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Andrew M. Calamari

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# UNION DISCIPLINE OF SUPERVISOR-MEMBERS WORKING IN NONUNION SHOPS

## INTRODUCTION

Supervisors, unlike their rank-and-file counterparts,<sup>1</sup> have no statutory right to organize and bargain collectively.<sup>2</sup> Supervisors, however, may be members of a union.<sup>3</sup> In certain industries, it is not unusual to find supervisors who are union members.<sup>4</sup> Jobs in the construction industry, for example, are mobile and unpredictable;<sup>5</sup> a worker may be a laborer one day and a supervisor the next.<sup>6</sup> Such transitory supervisors typically maintain union membership in order to retain accrued life insurance and pension benefits.<sup>7</sup>

Supervisors who maintain membership may encounter problems of divided loyalties when they act as employer representatives in collective bargaining and grievance adjustment. On one hand, union membership carries with it a responsibility to abide by union rules.<sup>8</sup> On the

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1. 29 U.S.C. §§ 152(3), 157 (1976).

2. 29 U.S.C. §§ 152(3), 157, 164(a) (1976); see *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 188 (1965).

3. 29 U.S.C. § 164(a) (1976); *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 808 (1974).

4. R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 689-90 (1976); Comment, *Section 8(b)(1)(B) of the National Labor Relations Act and Union Discipline of Supervisor-Members After Writers Guild: Equipose or Imbalance?*, 1978 S. Ill. U.L.J. 453, 456 [hereinafter cited as *Union Discipline*].

5. R. Gorman, *supra* note 4, at 690; *Union Discipline, supra* note 4, at 456; see *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 103 S. Ct. 1453, 1460 (1983).

6. *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 103 S. Ct. 1453, 1460 (1983); R. Gorman, *supra* note 4, at 690; *Union Discipline, supra* note 4, at 456.

7. R. Gorman, *supra* note 4, at 690; *Union Discipline, supra* note 4, at 456; see *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 793 (1974); *Local 636, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. NLRB*, 287 F.2d 354, 362 (D.C. Cir. 1961); Comment, *Changing Interpretation of NLRA Section 8(b)(1)(B)—Union Discipline of Supervisors in the Aftermath of Florida Power & Light*, 10 J. Mar. J. Prac. & Proc. 117, 118 (1976) [hereinafter cited as *Changing Interpretation*]. Readmission to the union may be available to the worker who resigns membership during his tenure as supervisor. This, however, may be insufficient to protect previously accrued benefits because seniority could be lost. See *Union Discipline, supra* note 4, at 456. Occasionally, the collective bargaining agreement between the employer and union will require supervisors to become union members. *E.g.*, *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 792 (1974); *Toledo Locals 15-P & 272 of the Lithographers & Photoengravers Int'l Union*, 175 N.L.R.B. 1072, 1073 (1969), *enforced*, 437 F.2d 55 (6th Cir. 1971).

8. *E.g.*, *ABC v. Writers Guild*, 437 U.S. 411, 415-16 (1978) (rules governing membership activity during strike); *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 796 (1974) (prohibition against crossing picket line); *NLRB v. IBEW, Local 323*, 703 F.2d 501, 502 n.1 (11th Cir.) (prohibition against working for

other, as the employer's representative, supervisors often must take positions contrary to union interests.<sup>9</sup>

These allegiances can collide when a union disciplines a supervisor-member who has violated union rules while representing his employer.<sup>10</sup> Such union discipline can run afoul of section 8(b)(1)(B) of the National Labor Relations Act (Act)<sup>11</sup> when the union's actions amount to coercion of the employer in the selection of its collective bargaining or grievance adjustment representative.<sup>12</sup> Section 8(b)(1)(B) has been construed to prohibit union discipline of a supervisor-member for conduct involving contract interpretation or grievance adjustment.<sup>13</sup> When the disciplining union represents or seeks to represent the rank-and-file workers of the supervisor-member's employer, the coercive aspects of the discipline are evident.<sup>14</sup> When there

employer in difficulty with union), *cert. denied*, 104 S. Ct. 366 (1983); IBEW, Local 73, 231 N.L.R.B. 809, 810 n.6 (1977) (same), *enforcement denied*, 621 F.2d 1035 (9th Cir.), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980); see *Changing Interpretation*, *supra* note 7, at 118.

9. See *Changing Interpretation*, *supra* note 7, at 118; *Union Discipline*, *supra* note 4, at 455; see, e.g., Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 796 (1974) (violating union rule against crossing picket line); Toledo Locals 15-P & 272 of the Lithographers & Photoengravers Int'l Union, 175 N.L.R.B. 1072, 1074 (1969) (working with undermanned crew contrary to union interests), *enforced*, 437 F.2d 55 (6th Cir. 1971); San Francisco-Oakland Mailers' Union 18, 172 N.L.R.B. 2173, 2173 & n.3 (1968) (contract interpretation contrary to union interests).

