPRETATION OF NLRA SECTION 8(b)(1)(B)—UNION DISCIPLINE OF SUPERVISORS IN THE AFTERMATH OF FLORIDA POWER & LIGHT

INTRODUCTION

It is the policy of the United States to promote peace and stability between labor unions and employers in order to prevent the obstruction of commerce.¹ The means used to implement this policy is the National Labor Relations Act.² The Act places emphasis upon the rights of employees to organize, form, join or assist labor organizations, and also provides remedies in those instances where employers have encroached upon employee rights.³ Moreover, through section 8(b)(1)(B), the Act protects an employer's collective bargaining rights against union interference by allowing the employer a free and unrestricted choice of his collective bargaining representatives.⁴

In protecting an employer's collective bargaining rights the most common situation to which 8(b)(1)(B) is applied is the "struck work" context. A struck work situation can arise when an employer and the union representative of his employees have reached an impasse in negotiations and the union engages in an economic or unfair labor practice strike against the employer. The employer requests or demands that his supervisors perform the rank-and-file work normally done by the striking employees, and the supervisors, who are also members of the union, are fined by their union for strikebreaking. The employer then files an 8(b)(1)(B) complaint with the National Labor Relations Board⁵ claiming that imposition of the union fine has effectively

1. This policy has been eloquently stated in the National Labor Relations Act [hereinafter referred to as the Act] 29 U.S.C. § 151 (1970):

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . .

2. 29 U.S.C. §§ 151-68 (1970).

3. 29 U.S.C. §§ 157, 158(a) (1970).

4. 29 U.S.C. § 158(b)(1)(B) (1970) [hereinafter referred to as 8(b)(1)(B)] states:

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

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . .

5. Hereinafter referred to as the Board.

restrained him in the selection of his representatives for purposes of collective bargaining or grievance adjustment.⁶

Contract interpretation is another context in which an employer might claim that a union has committed an 8(b)(1)(B) violation. In such a situation a supervisor is fined by his union for his interpretation of a collective bargaining agreement in a manner which the union considers harmful to its own interests. Therefore, the employer brings 8(b)(1)(B) charges against the union on the ground that the employer has been denied the right to have his collective bargaining representative protect the employer's interests in an unrestrained manner.⁷

These two common situations, struck work and contract interpretation, accurately exemplify the predicament of the supervisor-union member. On the one hand, the employee is expected to be loyal to the employer's interests. At the same time, however, the union expects the supervisor to support an employee strike or to resolve collective bargaining disputes in the union's favor. The supervisor may become acutely aware of these conflicting interests when he attempts to secure a promotion or some other type of employer benefit by demonstrating his loyalty to management, while at the same time attempting to retain union benefits that he may have accrued over the years (originating, perhaps, when he was a non-supervisory employee). Although these underlying factors have undoubtedly had some influence in 8(b)(1)(B) cases, the actual disposition of such cases must be consistent with the provisions of the Act. In order to determine whether there has in fact been an 8(b)(1)(B) violation, therefore, a careful evaluation of the precise language of 8(b)(1)(B), as well as a close analysis of Board and judicial interpretation of the applicable statutory provisions, is necessary. This comment will then examine recent changes which have been made in 8(b)(1)(B) interpretation by the Board and the courts in an attempt to cope with the problems created in this area. A further consideration will be whether deferral to fair and regular arbitration proceedings can

6. See also *NLRB v. Local 2150, IBEW*, 486 F.2d 602 (7th Cir. 1973); *Carpenters, Local 492*, 211 N.L.R.B. 62 (1974); *Bricklayers, Local 1*, 209 N.L.R.B. 820 (1974); *Operating Eng'rs, Local 450*, 209 N.L.R.B. 463 (1974); *Patternmakers Ass'n*, 203 N.L.R.B. 1126 (1973); Comment, *Union Discipline of Supervisor Members*, 74 COLUM. L. REV. 706 (1974).

7. A good example of an 8(b)(1)(B) violation in a contract interpretation setting is *Bricklayers, Local 7*, 193 N.L.R.B. 515 (1971) where a supervisor was fined by his union for refusal to submit the firing of a union steward to arbitration. The Board found an 8(b)(1)(B) violation on the grounds that the supervisor was engaged in contract interpretation in his refusal to arbitrate. See also *McCraw v. United Ass'n*, 341 F.2d 705 (6th Cir. 1965); *Local 702, IBEW*, 219 N.L.R.B. No. 48, 89 L.R.R.M. 1718 (1975); *Providence Stereotypers', Union 53*, 202 N.L.R.B. 195 (1973).

provide a less cumbersome and more equitable means of resolving employer-union conflict.

