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## Labor Law--Unions--The National Labor Relations Board's Role in Examining the Use of Union Dues Collected Pursuant to a Union Security Agreement

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## NOTES

### LABOR LAW—UNIONS—The National Labor Relations Board's Role in Examining the Use of Union Dues Collected Pursuant to a Union Security Agreement

Under section 8(a)(3) of the National Labor Relations Act (NLRA), a majority union and an employer are permitted to enter into a so-called "union security agreement," which requires all employees in the bargaining unit to tender to the union as a condition of continued employment "the periodic dues and the initiation fees uniformly required" by the union of its members.<sup>1</sup> As long as an employee—whether or not he is a member of the union—is willing to pay the proper initiation fees and the "periodic dues . . . uniformly required," the union commits an unfair labor practice if it threatens to request or in fact obtains his discharge.<sup>2</sup> Several cases have arisen

1. 29 U.S.C. § 158(a)(3) (1964). This section provides that nothing in the NLRA shall preclude a labor organization which is the representative of the employees in an appropriate bargaining unit from making an agreement with an employer "to require as a condition of employment membership therein . . ." Standing alone, this language would seem to allow a union the right to have an employee discharged from employment for failure to acquire and maintain union membership. However, this broad language of section 8(a)(3) is qualified by a proviso which states that an employer cannot discriminate against a nonunion employee if membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

This provision has led many employers and unions, to enter into union security agreements, which, as used in this Note, include union shop agreements, which require union "membership" as a condition of continued employment; and agency shop agreements, which do not require membership in the union but do require that those not wishing to become union members pay to the union as a condition of continued employment an amount equal to the members' dues.

Compare § 8(a)(3) with § 8(b)(2) [29 U.S.C. § 158(b)(2) (1964)], which makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee for nonmembership in the union where membership has been denied or terminated for reasons other than the failure of the employee to tender proper dues and fees.

2. Because section 7 of the NLRA [29 U.S.C. § 157 (1964)] grants employees the right to refrain from union activities except to the extent that this right is affected by a security agreement permitted by section 8(a)(3), and because an employee's maximum obligation under a section 8(a)(3) agreement is to acquire and maintain membership to the extent of paying proper initiation fees and periodic dues to the union, it follows that section 7 establishes the right to refrain from union activities except for the obligation to pay proper dues and fees under a security agreement. Thus, it is well established that union threats to request the discharge of an employee because he has refused to pay to the union sums other than proper dues and fees "restrain" or "coerce" employees in the exercise of their section 7 rights and thus constitute a violation of section 8(b)(1)(A) [29 U.S.C. § 158(b)(1)(A) (1964)]. See, e.g., *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 555-56, 562 (1955); *Eclipse Lumber Co.*, 95 N.L.R.B. 464, 473 (1951). See also *NLRB v. Spector Freight System, Inc.*, 273 F.2d 272 (8th Cir.), cert. denied, 362 U.S. 962 (1960); *Namm's Inc.*, 102 N.L.R.B. 466, 469 (1953).

in which a union has threatened to have an employee discharged for nonpayment of its monthly fees, part of which were to be refunded if the employee attended monthly union meetings. In such a situation, the issue presented is whether levies which are to be refunded for attending union meetings properly come with the meaning of "periodic dues . . . uniformly required." In two decisions concerning this issue, the National Labor Relations Board (NLRB) decided in 1962 and 1963 that the refund element precluded the levies from being "uniformly required," and therefore that they were not collectible as a condition of employment.<sup>3</sup> However, in a recent case, *Local 171, Pulp Workers (Boise Cascade Corp.)*,<sup>4</sup> the NLRB rejected this analysis.

In *Boise Cascade* the local union amended its bylaws to provide for an increase in monthly dues from three dollars and seventy-five cents to six dollars, with the proviso that two dollars would be refunded to persons attending monthly meetings.<sup>5</sup> Petitioner, a member of the union, became delinquent in his dues<sup>6</sup> and the union informed him that it would request the employer to discharge him pursuant to the union security agreement unless both the arrearage and a new initiation fee were paid. The employee paid the requested sums, but subsequently filed an unfair labor practice complaint with

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3. In *Leece-Neville Co.*, 140 N.L.R.B. 56 (1962), *enforced as modified*, 330 F.2d 242 (6th Cir.), *cert. denied*, 379 U.S. 819 (1964), the NLRB reiterated the proposition that to be "uniformly required," dues must be "charged to all members alike, and that any distinction [must] be based upon a reasonable classification." The NLRB reasoned that the effect of the refund arrangement in question was to require employees who did not attend union meetings to pay more money to the union than employees who did attend and noted that a "classification of employees based upon attendance or nonattendance . . . [is] not a reasonable classification." 140 N.L.R.B. at 59. In *United Packinghouse*, 142 N.L.R.B. 768 (1963), the Board struck down a similar refund arrangement on the authority of *Leece-Neville*.

