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UNION DISCIPLINE OF SUPERVISORS: ILLINOIS BELL TELEPHONE CO.

For most purposes, the rights and duties of supervisory personnel are firmly established by the exclusion of supervisors from the National Labor Relations Act's definition of "employee."¹ As a result of this exclusion, supervisors are denied the rights to organize and bargain collectively; they are not, however, prohibited from being members of labor organizations.² The failure of the Act specifically to define the relationship between a union and its supervisor/members has given rise to dispute in recent years. Although recent Supreme Court decisions have clarified the general right of a union to discipline recalcitrant members,³ the extent of the union's right to discipline members who also are supervisors has been obfuscated by a failure of the National Labor Relations Board and the courts to employ clear standards and analysis.

Section 8(b)(1)(B) of the Act has been interpreted to restrict the right of a union to discipline supervisors. However, the NLRB and the courts have failed to resolve conflicting policy considerations raised by the provision, and confusion has resulted in its application. This confusion became apparent in the recent decision of a panel of the Court of Appeals for the District of Columbia Circuit in *Local 134, IBEW v. NLRB (Illinois Bell)*,⁴ where a supervisor/member was fined by his union for crossing an authorized picket line at the request of his employer to perform rank-and-file work during a strike.

Before considering the permissible scope of union discipline of supervisor/members, it is necessary to examine the position of supervisors under the N.L.R.A. and the scope of a union's right to compel its members to obey its rules. An understanding of the fundamental policy

1. The Wagner Act, 49 Stat. 449 (1935), as amended by the Taft-Hartley Act, 61 Stat. 136 (1947), comprise the National Labor Relations Act, 29 U.S.C. §§ 141-88 (1970). Under section 2(3), the "term 'employee' shall include any employee . . . but shall not include any individual employed as . . . a supervisor" 29 U.S.C. § 152(3) (1970). See notes 14-30 *infra* & accompanying text.

2. The Act expressly permits a supervisor to be a union member. 29 U.S.C. § 164(a) (1970). However, such right is at the sufferance of the employer. See notes 18-20 *infra* & accompanying text.

3. See *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); cf. *NLRB v. Textile Workers Local 1029*, 93 S. Ct. 385 (1972).

4. 4 CCH LAB. L. REP. (69 CCH Lab. Cas.) ¶ 13,017 (D.C. Cir., Sept. 22, 1972), petition for rehearing *en banc* granted, Jan. 5, 1973; argued before court sitting *en banc*, Jan. 23, 1973.

considerations embodied in each of these areas is essential to an examination of the circumstances in which these policies appear to conflict.

THE POSITION OF SUPERVISORS UNDER THE N.L.R.A.

Determination of Supervisory Status

Section 2(11) of the Act defines supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."⁵ The various types of authority set forth in section 2(11) are applicable in the disjunctive; therefore, an individual possessing power to undertake one or more such actions using his independent judgment will be found to be a supervisor.⁶ The requirement of independent judgment must be read in conjunction with the specific authorities; thus, an employee who possesses authority to use independent judgment with respect to his work yet lacks authority as defined by section 2(11) is not a supervisor.⁷ Furthermore, it is the existence of supervisory authority and not the exercise thereof which is determinative of supervisory status.⁸ Thus, the fact that an individual spends a substantial portion of his time performing rank-and-file work will not deprive him of supervisory status as long as he possesses one or more of the specified powers.⁹

5. 29 U.S.C. § 152(11) (1970). Legislative history indicates a congressional intent to distinguish "straw bosses, leadmen, set-up men, and other minor supervisory employees" from individuals vested with "genuine management prerogatives." See S. REP. NO. 105, 80th Cong., 1st Sess. 4 (1947), in I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 410 (NLRB 1948) [hereinafter cited as LEGISLATIVE HISTORY]; NLRB v. Quincy Steel Casting Co., 200 F.2d 293, 296 (1st Cir. 1952).

6. See, e.g., Federal Compress & Warehouse Co. v. NLRB, 398 F.2d 631 (6th Cir. 1968); NLRB v. Howard Johnson Co., 398 F.2d 435 (3d Cir. 1968); Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949).

7. See, e.g., NLRB v. Brown & Sharpe Mfg. Co., 169 F.2d 331 (1st Cir. 1948).

8. See, e.g., Federal Compress & Warehouse Co. v. NLRB, 398 F.2d 631 (6th Cir. 1968); NLRB v. Quincy Steel Casting Co., 200 F.2d 293 (1st Cir. 1952); Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949).

9. See, e.g., NLRB v. Kolpin Bros., 379 F.2d 488 (7th Cir. 1967); NLRB v. Fullerton Publishing Co., 283 F.2d 545 (9th Cir. 1960); American Cable & Radio Corp., 121 N.L.R.B. 258, 42 L.R.R.M. 1322 (1958).

There is "of necessity a large measure of informed discretion" involved in the determination of supervisory status by the National Labor Relations Board;¹⁰ as a result, the courts have placed considerable weight on the Board's expertise when applying the substantial evidence test.¹¹ In determining supervisory status, the Board has found it necessary to go beyond the statutory definition. Thus, the ratio of supervisors to employees may be a relevant factor.¹² Other considerations may include the fact that the individual receives a higher rate of pay than other employees and that he is regarded by other employees as a "boss."¹³

Purpose of Exclusion

In 1947, the Supreme Court held in *Packard Motor Car Co. v. NLRB*¹⁴ that in the absence of specific limitation on the definition of "employee" in the Act, the Board had the power to determine that an organization of supervisors was an appropriate bargaining unit. Congress reacted immediately by specifically excluding supervisors from the definition of "employee."¹⁵ Legislative history of section 2(3) reveals a decided belief that an employer is entitled to the "undivided loyalty" of his supervisory personnel and that the existence of foremen's unions would be detrimental to such loyalty.¹⁶ Typical of the judicial interpretation of congressional intent was this statement by the Court of Appeals for the Second Circuit:

10. *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961).

11. *See, e.g., NLRB v. Magnesium Casting Co.*, 427 F.2d 114 (1st Cir. 1970), *aff'd on other grounds*, 401 U.S. 137 (1971); *NLRB v. Corral Sportswear Co.*, 383 F.2d 961 (10th Cir. 1967), *cert. denied*, 390 U.S. 995 (1968); *NLRB v. Swift & Co.*, 292 F.2d 561 (1st Cir. 1961).

12. *See, e.g., Commercial Fleet Wash, Inc.*, 190 N.L.R.B. No. 63, 77 L.R.R.M. 1156 (1971); *Cole Instrument Co.*, 75 N.L.R.B. 348, 21 L.R.R.M. 1030 (1947).

13. *See, e.g., Allen-Morrison Sign Co.*, 79 N.L.R.B. 904, 22 L.R.R.M. 1451 (1948).

14. 330 U.S. 485 (1947). Prior to this decision the Board had reversed itself on several occasions on the question of coverage of supervisors under the Act and their right to be included in bargaining units. *See Union Collieries Coal Co.*, 41 N.L.R.B. 961, 10 L.R.R.M. 140 (1942) (supervisors' union appropriate bargaining unit); *Maryland Drydock Co.*, 49 N.L.R.B. 733, 12 L.R.R.M. 126 (1943) (unit comprised of supervisors not appropriate); *Packard Motor Car Co.*, 61 N.L.R.B. 4, 16 L.R.R.M. 43 (1945) (supervisors' union appropriate bargaining unit).

15. 29 U.S.C. § 152(3) (1970); *see note 1 supra*.

16. "The evidence before the committee shows clearly that unionizing supervisors . . . is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of

The sponsors [of the provision] feared that unionization of foremen and similar personnel would tend to break down industrial discipline by blurring the traditional distinction between management and labor. It was felt necessary to deny foremen and other supervisory personnel the right of collective bargaining in order to preserve their unqualified loyalty to the interests of their employers, and to prevent the dilution of this loyalty by giving them common interests with the men they were hired to supervise and direct.¹⁷

Effects of Exclusion

While section 14(a) provides that supervisors are not prohibited by the Act from being members of a labor organization,¹⁸ an employer may refuse to hire union members as supervisors,¹⁹ and he may discharge a supervisor for engaging in union activities.²⁰ A limitation on the employer's "free hand" with respect to its supervisors applies when the discharge of a supervisor is found to interfere with, restrain, or coerce employees in the exercise of their protected rights.²¹ Thus, an employer may lawfully discharge supervisors for concerted activities on their own behalf or on behalf of a rank-and-file union,²² including a refusal

their bossing the rank and file, the rank and file bosses them." H. REP. NO. 245, 80th Cong., 1st Sess. 14 (1947), in I LEGISLATIVE HISTORY, *supra* note 5, at 305.

"It is natural to expect that unless this Congress takes action, management will be deprived of the *undivided loyalty* of its foremen." S. REP. NO. 105, 80th Cong., 1st Sess. 5 (1947), in I LEGISLATIVE HISTORY, *supra* note 5, at 411 (emphasis supplied).

17. *International Ladies' Garment Workers' v. NLRB*, 339 F.2d 116, 122 (2d Cir. 1964).