10. R. Gorman, *supra* note 4, at 690; *Union Discipline*, *supra* note 4, at 455; see Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 804-05 (1974); see, e.g., ABC v. Writers Guild, 437 U.S. 411, 430 (1978) (discipline of supervisor-members for crossing picket line adversely affects their performance of duties); San Francisco-Oakland Mailers' Union 18, 172 N.L.R.B. 2173, 2174 (1968) (discipline of supervisor-members for interpretation of contract adversely affects their performance of duties).

11. Ch. 120, § 101, 61 Stat. 136, 141 (1947) (codified at 29 U.S.C. § 158(b)(1)(B) (1976)).

12. *Id.* The term "collective bargaining" is defined in § 8(d) of the Act as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1976). "Grievance adjustment" has been defined as the resolution of complaints or grievances of employees as well as of problems that may arise during the supervisor's shift. Local 322, Laborers' Int'l Union, 229 N.L.R.B. 949, 950-51 (1977).

13. See Local 453, Bhd. of Painters, 183 N.L.R.B. 187, 188-89 (1970); R. Gorman, *supra* note 4, at 691; *Changing Interpretation*, *supra* note 7, at 120; *Union Discipline*, *supra* note 4, at 461; see, e.g., Houston Typographical Union 87, 182 N.L.R.B. 592, 595 (1970) (supervisor-member's failure to adhere to collective bargaining contract); San Francisco-Oakland Mailers' Union 18, 172 N.L.R.B. 2173, 2173 (1968) (supervisor-members' contract interpretation).

14. See ABC v. Writers Guild, 437 U.S. 411, 414, 435-36 (1978); Painters Dist. Council 36, 259 N.L.R.B. 808, 811 (1981); R. Gorman, *supra* note 4, at 691-92. See *infra* notes 65-68 and accompanying text.

is no union-management relationship, however, the existence of coercion resulting from discipline is more difficult to detect.<sup>15</sup>

The National Labor Relations Board (Board) has ruled that even absent a union-management relationship, union discipline of a supervisor-member, because he is working for a nonunion employer, constitutes coercion.<sup>16</sup> Under these circumstances the supervisor-member may be able to avoid discipline only by resigning from the supervisory position. Union discipline, therefore, may deprive the employer of its bargaining representative.<sup>17</sup> Courts have disagreed over whether such discipline contravenes section 8(b)(1)(B).<sup>18</sup>

This Note contends that union discipline of a supervisor-member can amount to coercion, within the meaning of section 8(b)(1)(B), only when two components are present: (1) discipline of particular supervisory conduct, and (2) a union-management relationship. Part I examines the types of supervisory conduct for which unions can discipline supervisor-members without being coercive. Part II discusses the type of union-management relationship that must exist for any discipline to be coercive. Part III demonstrates that section 8(b)(1)(B) was not intended to resolve the divided loyalty problem. Other sections of the Act were enacted for this purpose. This Note concludes that when the disciplining union neither represents nor seeks to represent the rank-and-file employees, there can be no coercion under section 8(b)(1)(B).

### I. THE DISCIPLINE COMPONENT

Section 8(b)(1)(B) makes it an "unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."<sup>19</sup> Early Board decisions limited section

15. Frequently, provisions in a union constitution prohibit members from accepting a position with a nonunion employer. The issue of coercion arises when a union disciplines a supervisor-member for breach of such a provision. *E.g.*, NLRB v. IBEW, Local 323, 703 F.2d 501, 502 & n.1 (11th Cir.), *cert. denied*, 104 S. Ct. 366 (1983); NLRB v. IBEW, Local 73, 621 F.2d 1035, 1036 (9th Cir.), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980). See *infra* note 24.

16. IBEW, Local 323, 255 N.L.R.B. 1395, 1397, 1401 (1981), *enforced*, 703 F.2d 501 (11th Cir.), *cert. denied*, 104 S. Ct. 366 (1983); IBEW, Local 73, 231 N.L.R.B. 809, 809, 811 (1977), *enforcement denied*, 621 F.2d 1035 (9th Cir.), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980).

17. See *infra* notes 84-85 and accompanying text.

18. Compare NLRB v. IBEW, Local 323, 703 F.2d 501, 505-06 (11th Cir.) (discipline prohibited even though union neither represents nor seeks to represent rank-and-file), *cert. denied*, 104 S. Ct. 366 (1983) with NLRB v. IBEW, Local 73, 621 F.2d 1035, 1037 (9th Cir.) (discipline not coercive if union neither represents nor seeks to represent rank-and-file), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980).

19. 29 U.S.C. § 158(b)(1)(B) (1976).

