Duquesne Law Review

Volume 8 | Number 2 Article 10

1970

Labor Law - Decertification - Union Discipline

Leonard Zapler

> located within the municipality; or (iii) the adoption, amendment or repeal of any official map, subdivision or land ordinance, zoning ordinance or planned residential development ordinance shall be submitted to the county planning agency for its recommendations. The recommendation of the planning agency shall be made to the governing body of the municipality within thirty days.[39]

In relation to school districts the Code also provides that:

> Any proposed action of the governing body of any school district located within the municipality or county relating to the location, demolition, removal or sale of any school district structure shall be submitted to the municipal or county planning agency for its recommendations.[40]

It is proposed that the practical solution is to allow the zoning power to rest predominantly with the zoning board who are best equipped and qualified to plan for the orderly development of the cities. The courts should only circumvent the zoning authority when the opposing municipal corporation can: (1) establish that the zoning legislation is not reasonably related to the health, safety and morals of the community; or (2) demonstrate that the legislation upon which it bases its authority is so comprehensive that it rebuts the presumption in favor of the zoning board's authority.

Frederick B. Gieg, Jr.

LABOR LAW—DECERTIFICATION—UNION DISCIPLINE—The National Labor Relations Board has held that the union commits an unfair labor practice under Section 8(b)(1)(A) of National Labor Relations Act when it fines a member who is attempting to institute decertification proceedings against it, because the fine is not only a punitive measure which inhibits access by the member to the processes of the Board but is also an ineffective deterrent to decertification.

International Molders and Allied Workers Union, Local 125, AFL-CIO (Blackhawk Tanning Co., Inc.). 178 N.L.R.B. No. 25, 72 L.R.R.M. 1049 (1969).

Approximately one year after the incumbent union was certified, several of its members began canvassing their fellow employees to seek enough support to petition for a decertification election. The union

39. *Id.*
40. *Id.*

responded by imposing a $100 fine on those members participating in the decertification attempt. The procedure for fining followed by the union complied with the requirements of substantive due process.[1] One of the members who had been fined filed an unfair labor practice charge asserting that the union had committed a violation under Section 8(b)(1)(A) of the National Labor Relations Act[2] of the member's Section 7 right to refrain from engaging in collective bargaining through representatives of his own choosing.[3]

The National Labor Relations Board upheld the finding of the Trial Examiner that the fining of those seeking to have the union decertified was an unfair labor practice under Section 8(b)(1)(A).[4]

The Board majority balanced the public policy of encouraging free access to the machinery of the Board against the proviso to Section 8(b)(1)(A) of the Act which permits the union to regulate its internal affairs.[5]

The Board's holding was an extension of a line of cases decided by the Board and the courts dealing with the relationship between Section 7 and the proviso to Section 8(b)(1)(A) of the Act. These cases comprehend the extent to which a union may discipline its members in accordance with the union's grant of authority under the proviso to Section 8(b)(1)(A). The cases fall within two broad categories, each of which gives rise to qualitatively different rules of law relevant to the outcome of the *Blackhawk* case: 1) where the member is engaging in activity which does not initially involve access to the Board; and 2) where

1. It is pertinent to note that in *Blackhawk* there is no issue as to whether or not the union violated the "Bill of Rights of Members of Labor Organizations." Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 411(a)(5) (1964). See note 11, *supra*, for the text of subsection (a)(5), which is interpreted by the Supreme Court in *NLRB v. Maine & Shipbuilding Workers*, 391 U.S. 418 (1968).

2. Labor Management Relations Act, 1947 (popularly known as the Taft-Hartley Act), 61 Stat. 136, 29 U.S.C. § 141. Section 8(b)(1)(A), provides:

(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 . . . .

29 U.S.C. § 158 (1964).

3. Section 7 of the Act, entitled "Rights of Employees," provides:

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

29 U.S.C. § 157 (1964).

4. Blackhawk Tanning Co., Inc., 178 N.L.R.B. No. 25, 72 L.R.R.M. 1049 (1969).

5. *Id.*

the member initially attempts to invoke the processes of the Board in an action directed against the union.