THE CHANGING INTERPRETATION OF SECTION 8(b)(1)(B)

One of the major problems inherent in 8(b)(1)(B) is the very nature of the conflict that it was designed to resolve. Any application of 8(b)(1)(B) must attempt to balance the vastly different interests at stake between the employer and the union. The legislative history of section 8(b)(1)(B) indicates that this balance was intended to be struck by preventing unions and their agents from "interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances."⁸

Early case law interpreting section 8(b)(1)(B) demonstrated an intent to construe the section narrowly.⁹ A union was held to have violated section 8(b)(1)(B) only in those situations in which there was restraint or coercion of those who were shown to be *collective bargaining or grievance adjustment representatives*, thereby preventing substitution of the employer's *personnel* by the union.¹⁰ Thus, a violation existed when the union refused to deal with the employer's representative, or struck in order to obtain the representative's discharge, but not when the union imposed a fine upon a collective bargaining representative for contract interpretation unfavorable to the union.¹¹ In light of section 8(b)(1)(B)'s policy of protecting an employer's bargaining rights from union interference, these early decisions raised a number of difficult questions: Was the statute being unnecessarily restricted in scope at the expense of the employer? Could application of section 8(b)(1)(B) be extended without perverting its legislative intent? Would an extension of it be

8. 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, S. REP. No. 105, 80th Cong., 1st Sess. 427 (1947) (emphasis added).

This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.'

93 CONG. REC. 3837 (1947) (remarks of Senator Taft).

9. Note 11 *infra*.

10. Comment, *Union Discipline of Supervisor Members*, 74 COLUM. L. REV. 706 (1974); Comment, *The Role of Supervisors in Employee Unions*, 40 U. CHI. L. REV. 185 (1972).

11. District Council of Painters No. 48, 152 N.L.R.B. 1136 (1965); Warehousemen, Local 986, 145 N.L.R.B. 1511 (1964); Los Angeles Cloak Joint Bd. ILGWU, 127 N.L.R.B. 1543 (1960); Teamsters Local 324, 127 N.L.R.B. 488 (1960); Pipe Trades Dist. Council No. 16, 120 N.L.R.B. 249 (1958). These cases held that the union committed an 8(b)(1)(B) violation when it attempted to obtain the discharge of an employer representative or refused to deal with such representative. See *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961) (no union violation of 8(b)(1)(B) when the union refused to deal with a supervisor who was not also a collective bargaining or grievance adjustment representative).

unduly harsh and burdensome to the union in light of the interest which the union had to protect? In 1968 these problems were resolved by the Board, largely in favor of employers, in *San Francisco-Oakland Mailers' Union No. 18*.¹²

Extension of Section 8(b)(1)(B) from its Original Confines

In *Oakland Mailers'* a union supervisor was fined for allocating work to a nonunion employee. In finding a violation of 8(b)(1)(B), the Board relied on the belief that the supervisor's decision of whether to permit a non-union member to perform the work or not, required an interpretation, by the supervisor, of the collective bargaining contract between the union and the employer. To the extent that the fined supervisor was engaged in contract interpretations he was acting as a collective bargaining representative for his employer. As a result of the fine, the employer's representative for purposes of collective bargaining or grievance adjustment had been restrained, thereby producing a concurrent restraint upon the employer.¹³ Since the union's acts were directed primarily at the collective bargaining representative, the employer was only indirectly restrained, and the union fine of the supervisor had no effect upon the employer in the *selection* of his collective bargaining or grievance adjustment representatives.¹⁴

The *Oakland Mailers'* decision is significant since the Board found an 8(b)(1)(B) violation in a situation involving substitution of the union's *attitude* for that of the employer's, whereas in earlier decisions the Board had required an actual substitution of *personnel* rather than a mere change in attitude.¹⁵ In *Oakland Mailers'* the union fined the supervisor for the *manner* in which he performed his duties as a collective bargainer and thereby attempted to substitute its attitude for the employer's attitude. Conversely, had the union refused to meet or deal with the particular collective bargaining representative, such refusal would have constituted an attempt to substitute union personnel for the employer's personnel. Thus, section 8(b)(1)(B) was extended from its original confines of only protecting employers in the *selection* of their collective bargaining representatives to the protection of the manner in which an employer's collective bargaining representative performs his duties.¹⁶

12. 172 N.L.R.B. 2173 (1968).

13. *Id.*

14. The Board determined that such action by the union was "... designed to change the Charging Party's [employer's] representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's [the union's] will." *Id.* at 2173.

15. See cases cited in note 11 *supra*.

16. See 52 J. URBAN LAW 789 (1975).

Although such an extension of 8(b)(1)(B) substantially increased the protection of an employer's collective bargaining rights, it raised further unresolved issues. After *Oakland Mailers'* the language of 8(b)(1)(B) had to be examined more closely than had been done earlier. It was also necessary to determine whether the language of 8(b)(1)(B) could be extended even further to protect the employer's interests without encroaching upon fundamental union rights.