18. "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . ." 29 U.S.C. § 164(a) (1970).

19. It has been held an unfair labor practice for a union to bargain to impasse over the unionization of supervisors. *Typographical Local 38 v. NLRB*, 278 F.2d 6 (1st Cir. 1960), *aff'd by equally divided court*, 365 U.S. 705 (1961).

20. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949).

"Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. . . . Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, *in spite of any union obligations*." *Carpenters' Dist. Council v. NLRB*, 274 F.2d 564, 566 (D.C. Cir. 1959) (dictum) (emphasis supplied).

21. See, e.g., *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954).

22. See, e.g., *NLRB v. Big Three Welding Equip. Co.*, 359 F.2d 77 (5th Cir. 1966); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960); *NLRB v. Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir. 1951), *cert. denied*, 342 U.S. 908 (1952).

to perform rank-and-file work during a strike.²³ However, it is unlawful to discharge a supervisor for testifying adversely to the employer in a Board proceeding,²⁴ for refusing to interfere with the organization of a rank-and-file union,²⁵ or for refusing to participate in other unlawful activity as demanded by the employer;²⁶ in such cases, the Board has ordered reinstatement with back pay.²⁷

An employer has no obligation under the Act to bargain with or on behalf of its supervisors.²⁸ Certification by the Board as an appropriate bargaining unit of a group later found to contain supervisors is invalid, and an employer has no duty to bargain with such a group.²⁹ However, an employer may voluntarily recognize supervisory personnel as "employees" for the purpose of collective bargaining and may include them in the resulting contract.³⁰

Participation of Supervisor/Members in Union Affairs

Although supervisors may, at the sufferance of their employer, be union members,³¹ their right to participate in union affairs is strictly limited by provisions of the Act making it an unfair labor practice for an employer to dominate or interfere with the formation or administration of a labor organization.³² Since a supervisor can

23. See, e.g., *Texas Co. v. NLRB*, 198 F.2d 540 (9th Cir. 1952); *Albrecht v. NLRB*, 181 F.2d 652 (7th Cir. 1950).

24. See, e.g., *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836 (4th Cir.), *cert. denied*, 355 U.S. 864 (1957); cf. *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61 (4th Cir. 1968) (unlawful to discharge supervisor for giving statement to Board agent admitting unfair labor practice).

25. See, e.g., *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954).

26. Compare *NLRB v. Lowe*, 406 F.2d 1033 (6th Cir. 1969) (discharge for refusal to spy on union activities, unlawful), with *Southwest Shoe Exch. Co.*, 136 N.L.R.B. 247, 49 L.R.R.M. 1759 (1962) (discharge for refusal to engage in permissible dissuasion of employees from supporting union, lawful).

27. See, e.g., *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836, 837 n.2 (4th Cir.), *cert. denied*, 355 U.S. 864 (1957).

28. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . ." 29 U.S.C. § 157 (1970) (emphasis supplied). Section 14(a) of the amended Act specifically provides: "[N]o 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." *Id.* § 164(a).

29. See, e.g., *Warner Co. v. NLRB*, 365 F.2d 435 (3rd Cir. 1966).

30. See, e.g., *Retail Clerks Local 330 v. Lake Hills Drug Co.*, 255 F. Supp. 910 (W.D. Wash. 1964).

31. See notes 18-20 *supra* & accompanying text.

32. 29 U.S.C. § 158(a) (2) (1970).

be regarded as an agent of the employer, any active participation of supervisors in union affairs may be deemed employer interference with the rights of "employees."³³ Thus, it has been held that a supervisor/member may not vote in union elections³⁴ or hold union office,³⁵ much less act as a bargaining agent for the union.³⁶ As a result, section 14(a) must be read to permit supervisors to have only nominal nonparticipating membership in a union. Nevertheless, union membership may be of great value to a supervisor—it enables him to retain his fringe benefits and to protect his seniority rights in the event he later returns to the rank-and-file.³⁷

The exclusion of supervisors by the Taft-Hartley Act has placed them unequivocally on the side of management in the general scheme of labor-management relations. Having described the pro forma relation of the supervisor with respect to the employer and the union, it is appropriate to frame a question which will become essential in later discussion: If an employer is entitled to keep his supervisors out of the union but nevertheless acquiesces in their membership, has he thereby waived his right to the *undivided* loyalty of such supervisors, and, if so, to what extent? Before considering this question, it is necessary to examine several recent Supreme Court decisions which have delineated the right of a union to demand the loyalty of its members.

33. An employer is responsible for the conduct of its supervisors within the scope of their general authority. *See, e.g., H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *International Ass'n of Machinists v. NLRB*, 311 U.S. 72 (1940); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *NLRB v. La Salle Steel Co.*, 178 F.2d 829 (7th Cir. 1949), *cert. denied*, 339 U.S. 963 (1950). Section 2(13) of the Act provides that in determining agency, actual authorization or subsequent ratification of specific acts shall not be controlling. 29 U.S.C. § 152(13) (1970). Thus, the fact that the employer has neither authorized nor encouraged his supervisors to participate in union affairs is not a defense to a charge of illegal interference. *See, e.g., Bottfield-Refractories Co.*, 127 N.L.R.B. 188, 45 L.R.R.M. 1522 (1960).

34. *See, e.g., NLRB v. Employing Bricklayers Ass'n*, 292 F.2d 627 (3d Cir. 1961).

35. *See, e.g., Plumbers Local 636 v. NLRB*, 287 F.2d 354 (D.C. Cir. 1961).

36. *See, e.g., id.; cf. Cox Market Inc.*, 155 N.L.R.B. 1, 60 L.R.R.M. 1225 (1965) (supervisor's participation on employee committee formed to influence union negotiations is unlawful interference).

37. A court of appeals has approved the Board's policy of determining on a case-by-case basis the permissible degree of supervisor union participation in industries such as construction where there is extreme flexibility in job positions. Factors to be considered are the nature of the supervisory position, the extent to which the holder is identified with management, the apparent permanency of the position, and the extent to which that position is properly included or excluded from the bargaining unit. *Plumbers Local 636 v. NLRB*, 287 F.2d 354, 362 (D.C. Cir. 1961).

THE LAW AND POLICY OF UNION DISCIPLINE

A basic premise of federal labor policy is that the pooling of economic strength through combination in labor organizations increases the ability of employees to bargain effectively for improvements in wages, hours, and other conditions of employment. As with most organizations, loyalty of members to organizational goals will be a prime determinant of a union's effectiveness. The union must have available to it means of disciplining those who threaten to detract from that effectiveness; however, such means must be applied with caution. "Discipline of individual members is essential if a union is to survive as an effective organization, but discipline may also be a ready tool of oppression within the union. There is a twilight zone between these two . . . rather than a clear line of demarcation."³⁸

In exploring the interests of the union in disciplining its members, it is necessary to recognize that under the collective bargaining system as envisioned by Congress and administered by the National Labor Relations Board, the interests of the individual necessarily are subordinated to the interests of the collective bargaining unit as a whole.³⁹ Moreover, it is imperative to realize that in order to accomplish its statutory duty of representing bargaining unit employees, the union must be able to present a united front in its activities.

Fundamental to the law of union discipline is the decision of the Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*,⁴⁰ where a union fined *employee/members* who had crossed a picket line during an authorized strike. After the union brought suit to collect the fines, an unfair labor practice complaint was filed by the employer charging the union with violating section 8(b)(1)(A)⁴¹ by restraining and coercing employees in the exercise of their section 7 right to refrain from concerted activities.⁴²

The Board sustained the trial examiner's dismissal of the charge, holding that even if the union's conduct was restraint and coercion within section 8(b)(1)(A), it was protected by the proviso to that section

38. Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

39. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

40. 388 U.S. 175 (1967).

41. "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section [7] . . ." 29 U.S.C. § 158(b)(1)(A) (1970).

42. Section 7 provides in part: "Employees shall have the right to . . . engage in . . . concerted activities . . . , and shall also have the right to refrain from any or all of such activities . . ." 29 U.S.C. § 157 (1970).

which allows a labor union to establish its own rules pertaining to membership.⁴³ The Board distinguished between union discipline that would affect the employee in his status as an employee and that which would affect him only in his status as a union member. It was noted that while the former is, in general, prohibited, the latter form of discipline is permitted by the proviso to section 8(b)(1)(A). Since the discipline involved in *Allis-Chalmers* in no way affected the member's employment rights, the Board held that the judicial enforcement of fines imposed for performing work during the strike was permissible. Furthermore, the Board recognized that a union rule requiring a member to refrain from working during a strike was vital to the achievement of legitimate union objectives and was not otherwise repugnant to labor policy.