8(b)(1)(B)'s application to instances of direct union coercion of the employer in the selection of its collective bargaining or grievance adjustment representatives.<sup>20</sup> Thus, a union violated the section when it struck to compel the employer to remove its bargaining agent.<sup>21</sup>

This provision has since been interpreted to prohibit union discipline of supervisor-members who are performing tasks related to the collective bargaining or grievance adjustment process.<sup>22</sup> Undeniably, the punitive nature of discipline can render it a coercive device.<sup>23</sup> Questions arise, however, as to which supervisory tasks are sufficiently related to collective bargaining or grievance adjustment to warrant immunity from discipline.<sup>24</sup>

In *San Francisco-Oakland Mailers' Union 18*,<sup>25</sup> the Board first recognized that union pressure need not be directed at an employer to constitute unlawful coercion.<sup>26</sup> Indirect coercion, intended to change the attitude of the employer's representative to one more favorable to the union, is as effective as replacing the representative.<sup>27</sup> Accordingly, pressure exerted on that representative may be sufficient to violate the Act.<sup>28</sup>

*Oakland Mailers* involved supervisor-members who were disciplined for interpreting the collective bargaining agreement in ways the union considered contrary to its interests.<sup>29</sup> Later decisions, spawned by *Oakland Mailers*, forbade discipline for the performance of any supervisory duties, provided the supervisor possessed the authority to bargain collectively or adjust grievances.<sup>30</sup> It was feared

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20. *E.g.*, Southern Cal. Pipe Trades Dist. Council 16, 120 N.L.R.B. 249, 250-51 (1958); *In re Int'l Typographical Union & Baltimore Typographical Union 12*, 87 N.L.R.B. 1215, 1217 (1949); see R. Gorman, *supra* note 4, at 690-91.

21. Los Angeles Cloak Joint Bd., 127 N.L.R.B. 1543, 1550-51 (1960); see R. Gorman, *supra* note 4, at 690-91. A union did not violate the section, however, when it struck to compel reinstatement of a supervisor who was not a collective bargaining or grievance adjustment representative. *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 947 (1st Cir. 1961).

22. See *infra* notes 25-33 and accompanying text.

23. See *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 804-05 (1974); *San Francisco-Oakland Mailers' Union 18*, 172 N.L.R.B. 2173, 2174 (1968); R. Gorman, *supra* note 4, at 691.

24. The discipline must relate to the supervisor-member's performance of collective bargaining or grievance adjustment duties. See *infra* notes 37, 43 and accompanying text. Discipline for matters of purely internal union administration, such as nonpayment of dues, is not coercive. See *Local 453, Bhd. of Painters*, 183 N.L.R.B. 187, 189 (1970); R. Gorman, *supra* note 4, at 692. See *infra* notes 61, 64.

25. 172 N.L.R.B. 2173 (1968).

26. *Id.* at 2173.

27. *Id.*

28. *Id.*

29. *Id.*

30. *E.g.*, *New Mexico Dist. Council of Carpenters*, 177 N.L.R.B. 500, 502 (1969) (supervisor-member with collective bargaining authority disciplined for working

that such discipline would carry over to the supervisor's collective bargaining or grievance adjustment activities.<sup>31</sup> Ultimately, the Board reasoned that any supervisor with substantial supervisory authority, regardless of whether he was empowered to perform collective bargaining or grievance adjustment functions, might at some future time become enmeshed in the process.<sup>32</sup> Thus, the section was construed to prohibit discipline of such supervisors, without concern for whether they possessed collective bargaining or grievance adjustment power.<sup>33</sup>

The Supreme Court's first review of section 8(b)(1)(B) came in *Florida Power & Light Co. v. IBEW, Local 641*<sup>34</sup> in which the Court struck a severe blow to the progeny of *Oakland Mailers*. The Board had held that union discipline of supervisor-members who perform rank-and-file work during a strike falls within the proscriptions of section 8(b)(1)(B).<sup>35</sup> The Court disagreed, reasoning that Congress intended to protect employers only in the selection of representatives for the purposes of collective bargaining and grievance adjustment.<sup>36</sup> Thus, no violation occurs unless the disciplined conduct is directly related to the collective bargaining or grievance adjustment function.<sup>37</sup> Although the Court accorded tacit approval to the Board's

with nonunion employer), *enforced*, 454 F.2d 1116 (10th Cir. 1972); Toledo Locals 15-P & 272 of the Lithographers & Photoengravers Int'l Union, 175 N.L.R.B. 1072, 1078 (1969) (supervisor-member with collective bargaining authority disciplined for working with undermanned crew), *enforced*, 437 F.2d 55 (6th Cir. 1971); *see* Detroit Newspaper Printing Pressmen's Union 13, 192 N.L.R.B. 106, 111 (1971); *Union Discipline*, *supra* note 4, at 461.

31. *See* NLRB v. Toledo Locals 15-P & 272 of the Lithographers & Photoengravers Int'l Union, 437 F.2d 55, 57 (6th Cir. 1971); Local 453, Bhd. of Painters, 183 N.L.R.B. 187, 188-89 (1970).

32. Local 2150, IBEW, 192 N.L.R.B. 77, 80 (1971) (quoting Toledo Locals 15-P & 272 of the Lithographers & Photoengravers Int'l Union, 175 N.L.R.B. 1072, 1079 (1969), *enforced*, 437 F.2d 55 (6th Cir. 1971)), *enforced*, 486 F.2d 602 (7th Cir. 1973), *vacated and remanded*, 418 U.S. 902 (1974); Houston Typographical Union 87, 182 N.L.R.B. 592, 595 (1970) (dictum); Toledo Locals 15-P & 272 of the Lithographers & Photoengravers Int'l Union, 175 N.L.R.B. 1072, 1079 (1969) (dictum), *enforced*, 437 F.2d 55 (6th Cir. 1971); *see* R. Gorman, *supra* note 4, at 692.