Collective Bargaining and Grievance Adjustment

Since *Oakland Mailers'* held that a union committed a section 8(b)(1)(B) violation even though an employer was not directly restrained in the *selection* of his collective bargaining or grievance adjustment representative, the best means to further extend section 8(b)(1)(B)'s protection of the employer would be to loosen the restrictions on who may qualify as a collective bargaining or grievance adjustment representative. In the past, it has been held that collective bargaining involves negotiation of rates of pay, wages or hours of employment.¹⁷ Therefore, a representative of an employer who engages in such negotiations for the employer can be considered a collective bargaining representative.¹⁸ Grievance adjustment, on the other hand, involves resolution of day to day problems and complaints of the employees.¹⁹ In determining whether an employer representative has collective bargaining or grievance adjustment powers it is helpful to look for substantial authority as such a representative in the past.²⁰ If the employer representative has exercised collective

17. 29 U.S.C. § 158(d) (1970):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . .

18. *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949).

19. *Painters Local 1010 v. NLRB*, 293 F.2d 133, 135 (D.C. Cir. 1961), cert. denied, 368 U.S. 824 (1963). That case held that "[O]ther terms and conditions of employment," [from 29 U.S.C. § 158(d) (1970)] refers to and includes only those provisions, in addition to wages and hours, which have to do with actual performance of work or to subsequent relations." *Id.* at 135. *Pressman's Union 13*, 192 N.L.R.B. 106 (1971) indicated that the duties of a grievance adjuster would consist of:

[A]uthoriz[ation] to handle the problems which may arise in the assistant foreman's area during the shift; this includes complaints or grievances of the employees as well as problems which concern the equipment.

Id. at 107; see also *San Francisco Typographical Union 21*, 193 N.L.R.B. 319 (1971) (power to make recommendations for the resolution of grievances); *Detroit Pressmen's Union 13*, 192 N.L.R.B. 106 (1971) (authority to independently adjust all employee grievances arising during the shift and resolvable on the spot). *Teamsters Local 287*, 183 N.L.R.B. 398 (1970).

20. *NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers*, 437 F.2d 55 (6th Cir. 1971).

bargaining or grievance adjustment powers in the past then it is not necessary that those powers be provided for in the collective bargaining agreement.²¹

In order to find a union in violation of 8(b)(1)(B) for imposing a fine upon an employer's representatives, most cases, including *Oakland Mailers*,²² had required that the employer's representatives be designated as collective bargaining or grievance adjustment representatives or that they had exercised the powers of such a representative at the time of the union fine.²² In *Dallas Mailers Union, Local 143 v. NLRB*²³ and in *NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers*,²⁴ however, section 8(b)(1)(B) protection was extended to an employer's supervisors who were fined by the union for having exercised their supervisory rather than their collective bargaining or grievance adjustment representative duties. In both *Dallas Mailers Union* and *Toledo Locals*, the courts indicated that union restraint upon a supervisor-member need only be potential, not actual. In those instances where a union fines a collective bargaining or grievance adjustment representative for his method of exercising his collective bargaining or grievance adjustment representative functions there would be an actual restraint.²⁵ However, where the union fines a supervisor-member for his method of exercising his supervisory and not his collective bargaining or grievance adjustment functions and the supervisor has the authority to act as a collective bargainer or grievance adjuster there has been a potential restraint if it can reasonably be concluded that the supervisor's future performance of his grievance adjustment or collective bargaining functions on behalf of the employer will be impaired by the union's discipline.²⁶ Furthermore, finding a union in violation of section 8(b)(1)(B) in these circumstances, would be justified even if the supervisor did not have authority to adjust grievances or collectively bargain because the employer may select the disciplined supervisor to be a collective bargaining or grievance

21. *Erie Newspaper Guild, Local 187 v. NLRB*, 489 F.2d 416 (3d Cir. 1973); *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972).

22. *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961) (no 8(b)(1)(B) violation was found since the supervisors were not collective bargaining representatives).

23. 445 F.2d 730 (D.C. Cir. 1971).

24. 437 F.2d 55 (6th Cir. 1971).

25. See notes 9-11 *supra* and accompanying text.

26. This principle was first enunciated in *NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers*, 437 F.2d 55 (6th Cir. 1971). In *Toledo Locals*, the union was held to be in violation of 8(b)(1)(B) for having fined supervisor-members who were engaged in strikebreaking and performing rank-and-file struck work. The decision was followed in *Dallas Mailers Union, Local 143 v. NLRB*, 445 F.2d 730 (D.C. Cir. 1971) and *Asbestos Workers, Local 127*, 189 N.L.R.B. 854 (1971).