The decision of the Board was appealed to the Court of Appeals for the Seventh Circuit. After a panel of that court had upheld the Board's decision, the court sitting en banc reversed the Board and held that the union had violated section 8(b)(1)(A).⁴⁴

The Supreme Court, by a five to four vote, reversed the court of appeals and affirmed the decision of the Board.⁴⁵ Mr. Justice Brennan, writing for the Court, noted that both the panel and the en banc majority of the court of appeals had stated that a literal reading of sections 7 and 8(b)(1)(A) would require the finding of an unfair labor practice, since crossing a picket line is within a member's section 7 right "to refrain from concerted activity," and the proviso to section 8(b)(1)(A), read literally, sanctions no form of discipline other than expulsion from the union. The panel in the lower court had eschewed a literal reading of the statute, while the majority en banc had adopted it, stating: "The statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification."⁴⁶ The Court rejected the reasoning of the en banc majority and stated: "It is highly unrealistic to regard § 8(b)(1) [(A)], and particularly its words 'restrain or coerce,' as precisely and unambiguously covering the union conduct involved in this case."⁴⁷

43. 149 N.L.R.B. 67, 57 L.R.R.M. 1242 (1964). The proviso to section 8(b)(1)(A) states: "[P]rovided, 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(b)(1)(A) (1970).

44. 358 F.2d 656 (7th Cir. 1966).

45. 388 U.S. 175 (1967).

46. 358 F.2d at 660.

47. 388 U.S. at 179.

The Court observed that labor legislation is the product of a legislative compromise of strongly held views, and that section 8(b)(1)(A) is only "one of many interwoven sections in a complex Act" ⁴⁸ After recognizing that Congress' intent throughout the Act was to fashion a coherent national labor policy, the Court undertook an examination of the legislative history of the section. It was concluded: "What legislative materials there are dealing with § 8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional union discipline in general, or disciplinary fines in particular. On the contrary, there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions." ⁴⁹

While the decision of the Court rested upon an interpretation of "restrain or coerce" in section 8(b)(1)(A), the proviso to that section was said to provide "cogent support" for the conclusion that the section was not intended to prohibit the imposition of fines and attempts at court enforcement where the discipline concerned internal union affairs. "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for non-payment." ⁵⁰ The Court found no indication in the legislative history that Congress intended to treat court enforcement of fines any differently than enforcement through expulsion, the method expressly authorized by the proviso to section 8(b)(1)(A). However, the Court cautioned that its "conclusion that section 8(b)(1)(A) does not prohibit the local's action makes it unnecessary to pass on the Board holding that the proviso protected such action." ⁵¹

Throughout its opinion, the Court stressed the importance of a coherent federal labor policy. This policy requires the subordination of the rights of the individual members of a collective bargaining unit to control their own relations with their employer once the unit's representative has been chosen. Thus, while an employee may disagree with decisions of the union, he is bound by them. Stressing the importance of the majority-rule concept in federal labor policy, the Court stated:

48. *Id.*

49. *Id.* at 185-86. Mr. Justice Black, in dissent, was not convinced by the majority's study of the legislative history. The dissent conducted its own study of the history and concluded that "[W]hen the legislative history is . . . brief, inconclusive, and ambiguous," the Court should not depart from the literal language of the statute. *Id.* at 217.

50. *Id.* at 191-92.

51. *Id.* at 192 n.29.

"Integral to this . . . policy has been the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership." ⁵² Characterizing the lawful economic strike as the "ultimate weapon in labor's arsenal," ⁵³ it was concluded that the power to fine or expel strikebreakers was essential for a union effectively to perform its functions. ⁵⁴

In two subsequent decisions, the Supreme Court qualified and further defined the scope of its decision in *Allis-Chalmers*. In *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America*,⁵⁵ a member was expelled for filing unfair labor practice charges against the union without exhausting his internal union remedies as required by the union constitution. Thereafter, the expelled member filed another unfair labor practice charge with the NLRB. The Board held that the expulsion violated section 8(b)(1)(A),⁵⁶ but the Court of Appeals for the Third Circuit denied enforcement of the Board's order.⁵⁷ In an eight to one decision, the Supreme Court reversed the Third Circuit and affirmed the Board. Stressing the strong policy consideration of keeping access to the Board unimpeded, especially in those areas where public rights are involved, the Court held that section 8(b)(1)(A) does not permit a union to penalize a member for invoking the assistance of the very agency created to hear complaints against unions and their officers.

*Scofield v. NLRB*⁵⁸ involved a union rule requiring a union member to "bank" any incentive plan earnings exceeding a union-imposed ceiling which limited such earnings per pay period. When the union discovered that some of its members had requested and received full payment from the company instead of "banking" excess earnings, it fined the members for violating the union by-laws. After the union brought suit to collect the fines, unfair labor practice charges were filed with

52. *Id.* at 181.

53. *Id.*

54. The Court rebutted the argument that the power to expel a recalcitrant was the only power given by the statute, noting that under such an interpretation, a weak union would be forced to deplete its ranks to discipline its dissenting members, and that it is for the weak union that the power to discharge its statutory function is most critical. *Id.* at 183-84. Cf. *NLRB v. Textile Workers Local 1029*, 93 S. Ct. 385 (1972) (union discipline prohibited where employee/member resigns from union before crossing picket line).

55. 391 U.S. 418 (1968).

56. 159 N.L.R.B. 1065, 62 L.R.R.M. 1301 (1966).

57. 379 F.2d 702 (3d Cir. 1967).

58. 394 U.S. 423 (1969).

the NLRB. The Board dismissed the unfair labor practice complaint,⁵⁹ and the Court of Appeals for the Seventh Circuit affirmed the decision of the Board.⁶⁰ In affirming the holding of the court of appeals, the Supreme Court cited the distinction drawn in *Allis-Chalmers* between union rules which primarily affect internal union affairs and those which have an external effect on the employee's job status. The Court also noted that *Marine Workers* qualified the *Allis-Chalmers* rule in those instances where the union rule frustrates or conflicts with an overriding policy of the federal labor law. Conceding that the ceiling on incentive-plan earnings had and was intended to have an effect on the members' employment conditions, the Court nevertheless held that where there is "a properly adopted rule which reflects a legitimate union interest [and] impairs no policy Congress has imbedded in the labor laws,"⁶¹ enforcement of such rule is outside the prohibitions of section 8(b)(1)(A).

By interpreting the words "restrain or coerce" in section 8(b)(1)(A) in a manner which allows court enforcement of a reasonable fine imposed for conduct relating primarily to internal union affairs, the Supreme Court has given support to a policy of permitting a union to present a unified front in a lawful strike situation. Acting upon the premise that federal labor legislation vests in the chosen representative the power to act in the interest of all employees in the bargaining unit, the Court has recognized the union's strong interest in having its members conform to its rules and regulations.

Bearing in mind the union's interest in maintaining the loyalty of its members, and recalling that Congress intended to give an employer the right to demand the undivided loyalty of its supervisors, it is now possible to examine the situation where these two interests may conflict.

DEVELOPMENT OF SECTION 8(b)(1)(B): OAKLAND MAILERS TO MEAT CUTTERS

Restraint and coercion of an employer in the selection of his collective bargaining and grievance adjustment representatives constitutes an unfair labor practice under section 8(b)(1)(B) of the Taft-Hartley Act.⁶² This section was designed to prohibit a union, dissatisfied with

59. 145 N.L.R.B. 1097, 55 L.R.R.M. 1085 (1964).

60. 393 F.2d 49 (7th Cir. 1968).

61. 394 U.S. at 430.

62. "It shall be an unfair labor practice for a labor organization or its agents . . . to

a management representative, from exerting pressure on the employer to replace the representative with one more favorable to the union.⁶³

Section 8(b)(1)(B), by its terms, protects from union interference an employer's relation with its "representatives." It should be noted that a "representative" within the meaning of section 8(b)(1)(B) often will also be a "supervisor" within section 2(11).⁶⁴ Recent utilization of section 8(b)(1)(B) to limit the scope of union discipline of supervisors is possible only where supervisors possess collective bargaining or grievance adjustment responsibilities and thus are representatives within the meaning of section 8(b)(1)(B).⁶⁵

restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . ." 29 U.S.C. § 158(b)(1)(B) (1970).

63. See 93 CONG. REC. 3837 (1947) (remarks of Sen. Taft), in II LEGISLATIVE HISTORY, *supra* note 5, at 1012. The Senate Report on the bill noted that the section would prohibit a union from coercing an employer to join or refrain from joining an employer bargaining organization or pressuring him to remove a personnel director. S. REP. NO. 105, 80th Cong., 1st Sess. 21 (1947), in I LEGISLATIVE HISTORY, *supra* note 5, at 427.

It is not clear what may be inferred from the deletion of the term "interfere" from the original bill. Compare section 8(b)(1) of S. 1126, 80th Cong., 1st Sess. 12 (1947) in I LEGISLATIVE HISTORY, *supra* note 5, at 112, with 29 U.S.C. § 158(b)(1)(B) (1970).

64. The statutory definition of supervisor is found in section 2(11) of the Act. See note 5 *supra* & accompanying text.

65. An individual may be a representative within the meaning of section 8(b)(1)(B) even though he has not yet exercised his collective bargaining or grievance adjustment responsibilities or even though he has not been informed that he has such responsibilities. See Toledo Locals 15-P & 272, Lithographers, 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969), *enforced*, 437 F.2d 55 (6th Cir. 1971). It is not necessary that such representatives be designated in the collective bargaining agreement. Meat Cutters, Local 81, 185 N.L.R.B. No. 130, 75 L.R.R.M. 1247 (1970).