33. *See* Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 802 (1974); Meat Cutters Union 81 v. NLRB, 458 F.2d 794, 798-99 (D.C. Cir. 1972); *Changing Interpretation*, *supra* note 7, at 122-23; *Union Discipline*, *supra* note 4, at 461-62.

34. 417 U.S. 790 (1974).

35. IBEW Sys. Council U-4, 193 N.L.R.B. 30, 31 (1971), *enforced sub nom.* IBEW, Local 134 v. NLRB, 487 F.2d 1113 (1972), *rev'd en banc*, 487 F.2d 1143 (D.C. Cir. 1973), *aff'd sub nom.* Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790 (1974); IBEW, Local 134, 192 N.L.R.B. 85, 86 (1971), *enforced*, 487 F.2d 1113 (1972), *rev'd en banc*, 487 F.2d 1143 (D.C. Cir. 1973), *aff'd sub nom.* Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790 (1974).

36. *Florida Power*, 417 U.S. at 804.

37. *Id.* at 804-05; *accord* NLRB v. Amax Coal Co., 453 U.S. 322, 349 (1981) (Stevens, J., dissenting).

*Oakland Mailers* decision,<sup>38</sup> it cast grave doubt on the validity of the post-*Oakland Mailers* extensions.<sup>39</sup>

The Court again encountered section 8(b)(1)(B) in *ABC v. Writers Guild*.<sup>40</sup> In this case the Board held,<sup>41</sup> and the Court agreed, that union discipline of supervisor-members who cross a picket line to perform only supervisory duties, including the adjustment of grievances, contravenes section 8(b)(1)(B).<sup>42</sup> *Writers Guild* revitalized those Board decisions premised on the principle that discipline for the performance of general supervisory duties is forbidden if such discipline may carry over to the supervisor's performance of collective bargaining or grievance adjustment tasks.<sup>43</sup>

*Writers Guild* leaves open the question whether discipline violates the Act when the supervisor lacks authority to bargain collectively or adjust grievances.<sup>44</sup> Nonetheless, it is clear that a union may discipline a supervisor-member for performing only rank-and-file work during a strike without coercing the employer.<sup>45</sup> Union discipline becomes coercive when it interferes with the employer's ability to bargain and resolve contract disputes.

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38. *Id.* at 805.

39. See *infra* note 43.

40. 437 U.S. 411 (1978).

41. *Writers Guild*, 217 N.L.R.B. 957, 969 (1975), *enforcement denied per curiam*, 547 F.2d 159 (2d Cir. 1976), *rev'd*, 437 U.S. 411 (1978).

42. *Writers Guild*, 437 U.S. at 429-30. The Court seemingly based its conclusion on the standards enunciated in *Florida Power*, *id.* at 429, and the result is technically in accord with the holding of that case. Compare *Writers Guild*, 437 U.S. at 429-30 (discipline of supervisor-members who cross picket line to perform only supervisory duties, including the adjustment of grievances, contravenes § 8(b)(1)(B)) with *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 805 & n.16 (1974) (discipline of supervisor-members who cross picket line to perform only rank-and-file work is not coercive).

43. See *Writers Guild*, 437 U.S. at 429. *Writers Guild's* analysis of *Florida Power* is somewhat questionable. The Court inferred that *Florida Power* embraced the "carryover" rationale of post-*Oakland Mailers* decisions. *Id.* This was the notion that discipline of a supervisor, for the performance of general supervisory duties, is prohibited if such discipline may carry over to the performance of collective bargaining or grievance adjustment tasks. See *supra* notes 30-31 and accompanying text. *Florida Power*, however, indicated that *Oakland Mailers* "fell within the outer limits" of the test for a violation. 417 U.S. at 805 (emphasis added); accord *Writers Guild*, 437 U.S. at 442 n.5 (Stewart, J., dissenting). Thus, to find that *Florida Power* endorsed extensions of *Oakland Mailers* is contrary to the language of *Florida Power*. Yet, *Writers Guild* apparently intends a return to many of the pre-*Florida Power* precepts. See *Union Discipline*, *supra* note 4, at 471.

44. See *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 103 S. Ct. 1453, 1460 n.10 (1983). The "carryover" rationale may extend to cases where the supervisor lacks authority to bargain collectively or adjust grievances. See *id.*

45. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 805 (1974); see *R. Gorman*, *supra* note 4, at 693.