adjustment representative at some future date.²⁷ This latter practice is known as the "reservoir doctrine." Under this doctrine, it is assumed that the employer has a right to demand loyalty of his representatives, whether they are supervisors or collective bargaining or grievance adjustment representatives. Without such loyalty the union would enjoy an unfair advantage in bargaining power over the employer. Employers would have difficulty finding someone to be a supervisor or collective bargaining or grievance adjustment representative since potential candidates for the job would be reluctant to assume responsibility if they were aware of the fact that they might be subjected to fines and penalties for performing their duties. The employer, therefore, needs a reserve of loyal supervisors upon whom he can rely to serve as collective bargaining or grievance adjustment representatives.²⁸ In this manner, the requirements as to what type of employer representatives would be protected as *collective bargaining or grievance adjustment representatives* under section 8(b)(1)(B) was relaxed.²⁹ To be held in violation of section 8(b)(1)(B) a union need only fine a supervisor for his performance of supervisory duties.³⁰ Although the cases do not go so far as to hold that the imposition of a union fine upon a supervisor-member is unlawful *per se*,³¹ they do make it clear that a union will face a heavy burden of justification for imposing a fine upon a supervisor.

It is submitted that this reasoning will thoroughly protect the employer's need to have unrestrained representatives. Such a far reaching effect, however, can seriously undermine a union's

27. The underlying justification for this principle, as enunciated in *Toledo Locals*, was that a supervisor, while engaged in the performance of rank-and-file struck work, is performing a supervisory function in order to carry out the policies of management. *NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers*, 437 F.2d 55 (6th Cir. 1971).

28. *Id.* This line of reasoning was extended to the area of contract interpretation in *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972). *Meat Cutters* stressed the plight of the supervisor, who is placed in a tense situation, since if he follows his employer's orders he can be fined or expelled from the union, and if he does not follow his employer's orders he can be fired.

29. *Erie Newspaper Guild, Local 187 v. NLRB*, 489 F.2d 416 (3d Cir. 1973); *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972); *Dallas Mailers Union, Local 143 v. NLRB*, 445 F.2d 730 (D.C. Cir. 1971); *NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers*, 437 F.2d 55 (6th Cir. 1971); *Asbestos Workers, Local 127*, 189 N.L.R.B. 854 (1971). These cases held that union punishment imposed for any acts performed in the course of a supervisor's supervisory and managerial duties is an 8(b)(1)(B) violation, whether or not the supervisor was acting as a collective bargaining representative, or even if he had not done so in the past. See 51 TEXAS L. REV. 595 (1973).

30. *Bakery Workers, Locals 24 & 119*, 216 N.L.R.B. No. 150, 88 L.R.R.M. 1390 (1975); *New York Typographical Union 6*, 216 N.L.R.B. No. 147, 88 L.R.R.M. 1384 (1975).

31. It is undisputed that union fines for failure to attend union meetings or pay union dues will not result in 8(b)(1)(B) violations. *Dallas Mailers Union, Local 143 v. NLRB*, 445 F.2d 730 (D.C. Cir. 1971).

ability to maintain discipline within its ranks and protect its own interests.³² In support of this proposition it is significant that the statutory language only protects against restraint of collective bargaining and grievance adjustment representatives. If Congress had intended to protect against restraint of supervisors, as well as collective bargaining or grievance adjustment representatives, perhaps 8(b)(1)(B) would have been worded differently to include supervisors.

These criticisms have not gone unheeded, and recent decisions indicate that the employer-supervisor loyalty argument may no longer be a sufficient basis upon which an employer may successfully press his claim of an 8(b)(1)(B) violation. Formerly, the loyalty arguments, where found to have some basis in fact, would override union defenses to a charge of an 8(b)(1)(B) violation.³³ Furthermore, in cases involving union fines upon supervisor-members for strikebreaking, the trend had been to find the union in violation of section 8(b)(1)(B). This was true whether the fined members were collective bargaining representatives or only supervisors.³⁴ In *Florida Power & Light Co. v. IBEW, Local 641*,³⁵ however, this trend was reversed, and the loyalty argument is now subject to close scrutiny and increased attack.

The Florida Power Decision

In the *Florida Power* case, the Supreme Court consolidated two Board decisions for trial: *IBEW System Council U-4*³⁶ and *IBEW, Local 134*.³⁷ In both cases the respective employers were engaged in an economic strike with the same union. Some of the supervisors were members of the union, others were not, and still others only held withdrawal cards, giving them the right to retain certain accrued union benefits. In both cases the employers requested the supervisors to cross the picket lines and perform the rank-and-file work normally done by the striking employees. Those supervisors who were union members or who retained union benefits and who crossed the picket lines were fined by the union. The employers and some of the supervisors in both cases brought 8(b)(1)(B) charges against the union. In response to these charges the United States Supreme Court held that union fines imposed upon supervisor-members who crossed

32. See note 29 *supra*.

33. *Id.*

34. See note 29 *supra* and accompanying text.

35. 417 U.S. 790 (1974).