Grievances may concern disputes arising either from interpretation of the collective bargaining agreement or from personal disputes between employees. The Board has adopted a trial examiner's conclusion that the authority to adjust either type of grievance is sufficient to establish status as a section 8(b)(1)(B) representative. Toledo Locals 15-P & 272, Lithographers, 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969). See New Mexico Dist. Council of Carpenters, 176 N.L.R.B. 797, 71 L.R.R.M. 1445 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972); Teamsters Local 287, 183 N.L.R.B. No. 49, 74 L.R.R.M. 1354 (1970).

The fact that an individual is a supervisor with substantial authority to direct the work of employees may give rise to the contention that he should be deemed an employer representative within the meaning of section 8(b)(1)(B). See, e.g., Teamsters Local 287, 183 N.L.R.B. No. 49, 74 L.R.R.M. 1354 (1970). The Board adopted the trial examiner's conclusion that if an individual is a natural and logical choice for future designation by the employer as a collective bargaining or grievance adjustment representative, then that individual should be deemed a section 8(b)(1)(B) representative. Since section 8(b)(1)(B) was intended to assure that an employer's selection of representatives is free from union interference, its protection should extend to those who are

For the first 20 years following the enactment of the Taft-Hartley Act, section 8(b)(1)(B) was applied to proscribe only direct restraint and coercion of employers in situations similar to those discussed by Congress in enacting the section.⁶⁶ For example, in *NLRB v. Teamsters, Local 294*,⁶⁷ a union expressed an unwillingness to bargain with an attorney employed by the company to negotiate a contract with the union. The employer's refusal to accede to the union's demands that the attorney be withdrawn resulted in a strike. Upholding the Board's finding that the union had violated section 8(b)(1)(B), the court concluded that "for a union to refuse to bargain with a proper representative of an employer and yet threaten a strike if bargaining does not succeed is restraint or coercion" ⁶⁸

In 1968, the NLRB substantially expanded the application of section 8(b)(1)(B) by interpreting it to prohibit indirect as well as direct restraint and coercion of employers. In *San Francisco-Oakland Mailers' Union No. 18*,⁶⁹ foremen who possessed collective bargaining and grievance adjustment responsibilities, and who were union members pursuant to a union security clause, were disciplined by their union because of the manner in which they interpreted the collective bargaining agreement.⁷⁰ After noting that Congress had intended section 8(b)(1)(B) to protect an employer's control of its chosen representatives from interference by a union, the Board found that union discipline of super-

natural and logical choices of the employer. *Toledo Locals 15-P & 272, Lithographers*, 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969).

There has been little if any discussion concerning the definition of a collective bargaining representative. The term would appear to apply to one associated with the process of negotiation or administration of a collective bargaining agreement. However, there have been suggestions that "collective bargaining duties" encompass a far broader range of activities. See notes 110-12 & 126-30 *infra* & accompanying text.

66. See note 63 *supra*.

67. 284 F.2d 893 (2d Cir. 1960).

68. 284 F.2d at 896. The court held that the lack of official designation of the union as the exclusive bargaining representative was not a defense to a charge of violating section 8(b)(1)(B), even though it might be a defense where violation of section 8(b)(3) is at issue.

Direct restraint and coercion under section 8(b)(1)(B) has remained a source of litigation. See, e.g., *Iron Workers Local 207 v. Perko*, 373 U.S. 701 (1963); *Cheney Cal. Lumber v. NLRB*, 319 F.2d 375 (9th Cir. 1963); *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961); *Teamsters Local 70*, 183 N.L.R.B. No. 137, 74 L.R.R.M. 1401 (1970).

69. 172 N.L.R.B. No. 252, 69 L.R.R.M. 1157 (1968).

70. It should be noted that interpretation of the contract is part of the processes of grievance adjustment and administration of the contract, and thus part of the duties of a representative within the meaning of section 8(b)(1)(B). See note 65 *supra*.

visors could be as effective a restraint on the employer in the free choice and control of its representatives as the restraint or coercion applied directly upon the employer to replace them. "That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. Realistically, the Employer would have to replace its foremen, or face *de facto* nonrepresentation by them."⁷¹

In *Oakland Mailers* and subsequent cases, the Board and the courts apparently have interpreted "restraint or coercion" as used in section 8(b)(1)(B) according to the interpretation given those words in other sections of the Act. Under this interpretation, it is not necessary to demonstrate that an alleged unlawful act had an actual subjective effect on another party, so long as it may reasonably be said that the conduct tended to interfere with the free exercise of a right of another which is protected under the Act.⁷² Thus, the Board in *Oakland Mailers* held that acts of the union which "were designed to change the [employer's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will" were illegal.⁷³

Subsequent decisions of the Board have applied the rationale of *Oakland Mailers* to strike down discipline imposed by unions for various actions of supervisors who possessed collective bargaining or grievance adjustment responsibilities. The federal courts of appeals have upheld Board decisions finding violations of sections 8(b)(1)(B) where unions disciplined supervisor/representatives for co-signing a letter urging employees to vote against the union in an upcoming election;⁷⁴ for working for an employer which did not have a contract with the union and which was not contributing to certain union funds;⁷⁵ for performing work prior to beginning of the regular working day;⁷⁶ and for reporting to work during a strike in crews smaller than those required by the

71. 69 L.R.R.M. at 1158.

72. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 51 (1954); *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 231 (1947); *Mine Workers Local 167 v. NLRB*, 422 F.2d 538, 542 (7th Cir.), cert. denied, 399 U.S. 905 (1970); *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

73. 69 L.R.R.M. at 1158.

74. *NLRB v. New Mexico Dist. Council of Carpenters*, 454 F.2d 1116 (10th Cir. 1972), enforcing 176 N.L.R.B. 797, 71 L.R.R.M. 1445 (1969).

75. *NLRB v. New Mexico Dist. Council of Carpenters*, 454 F.2d 1116 (10th Cir. 1972), enforcing 177 N.L.R.B. 500, 71 L.R.R.M. 1470 (1969).

76. *NLRB v. Sheet Metal Workers Local 49*, 430 F.2d 1348 (10th Cir. 1970).

collective bargaining agreement.⁷⁷ In each of these cases, the Board and the courts appear to have applied the rationale of *Oakland Mailers* without distinguishing the relationship of the activity of the supervisors involved in those cases from that involved in *Oakland Mailers*.⁷⁸ Implicit in each decision is a finding that discipline of the supervisor would tend to result in a "substitution of attitudes," thus making the supervisor more responsive to union interests and less responsive to the interests of the employer, and therefore depriving the employer of the free choice and control of its supervisors, guaranteed by section 8(b)(1)(B).

The Board, in *Toledo Locals 15-P & 272, Lithographers*,⁷⁹ characterized the "apparent import of Section 8(b)(1)(B) as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers."⁸⁰ The type of conduct which is considered to be "in the course of representing an employer's interests" was not made clear by the Board or by the courts which summarily affirmed the decisions of the Board. The only case suggesting a limit was *Painters Local 453*,⁸¹ where the Board held that section 8(b)(1)(B) did not prohibit a union from disciplining a supervisor for his failure to register at the office of a local before obtaining work within that local's jurisdiction.

*Meat Cutters, Local 81 v. NLRB*⁸² was the first case in which a court attempted to delineate the scope of conduct against which union discipline is prohibited. In *Meat Cutters*, a grocery store manager who possessed the authority to adjust grievances (and thus was a "representative" within the meaning of section 8(b)(1)(B), as well as a "supervisor" under section 2(11)) was directed by the company to cease the performance of certain functions relating to the preparation of meat. These functions thereafter were to be performed at the company's central warehouse. Objecting to this change in policy, the union ordered the manager, who was a union member, to continue the operations at the retail store. When the manager failed to comply with the union directive, he was fined and subsequently expelled.

In upholding the Board's decision that the union's actions violated section 8(b)(1)(B), the Court of Appeals for the District of Columbia

77. *NLRB v. Toledo Locals 15-P & 272, Lithographers*, 437 F.2d 55 (1971), *enforcing* 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969).

78. See note 70 *supra* & accompanying text.

79. 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969).

80. *Id.* at 1080.

81. 183 N.L.R.B. No. 24, 74 L.R.R.M. 1539 (1970).

82. 458 F.2d 794 (D.C. Cir. 1972).

Circuit described the supervisor's conduct as an act "performed in the course of his management duties"⁸³ and while "exercising his managerial authority."⁸⁴ However, beyond citing *Painters Local 453*⁸⁵ as presenting a situation where a union legally may discipline a supervisor/member for acts which are *not* in furtherance of his obligations as the employer's representative,⁸⁶ the court failed to elucidate the standards they invoked in determining what activities of an employer representative *are* immune from discipline.