## II. THE RELATIONSHIP COMPONENT

Once it is determined that there has been discipline sufficient to constitute coercion, it must be established that the discipline has provided the union with some measure of control over the employer's ability to bargain collectively or adjust grievances. In *Oakland Mailers*, the Board acknowledged that discipline violates the Act when such discipline is imposed to change the employer's foremen "from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will."<sup>46</sup> The legislative history of section 8(b)(1)(B) indicates that Congress was concerned primarily with preventing unions from exercising such control.<sup>47</sup> The section was intended to prohibit unions from coercing employers into choosing bargaining representatives or grievance adjusters favorable to the union.<sup>48</sup> Senator Taft explained the provision as follows:

[E]mployees cannot say to their employer, "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." . . . It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." . . . Under the bill the employer has a right to say, "No . . . [h]ere is my representative, and this is the man you have to deal with."<sup>49</sup>

In *Florida Power*, the Supreme Court recognized that Congress, in enacting section 8(b)(1)(B), was "exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment."<sup>50</sup> After laying this founda-

46. San Francisco-Oakland Mailers' Union 18, 172 N.L.R.B. 2173, 2173 (1968).

47. "It often happens that management is forced to replace a foreman because the union does not like him—because he is too strict. Cases of that nature are very numerous. . . . The bill outlaws such conduct." 93 Cong. Rec. 4137 (1947) (remarks of Sen. Ellender); see *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 804-05 (1974); 93 Cong. Rec. 4143 (1947) (remarks of Sen. Ellender). *Oakland Mailers* recognized that union pressure to replace a foreman may be the equivalent of union control over the foreman. 172 N.L.R.B. at 2173.

48. S. Rep. No. 105, 80th Cong., 1st Sess. 21 (1947) [hereinafter cited as Senate Report], reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 427 (1948) [hereinafter cited as Legislative History]. The section was also designed to prevent unions from compelling employers to either join or resign from employer associations that negotiate labor contracts for their members. *Id.*, reprinted in Legislative History, *supra*, at 427.

49. 93 Cong. Rec. 3837 (1947) (remarks of Sen. Taft). Senator Taft was the principal sponsor of the measure; accordingly, his interpretation is entitled to great deference. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 640 (1967); 2A C. Sands, *Sutherland Statutory Construction* § 48.15, at 221-22 (4th ed. 1973).

50. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 803 (1974).



tion, the Court determined that union discipline of supervisor-members can constitute a violation of section 8(b)(1)(B) only when the discipline may "adversely affect" the supervisor's performance of his collective bargaining or grievance adjustment duties.<sup>51</sup> Indeed, if it is the exclusive purpose of section 8(b)(1)(B) to prohibit a union's determination of the employer's bargaining representative, an adverse effect on the supervisor's performance of his duties is necessarily one that will enable a union to dictate its choice of representative or unduly influence the attitude of the representative.<sup>52</sup>

*Florida Power* and *Writers Guild* were decided in the context of a bargaining relationship between an employer and a union.<sup>53</sup> *Writers Guild* did not disturb the underpinnings of *Florida Power* that require a control factor on which to premise a claim of coercion.<sup>54</sup> *Writers Guild* simply placed greater restrictions on permissible union discipline of supervisor-members when the union is already in a position to obtain some control through its bargaining relationship with the employer.<sup>55</sup>

*Oakland Mailers*, which was approved by the Court in both *Florida Power*<sup>56</sup> and *Writers Guild*,<sup>57</sup> illustrates the significance of a relationship as the conduit for control. In articulating the concept of indirect coercion, the Board reasoned that discipline of the employer's representative can change that representative's attitude toward the union.<sup>58</sup> Although causing a change in the supervisor's attitude may be as effective as replacing the representative,<sup>59</sup> this attitude is not impor-

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51. *Id.* at 804-05.

52. See *infra* notes 58-61 and accompanying text.

53. *Writers Guild*, 437 U.S. at 413-14; *Florida Power*, 417 U.S. at 792, 794-95.

54. The Court indicated that it was the control factor, derived from the union-management relationship, that rendered the discipline coercive: "At the same time, [the supervisors] were expected to perform their regular supervisory duties and to adjust grievances whenever the occasion demanded, functions requiring them to deal with the same union which was considering the appeal of their personal sanctions." *Writers Guild*, 437 U.S. at 434 (emphasis added).

55. See *id.* at 429-30. *Florida Power's* language indicating that an adverse effect on the supervisor's performance will only be coercive when the disciplined conduct relates directly to the collective bargaining or grievance adjustment process is dictum. See *Florida Power*, 417 U.S. at 804-05; *NLRB v. Amax Coal Co.*, 453 U.S. 322, 349-50 (1981) (Stevens, J., dissenting). *Writers Guild* merely diluted this dictum by expanding the category of supervisory duties insulated from discipline. See *Writers Guild*, 437 U.S. at 429-30; *Union Discipline*, *supra* note 4, at 471. This is consistent with the fundamental requirement, established in *Florida Power*, that there be an adverse effect that enables a union to dictate effectively its choice of employer representative. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-35 (1981); *Writers Guild*, 437 U.S. at 422-23, 429.

56. See 417 U.S. at 805.

57. 437 U.S. at 436.

58. *San Francisco-Oakland Mailers' Union 18*, 172 N.L.R.B. 2173, 2173 (1968).