36. The Board decision is reported at 193 N.L.R.B. 30 (1971).

37. The Board decision is reported at 192 N.L.R.B. 85 (1971).

picket lines and performed struck work did not constitute an 8(b)(1)(B) violation.³⁸

In arriving at this conclusion, the Court reasoned that supervisors who performed rank-and-file struck work were not performing supervisory or management duties, and thus the employer had not in any way been restrained in the selection or retention of supervisors or collective bargaining representatives.³⁹ Although the Court recognized the existence of the employer-supervisor loyalty argument, it pointed out that the employer, by agreeing to a union security clause agreement including supervisors, had effectively given up his right to hire and retain only non-union supervisors. The employer, therefore, could not complain that he had been denied the loyalty of his supervisors.⁴⁰

The Employer's Right to Demand Loyalty of His Supervisors

The determination of whether an employer has the right to demand the loyalty of his supervisors requires interpretation of two important sections of the Act. Under section 2(3)⁴¹ supervisors are excluded from the definition of employees. Basically, this means that supervisors are not guaranteed the same rights as employees to form, join or assist in the organization of labor organizations.⁴² Furthermore, under section 14(a)⁴³ supervisors are not prohibited from joining or remaining members of labor organizations, but an employer is not required to consider a supervisor as an employee for the purposes of collective bargaining. When considered together, these sections clearly indicate that an employer need not hire or retain union members as

38. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 813 (1974).

39. The Court held, *inter alia*:

The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

Id. at 804-05.

40. *Id.* at 808-12. *Operating Eng'rs, Local 501*, 217 N.L.R.B. No. 21, 89 L.R.R.M. 1012 (1975).

41. 29 U.S.C. § 152(3) (1970) indicates that "The term 'employee' . . . shall not include . . . any individual employed as a supervisor. . . ." *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974).

42. *Carpenters Dist. Council, AFL-CIO v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959); *Rodriguez v. Conagra, Inc.*, 387 F. Supp. 951 (D. P.R. 1974).

43. 29 U.S.C. § 164(a) (1970):

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

supervisors.⁴⁴ Ultimately, such a reading of sections 2(3) and 14(a) weakens the theory that a union fine levied upon supervisors constitutes an 8(b)(1)(B) violation in order to protect the loyalty of an employer's supervisors.⁴⁵ Since the employer is not required to hire or retain union members as supervisors, if he does decide to hire or retain supervisors who are union members, his act is voluntary. If the union fines one of these supervisors, the employer cannot argue that he has been coerced or restrained in the selection of a representative.⁴⁶

Although such a restriction upon those whom an employer may select as supervisors, e.g., nonunion supervisors in order to insure loyalty, might excessively burden the employer, the problem can ultimately be solved by making the supervisor's position so economically attractive that prospective supervisors will readily forfeit their union benefits, thereby ensuring full loyalty to the employer.⁴⁷ Relying heavily upon this rationale, the Court in *Florida Power* pointed out that the union's right to strike outweighed the employer's right to the loyalty of his supervisors.⁴⁸ Additionally, the Court made it clear that it was halting the previous expansion of 8(b)(1)(B) and that it was shifting the balance to the side of the union. In short, the Court established *Oakland Mailers'* as the outer limit of section 8(b)(1)(B) interpretation and abolished the "reservoir doctrine."⁴⁹

44. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974); *Texas Co. v. NLRB*, 198 F.2d 540 (9th Cir. 1952); *Rodriguez v. Conagra, Inc.*, 387 F. Supp. 951 (D. P.R. 1974); Comment, *The Role of Supervisors in Employee Unions*, 40 U. CHI. L. REV. 185 (1972).

45. *International Typographical, Local 38 v. NLRB*, 278 F.2d 6 (1st Cir. 1960); *Portland Stereotypers' & Electrotypers', Local 48*, 137 N.L.R.B. 782, 787 (1962).

46. The end product of this line of reasoning is that an employer who gives in to union demands and agrees to include supervisors in the collective bargaining agreement gives up the right to use those supervisors as strikebreakers in the performance of rank-and-file work. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974). See also the dissenting opinion of Member Fanning in *Carpenters, AFL-CIO*, 218 N.L.R.B. No. 157, 89 L.R.R.M. 1477 (1975) and *New York Typographical, Union 6*, 216 N.L.R.B. No. 147, 88 L.R.R.M. 1384 (1975).

47. Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067. In support of the proposition that a supervisor may forego union membership under a closed shop arrangement since he need only pay dues but need not belong to the union, see *NLRB v. General Motors Corp.*, 373 U.S. 734, 743-44 (1963) (dictum); Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187 (1969).

48. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974).

49. *Id.* at 805. Ultimately, the Court's judgment rested on a finding that supervisors performing rank-and-file struck work were not performing supervisory or collective bargaining functions. This finding was not unanimous. *Id.* at 813-16 (dissenting opinion). See also *IBEW v. NLRB*, 487 F.2d 1143, 1173-82 (D.C. Cir. 1973) (dissenting opinion), *aff'd sub nom. Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974).