The first category is delineated by two cases: *NLRB v. Allis-Chalmers Mfg. Co.*[6] and *Scofield v. NLRB*,[7] each of which were decided by the Supreme Court. In *Allis-Chalmers* the Court held that the union could impose a *judicially* enforceable fine (as distinguished from a fine enforceable only by threat of expulsion) on a full union member.[8] The member had violated a union bylaw by crossing his union's picket line during a strike ratified by the union membership. In *Scofield* the Court held that the union could impose both a judicially enforceable fine *and* suspend a union member who violated the terms of a valid collective bargaining agreement between the employer and the union.

The rule thus enunciated in *Allis-Chalmers* and *Scofield* is that the union may bring the device of a judicially enforceable fine to bear upon the recalcitrant member who attempts to engage in activities detrimental to the union which do not involve an attempt at the outset by the member to apply to the Board for relief.

The second category involves union discipline of the member who files an unfair labor practice charge against it or the member who petitions the Board in an effort to have the union decertified. The majority of the Board based its opinion on four cases within the ambit of the second category. The skeletal facts and enunciated rule of law in each of these cases will therefore be examined.

In *Local 138, Operating Engineers* (Charles Skura),[9] a union member who filed an unfair labor practice charge with the Board was fined by the union on the ground that he had failed to exhaust the union's internal procedures for seeking a remedy for his grievance. The Board held that the union violated Section 8(b)(1)(A), in that the fine is by nature coercive, and as such conflicts with the Section 7 rights of the member.

---

6. 388 U.S. 175 (1967).
7. 394 U.S. 423 (1968).
8. The Court intimated that there was a question as to the validity of a fine imposed on a member whose membership was limited solely to the obligation of paying monthly dues, but withheld judgment until such issue would come before it. The Board in *Blackhawk* was faced with a fact issue of full versus nominal-membership, but held that it was not determinative of the central issue: "The only issue of fact in the case is whether the employee who was fined was a full union member or a "financial core" member—one who pays union dues and initiation fees as required by the union-security contract, but refuses to join the union formally or to assume the obligations of full membership. It is found, however, that for purposes of this case there is no valid distinction between a full union member and a financial core member." 72 L.R.R.M. at 1049.
9. 148 N.L.R.B. No. 674 (1964).

In *NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*,[10] the Supreme Court dealt with a fact situation identical to that in *Local 138*. Here the Court, in reversing the judgment of the lower court and approving the approach taken by the Board in *Local 138*, stated:

> . . . the proviso in Section 8(b)(1)(A) that unions may design their own rules respecting "the acquisition or retention of membership" is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union.[11]

Essentially then, the rule set forth in *Marine and Shipbuilding Workers* is that the union may *not* fine a member who files an unfair labor practice charge against it.

In *Tawas Tube Products, Inc.*,[12] the union expelled a member who was attempting to have it decertified. In holding that the union did not commit a Section 8(b)(1)(A) violation of the member's Section 7 rights, the Board distinguished between filing for decertification of a union and filing an unfair labor practice against the union. It held expulsion to be a valid weapon of union self-defense on the ground that a member who has resorted to the Board in an effort to have his union decertified would hardly be deterred by expulsion, within the meaning of Section 8(b)(1)(A).[13]

In *Price v. NLRB*,[14] the United States Court of Appeals for the Ninth Circuit denied a petition to review an order of the Board that the union did not commit a Section 8(b)(1)(A) violation when it sus-

---

10. 391 U.S. 418 (1968).

11. Id. at 425. The Court's holding was based on their interpretation of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 411(a)(5) which provides:

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

12. 151 N.L.R.B. No. 9 (1965).

13. The Board in *Tawas* stated that:

> This case, however, presents a situation where union members have resorted to the Board for the purpose of attacking the very existence of their union rather than as an effort to compel it to abide by the Act. We do not consider it beyond the competence of the Union to protect itself in this situation by the application of reasonable rules and discipline. Furthermore, the employees' attempt to repudiate the Union by a decertification proceeding demonstrates that loss of membership was of no significance to them; consequently their expulsion from the Union could hardly be an effective deterrent against resorting to the Board.

Id.