Following the decision in *Meat Cutters*, the law in the District of Columbia Circuit apparently was that, where a supervisor possesses collective bargaining or grievance adjustment responsibilities, section 8 (b) (1) (B) prohibits a union from disciplining him for acts "performed in the course of his management duties" or while "exercising his managerial authority." However, acts of the supervisor which are "not in the furtherance of his obligations as the employer's representative" remained subject to union discipline. It was only a matter of time until the vague standards set forth in *Meat Cutters* were put to a test in a fact situation similar to that presented in *Allis-Chalmers*, where the Supreme Court upheld the right of a union to discipline employee/members for crossing a picket line.

ILLINOIS BELL TELEPHONE CO.

In *Local 134, IBEW v. NLRB (Illinois Bell)*,⁸⁷ a union represented rank-and-file employees and certain foremen pursuant to a collective

83. *Id.* at 796.

84. *Id.* at 800. The court also described the manager's activity as "performance of duties indigenous to his position as a *management representative*." *Id.* at 798 (emphasis supplied). It is difficult to understand how following an employer's directive concerning a company policy could be considered part of an individual's collective bargaining or grievance adjustment responsibilities. The court, recognizing that the application of section 8(b) (1) (B) was limited to individuals possessing collective bargaining or grievance adjustment responsibilities, stated that: "The rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a *representative* of his employer in administering the collective bargaining agreement or the adjustment of employee grievances," but then continued, "because he has performed duties as a *management representative*." *Id.* at 798-99 n.12 (emphasis supplied). The only acceptable conclusion is that the court was employing "representative" in two different senses. See note 65 *supra*.

85. 183 N.L.R.B. No. 24, 74 L.R.R.M. 1539 (1970). See note 81 *supra* & accompanying text.

86. 458 F.2d at 798 n.12.

87. 4 CCH LAB. L. REP. (69 CCH Lab. Cas.) ¶ 13,017 (D.C. Cir., Sept. 22, 1972), *petition for rehearing en banc granted*, Jan. 5, 1973, *argued before court sitting en banc*, Jan. 23, 1973.

bargaining agreement between the union and the employer. A union security clause was in effect; all members of the bargaining unit, including foremen, were required to join and remain members of the union within 30 days of commencing employment.⁸⁸

In May, 1968, the union commenced an economic strike against the employer. At the onset of the strike, the employer notified its foremen that it desired to have them report for work during the strike, but that each individual could decide for himself whether to work or respect the strike. At this time, the employer indicated that those who did not report would not be penalized.⁸⁹ The union, however, warned the foremen/members at a pre-strike meeting that if they performed rank-and-file work, they would be subject to union discipline.⁹⁰ Nevertheless, several of the foremen/members reported and performed rank-and-file work during the strike. At the conclusion of the strike, the union instituted disciplinary proceedings against these foremen, levied fines,⁹¹ and sought enforcement in a state court. The foremen, through their Protective Association,⁹² filed unfair labor practice charges with the NLRB, alleging that the fining of supervisors for performing rank-and-file work constituted a violation of section 8(b)(1)(B).⁹³

The trial examiner determined that the foremen were both "supervisors" within the meaning of section 2(11),⁹⁴ and "employer representatives" within the meaning of section 8(b)(1)(B).⁹⁵ He concluded that the union had violated section 8(b)(1)(B) by fining the supervisor/members for performing rank-and-file work during the strike.⁹⁶

88. The foremen were full members of the union. For a discussion of the validity of the union security clause see note 96 *infra*.

89. The employer was true to this promise. Indeed, after the strike it promoted several of the foremen who did not work during the strike.

90. Following this warning, several of the foremen/members formed the Bell Supervisors Protective Association. The Association retained counsel to protect the rights of those foremen who chose to work during the strike.

91. To the extent that any of the foremen/members paid their fines, the employer reimbursed them.

92. See note 90 *supra*.

93. The Association also charged that the fining of the organizers of the Association was a section 8(b)(1)(B) violation.

94. See notes 5-9 *supra* & accompanying text.

95. See note 65 *supra* & accompanying text.

96. On the last day of the hearings before the trial examiner, the Association moved to amend its pleadings to conform with the evidence in order to put in issue the validity of the union security provision in the collective bargaining agreement. The Association argued that the provision was in violation of section 8(a)(3)(i), since it covered a bargaining unit which included both employees and supervisors. Inasmuch as many

The Board concurred with the trial examiner's determination,⁹⁷ and the union appealed to the Court of Appeals for the District of Columbia Circuit.⁹⁸ A divided three-judge panel of that court upheld the Board's decision, with Judge J. Skelley Wright filing a vigorous dissent.⁹⁹ The union's petition for rehearing was granted and the case reargued before the court sitting en banc.¹⁰⁰

Because of its factual similarity to *Allis-Chalmers*, the case is especially appropriate for an examination of the conflicting interests involved in union discipline of supervisors. The only essential difference between

cases of union discipline of supervisors may involve such provisions, the question merits discussion.

The Association's argument rests on a construction of section 8(a)(3), which prohibits employer discrimination to encourage or discourage union membership. However, the proviso to section 8(a)(3) permits union security clauses to operate so long as certain conditions are met. One of these conditions, found in section 8(a)(3)(i), is that the union concerned be "the representative of the employees as provided in section [9(a)] . . . , in the *appropriate collective bargaining unit* covered by such agreement when made . . ." 29 U.S.C. § 158(a)(3)(i) (1970) (emphasis supplied). The Association contended that the bargaining unit here involved was not "appropriate" within the meaning of section 8(a)(3)(i) since it included supervisors. If "appropriate" is given the same meaning in section 8(a)(3)(i) as it has in section 9, the Association's argument would appear to be correct, since it has been held that a unit containing supervisors is not "appropriate" for the purposes of certification by the Board. *Warner Co. v. NLRB*, 365 F.2d 435 (3d Cir. 1966). See notes 28-30 *supra* & accompanying text.

Since the Board and the court both sustained the denial of the Association's motion to amend, the question was not faced. However, the court noted that the General Counsel of the Board had earlier concluded that inclusion of supervisors in a unit by voluntary agreement of the parties did not render such unit inappropriate for coverage by an otherwise valid union security clause. In answer to the Association's contention, it could be argued that "appropriate" is nowhere defined in the Act and that there is therefore no reason to conclude that it must be interpreted in section 8(a)(3) in light of its use for the purposes of Board certification under section 9.

97. 192 N.L.R.B. No. 17, 77 L.R.R.M. 1610 (1971).

98. The Association appealed the denial of the right to amend its pleadings. See note 96 *supra*. The court affirmed the Board's denial of the amendment.

99. The court modified a portion of the Board's order not here relevant.

100. It is interesting to note that the union's petition for rehearing was granted without the court inviting a response from the NLRB. As a matter of practice, no response may be filed to a petition for rehearing except upon invitation of the court, but such petition usually will not be granted until an invitation for a response has been issued.

On rehearing, the case was consolidated with *NLRB v. IBEW, System Council U-4 (Florida Power and Light Co.)*. The facts are substantially the same as those in *Illinois Bell*, except that the supervisors had joined the union voluntarily rather than pursuant to a union security clause, and several of the supervisors adjusted grievances of and supervised only nonbargaining unit employees. The Board had held that these facts did not distinguish the case from *Illinois Bell* and relied on its decision in that case in holding that the union violated section 8(b)(1)(B) by fining the supervisors for performing struck rank-and-file work. 193 N.L.R.B. No. 7, 78 L.R.R.M. 1065 (1971).

the two cases is that in *Illinois Bell*, supervisor/members, rather than employee/members, crossed an authorized picket line. The distinction is important, but, as will be suggested,¹⁰¹ the Supreme Court decisions concerning union discipline of employees remain relevant in resolving section 8(b)(1)(B) cases.

Before the applicability of *Allis-Chalmers* and other section 8(b)(1)(A) cases is discussed and before an approach to the resolution of section 8(b)(1)(B) cases can be suggested, an examination of the opinions of the panel in *Illinois Bell* is essential. These opinions demonstrate the manner in which imprecise language and superficial analysis can serve to becloud the basic issues which arise when a union disciplines a supervisor/member.

A Profusion of Standards

The panel majority in *Illinois Bell* did little but add to the existing confusion concerning the standards to be employed in reconciling the conflicting interests involved in section 8(b)(1)(B) cases. Indeed, the majority introduced several new standards without defining them. Moreover, although the dissent attempted to criticize the majority's imprecision, much of its own language is confusing and its analysis unclear. In an area where delicate balancing of interests is required, it would seem apparent that the employment of clear terminology and careful analysis is of utmost importance.

The panel majority began with an examination of the development of section 8(b)(1)(B). Recognizing that the statute had been interpreted to prohibit indirect, as well as direct restraint or coercion of an employer in the selection of his collective bargaining or grievance adjustment representatives,¹⁰² the court stated that this prohibition extends to "imposition of discipline upon the employer's representatives for actions performed by them within the *general scope of their supervisory or managerial responsibilities*."¹⁰³ It should be noted that the language here employed to describe actions for which an employer representative may not be disciplined differs from the standards employed by a different panel of the same court in *Meat Cutters*, where the terms "*managerial authority*" and "*management duties*" were used.¹⁰⁴

101. See text following note 150 *infra*.

102. See notes 69-71 *supra* & accompanying text.

103. 4 CCH LAB L. REP. ¶ 13,017, at 25,245 (emphasis supplied).