59. *Id.*

tant unless the employer is engaged in dealings with the union. In *Oakland Mailers*, for example, the representative was charged with the responsibility of interpreting the agreement between the employer and the union.<sup>60</sup> Absent such a union-management relationship, however, any attitudinal changes will not enhance a union's control over the collective bargaining or grievance adjustment process.<sup>61</sup>

The union-management relationship in *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*<sup>62</sup> represents the minimum relationship sufficient to allow a finding of coercion. Although there was no established bargaining relationship, the union had twice, prior to the disciplinary action, lost elections to represent the rank-and-file employees.<sup>63</sup> The Board acknowledged that this relationship was adequate to inject coercion into the union's disciplinary action.<sup>64</sup>

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60. *Id.*

61. In *Oakland Mailers*, the Board rejected the union's contention that the discipline was permitted as a purely internal union measure. *Id.* at 2174. The Board found that the relationship between the union and its members was "used as a convenient and . . . powerful tool to affect the employer-union relationship." *Id.* Later decisions also recognized that § 8(b)(1)(B) violations require that the underlying dispute be between the employer and union and not between the union and its members. Wisconsin River Valley Dist. Council, 218 N.L.R.B. 1063, 1066 (1975) (dissent of Member Penello), *enforced*, 532 F.2d 47 (7th Cir. 1976); United Bhd. of Carpenters & Joiners Union 14, 217 N.L.R.B. 202, 202, 206 (1975); Newspaper Guild, Local 187, 196 N.L.R.B. 1121, 1122 (1972), *enforcement denied*, 489 F.2d 416 (3d Cir. 1973); Local 2150, IBEW, 192 N.L.R.B. 77, 81 (1971), *enforced*, 486 F.2d 602 (7th Cir. 1973), *vacated and remanded on other grounds*, 418 U.S. 902 (1974); New Mexico Dist. Council of Carpenters, 177 N.L.R.B. 500, 502 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972); *see* NLRB v. Amax Coal Co., 453 U.S. 322, 350 (1981) (Stevens, J., dissenting); NLRB v. IBEW, Local 73, 621 F.2d 1035, 1037 (9th Cir.), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980); NLRB v. Sheet Metal Workers' Int'l Ass'n, Local 361, 477 F.2d 675, 677 (5th Cir. 1973); Meat Cutters Union 81 v. NLRB, 458 F.2d 794, 800-01 (D.C. Cir. 1972); R. Gorman, *supra* note 4, at 692; *cf.* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 187 (1967) (§ 8(b)(1)(A) not intended to regulate internal union affairs with respect to union discipline of nonsupervisory members).

62. 177 N.L.R.B. 500 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972).

63. *Id.* at 501. In *Horner*, the union clearly had a continuing interest in representing the rank-and-file workers of the supervisor-member's employer. *See id.* The union had petitioned for representation elections in two consecutive years, waiting only the minimum statutory time between elections. *See* 29 U.S.C. § 159(c)(3) (1976). At some point after the union loses an election, however, its interest in representing the rank-and-file can no longer be presumed from prior election petitions; the union-management relationship underlying a § 8(b)(1)(B) claim will no longer exist.

64. *See Horner*, 177 N.L.R.B. at 502 (underlying dispute was between union and employer rather than between union and its members); *see also* Painters Dist. Council 36, 259 N.L.R.B. 808, 808 (1981) (union's interest in representing rank-and-file distinguished from lack of interest); Wisconsin River Valley Dist. Council, 218 N.L.R.B. 1063, 1066 (1975) (dissent of Member Penello) (relationship crucial to determining the existence of a violation), *enforced*, 532 F.2d 47 (7th Cir. 1976).

Clearly, union discipline of supervisor-members, who have collective bargaining or grievance adjustment authority, may result in coercion of the employer when the union represents<sup>65</sup> or seeks to represent the rank-and-file employees.<sup>66</sup> Under these circumstances, a union may use discipline to compel the resignation of a supervisor in order to avoid dealing with an undesirable representative.<sup>67</sup> Alternatively, such discipline may be used to effect a change in the representative's attitude toward the union, thereby accomplishing a similar result.<sup>68</sup> In either case, the union's conduct amounts to choosing the employer's representative.

There is no such coercion, however, when a union is neither engaged in a bargaining relationship with an employer nor exhibits an interest in becoming so engaged. In this situation, the discipline can effectuate no choice of bargaining representative.<sup>69</sup> Therefore, the required adverse effect on the supervisor's performance cannot exist.<sup>70</sup>

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When a union neither represents nor seeks to represent the rank-and-file employees, there is no dispute between the employer and union. Accordingly, any discipline must be considered a purely internal union affair and, therefore, not coercive. *See* Local 453, Bhd. of Painters, 183 N.L.R.B. 187, 189 (1970). *See supra* note 61 and accompanying text. Although unions have no statutory right to discipline supervisor-members, even for purely internal matters, there is no basis to prohibit such discipline under § 8(b)(1)(B). *See* Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 805 n.16 (1974).