14. 373 F.2d 443 (9th Cir. 1967), cert. denied 392 U.S. 904 (1968).

pended from membership for five years a member of long standing[15] who was trying to have the union decertified. The court endorsed the Boards' rationale in *Tawas Tube* and enlarged upon it.[16] More important in terms of the *Blackhawk* case was the *Price* court's response to the fact that the union had *also* levied a fine on the member but had later withdrawn the fine before the member became theoretically liable to pay it. The court pointed out that the fine would not have become operative until the expiration of the period of suspension; furthermore, the court maintained that the fine could be likened to a fee for readmission, and consequently not judicially enforceable.[17]

As stated previously, the four cases in the second category provided the precedent for the majority's holding in *Blackhawk*—that there is a qualitative difference between expelling and fining a member who has filed a decertification petition. Where the union expels such a member, the majority reasoned, it is protecting itself against a potential fifth columnist, privy to its strategy and tactics in its fight to maintain its representative status; expulsion, it is argued, does not significantly impede the free access of that member to the Board's processes.[18] The majority further reasoned that where the union merely imposes a fine which is potentially enforceable in a court action, the fine has a chilling effect on the readiness of the member to invoke the processes of the Board.[19]

The dissenting members of the Board endeavored to point out that where a strong union fines rather than expels a member, the fine is often less harsh than expulsion because the expelled member may lose union benefits which have accrued to him.[20] The dissent's main

15. *Id.* at 445.
16. The court said:
We think that, at the least, the proviso was intended to permit the union to suspend or expel a member who takes such a position (attacking the union's position as bargaining agent). Otherwise, during the pre-election campaign, the member could campaign against the union while remaining a member and therefore privy to the union's strategy and tactics.
Id. at 447.
17. The Court noted with approval that:
The Board held that because the fine had been withdrawn at a time when Price was not obligated to pay it, the mere levy of the fine was not an operative factor in this case. We agree. The fine would not have become relevant until the end of the period of suspension. It was in effect a fee for readmission, not a straight fine enforceable in court.
Id. at 446.
18. Blackhawk Training Co., Inc., 178 N.L.R.B. No. 25, 72 L.R.R.M. 1049 (1969).
19. *Id.*
20. The dissent at 72 L.R.R.M. 1053 argued:
It does not answer the oft-repeated theme voiced by both this Board and the Supreme Court that there is no meaningful distinction between fining and expulsion.

objection to the majority rationale is, consequently, that there is no meaningful difference between fining and expulsion and that fines are permissible under a reasonable reading of the proviso to Section 8 (b)(1)(A).[21] The rationale of the dissent in Blackhawk is premised principally on the Supreme Court holding in *Scofield*[22] and Mr. Justice White's concurring opinion in *Allis-Chalmers*.[23]

It thus becomes evident that the majority relied on the line of cases in category two, and that the minority's position is based on the line of cases in category one. While the Board was correct in distinguishing between the filing of a decertification petition and the filing of an unfair labor practice charge against the union, it is believed that the Board was remiss to the extent that it relied on its *Tawas Tube* position approving expulsion as a valid tactic to counteract the filing of a decertification petition. Furthermore, it is believed that the Board erroneously overlooked the possibility of applying the equally effective yet less harsh remedy of suspension, a remedy which met with approval in *Price*. It will be recalled that in *Price* the union, in addition to suspending the member for a five year period, imposed, then withdrew, a fine on the member seeking its decertification.[24] The court, citing *Tawas Tube*[25] held that *suspension* as well as expulsion of the member

---

Nor is it likely that the majority's qualitative standards can be effectively applied if, for example, future cases present such problems as: the coerciveness of a $5 union fine as contrasted to a five-year suspension from the union; or a reasonable union fine against suspension or expulsion from a union *which may result in loss of such union benefits as insurance and/or death benefits, and medical and pension benefits.* (Emphasis added.)

21. *Id.* at 1051.

22. The dissent observed at 72 L.R.R.M. 1053 that:
In the recently decided *Scofield* case, the Supreme Court concluded that union imposed fines of $50 to $100 (including court action to collect such fines) on certain members who exceeded union imposed production quotas was not violative of Section 8(b)(1)(A).

23. Mr. Justice White, in concurring, discussed the difference between fines and expulsion in this way:
The dissenting opinion in this case, although not questioning the enforceability of coercive rules by expulsion from membership, questions whether fines for violating such rules are enforceable at all, by expulsion or otherwise. The dissent would at least hold court collection of fines to be an unfair labor practice, apparently for the reason that fines collectible in court may be more coercive than fines enforceable by expulsion. My Brother Brennan, for the Court, takes a different view reasoning that since expulsion would in many cases—certainly in this one involving a strong union—be a far more coercive technique for enforcing a union rule and for collecting a reasonable fine than the threat of court enforcement, *there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of Section 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive.* (Emphasis supplied.)
388 U.S. at 198.