4. 165 N.L.R.B. No. 97 (June 23, 1967) [hereinafter *Boise Cascade*]. Excerpts from the Board's opinion may be found in 1967 CCH NLRB Dec. ¶ 21,547.

5. The amendment did not specify whether only members of the union who attended meetings would receive refunds or whether all employees in the bargaining unit were eligible to receive them. It merely stated: "The monthly dues of the Local Union are \$6.00 per member with \$2.00 refunded for monthly meeting attendance." Trial Examiner's Decision at 3. The propriety of the amendment procedure was not challenged before the NLRB. *Boise Cascade* at 1 n.2.

6. The petitioner did not at any time tender less than six dollars as monthly dues. Although the issue of tender was not raised before the NLRB, the trial examiner had rejected the union's contention that a tender of four dollars and a refusal thereof by the union was necessary to establish an unfair labor practice. Although the trial examiner did not fully explain the basis for this rejection, he noted that "it is evident that the members, being directed by the by-laws to pay the sum of \$6.00 in monthly dues in order to remain 'in good standing,' were expected . . . to do so." Trial Examiner's Decision at 5. It is well established that an employee need not make a tender of "periodic dues" where the circumstances indicate that such a tender would almost certainly be rejected by the union. *E.g.*, *Westinghouse Elec. Corp.*, 96 N.L.R.B. 522, 525 (1951), *enforced sub nom.*, *NLRB v. Machinists, Local 504*, 203 F.2d 173 (9th Cir. 1953); *Eclipse Lumber Co.*, 95 N.L.R.B. 464, 467 (1951), *enforced*, 199 F.2d 684 (9th Cir. 1952).

the NLRB alleging that the union had threatened to have him discharged for nonpayment of levies which could not be considered "dues," and that the union had thereby unlawfully "restrained" or "coerced" him in the exercise of his right under section 7 of the NLRA<sup>7</sup> to "refrain" from union activities. Overruling its two prior decisions, the NLRB held that the union had not committed an unfair labor practice.<sup>8</sup> Thus, a union acting under a union security agreement may threaten to cause the discharge of an employee for nonpayment of "dues," part of which will be "refunded" to employees who attend union meetings.

The NLRB held that such levies were in fact "uniformly required."<sup>9</sup> However, apparently reluctant to rest its holding merely upon this determination, the NLRB devoted most of its opinion to a discussion of the *use* to which the disputed portions of the levies, once collected, were to be put. The NLRB emphasized that granting cash "rewards" to employees who attended meetings was a commendable "use" of the collected funds because of the importance of stimulating attendance and participation at union meetings.<sup>10</sup> Thus, the nature of the use to which levies are applied apparently must be examined in determining whether such levies can be considered "periodic dues . . . uniformly required."

Although the Supreme Court has held that there are limitations on the uses to which a union subject to the Railway Labor Act

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7. Section 7 of the NLRA, 29 U.S.C. § 157 (1964), guarantees to all employees the right to refrain from concerted union activities except to the extent that such right is affected by an agreement under section 8(a)(3) requiring "membership" in the union as a condition of continued employment. Section 8(b)(1)(A) of the NLRA makes it 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) (1964). The employee also charged that the union had violated section 8(b)(2) of the NLRA [29 U.S.C. § 158(b)(2) (1964)], which makes it an unfair labor practice to cause or attempt to cause an employer to discriminate against an employee for nonmembership in a union where membership has been denied or terminated for reasons other than the failure or the employee to tender proper dues and fees. However, the trial examiner found no such violation. Trial Examiner's Decision at 5. The NLRB adopted pro forma the trial examiner's recommendation that the allegations of the complaint pertaining to section 8(b)(2) be dismissed. Boise Cascade at 1 n.l.

8. Two members of the NLRB dissented, but the majority expressly overruled two earlier decisions, *Packinghouse Workers, Local 673*, 142 N.L.R.B. 768 (1963) and *Leece-Neville Co.*, 140 N.L.R.B. 56 (1962), *enforced as modified*, 330 F.2d 242 (6th Cir.), *cert. denied*, 379 U.S. 819 (1964), to the extent that they held that a union may not request the discharge of an employee for nonpayment of sums which are to be refunded for attendance at union meetings. The majority did not refer to the similar case of *Electric Auto-Lite Co.*, 92 N.L.R.B. 1073 (1950), *enforced*, 196 F.2d 500 (6th Cir.), *cert. denied*, 344 U.S. 823 (1952).

9. The NLRB stated, "Each member was assessed an equal amount of dues, and each member was accorded an equal opportunity to share in the reward offered for giving of his time to necessary Union affairs. The amount of dues required of members was uniform; the method of collecting such dues was uniformly applied." Boise Cascade at 4.