The Court in *Florida Power* concluded that a union fine upon a supervisor-member would constitute an 8(b)(1)(B) violation only where the supervisor was engaged in collective bargaining or grievance adjustment duties.⁵⁰ The Court also impliedly indicated that a union fine upon a supervisor-member who was performing *supervisory* duties would not constitute an 8(b)(1)(B) violation if the supervisory duties did not include collective bargaining or grievance adjustment duties.⁵¹ This discussion, however, was dicta. Since the Court had concluded that strikebreaking supervisors were not involved in collective bargaining or grievance adjustment, or even supervisory duties while they were engaged in such strikebreaking,⁵² the actual holding of the case was limited to a finding of no union violation of 8(b)(1)(B) for a union fine imposed upon a supervisor-member *who is performing non-supervisory struck work*.⁵³ Therefore, previous Board and court decisions finding a union in violation of section 8(b)(1)(B) for a fine imposed upon a supervisor-member who has the authority of a collective bargainer or grievance adjuster and is engaged in *supervisory work* are still viable.⁵⁴ The Court's decision in *Florida Power* effectively did no more than convert supervisor strikebreaking into a non-supervisory activity, punishable by a union fine.

Although the Court in *Florida Power* attempted to clarify the issues in what has become an increasingly complex area, and although it also attempted to provide a resolution to those issues in order to help guide the lower courts and the Board in their decisions, the case has not met with complete Board satisfaction. In an attempt to limit *Florida Power* as much as possible, the Board has begun to closely scrutinize the nature of the duties the supervisor performs while strikebreaking. In those cases where supervisors have engaged in only minimal rank-and-file work during a strike, and have performed substantially the same duties as they had been responsible for prior to the strike, a union fine upon supervisors for strikebreaking will be held to be an 8(b)(1)(B) violation if the supervisor has the authority of a collective bargainer or grievance adjuster.⁵⁵ In this manner, the

50. The Court took pains to point out that:

Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment.

Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. at 804.

51. *Id.* at 805.

52. *Id.* at 803.

53. *Id.* at 805 (emphasis added).

54. See cases cited at note 29 *supra*.

55. *Warehouse Local 6*, 220 N.L.R.B. No. 123, 90 L.R.R.M. 1363 (1975); *Carpenters, AFL-CIO*, 218 N.L.R.B. No. 157, 89 L.R.R.M. 1477 (1975); Car-

Board has interpreted *Florida Power* to mean that where a union imposes a fine upon a supervisor-member who has performed largely supervisory work during a strike, there will be an 8(b)(1)(B) violation because it is likely that an adverse effect will carry over to the supervisor's performance of his collective bargaining or grievance adjustment duties.⁵⁶

The Board, through its reluctance to enforce the standards set out in *Florida Power*, has frustrated the efforts of the Supreme Court to provide a workable rule and to clarify the issues involved in 8(b)(1)(B) interpretation. Recent Board decisions have now made it necessary to determine what constitutes minimal rank-and-file work and what percentage of that work must be performed in order to permit the union to fine strikebreaking supervisor-members.⁵⁷ Although the holding and subsequent Board interpretation of *Florida Power* have been limited to supervisor strikebreaking, the decision has also had an impact on other 8(b)(1)(B) situations.⁵⁸

Broad Interpretation of Florida Power & Light by Federal Courts

If recent decisions can be interpreted as a trend, then the trend has been towards a further restriction of section 8(b)(1)(B) in order to swing the balance in favor of the union. An example of this restriction arises in the area of a supervisor who is fined for exercising merely supervisory powers. Although the Court in *Florida Power* discussed the problem, it was not directly at issue in that case, and thus the discussion was merely dicta. The problem was at issue, however, in *NLRB v. Rochester Musicians Association, Local 66*.⁵⁹

In *Rochester Musicians*, the conductor of the Rochester Philharmonic was classified as a supervisor. Through his rec-

penters, Local 14, 217 N.L.R.B. No. 13, 89 L.R.R.M. 1002 (1975); Bakery Workers, Locals 24 & 119, 216 N.L.R.B. No. 150, 88 L.R.R.M. 1390 (1975); Chicago Typographical, Union 16, 216 N.L.R.B. No. 149, 88 L.R.R.M. 1378 (1975); New York Typographical, Union 6, 216 N.L.R.B. No. 147, 88 L.R.R.M. 1384 (1975).

56. Note 55 *supra*.

57. Longshoremen, Local 6, 220 N.L.R.B. No. 123, 90 L.R.R.M. 1363 (1975) held that a fine upon a strikebreaking supervisor who performed 40-50 percent rank-and-file struck work constituted an 8(b)(1)(B) violation. The case also showed an intent to limit *Florida Power* as much as possible.