104. See notes 83-84 *supra* & accompanying text.

It may be suggested from the structure of its opinion that the majority tacitly recognized that it was departing from the standards set forth in *Meat Cutters*. The "responsibilities" language appears in the form of a conclusion at the outset of the opinion. Later, in discussing *Meat Cutters*, the court was careful to use the terminology employed therein, on one occasion describing *Meat Cutters* as "prohibiting union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties,"¹⁰⁵ and at another point quoting the "managerial authority" language of *Meat Cutters*.¹⁰⁶ After discussing earlier section 8(b)(1)(B) cases, the court produced yet another new standard. Citing *Meat Cutters*, the court propounded that the obligations of supervisors to their employer supercede any obligations owed to their union "when they are engaged in *supervisory or managerial endeavors*."¹⁰⁷ In explaining its decision that the International Union had violated section 8(b)(1)(B) by upholding the fines imposed by the local, the court asserted that the action of the union would inhibit the performance of "*supervisory or managerial functions* by [the] foremen"¹⁰⁸ Whether the court was merely being careless with its terminology or was camouflaging a conscious attempt to set forth new standards to encompass the activities involved in *Illinois Bell* is difficult to determine. In either case, the result of the decision is to aggravate the existing confusion.

In applying section 8(b)(1)(B) to the facts of *Illinois Bell*, the court stated that while the employer did not require its supervisors to perform the rank-and-file work during the strike, it had made it "very clear" that it desired them to do so.¹⁰⁹ Stressing the fact that economic pressure is important to both parties as an integral part of the process of collective bargaining, the court declared:

[W]hen supervisors' actions during an economic strike *further the interests of their employer*, they are performing in a manner which could reasonably be expected from such persons. . . . As management representatives, supervisory personnel may be re-

105. 4 CCH LAB. L. REP. ¶ 13,017, at 25,245.

106. *Id.* at 25,246.

107. *Id.* at 25,247 (emphasis supplied).

108. *Id.* at 25,251 (emphasis supplied). While this language of the court could easily be misinterpreted as yet another standard for determining the acts of supervisors which are immune from union discipline, the court was actually referring to future results of the union discipline. Interestingly, even the dissent misinterpreted the language as the foundation for a new standard.

109. *Id.* at 25,249.

quested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved. . . . [S]ince [the foremen] were clearly punished for *actions undertaken by them as representatives of their Employer* within the meaning of section 8(b)(1)(B), and in accordance with the Employer's express wishes, it logically follows that the disciplining union thereby violated section 8(b)(1)(B) of the Act.¹¹⁰

If the court was suggesting that performance of rank-and-file work during a strike is part of the responsibility of a collective bargaining representative, it is submitted that the court's expansive definition of a representative's duties far exceeded reasonable bounds. The definition of collective bargaining representative within the meaning of section 8(b)(1)(B) in other situations appears to have been interpreted narrowly, and it is reasonable to suggest that a collective bargaining representative's duties must be related to the process of negotiation or interpretation of the contract.¹¹¹ Clearly, the conduct of supervisors in *Illinois Bell* was not related to the process of negotiation or interpretation of the collective agreement. Despite this fact, the dissent failed to criticize the majority's novel extension of the limits of a collective bargaining representative's duties. Indeed, the dissent appears to have adopted an equally broad concept of a representative's duties in an attempt to distinguish a prior case.¹¹²

If, however, the gravamen of the majority opinion is that section 8(b)(1)(B) prohibits union discipline for acts of an employer representative performed on behalf of the employer, then it would appear that the court is applying yet another standard, in addition to those already mentioned, for measuring the scope of activity of an employer representative which is immune from union discipline.

The dissent attacked the majority for condoning a "major shift in federal labor policy" without support from the statute, legislative history, or ascertainable congressional purpose.¹¹³ While characterizing the Board decision in *Oakland Mailers* as having placed a "permissible gloss" on section 8(b)(1)(B),¹¹⁴ Judge Wright demonstrated concern with the manner in which that decision has been applied in subsequent

110. *Id.* at 25,249-50 (emphasis supplied) (footnote omitted).

111. See note 65 *supra* & accompanying text.

112. See note 130 *infra* & accompanying text.

113. 4 CCH LAB. L. REP. ¶ 13,017, at 25,254.

114. *Id.* at 25,256.

cases. It will be recalled that *Oakland Mailers* involved union discipline of a supervisor for the manner in which he interpreted and applied a collective bargaining contract. Such activity was characterized by the dissent as part of a supervisor's duties as a collective bargaining and grievance adjustment representative,¹¹⁵ while, by contrast, the activity for which the supervisor was fined in *Meat Cutters*—carrying out the employer's order relative to a new meat procurement policy—was considered to be unrelated to collective bargaining or grievance adjustment responsibilities.¹¹⁶

Judge Wright, who did not participate in the *Meat Cutters* decision, asserted that the panel in that case was concerned that "the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors, thus giving supervisory personnel all the benefits of union membership without having to bear any of the responsibilities."¹¹⁷ He stressed that the *Meat Cutters* court had acted on the explicit assurance of the Board that section 8(b)(1)(B) would not be applied where the activity which caused the employer representative to be fined was unrelated to the exercise of supervisory or managerial authority.¹¹⁸

While suggesting that the panel majority purported to adhere to the principles enunciated in *Meat Cutters*,¹¹⁹ the dissent criticized the majority for employing terminology such as "management functions" without anywhere defining the phrase.¹²⁰ This lack of precise definition and the manner in which the standards were applied to the facts in *Illinois Bell* appeared to the dissent to impose "no limits at all on the reach of Section 8(b)(1)(B)."¹²¹ In order to stress the magnitude of what he believed the majority had done, Judge Wright compared the activity of the supervisors in *Meat Cutters* with that involved in *Illinois Bell*. He suggested that the Board's decision in *Meat Cutters* was upheld "because the supervisors were fined for engaging in usual and tradi-

115. See note 70 *supra*.

116. 4 CCH LAB. L. REP. ¶ 13,017, at 25,254.

117. *Id.*

118. See Brief for NLRB at 15, *Meat Cutters Local 81 v. NLRB*, 458 F.2d 794 (D.C. Cir. 1972).

119. The majority had cited *Painters* to show that their interpretation of section 8(b)(1)(B) "does not mean that a union may never discipline a supervisor/member for breaching a valid union rule." 4 CCH LAB. L. REP. ¶ 13,017, at 25,247 n.28.

120. The dissent apparently misinterpreted the majority's use of the term "management functions." See note 108 *supra*.

121. 4 CCH LAB. L. REP. ¶ 13,017, at 25,258.

tional management activity.”¹²² However, to say “that rank-and-file labor is an ordinary management function is like saying that black is white. The two are usually perceived as diametrical opposites”¹²³

Apparently, Judge Wright would have preferred strict adherence to what he characterized as the *Oakland Mailers* doctrine, that is, prohibiting union discipline of supervisors only for acts directly related to their collective bargaining or grievance adjustment responsibilities. However, faced with the decision in *Meat Cutters*, the dissent appeared prepared to accept a “usual and traditional management activity” standard, but provided no guidelines for its application.

The manner in which the dissent appeared to interpret several of the section 8(b)(1)(B) cases between *Oakland Mailers* and *Meat Cutters* raises further questions. The dissent implied that until *Meat Cutters*, the Board applied a standard prohibiting union discipline only where supervisors were acting in their capacities as employer representatives within the meaning of section 8(b)(1)(B).¹²⁴ However, it is not clear that the Board and the courts were so limiting the application of that section.¹²⁵ For example, the dissent asserted that what it had characterized as the *Oakland Mailers* doctrine was applied “without essential change”¹²⁶ in *New Mexico District Council of Carpenters*,¹²⁷ where a supervisor was disciplined for co-signing a letter urging employees to vote with management in an upcoming election. Judge Wright stated that “[o]bviously, it is part of a supervisor’s *collective bargaining* duties to urge management’s viewpoint on union members. The Board’s holding in *New Mexico District Council* is therefore squarely within the *Oakland Mailers* rule.”¹²⁸ Had the dissent followed this assertion by characterizing the performance of rank-and-file work as not being part of a supervisor’s *collective bargaining* duties, the attempt to distinguish the case might have been tenable. Instead, the dissent completed its distinction by stating: “It is far from obvious, however, that a supervisor’s *ordinary* duties include performance of rank-and-file work”¹²⁹—a standard which appears to be similar to those employed in *Meat Cutters* rather than the standard of *Oakland Mailers*.

122. *Id.* It would appear that the dissent has suggested yet another standard.

123. *Id.* (footnote omitted).

124. *Id.* at 25,256.

125. See notes 74-80 *supra* & accompanying text.

126. 4 CCH LAB. L. REP. ¶ 13,017, at 25,256 n.5.