24. Price v. NLRB, *supra* note 14.

25. *Id.* at 445.

by the union was a valid protective measure.[26] It should be noted at this point that if the union's response is suspension pending resolution of the decertification proceedings rather than expulsion, the member is permitted to retain union benefits accumulated during his membership if his bid fails and he elects to remain a member of the union. The second significant point discussed but not decided in *Price* was that the union might legitimately impose a fee for readmission after suspension.[27] Proceeding further with this view it would seem that if the fee is reasonable and if the penalty for non-payment is expulsion rather than court enforcement, the fee might not be deemed violative of the proviso to Section 8(b)(1)(A) as an attempt by the union to expand its power over its members beyond regulation of its internal affairs. The amount of the fee for readmission could rationally be the amount of dues unpaid by the member during his suspension. It will be recalled that in *Blackhawk* the union had reached a collective bargaining agreement with the employer only six months before decertification proceedings began[28] and just six months after the union was certified.[29] It may then be presumed that union was relatively weak and the dissident employees had "nothing to lose" by seeking the union's decertification. In *Price*, however, the member seeking decertification had been a member for over thirteen years.[30] If the present Board position, which allows expulsion in such cases, were applied to a factual situation similar to *Price*, the member could be expelled, with the resultant loss of union benefits accumulated over the span of union membership. The dissent alluded to this possibility, but only for the purpose of comparing the relative coerciveness of a small fine to the effect on the member of expulsion or suspension.[31]

It is submitted that suspension will accomplish what should be the only valid union objective—assuring that the dissident member could not be privy to its strategy and tactics. Thus the union is effectively protected *without* resort to the potentially punitive measure of expulsion. Indeed, the declaration of policy of the National Labor Relations Act states as one of its basic purposes the protection of the rights of the individual union member in relationship with his union.[32] The

26. *Id.* at 447.
27. *Id.* at 447.
28. *See* note 4, *supra.*
29. *See* note 4, *supra.*
30. Price v. NLRB, *supra* note 14 at 445.
31. *See* note 20, *supra.*
32. The declaration of policy at 61 Stat. 136, 29 U.S.C. § 141(b) of the Taft-Hartley

union is an instrumentality whose existence is justfied when it is utilized to strengthen the bargaining status of its members vis-a-vis the employer so that it may obtain those terms of employment conducive to its members' welfare in the give and take of collective bargaining.[33] Where, then, union action crosses the boundary beyond which a valid weapon of self defense becomes a weapon of offense when applied against a member, that member's Section 7 rights are violated and such action must be proscribed.

The Board's holding that fining a member for filing a decertification petition is a union unfair labor practice was a proper interpretation of the relationship between the member's Section 7 rights and the union's Section 8(b)(1)(A) proviso right. It is believed, nonetheless, that the Board should not have relied on it's holding in *Tawas Tube*, but should have grasped the opportunity to correct the possibly injurious effect on the union member's rights of that decision by stating that suspension, not expulsion, was the proper union remedy.

Leonard Zapler

CRIMINAL LAW—ABORTION STATUTE—DUE PROCESS—The Supreme Court of California has held that a statute prohibiting abortions not "necessary to preserve" the mother's life is so vague and uncertain as to be violative of the Fourteenth Amendment's Due Process Clause.

People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

Appellant-defendant, a physician and surgeon considered eminent in the field of obstetrics and gynecology, was convicted of abortion in violation of section 274[1] and conspiracy to commit an abortion, a viola-

Act states in part: "It is the purpose and policy of this chapter . . . *to protect the rights of individual employees in their relations with labor organizations. . . .*" (Emphasis added.).

33. Mr. Justice Black stated for the dissent in *Allis-Chalmers*:

> Section 7 and 8 together bespeak a strong purpose of Congress to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage. This freedom of workers to go their own way in this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the labor legislation now under consideration.

338 U.S. 175, 216.

1. CAL. PEN. CODE § 274 (West 1955). This statute was amended in 1967 by what has come to be called "The Therapeutic Abortion Act." This new enactment authorizes an abortion if it takes place in an accredited hospital, is approved by a hospital staff