58. In Local 702, IBEW, 219 N.L.R.B. No. 48, 89 L.R.R.M. 1718 (1975) a supervisor was fined by the union after setting up headquarters in a town allegedly unapproved by the collective bargaining agreement. The majority found no 8(b)(1)(B) violation on the ground that when the supervisor did not move the headquarters as instructed by his immediate supervisor, he was not acting as a collective bargaining representative. Therefore, 8(b)(1)(B) afforded him no protection. Assuming that the supervisor was fined for contract interpretation in his original selection of the site (that was essentially a factual dispute) the decision is clearly contra to *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972).

59. 514 F.2d 988 (2d Cir. 1975).

ommendation five musicians were fired for incompetence. The Musicians Association, of which the conductor was a member, subsequently fined the conductor for his unfavorable recommendation. The second circuit found no 8(b)(1)(B) violation where it was shown, at the time of the fine, that the conductor did not possess any formal grievance adjustment powers and that he was only engaged in a supervisory and not a collective bargaining or grievance adjustment function. The court indicated that to find a section 8(b)(1)(B) violation there must be evidence that the supervisor presently plays a part in grievance adjustment or collective bargaining.⁶⁰ In short, the second circuit, in accordance with *Florida Power*, refused to apply the "reservoir doctrine" to a non-struck work context.

Rochester Musicians, therefore, returns 8(b)(1)(B) construction to the *Oakland Mailers'* interpretation, i.e., to constitute an 8(b)(1)(B) violation a union must fine an employer representative for the exercise of his supervisory duties if he has the authority of a collective bargainer or grievance adjuster, or for the exercise of his collective bargaining or grievance adjustment functions, but not merely for the performance of his supervisory duties if he has no collective bargaining or grievance adjustment authority.⁶¹ However, if the Board elects to distinguish and circumvent *Rochester Musicians*, as it did *Florida Power*, the result could be formulation of further tests and guidelines resulting in an even more tangled web of issues and problems in 8(b)(1)(B) interpretation. This would leave such interpretation in as complicated a state as it was before the Court attempted to clarify and untangle it in *Florida Power*. Unfortunately, these divergent interpretations of 8(b)(1)(B) by the federal courts and the Board leave the statute in such a confusing state that it certainly will not provide the stability in employer-union relations which is so necessary to promote the peaceful settlement of labor relations disputes.⁶²

A recent case has interpreted 8(b)(1)(B) in such a manner as to promote even more instability. In *Wisconsin River Valley District Council v. NLRB*,⁶³ the Seventh Circuit Court of Appeals was faced with a situation involving a strikebreaking

60. *Id.* at 992.

61. The court's holding in *Rochester Musicians* would therefore reverse the trend established by *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972), where a supervisor was fined for exercising supervisory powers. This trend was not halted by *Florida Power* since that case was limited to supervisors performing rank-and-file struck work. *Florida Power* did, however, halt the precedent established in *NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers*, 437 F.2d 55 (6th Cir. 1971).

62. See notes 1-3 *supra* and accompanying text.

63. 532 F.2d 47 (7th Cir. 1976).

supervisor-member who performed primarily supervisory work while he was engaged in strikebreaking.

The court interpreted *Florida Power* to mean that a union fine imposed upon a strikebreaking supervisor-member when he performs supervisory work during a strike will constitute an 8(b)(1)(B) violation where the supervisor has the authority to adjust grievances.⁶⁴ In this manner, the Board's narrow interpretation of *Florida Power* was sanctioned.⁶⁵

In *Wisconsin River* the seventh circuit impliedly indicated that a supervisor who has the authority of a collective bargaining or grievance adjustment representative would be affected in his capacity as a collective bargainer or grievance adjuster even though he was not performing collective bargaining or grievance adjustment at the time of the fine.⁶⁶ In so holding, the court relied upon the following language from *Florida Power*:

[A] union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

*We may assume that the Board's Oakland Mailers decision fell within the outer limits of that test, . . .*⁶⁷

That language would seem to support the theory of the court in *Wisconsin River* which maintained that an employer's representative need only be affected in his performance of collective bargaining or grievance adjustment duties, and that he need not have been performing such duties at the time of the fine. However, in *Wisconsin River*, the seventh circuit failed to realize that *Florida Power* did not find an 8(b)(1)(B) violation because the supervisors in that case

were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.⁶⁸

That language would seem to indicate that a supervisor must be exercising collective bargaining or grievance adjustment duties at the time of the fine and that only affecting a supervisor's performance of those duties (as shown by his possession of the authority of a collective bargainer or grievance adjuster) where

64. *Id.* at 52.

65. See notes 55 & 57 *supra* and accompanying text.

66. *Wisconsin River Valley Dist. Council v. NLRB*, 532 F.2d 47, 52 (7th Cir. 1976).