127. 176 N.L.R.B. 797 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972).

128. 4 CCH LAB. L. REP. ¶ 13,017, at 25,257 n.9 (emphasis supplied).

129. *Id.* See notes 83-84 *supra* & accompanying text.

Thus, two different standards were employed in distinguishing the cases. The activity involved in *New Mexico District Council* (urging employees to vote with management) was said to fall within the *Oakland Mailers* rule (conduct in the capacity of employer representative), while that involved in *Illinois Bell* (performing struck rank-and-file work) was argued not to fit within a standard (supervisor's ordinary duties) which appears closely related to those employed in *Meat Cutters*.

Moreover, it is submitted that what is "obvious" to the dissent is not at all obvious. It has been suggested that the majority was straining in its apparent argument that performance of struck rank-and-file work is among the responsibilities of a collective bargaining representative.¹³⁰ It is submitted that the dissent's statement that it is "obviously" within a supervisor's collective bargaining duties to urge employees to vote with management is an equally strained effort to distinguish *New Mexico District Council*, a decision of the Board affirmed by the Court of Appeals for the Tenth Circuit.

The profusion of standards by the majority and the careless analysis of the dissent serve only to obfuscate the conflict of interests which is presented when a union disciplines a supervisor/employer representative for performing rank-and-file work during a strike. An analysis of the applicability of *Allis-Chalmers* and other Supreme Court decisions interpreting section 8(b)(1)(A) to *Illinois Bell* and other section 8(b)(1)(B) cases should be helpful in suggesting the correct approach toward reconciliation of the conflicting interests in the area of union discipline of supervisors.

Applicability of Allis-Chalmers

In upholding the fining of employee/members who crossed an authorized union picket line, the Supreme Court in *Allis-Chalmers* recognized strong union interests in maintaining the loyalty of its members and, in particular, in presenting a unified front during a labor dispute.¹³¹ The panel majority in *Illinois Bell* found *Allis-Chalmers* "not apposite" to questions of union discipline of supervisors,¹³² whereas the dissent asserted that the series of Supreme Court decisions beginning with *Allis-Chalmers* was controlling.¹³³ It is submitted that neither characterization is entirely correct. The applicability of *Allis-Chalmers* to questions of

130. See notes 110-11 *supra* & accompanying text.

131. See notes 40-54 *supra* & accompanying text.

132. 4 CCH LAB. L. REP. ¶ 13,017, at 25,248.

133. *Id.* at 25,259.

union discipline of supervisors has been raised continually since the Board's decision in *Oakland Mailers*. In *Illinois Bell*, where there is such a close factual similarity, the question ought to be resolved.

While the Supreme Court in *Allis-Chalmers* drew "cogent support" from the proviso to section 8(b)(1)(A), it was primarily concerned with an assessment of the language "restrain and coerce" as used in that section.¹³⁴ The proviso protects a union's right to make rules as to acquisition or retention of membership free from the prohibitions of section 8(b)(1)(A). In the section 8(b)(1)(B) decisions since *Oakland Mailers*, the Board and the courts have focused on the "cogent support" language of the Court. They have argued that since the proviso is not attached to section 8(b)(1)(B), and since the Court drew support from the proviso for its interpretation of section 8(b)(1)(A) in *Allis-Chalmers*, that decision is "not apposite" to section 8(b)(1)(B) cases.¹³⁵ This argument overlooks the explicit statement of the Court in *Allis-Chalmers* that it found it unnecessary to consider whether the conduct in that case was protected by the proviso.¹³⁶ On the other hand, the unions, in urging the applicability of the Supreme Court decisions on union discipline of employee/members, have overlooked the important fact that sections 8(b)(1)(A) and 8(b)(1)(B) are aimed at two entirely different relationships. Whereas section 8(b)(1)(A) seeks to regulate the union-employee relationship, the purpose of section 8(b)(1)(B) is to limit union interference with a right of the employer.

It is submitted that *Allis-Chalmers* and the subsequent Supreme Court decisions interpreting section 8(b)(1)(A) are relevant to the question of union discipline of supervisors and, as will be shown,¹³⁷ can be of use to both sides in reconciling conflicting interests in section 8(b)(1)(B) cases. The Supreme Court disregarded the literal meaning of section 8(b)(1)(A) and relied on policy considerations to reach results deemed consonant with the congressional purpose. Similarly, the

134. Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1128. See notes 50-51 *supra* & accompanying text.

135. See, e.g., 4 CCH LAB. L. REP. ¶ 13,017, at 25,247-48.

136. 388 U.S. 175, 192 n.29. It is interesting to note that Judge MacKinnon, who wrote the opinion of the panel majority in *Illinois Bell*, only a few months earlier had stated that in *Allis-Chalmers*: "Instead of relying on the express language of the *proviso*, . . . the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion'." *Booster Lodge No. 405, IAM v. NLRB*, 459 F.2d 1143, 1149 (D.C. Cir. 1972).

137. See text following note 150 *infra*.

NLRB has placed a "permissible gloss" on the express statutory language of section 8(b)(1)(B) in order to fulfill what was found to have been the congressional purpose underlying that section. It is submitted that the proper approach in determining the extent of that "permissible gloss" is to discard the myriad of vague standards and confusing terminology in order to take precise aim at the relevant policy considerations, as was done by the Supreme Court in *Allis-Chalmers*.

A Suggested Approach to Resolution of the Issues

Judge Wright correctly characterized the desired *result* in resolving section 8(b)(1)(B) cases: "Any sensible interpretation of the statute must . . . involve a determination of what obligations a supervisor owes to his union and what obligations he owes to his employer."¹³⁸ Moreover, the panel majority in *Illinois Bell* suggested the correct *approach*: "Section 8(b)(1)(B) must not be examined in a vacuum."¹³⁹ However, utilization of this approach to reach the desired result is valid only if it is understood *why* it is necessary to explore the policies expressed by Congress in sections 2(3) and 14(a) of the Act and by the Supreme Court in *Allis-Chalmers*.

Congress, in enacting section 8(b)(1)(B), intended to prevent a union from applying direct pressure upon an employer to interfere with his free choice of collective bargaining and grievance adjustment representatives.¹⁴⁰ There is nothing in the legislative history of the Act to indicate that Congress ever intended that the section would be applied to prevent indirect pressure upon an employer through union discipline of supervisors.¹⁴¹ The congressional policy with respect to supervisors was expressed in sections 2(3) and 14(a): Management was to have the *right* to demand the undivided loyalty of its supervisors,¹⁴² but supervisors could continue to be union members. Section 14(a) enables an employer to obtain as supervisors individuals who might be hesitant to forego benefits and seniority rights they have accumulated as union members. It should be apparent to an employer that, by permitting his supervisors to be union members, he thereby may be divesting himself

138. 4 CCH LAB. L. REP. ¶ 13,017, at 25,258.

139. *Id.* at 25,246.

140. See notes 63-68 *supra* & accompanying text.

141. "[T]here is not so much as a word in the legislative history of this or any other section of the Taft-Hartley Act which indicates that § 8(b)(1)(B) was intended to . . . protect supervisors from union discipline." 4 CCH LAB. L. REP. ¶ 13,017, at 25,255 n.1 (Wright, J., dissenting).

142. See notes 16-18 *supra* & accompanying text.

of a degree of their loyalty to which he is otherwise entitled. In addition to the intangible effects union membership may have on a supervisor's loyalties, the supervisor/member must be expected to incur certain obligations to the union from which he obtains benefits.¹⁴³ Congress in 1947, gave no indication that a union could not discipline a supervisor/member in order to enforce the obligations the union felt were owed to it.

For 20 years, section 8(b)(1)(B), as interpreted by both the Board and the courts, was totally unrelated to sections 2(3) and 14(a). The only situation in which a supervisor could be involved in a section 8(b)(1)(B) case was where the supervisor was also a collective bargaining or grievance adjustment representative, and the union applied pressure directly on the employer to have him replaced. It was not until—and it is only because of—the Board's decision in *Oakland Mailers* that policy considerations underlying the provisions of the Act relating to supervisory personnel became relevant to the interpretation of section 8(b)(1)(B).

In the section 8(b)(1)(B) cases since *Oakland Mailers*, the Board and courts have negated the effect of section 14(a) on the question of union discipline of *employer representatives* by stressing that Congress, in section 2(3), intended that an employer have the right to demand the undivided loyalty of its *supervisors*. It is submitted that such arguments are untenable. For example, the court in *Meat Cutters* stated:

[I]t is readily apparent, when all of the relevant 1947 amendments to the Act are considered in concert, that *Congress did not intend* (by permitting supervisors to be union members) . . . to allow unions to subvert the "undivided loyalty" it clearly believed such managerial personnel owe to their respective employers. A supervisor's obligations to his union simply cannot detract from the absolute duty, evidenced by section 8(b)(1)(B), which he owes to his employer when exercising his managerial authority.¹⁴⁴

The first part of this statement is contradicted by the fact that Congress included nothing in the Act to prohibit union discipline of supervisor/members, and no portion of the Act has been interpreted to re-

143. However, there is nothing in the Act to prohibit an employer from discharging a supervisor/member if the employer feels that the supervisor's loyalties have been drawn too far toward the union's interests, unless such discharge would affect the protected rights of the employees. See notes 20-26 *supra* & accompanying text.