10. Boise Cascade at 3-4.

(RLA) may put dues money,<sup>11</sup> the NLRB, with a few limited exceptions, has never inquired into the propriety of the use of funds collected as dues by unions subject to the NLRA.<sup>12</sup> Thus, the decision in *Boise Cascade* seems to raise for the first time the question of the nature and extent of limitations, if any, which the NLRB will impose upon a union's expenditure of dues money collected as a condition of employment under the NLRA.

NLRB investigation into the use of dues seems to be supported both by legislative history and past cases. Under the NLRA as originally enacted, majority unions were permitted to use union security agreements to require all employees in the bargaining unit to acquire and maintain *actual* membership in the union as a condition of employment.<sup>13</sup> Because these unions had unrestricted control over the requirements for membership, they had the power to make continued employment dependent upon compliance with union rules and maintenance of favor with union officials. In order to extirpate the abuses which resulted from this concentration of power,<sup>14</sup> Congress in 1947 granted employees the right to refrain from union activities and made it an unfair labor practice for a union either to threaten to impair an employee's job status or to cause an employer to discriminate against an employee because he refrained from such activities.<sup>15</sup> However, at the same time, Congress recognized that a union is required to represent all the employees in the bargaining unit whether or not such employees are

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11. *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963); *International Assn. of Machinists v. Street*, 367 U.S. 740 (1961).

12. In several instances where unions have attempted to collect special sums in addition to their regular dues, these additional sums, even though uniformly levied and periodically required, have been held not to be "dues" on the ground that they were to be used for purposes other than those authorized by the NLRA. *E.g.*, *Teamsters, Local 959 (RCA Service Co.)*, 167 N.L.R.B. No. 148, (Oct. 25, 1967) [decided after *Boise Cascade*]; *Anaconda Copper Mining Co.*, 110 N.L.R.B. 1925, 1926 (1954). *See NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11 (3d Cir. 1962). *See also* text accompanying notes 18-23 *infra*.

13. National Labor Relations Act § 8(a)(3), 49 Stat. 452 (1935), *as amended*, 29 U.S.C. § 158(a)(3) (1964).

14. An example of such abuse can be seen in one instance where a union member saw a union steward hit a foreman and, having been subpoenaed to appear in court, testified to what he had seen. Subsequently, the union expelled him and the employer was compelled to discharge him under a closed shop contract. 93 CONG. REC. 4193 (1947). In another instance two employees were expelled by the union and deprived of their jobs because they had refused to buy chances in a lottery conducted by the union. 93 CONG. REC. 5110 (1947).

15. The Taft-Hartley amendments included: the provision in section 7 enabling employees to refrain from union activities except to the extent that they may be subject to security agreements under section 8(a)(3); the provision in section 8(a)(3) prohibiting an employer from discriminating against an employee under a security agreement unless the employee has failed to tender proper dues and fees (*see* note 1 *supra*); all of sections 8(b)(1)(A), and (b)(2) [29 U.S.C. §§ 158(b)(1)(A), 158(b)(2) (1964)].

also union members;<sup>16</sup> accordingly, since all the employees in the bargaining unit benefited from union representation, Congress allowed unions to require that all employees help defray the expenses of collective bargaining and other closely related activities the benefits of which inured to the whole unit. A balance was struck between the individual employee's right to refrain from union activity and the union's interest in collecting funds to carry on its necessary operations. It was to deal with the problem of so-called "free riders" that unions were permitted to include as part of their collective bargaining agreements security clauses requiring union activity to the limited extent of payment of uniformly required periodic dues and initiation fees.<sup>17</sup> Implicit in this concern is a congressional intent

16. The duty of a union to represent fairly all the employees in a bargaining unit is derived from section 9 of the NLRA [29 U.S.C. § 159 (1964)], which grants powers of exclusive representation to a majority union. *See* *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Steele v. Louisville & N. Ry.*, 323 U.S. 192 (1944).

17. The report of the Senate Committee on Labor and Public Welfare stated: "It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947). The Joint Committee on Labor-Management Relations so understood the section. Its report states:

When Congress abolished the closed shop and permitted the union shop with the safeguard that it might not be used to deny employment to anyone whose lack of membership was occasioned by anything other than refusal to pay a reasonable initiation fee and regular membership dues, it was attempting to eliminate the abuses of compulsory membership while still permitting labor organizations to enjoy a form of union security. . . .

In permitting a limited form of compulsory membership, Congress recognized that the "free rider" argument had some validity.

S. REP. NO. 986, 80th Cong., 2d Sess., pt. 3, at 52 (1948).

On the Senate floor on May 9, 1947, Senator Taft said:

Mr. President, while I think of it, I should like to say that the rule adopted by the committee is substantially the rule now in effect in Canada. Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the present rule in Canada is that there can be a closed shop or union shop, and the union does not have to admit an employee who applied for membership, but the employee must nevertheless pay dues, even though he does not join the union.

If he pays the dues without joining the union, he has the right to be employed. That, in effect, is a kind of tax, if you please, for union support if the union is the recognized bargaining agent for all the men, but there is no constitutional way by which we can do that in the United States.