65. *See* ABC v. Writers Guild, 437 U.S. 411, 429 (1978); Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 804-05 (1974); San Francisco-Oakland Mailers' Union 18, 172 N.L.R.B. 2173, 2173 (1968); R. Gorman, *supra* note 4, at 691-93.

66. *See* New Mexico Dist. Council of Carpenters, 177 N.L.R.B. 500, 501 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972).

67. *See* ABC v. Writers Guild, 437 U.S. 411, 435 (1978); Dallas Mailers Union, Local 143 v. NLRB, 445 F.2d 730, 734 (D.C. Cir. 1971); Painters Dist. Council 36, 259 N.L.R.B. 808, 811 (1981).

68. *See supra* notes 58-64 and accompanying text.

69. This analysis comports with the Board's position that a violation of § 8(b)(1)(B) is dependent not on the union's motivation for discipline, but on whether the discipline will have the reasonable effect of coercing the employer in the selection of its collective bargaining or grievance adjustment representative. *See* Painters Dist. Council 36, 259 N.L.R.B. 808, 811 (1981); Chicago Typographical Union 16, 216 N.L.R.B. 903, 903-04 (1975), *enforced*, 539 F.2d 242 (D.C. Cir. 1976).

70. Rules forbidding members from working for nonunion employers are typically justified by the union's need to prevent its members from aiding employers opposed to the cause of unionism. *See* IBEW, Local 323, 255 N.L.R.B. 1395, 1397 (1981), *enforced*, 703 F.2d 501 (11th Cir.), *cert. denied*, 104 S. Ct. 366 (1983); New Mexico Dist. Council of Carpenters, 177 N.L.R.B. 500, 502 (1969), *enforced*, 454 F.2d 1116 (10th Cir. 1972). Absent an adverse effect on the collective bargaining process, however, the enforcement of these rules is not coercive even if they are used to influence employers' views of unionism. *See supra* notes 50-52 and accompanying text.

### III. DIVIDED LOYALTIES AND THE LIMITED SCOPE OF SECTION 8(b)(1)(B)

The purpose of section 8(b)(1)(B) militates against finding a violation when there has been a failure to establish some form of union-management relationship.<sup>71</sup> Absent this relationship, barring union discipline of supervisor-members simply ensures for the employer the absolute loyalty of its supervisors.<sup>72</sup> Section 8(b)(1)(B), however, was never intended to guarantee undivided loyalty.<sup>73</sup> The section was designed to prevent unions from compelling employers to choose pro-union collective bargaining or grievance adjustment representatives.<sup>74</sup>

The 1947 Taft-Hartley Act<sup>75</sup> enunciates a national labor policy intended to foster the development of supervisors "loyal to [management and] not subject to influence or control of unions."<sup>76</sup> Section 2(3), for example, expressly defines "employee" to exclude supervisors from the protection of the Act.<sup>77</sup> Similarly, section 14(a)<sup>78</sup> permits

71. See *supra* text accompanying notes 46-70.

72. See *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 805-07 (1974).

73. See text accompanying *infra* notes 81-82.

74. See *supra* notes 48-50 and accompanying text.

75. Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (1976)). The Wagner Act of 1935 was the first promulgation of the National Labor Relations Act. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1976)). Several of the Taft-Hartley amendments were enacted to clarify Congressional intent with respect to the status of supervisors under the Act. The Wagner Act had defined "employer" as "any person acting in the interest of an employer." Ch. 372, § 2(2), 49 Stat. 449, 450 (1935); see H.R. Rep. No. 245, 80th Cong., 1st Sess. 13 (1947) [hereinafter cited as House Report], reprinted in *Legislative History, supra* note 48, at 304. Board decisions over the next ten years, however, included supervisors within the class of statutory employees. Under this rationale, the Board began certifying unions of foremen. *E.g., In re Packard Motor Car Co.*, 61 N.L.R.B. 4, 15, 17 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947); *In re Godchaux Sugars, Inc.*, 44 N.L.R.B. 874, 876-77 (1942), overruled, *In re Maryland Dry Dock Co.*, 49 N.L.R.B. 733 (1943), overruled, *In re Packard Motor Car Co.*, 61 N.L.R.B. 4 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947); *In re Union Collieries Coal Co.*, 41 N.L.R.B. 961, 965-67 (1942); see House Report, *supra*, at 13, reprinted in *Legislative History, supra* note 48, at 304. In response, Congress amended § 2(3) of the Act and enacted §§ 2(11) and 14(a). See Ch. 120, § 101, 61 Stat. 136, 137-38, 151 (1947) (codified at 29 U.S.C. §§ 152(3), (11), 164(a) (1976)). See *infra* notes 77-80 and accompanying text. These sections apply not only to unions of supervisors, but also to rank-and-file unions that have supervisor-members. House Report, *supra*, at 15, reprinted in *Legislative History, supra* note 48, at 306.

76. House Report, *supra* note 75, at 16, reprinted in *Legislative History, supra* note 48, at 307; accord *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 661-62 (1974).

77. 29 U.S.C. § 152(3) (1976); see also 29 U.S.C. § 152(11) (1976) (defining "supervisor").