144. 458 F.2d. 794, 800 (emphasis supplied).

strict such discipline when the supervisor is not also a collective bargaining or grievance adjustment representative within the meaning of section 8(b)(1)(B). Furthermore, to assume this alleged intent with respect to the obligations of supervisors and to superimpose it upon a section of the Act designed to protect an employer's rights with respect to his collective bargaining and grievance adjustment representatives is a leap of faith, especially when there is no indication that Congress ever considered the question of union discipline of employer representatives.

The panel majority in *Illinois Bell* fell into this error when it asserted that section 8(b)(1)(B) must be interpreted "in conjunction with the other 1947 amendments . . . relating to supervisory personnel."¹⁴⁵ Section 8(b)(1)(B) relates to representatives of the employer for the purposes of collective bargaining or grievance adjustment. It is only where such representatives are also supervisors that provisions of the Act relating to supervisory personnel become relevant, and then *only* because the Board has placed a "permissible gloss" on that section by limiting union discipline of *such* representatives.

The purpose of this analysis is to demonstrate that, while section 8(b)(1)(B) must not be examined in a vacuum but must be considered in light of other policy considerations imbedded in the labor law, it is not proper to infer that Congress itself intended that interpretation of section 8(b)(1)(B) be governed by those policies. It was the NLRB in *Oakland Mailers*, and not Congress in 1947, that has made it necessary to examine the effect of permitting supervisors to join unions. Because the Board has gone beyond the expressed intent of section 8(b)(1)(B) by placing a "permissible gloss" thereon, the Board and the courts should now feel free to be flexible in analyzing the conflicting policy considerations to determine the extent of that "permissible gloss."

The policy considerations to be applied already have been discussed in depth. It is these policies, protecting conflicting interests, which must be reconciled to determine "what obligations a supervisor (who is also an employer representative) owes to his union and what obligations he owes to his employer."¹⁴⁶ Recapitulating, section 2(3) places supervisors unequivocally on the side of management in the general scheme of labor-management relations and gives management the right to demand their undivided loyalty.¹⁴⁷ At the same time, section 14(a) expressly

145. 4 CCH LAB. L. REP. ¶ 13,017, at 25,246 (emphasis supplied).

146. See note 138 *supra* & accompanying text.

147. See notes 16-17 *supra* & accompanying text.

permits a supervisor to join a union, although his participation in union affairs is sharply restricted by other provisions of the Act prohibiting employer domination or interference with labor organizations.¹⁴⁸ On the other hand, the Supreme Court has recognized the strong interest of unions in maintaining the loyalty of their members through enforcement of rules which reflect legitimate union interests and which do not impair other policies imbedded in the labor laws.¹⁴⁹ The importance of a union's ability to maintain a unified front during a labor dispute has been specifically recognized.¹⁵⁰

The application of these considerations and the questions which must be resolved in determining the prohibited area of union discipline of supervisors who are also representatives under section 8(b)(1)(B) may be framed in light of the facts presented in *Illinois Bell*. Did the employer, in agreeing that its supervisory personnel would be union members, thereby voluntarily waive his right to the undivided loyalty of those supervisors, to which he was otherwise entitled; and if so, to what extent? Applying the considerations raised by the Supreme Court in section 8(b)(1)(A) cases, does the union rule forbidding supervisor/members to cross its picket lines represent a legitimate union interest; but, even if this is conceded, does that rule, as applied to supervisor/members, impair a policy imbedded in the labor laws? Finally, if as may be presumed, the employer obtained a concession from the union as consideration for its agreeing to the unionization of supervisors through the union security clause, would it constitute an abrogation by the employer of its part of the bargain to allow it to maintain that its interests in retaining the loyalty of its supervisor/representatives supersede the union's interests in maintaining a unified front during a labor dispute?

One other consideration might be taken into account in resolving section 8(b)(1)(B) cases. Presumably, a supervisor would wish to retain his union membership in order to maintain benefits he has accumulated with the union and to preserve his seniority status should he later return to employee status. The employer may be forced to concede to the wishes of qualified supervisors that they be allowed to retain their union membership. Professor Gould has suggested that if an employer were faced with the possibility that a union could discipline supervisor/members in a manner which the employer felt would harm its interests,

148. See notes 32-37 *supra* & accompanying text.

149. See note 61 *supra* & accompanying text.

150. See notes 53-54 *supra* & accompanying text.

the employer has an alternative. If the benefits arising from the supervisory position were sufficiently attractive, prospective supervisors should be willing to forego the benefits of retaining union membership.¹⁵¹

Some Proposed Standards

Finally, it is necessary to suggest some precise standards which would permit predictability in section 8(b)(1)(B) cases. If the policy considerations which have been outlined are resolved relatively in favor of the interests of management, a suitably definite standard might limit the permissible scope of union discipline to matters mechanical in nature which relate solely to the supervisor's relationship with the union and to those actions of the supervisor which threaten the ability of the union to carry out its routine business.¹⁵² Application of this standard would clearly proscribe the discipline in *Illinois Bell*, but would allow discipline for such matters as failure to pay dues, disruption of a union meeting, or the failure to register at a local's office before obtaining work within that local's jurisdiction.¹⁵³

If it is found that application of section 8(b)(1)(B) should be limited, a very narrow standard would proscribe union discipline only for acts performed by the supervisor within his responsibilities as a collective bargaining or grievance adjustment representative, with such responsibilities being interpreted narrowly.¹⁵⁴ Application of this standard clearly would require reversal of the board and panel decisions in *Illinois Bell*.

Another standard, which might exist in the area between those previously discussed, would prohibit union discipline of a supervisor who is also an employer representative for acts performed while exercising one of the supervisory authorities delineated in section 2(11)¹⁵⁵ or while following a clear directive of management as to a matter which

151. See Gould, *supra* note 134, at 1129. Professor Gould foresaw the situation which arose in *Illinois Bell* and concluded that under the *Allis-Chalmers* rationale, a union should be able to discipline a supervisor/member for performing rank-and-file struck work.

152. Any reference to internal/external union affairs as a basis for a standard is intentionally avoided. As Judge Wright noted: "All union rules are . . . 'external' since they are all designed to insure a strong and united front among union members when the union confronts its employer adversary." 4 CCH LAB. L. REP. ¶ 13,017, at 25,261. See *Scofield v. NLRB*, 394 U.S. 423, 431-32 (1969).

153. See *Painters Local 453*, 183 N.L.R.B. No. 24, 74 L.R.R.M. 1539 (1970).

154. Such responsibilities interpreted narrowly would not include performing rank-and-file struck work as was apparently suggested by the majority in *Illinois Bell*. See notes 110-12 *supra* & accompanying text. Nor would it include the urging of employees to vote with management as was suggested by the dissent. See notes 126-30 *supra* & accompanying text.

155. See note 5 *supra* & accompanying text.

can be asserted in good faith to be within management's prerogative under the collective bargaining agreement. The discipline in *Illinois Bell* would be permissible under this standard, since performing rank-and-file work does not involve exercise of any of the 2(11) authorities and since there was no clear directive from the employer to report for work. Moreover, it could be argued that the inclusion of supervisors in the union security clause negates any management prerogative to have its supervisors perform rank-and-file struck work. This final standard would, however, support the decision in *Meat Cutters*, if the change of meat procurement policy involved in that case could be asserted in good faith as a matter of management prerogative under the collective bargaining agreement.

CONCLUSION

Section 8(b)(1)(B) was intended by Congress to protect an employer from union interference in the selection of his collective bargaining and grievance adjustment representatives. It was not intended to be used to determine whether a union could discipline a supervisor whom the employer had permitted to become or remain a union member. In holding that union discipline of a supervisor who is also an employer representative could force a substitution of his loyalties and be an effective impediment to the employer's free choice of its collective bargaining or grievance adjustment representatives, the NLRB went beyond the language of the statute in order to effectuate the purpose of section 8(b)(1)(B). Congress permitted supervisors to join unions if an employer should so agree, but it gave no basis for determining what effect union membership of a supervisor should have on the undivided loyalty an employer is otherwise entitled to demand of such a supervisor. Because of an administrative determination, it is now necessary that the courts apply conflicting policy considerations flexibly in order to reach a reasonable resolution of the question.

In the five years since the Board's decision in *Oakland Mailers*, the Board and the courts have managed to create a confusing jungle of imprecise terminology and careless analysis. While other courts have summarily affirmed decisions of the Board, the Court of Appeals for the District of Columbia has at least made an effort to determine the limits of application of section 8(b)(1)(B) to union discipline of supervisors who are also employer representatives. The full court, on rehearing in *Illinois Bell*, is presented with an excellent opportunity to examine the policy considerations and set meaningful standards for resolution of section 8(b)(1)(B) cases.