. . . .

I may say that the argument for the union shop and against abolishing the closed shop, is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself. Under the Canadian rule, and under the rule of the committee, we pretty well take care of that argument. There is not much argument left.

93 CONG. REC. 4887 (1947).

On another occasion Senator Taft said:

The bill further provides that if the man is admitted to the union, and subsequently is fired from the union for any reason other than nonpayment of dues, then the employer shall not be required to fire that man. In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the dues.

93 CONG. REC. 3837 (1947). For further debate on this point, *see* 93 CONG. REC. 3558

that dues money should be used in certain ways; thus, it appears proper for the NLRB to determine if levies are properly dues, not merely by looking to see if they are "periodic" and "uniform," but also by determining whether they are being applied for the purposes Congress apparently intended.

This approach of looking to the "use" of money seems to have further support in two United States Supreme Court decisions which, although arising under the RLA, concerned an analogous problem. In the first case, *International Association of Machinists v. Street*,<sup>18</sup> the Court held that a union may not use money collected as dues to support political causes over an employee's objection.<sup>19</sup> The Court specifically denied that the improper use caused the money collected to lose its character as dues; rather it concluded that although the exaction was properly collected at the time, an employee could have restitution if the union later put the money to an improper use.<sup>20</sup>

However, in the second RLA case, *Brotherhood of Railway Clerks v. Allen*,<sup>21</sup> decided two years later, the Court seemed to retreat from its position in *Street*. The Court indicated that an exaction may not be collected as "dues," and hence made a condition of employment, if the subsequent use is improper. *Allen* involved the same question of using union funds to support certain political causes, and the Supreme Court suggested that in such cases the trial court should determine the percentage of total union expenditures applied to political purposes. Once this percentage was determined, the Court indicated that a decree could properly order both restitution of that portion of the dues improperly used and a reduction of future "dues" by the same percentage.<sup>22</sup> Thus, the Court at least intimated that these levies were not the type of "dues" payment which could be made a condition of continued employment.<sup>23</sup>

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(1947) (remarks of Representative Robison.) See also *Radio Officers Union v. NLRB*, 347 U.S. 17, 41 (1954); *Union Starch & Ref. Co.*, 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir.), cert. denied, 342 U.S. 815 (1951).

18. 367 U.S. 740 (1961).

19. The Court relied heavily on legislative history of the RLA in concluding that Congress enabled unions to collect dues from all employees in order "to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes," and stated that the use of dues to suggest candidates for public office and to advance political programs was therefore not a proper use. 367 U.S. at 763-68.

20. 367 U.S. at 771-75.

21. 373 U.S. 113 (1963).

22. 373 U.S. at 122.

23. It should be pointed out that because of certain differences between the RLA and the NLRA, the Supreme Court might not extend the *Street-Allen* doctrine to the NLRA. It might be argued that the Court only interpreted the RLA as it did in those decisions to avoid the necessity of deciding whether the use of exacted money for political causes over an employee's objection violates the employee's rights under the first amendment. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), the

In addition to the legislative history and the two RLA cases, both the NLRB and the courts have inquired into the "use" of union-collected funds to determine if levies can be considered "dues" in several analogous contexts. For example, unions have occasionally charged a particular periodic levy as dues for some period of time, and have then added to this regular amount another periodic levy earmarked for a certain purpose, such as financing a new union building or establishing a special strike fund. In holding that these additional levies were not dues, the NLRB indicated that since these additional amounts were not levied for the purpose of defraying the cost of "maintaining" the union in its capacity as collective bargaining agent, they were "assessments" rather than dues. Thus, they could not be collected as a condition of employment.<sup>24</sup> Although these cases involved exactions over and above what had previously been the "normal" monthly charge, it seems that an analogous approach could be taken in cases in which a portion of the "normal" monthly exaction has been applied to an improper use. Thus, it is submitted that the NLRB had ample authority to support its inquiry in *Boise Cascade* into the "use" of union levies to determine if in fact they can be considered to be dues which are "uniformly required."

Assuming that the NLRB has the right to inquire into the use of funds collected as union dues, difficult issues are presented in determining what kinds of uses should be considered proper.

One obvious approach—suggested by the congressional interest in forcing "free-riders" to pay their share of union representation expenses,<sup>25</sup> by the *Street* and *Allen* decisions under the RLA,<sup>26</sup> and by the NLRB's decisions under the NLRA holding that particular union levies were "assessments" rather than "dues"<sup>27</sup>—is that dues money may be collected and used only as necessary to support the union in its capacity as collective bargaining agent. Specifically, there is language in the Supreme Court's opinions in *Street* and *Allen* which seems to suggest that union expenditures, to be proper, must

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Court had held that because the RLA expressly allows union shop agreements notwithstanding state laws, the federal statute authorizing such agreements is "the only governmental action on which the Constitution operates." 351 U.S. at 232. However, since § 14(b) of the NLRA [29 U.S.C. § 164(b) (1964)] allows state law to prohibit union security agreements, governmental action may be absent, with the result that under the NLRA expenditure of exacted dues for political purposes may present no constitutional problems. With no constitutional issue in the background the Court may not feel impelled to interpret the NLRA as prohibiting use of dues money for political purposes.