78. 29 U.S.C. § 164(a) (1976). Section 14(a) provides:

Nothing herein shall prohibit any individual employed as a supervisor from

supervisors to retain union membership, but relieves "employers . . . from any compulsion . . . to accord [supervisors] the anomalous status of employees."<sup>79</sup> The primary purpose of these sections is to provide management with the "undivided loyalty" of its supervisors.<sup>80</sup>

*Florida Power*, however, rejected the notion that section 8(b)(1)(B) was designed to provide an employer with such loyalty.<sup>81</sup> The Court ruled that Congress intended sections 2(3) and 14(a) to be the exclusive means to resolve the loyalty problem.<sup>82</sup> Any employer desiring the absolute loyalty of its supervisors can insist that they resign their union membership.<sup>83</sup>

Implicit in this conclusion is the possibility that a supervisor may prefer union membership to his position. The Court's willingness to risk this resignation indicates that a resignation alone is not conclusive evidence of union coercion. Yet, the Board has ruled that the employer is coerced within the meaning of section 8(b)(1)(B) when the supervisor can only avoid discipline by resigning from his position.<sup>84</sup>

becoming or remaining a member of a labor organization, but no employer subject to this [Act] 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.*

79. Senate Report, *supra* note 48, at 5, *reprinted in* Legislative History, *supra* note 48, at 411; *see Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 810 n.19 (1974).

80. Senate Report, *supra* note 48, at 5, *reprinted in* Legislative History, *supra* note 48, at 411.

81. *Florida Power & Light v. IBEW, Local 641*, 417 U.S. 790, 807 (1974).

82. *Id.* at 807-08.

83. *Id.* at 812. There is, of course, a loyalty aspect to the § 8(b)(1)(B) problem. The *Oakland Mailers* formulation of indirect coercion was premised on a union's ability to use discipline to change the supervisor-member's attitude toward the union. 172 N.L.R.B. at 2173. Essentially, a change in attitude represents a diversion of the supervisor-member's loyalty away from the employer and toward the union. *See id.* Yet, influencing the supervisor-member's loyalty does not alone constitute coercion. *See Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 813 (1974); *Union Discipline, supra* note 4, at 464. The supervisor-member's loyalty is merely the vehicle by which the union may adversely affect the employer's ability to bargain collectively or adjust grievances. *See ABC v. Writers Guild*, 437 U.S. 411, 436-37 (1978). Absent such an adverse effect, § 8(b)(1)(B) cannot be applied to guard against divided loyalties. *See Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 807 (1974); *Union Discipline, supra* note 4, at 463.

84. *IBEW, Local 323*, 255 N.L.R.B. 1395, 1401 (1981), *enforced*, 703 F.2d 501 (11th Cir.), *cert. denied*, 104 S. Ct. 366 (1983); *IBEW, Local 73*, 231 N.L.R.B. 809, 811 (1977), *enforcement denied*, 621 F.2d 1035 (9th Cir.), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980).

Should the supervisor choose allegiance to the union, the employer would be deprived of its bargaining representative.<sup>85</sup>

This analysis, however, obscures the issue. The critical inquiry must focus on whether the resignation could adversely influence the grievance adjustment or collective bargaining process. Although the discipline component of coercion may be present, there can be no such influence when a union neither represents nor seeks to represent the rank-and-file. Section 8(b)(1)(B) must not be applied solely to bolster a supervisor's allegiance to his employer. Thus, failure to establish a sufficient union-management relationship should be fatal to a claim of union coercion.

### CONCLUSION

Two components are necessary to establish a claim of coercion under section 8(b)(1)(B). Discipline must have been imposed for the supervisor's performance of duties related to the collective bargaining or grievance adjustment process. Once a union has so disciplined a supervisor-member, it must be determined that the discipline will enhance the union's control over either of the two processes. When there is a bargaining relationship between the employer and union, such control may be presumed. When there is no such relationship, however, there must be a showing that some other form of union-management relationship exists. This necessary relationship is not present when a union neither represents nor displays an interest in representing the rank-and-file employees. As a result, there is no coercion within the meaning of section 8(b)(1)(B).

The Board's approach to this issue is problematic because it affords employers the protection of the Act when it is neither warranted nor permitted. This application of section 8(b)(1)(B) serves the forbidden purpose of ensuring for these employers the absolute loyalty of their supervisors. In addition, many unions provide their members with substantial benefits. To allow section 8(b)(1)(B) to shelter supervisors from discipline when protection is unnecessary enables these supervisors to avoid their responsibilities as union members while they continue to reap the rewards of their affiliation with the union.

*Andrew M. Calamari*

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85. IBEW, Local 323, 255 N.L.R.B. 1395, 1401 (1981), *enforced*, 703 F.2d 501 (11th Cir.), *cert. denied*, 104 S. Ct. 366 (1983); IBEW, Local 73, 231 N.L.R.B. 809, 811 (1977), *enforcement denied*, 621 F.2d 1035 (9th Cir.), *modified on other grounds*, 714 F.2d 870 (9th Cir. 1980).