67. *Id.* at 52 citing *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 804-05 (emphasis added).

68. 417 U.S. at 805 (1974).

he is not in fact exercising them would be insufficient to constitute an 8(b)(1)(B) violation.⁶⁹

On the whole, these artificial distinctions between a supervisor doing supervisory work, a supervisor doing collective bargaining or grievance adjustment work, and a supervisor doing rank-and-file struck work seem largely fictitious. In reality, it is only a tool for extending 8(b)(1)(B) beyond its original statutory limits, in order to protect the employer, without completely subverting the purpose of the section. Perhaps a satisfactory solution to this instability in 8(b)(1)(B) interpretation would be for Congress, the courts and the Board to utilize alternative means of resolving 8(b)(1)(B) disputes.

CONCLUSION

Alternative methods for settlement of 8(b)(1)(B) disputes could take many forms. One possibility would be for Congress to amend section 8(b)(1)(B) to reflect those parts of recent decisions which would be most helpful in defining the nature and function of the section. Specifically, such words as "restrain or coerce" and "collective bargaining or grievance adjustment representatives" could be further defined so as to establish definite guidelines for union and employer conduct.⁷⁰

Under another alternative, some or all types of 8(b)(1)(B) disputes could be left to arbitration proceedings. Where an issue presented in an unfair labor practice case has previously been decided in arbitration proceedings the Board will defer the dispute to arbitration if the proceedings are fair and regular, and all parties agree to be bound.⁷¹ If, for example, the collective bargaining agreement prohibits the fining or disciplining of a supervisor by the union, disputes could be left to arbitration since what is really involved is the extent of a supervisor's authority. These types of contract (collective bargaining agreement) interpretations could best be performed by the parties in the course of their grievance procedure, or if necessary, by arbitration. In fact, recent decisions indicate a tendency by the Board to leave 8(b)(1)(B) disputes to arbitration in those cases in which the collective bargaining agreement so provides.⁷² Board or court settlement of the dispute could be

69. *Id.* at 803-05.

70. It would certainly be helpful if 8(b)(1)(B) were amended to provide a clear course of acceptable conduct and workable guidelines for unions and employers in light of such decisions as *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974); *NLRB v. Rochester Musicians Ass'n, Local 66*, 514 F.2d 988 (2d Cir. 1975); *Longshoremen, Local 6*, 220 N.L.R.B. No. 123, 90 L.R.R.M. 1363 (1975).

71. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

72. *Columbia Typographical, Union 101*, 207 N.L.R.B. 841 (1973); *Bal-*

reserved for those situations where arbitration has been totally ineffective.⁷³

As a further alternative to present 8(b)(1)(B) enforcement, the parties could be encouraged to maintain greater explicitness of provisions for the settlement of 8(b)(1)(B) disputes in the terms of their collective bargaining agreements. This would prevent either party from attempting to gain through a union fine or contract interpretation what they could not gain at the bargaining table.⁷⁴ The Board and the courts could then alleviate 8(b)(1)(B) interpretation problems by formulating more workable, uniform guidelines for examining the disputed conduct of the fined supervisor-member. Thorough evidentiary findings could be made to determine if the supervisor-member possesses or has in the past possessed collective bargaining or grievance adjustment powers. If he does possess or has possessed such powers, a union fine upon a supervisor would be an 8(b)(1)(B) violation, regardless of whether or not the supervisor has exercised, or is in fact exercising, such collective bargaining or grievance adjustment powers. However, where the supervisor does not or has never possessed grievance adjustment or collective bargaining functions there would be no union violation of 8(b)(1)(B) on the grounds that the supervisor may be selected as a collective bargaining or grievance adjustment representative in the future. Application of such a standard would thereby avoid the problems of the "reservoir doctrine" and its inherent vagueness. At the same time, the employer would be protected from restraint or coercion of his collective bargainers or grievance adjusters without restricting application of 8(b)(1)(B) to its original narrow confines. After all, the true purpose of 8(b)(1)(B) is to protect the employer, not the individual supervisor.

Whatever the form of action taken to correct the present state of 8(b)(1)(B) interpretation, such action is needed soon. All parties involved need rules and standards with which to guide their conduct in order to efficiently protect those interests which each party considers so important.

Robert L. Abraham

timore Typographical, Union 12, 201 N.L.R.B. 120 (1973); Houston Mailers, Union 36, 199 N.L.R.B. 804 (1972). In these cases, the collective bargaining agreements provided for arbitration in case of a fine upon a supervisor. The Board dismissed the charges in order to permit the parties to engage in arbitration. This procedure was recommended in *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972).

73. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

74. Comment, *The Role of Supervisors in Employee Unions*, 40 U. CHI. L. REV. 185, 189 (1972). Such conduct on the part of a union could also constitute an 8(b)(3) violation (refusal to bargain collectively with an employer).