24. *Teamsters, Local 959 (RCA Service Co.)*, 167 N.L.R.B. No. 148 (Oct. 25, 1967) [decided after *Boise Cascade*]; *Anaconda Copper Mining Co.*, 110 N.L.R.B. 1925, 1926 (1954). See also *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11 (3d Cir. 1962).

25. See notes 16-17 *supra* and accompanying text.

26. See notes 18-23 *supra* and accompanying text.

27. See note 24 *supra* and accompanying text.



be related to the costs of collective bargaining.<sup>28</sup> However, such an approach would seem unduly narrow. Not only have unions never been so confined, but also, in *Street* the Court specifically reserved the question of the propriety of union "expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders' [that is, the costs of representing all employees in the bargaining unit in collective bargaining], and the expenditures to support union political activities."<sup>29</sup> Furthermore, in 1958 the Senate considered and rejected a proposed amendment which would have explicitly limited the use of dues collected under a union security agreement to defraying the expenses of collective bargaining and related activities.<sup>30</sup> In rejecting the proposed limitation, the Senate seems implicitly to have indicated its belief that the Taft-Hartley amendments to the NLRA, in their original form, were not intended to provide such a limitation upon the use of dues money. In developing a standard for determining what kinds of uses of dues money—beyond simply meeting the expenses of collective bargaining—are permissible, two separate but related considerations seem to be controlling.

First, despite the rejection of the proposed amendment in 1958, the broad intention of Congress in enacting the Taft-Hartley amendments still appears to have been that employees should receive the benefit of expenditures of funds which they must pay as a condition of continued employment. As indicated above,<sup>31</sup> passage of the statutory provisions enabling unions to collect dues from all employees in the unit was motivated by a desire to prevent employees from receiving benefits for which they did not pay. This legislative intent is keyed to the benefit which employees receive; thus, even if a union may spend dues money for purposes other than defraying the expenses of collective bargaining, the dues money which an employee is required to pay must at least be used to benefit him to provide benefits which are available to him.<sup>32</sup>

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28. In *International Assn. of Machinists v. Street*, 367 U.S. 740, 763-64 (1961), the Court stated that "[t]he conclusion to which this history [of this part of the RLA] clearly points is that § 2, 11th contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." Similar statements would be equally applicable to the NLRA.

29. 367 U.S. at 769. The Court thus made it clear that it "express[ed] no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective [bargaining] agreements . . . ." 367 U.S. at 769-70. An additional argument that the Supreme Court did not intend to limit union expenditures solely to collective bargaining costs is indicated by the fact that the Court stressed that spending money collected as dues for political purposes over the objections of members directly infringed upon their right of dissent. *See International Assn. of Machinists v. Street*, 367 U.S. 740, 765-70 (1961).

30. 104 CONG. REC. 11214-24, 11330-47 (1958).

31. *See* notes 16-17 *supra* and accompanying text.

32. Although the question of the extent to which all employees in a unit are en-

Of course, it is too simplistic to assert that the union expenditure must provide benefits which are "available" to all employees in the bargaining unit. A more effective test of the propriety of the expenditure would be that it should provide tangible benefits which are of the type normally associated with job or union activities. Such an approach would not permit unions to spend dues money collected as a condition of employment on items which do not bear a reasonable relation to employees' job-related concerns or which confer only remote or intangible benefits upon employees. For example, a union contribution out of dues money to a local charity should not be found proper on the ground that all employees benefit from the improved public image of the union. Even if the union argued that this new status in the community strengthened its bargaining position with the employer, this "benefit" seems too intangible to justify an expenditure of dues paid by all employees in the unit as a condition of continued employment. Similarly, even if the union's contribution allows each employee to secure a membership in the charity—perhaps in the form of season tickets to a civic theater or concert series or just a donor's card or certificate—at a reduced rate, such a benefit is only remotely related to the workers' job activities and the expenditure should not be permissible.

The second consideration in determining which expenditures are proper relates to the right of all employees to refrain from union activities, and to the congressional intent to prevent unions from using security agreements to compel employees to participate in union activities or fulfill union obligations other than the obligation to pay "periodic dues."<sup>33</sup> Just as a union cannot lawfully use

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titled to receive the benefits of all union expenditures has not received any direct attention from the NLRB or the courts, a few decisions shed some light on the matter. For example, in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), in which the Supreme Court upheld the agency shop, the Court discussed the benefits which would be received by those employees who chose merely to pay dues to the union and not to become members of the union. The court noted that these employees, although not entitled under the union bylaws to attend meetings or to have a voice in the internal affairs of the union, would "in accordance with union custom . . . share in union expenditures for strike benefits, educational and retired member benefits . . ." 373 U.S. at 737. Although the court did not explicitly state that such benefits had to be given to all employees in the unit, its observation that all employees would receive the benefits seems to imply that they had a right to receive them. In addition, the majority opinion in the NLRB decision appears also to have assumed that nonmember employees who were required to pay the same dues and fees as members are entitled to the same benefits as members. *See General Motors Corp.*, 133 N.L.R.B. 451, 456 n.12 (1961).

33. In *Radio Officers Union v. NLRB*, 347 U.S. 17, 40 (1954), the Supreme Court stated:

The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. It has been held that a union cannot harm or threaten to harm an employee's job

its security agreement to enforce payment of a union imposed "fine,"<sup>34</sup> so it would seem that it should not be able to "use" dues already collected to coerce an employee in the exercise of his right to refrain from union activities.

Thus, the "use" of dues by the union in *Boise Cascade* to provide "refunds" to employees who attended union meetings clearly seems to be improper. The impropriety results from the fact that collection and subsequent refunding of sums to employees present at the meetings has the same coercive effect upon those who choose not to attend as would ordinary fines for nonattendance. In each case, in order to induce participation in a union activity, the union requires the employee who exercises his right to refrain from the activity to pay the union an amount not paid by those employees who accede to union demands. And just as conditioning the receipt of cash "rewards" upon attendance at union meetings seems improper in *Boise Cascade*, so in any case it seems improper for a union to provide or to withhold the benefit from the use of dues money in order to induce compliance with union rules or participation in union activities.

Thus, a proper standard for the use of dues money would appear to require that dues money be used to provide tangible, job-related benefits, available to all employees in the unit, and that such availability not be conditioned upon compliance with union obligations. Under such a standard unions would be able to spend dues money to provide all employees in the unit with such benefits as health and accident insurance, educational assistance programs, retirement

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status as a means of inducing him to swear an oath of allegiance to the union [Union Starch & Ref. Co., 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951)], to attend meetings (*id.*), to strike [NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953)], to march in a picket line [Local 450, Operating Engrs., 122 N.L.R.B. 564, 567-68 (1958), *enforced as modified*, 281 F.2d 313 (5th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961)], or to give up membership in another local [Pape Broadcasting Co., 104 N.L.R.B. 29 (1953), *enforced as modified*, 217 F.2d 197 (5th Cir. 1954)].

34. *E.g.*, Injection Molding Co., 104 N.L.R.B. 639 (1953), *enforced as modified*, 211 F.2d 59 (8th Cir. 1954); Electric Auto-Lite Co., 92 N.L.R.B. 1073 (1950), *enforced*, 196 F.2d 500 (6th Cir.), *cert. denied*, 344 U.S. 823 (1952); Pen Workers, Local 19593, 91 N.L.R.B. 883 (1950).

The range of union conduct which has been held to be an unfair labor practice is suggested by the following decisions: NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953) [union attempted to prevent employer from promoting employee]; Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954) [temporary discharge from job followed by dropping of employee to bottom of seniority list]; Local 479, Amalgamated Clothing Workers, 151 N.L.R.B. 555 (1965) [threatened deprivation of insurance coverage purchased out of funds provided by the employer].

On the subject of union discipline, see generally Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960); Summers, *Legal Limitations on Union Discipline*, 64 HARV L. REV. 1049 (1951); Note, *Union Disciplinary Power and Section 8(b)(1)(A) of the National Labor Relations Act: Limitations on the Immunity Doctrine*, 41 N.Y.U. L. REV. 584 (1966).

benefits, and the like, even though provision of such benefits would not be strictly related to the union's role as collective bargaining agent. These benefits, which employees might not otherwise obtain for themselves, are socially desirable, and they may also be purchased more cheaply through group plans than on an individual basis. Admittedly, if a particular employee chooses not to apply for tuition assistance from a union-sponsored educational program, for example, he would not be benefited by the union expenditures to the same extent as are those employees who do participate; but at least the benefits would be freely *available* to the employee.

At this point it is instructive to consider the propriety of several other examples of union spending. Expenditures for strike benefits would seem to be a proper use of dues money, even if all the employees in the unit did not receive them. Although receipt of strike benefits presumably would be conditioned upon participation in the strike, such benefits, unlike a fining arrangement or the "refunds" in *Boise Cascade*, would seem not to be designed so much to coerce or induce participation in union activities, but rather as a partial substitute for loss of wages during the strike.<sup>35</sup> In that respect, strike benefits are certainly tangible and job-related. Moreover, it might be argued that even if use of dues money to provide strike benefits is deemed to "coerce" the employees in the exercise of their right to refrain from striking, nevertheless such an expenditure should be permissible because of its relationship to the collective bargaining process. It is undisputed that unions can collect dues money to defray the expenses of negotiating a collective bargaining agreement, and payment of strike benefits is arguably necessary to make a strike or the threat of a strike an effective economic weapon which will enable a union to negotiate a favorable collective bargaining agreement.<sup>36</sup> Of course, any benefit which can be tied to the collective bargaining process itself is job-related, although it is possible to differ about whether the benefit accruing to *all* the employees in

35. Cf. *United States v. Kaiser*, 363 U.S. 299 (1960), where it was held that a jury could find that under the circumstance of the case strike benefits had been conferred upon the respondent as a "gift," and that, therefore, they were excluded from income for income-tax purposes under the Internal Revenue Code of 1954. The Court emphasized the evidence that the benefits were granted simply on the basis of need and that they were "not a recompense for striking." 363 U.S. at 304. A different situation would seem to be presented if a union conditioned receipt of strike assistance upon performance of picket duty. But note that the Supreme Court in *NLRB v. General Motors*, 373 U.S. 734 (1963), mentioned that "strike benefits" were available to all employees in the bargaining unit without distinguishing between those benefits given only to those who join in picketing. See note 32 *supra*.

36. The same argument might even be extended to provisions of cash awards for attending meetings. It might be argued that attendance is necessary to enable the union to function effectively and that cash awards are necessary to achieve meaningful attendance. However, attendance at meeting would hardly seem to be as essential to the successful functioning of the union in its capacity as collective bargaining agent as would be the ability to carry on a strike.

the unit in the foregoing example is tangible enough to justify the expenditure. Another example of union spending which might produce rather intangible benefits would be bearing the expense of union officials' testimony before state and federal legislative committees and administrative bodies. Much of this testimony is clearly job-related in the most basic sense: it involves attempts to secure favorable legislation regarding wages, hours, and working conditions. Thus, while the immediate benefit accruing to individual employees may be rather intangible, such expenditures should probably be permitted.<sup>37</sup> On the other hand, use of dues money to make political contributions would seem to be improper not only because any benefit to all the employees would not be tangible and immediate, but also because any direct relationship to job-connected concerns would be highly speculative. A different problem would be encountered if a union established a job training program in order to develop a particular skill in a number of employees in the bargaining unit. In such a case those employees who already possessed the skill might complain that as a practical matter the benefits from the use of their dues money were not available to them. Even so, in the absence of any coercion of their rights to refrain from union activity and in view of a substantial interest of other members of the union in receiving this specifically job-related training, such use of dues money would appear to be permissible.

Comparing all of these examples, it is apparent that there should be a weighing process used in assessing the nature of the benefits which union use of dues money is alleged to provide. If the benefits are clearly job-related, they can be less tangible—that is, less concrete as regards the individual employee—and the union spending can thus be upheld. Conversely, although a benefit is physically available to each individual employee—as are the concert tickets mentioned earlier—if it bears no reasonable relation to job or union activities, the expenditure to produce it is improper. The basic premise of the standard—that the use of dues money should benefit the employees required to pay it—does preclude a union from using dues money for some projects which may be of benefit to the community, but which are at most of only incidental benefit to the employees in the unit. Thus, it would seem that unions could not spend dues money on such projects as local hospitals, community gardens, or college construction. This is so despite the fact that the

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37. The possibility exists that expenditures for such testimony could be found improper. If a union official goes to Washington to testify in hearings on a proposed bill changing reporting requirements for union officers, the direct relationship to job concerns of employees in the bargaining unit does not exist. In such a case, given the fact that our hypothetical employee is not a full-fledged union member, it is clear that he receives no benefit from having a union official testify about a bill making it less onerous to be a union official.

directors of publicly held corporations, an obvious analogy, can make such contributions or gifts out of corporate funds without fear of having their actions declared ultra vires.<sup>38</sup> The obvious distinction is that the dissatisfied shareholder has an operative free market in which to dispose of his shares, whereas the employee who is unhappy with his union's use of dues money has no such recourse. He has a great deal invested in his job and the location of his family; it is very difficult for an employee to disassociate himself from a union which, although it is his collective bargaining representative, pursues spending policies with which he disagrees.

Once it has been determined that inquiry should be made into the use of union levies and that a particular use is improper, the question of the proper remedy is presented. If the intended use of a specific portion of the dues money is known from the outset, as in *Boise Cascade*, it seems relatively simple to excuse an employee from paying the improper portions and to find that a union which attempts to use its security agreement to collect these portions has committed an unfair labor practice under section 8(b)(1)(A) of the NLRA. The section 8(b)(1)(A) violation results from the union "coercing" payment of funds which are not properly dues. To show such coercion, however, it would not be necessary for an employee to withhold the portion of the dues that he thinks will be improperly spent and thus risk his job security if he is later proved wrong or if the amount withheld was too large. Rather, as the NLRB indicated in *Boise Cascade*, the employee could pay the entire amount "under protest," and then bring his unfair labor practice charge before the NLRB.<sup>39</sup> This approach of calling the collection of dues an unfair labor practice where the money is improperly used would give real meaning to the type of rights announced by the Supreme Court in the *Street* and *Allen* decisions; an employee could effectively protest what he considers improper union expenditures without jeopardizing his job status.

However, a far more difficult problem arises where the union accumulates dues money over a period of several years (or even sev-

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38. The modern trend of decision is to expand the interpretation of a corporation's incidental powers to include the right to make charitable donations within reasonable limits. *A. P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 98 A.2d 581, *appeal dismissed*, 346 U.S. 861 (1953). See *Carey v. Corporations Commr.*, 168 Okla. 487, 33 P.2d 788 (1934), *Annot.*, 39 A.L.R.2d 1194 § 2(a) (1955); *cf. Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

39. Paying the dues "under protest" appears to be sanctioned in the *Boise Cascade* decision since the employee never paid less than the six dollar amount, but paid the entire amount under protest. See note 6 *supra*. However, neither the NLRB nor the trial examiner directly relied on this method of challenging the union collection; rather, its acceptance by the NLRB is evidenced by the fact that the NLRB apparently approved of the method. See *Boise Cascade* at 2.

eral months), as was apparently done in *Street* and *Allen*, and then uses the money improperly. It would appear conceptually difficult to say that such use relates back and converts the original collection into an improper and unlawful one. Even if this were done, there would be no showing of "coercion" at the time of the collection, not to mention the fact that the six-month statute of limitations probably would have run.<sup>40</sup> Since there could be no unfair labor practice charge filed, the employee would have to object to the expenditure itself, and, as is the case with a railway employee under *Street* and *Allen*, he would have to sue in state court to prevent such use or for restitution. This costly process has all but eliminated challenges to improper union expenditures under the RLA, and would undoubtedly have the same effect upon employees under the NLRA. It is obvious that in such a situation the undercutting of an employee's right to refrain from union activities, and the impropriety of the "use," is no less than in the case in which a portion of the levy is earmarked for an improper use or such use is otherwise foreseeable at the time of collection of the exactions. To allow an employee to challenge such an expenditure as an unfair labor practice under section 8(b)(1)(A), it only seems necessary to say that any union expenditure during a particular period is financed first out of currently collected dues. This approach would allow the employee to pay his dues "under protest" and would provide him with an effective challenge to the use of the dues money before the NLRB. If this approach or a similar one were not employed, it seems that the *Boise Cascade* reasoning could only apply where the intended use of dues is known before the money is collected. And, if that were the case, unions could easily circumvent employee challenges to their expenditure of dues collected pursuant to security agreements.

In either situation, if a violation of section 8(b)(1)(A) is found, an employee should be given restitution of the portion of his payment which was improperly used<sup>41</sup> and a cease and desist order should be entered enjoining the union from making any further pro-

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40. NLRA § 10(b), 29 U.S.C. § 160(b) (1964).

41. In the case where an unfair labor practice is found because of collection of dues for improper uses, the NLRB can probably grant reimbursement of the improperly collected portions of the dues. See *Anaconda Copper Mining Co.*, 110 NLRB 1925 (1954), where the NLRB provided reimbursement of improperly collected assessments. See also *Packinghouse Workers, Local 673*, 142 NLRB 768 (1963)—one of the cases involving a refund system like that in *Boise Cascade* and overruled by *Boise Cascade*. The NLRB ordered reimbursement of the refundable portion of dues, saying that it was an improperly collected fine. The NLRB gets its remedial authority from § 10(c) of the NLRA [29 U.S.C. § 160(c) (1964)], which authorizes it to issue cease and desist orders and to take "such affirmative action . . . as will effectuate the policies of this Act." Reimbursement comes under this latter clause.

hibited use of dues money and from collecting dues money for such prohibited purposes.<sup>42</sup> A similar approach should govern where a union which has established a program of benefits (such as insurance coverage or death benefits) funded with money collected under a security agreement decides to cut off or deny benefits to an employee who refuses to become an actual member of the union or who, even though an actual member, refuses to comply with a particular union rule. In such situations, the union may be said to be putting dues money to an improper use by, in effect, spending money to provide benefits for some employees but not for others. The basis for the discrimination is noncompliance with union rules, and this would violate the proposition that benefits should be available to all employees. The NLRB, in fashioning a remedy, would seem to have a choice of either ordering the union to cease and desist from depriving the complaining employee of his normal benefits—a remedy which may be most desirable from the employee's viewpoint—or ordering the union to grant restitution to the employee of the amount of the dues apportioned to the benefits which he is being denied. To be fully effective, of course, the NLRB's order would also have to provide for a reduction of future dues exactions by this same percentage.<sup>43</sup>

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42. See notes 21-22 *supra* and accompanying text for support for the idea that an injunction could be issued in this situation.

43. *Id.*