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## Right to Restrain versus Right to Refrain: An Examination of *Pattern Makers' League of North America v. NLRB*

### I. INTRODUCTION

"What do ya wanna do?" screams the union president over the roar of incensed union members following the latest company contract offer. "Strike, strike, strike," they chant in one voice. A vote is taken and the economic strike begins with strong feelings of union solidarity and the desire to obtain a fair collective bargaining agreement.

As the days and weeks pass by, the feelings of solidarity begin to fade. Unpaid bills and dwindling bank accounts become commonplace. Soon the thoughts of returning to work begin to invade the minds of disenchanted strikers. A dilemma is created; if they go back to work and cross the picket lines their earnings will be negated by union fines in an amount equal to their wages, but if they do not return, the financial pressures will overwhelm them. The only alternative is to tender a letter of resignation to the union. The union's constitution, however, prohibits resignation during a strike, leaving the employee trapped without any relief.

It was in just such a situation that forty three union members of Pattern Makers' League of North America, AFL-CIO, found themselves during an economic strike which lasted seven months.<sup>1</sup> Eleven of the members felt the financial pressure so strongly that they submitted letters of resignation only to become subject to union discipline. The United States Supreme Court ultimately decided the conflict in *Pattern Makers' League of North America v. NLRB*,<sup>2</sup> holding that employees had the right to resign, thereby restricting the union's right to restrain.

After examining the historical background of the National Labor Relations Act and subsequent judicial decisions which have interpreted it, this note will examine the *Pattern Makers* decision. The opinion of the Court will be summarized along with the potential impact in the area of union-employee-employer relations.

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1. *Pattern Makers' League of N. Am. v. NLRB*, 105 S. Ct. 3064, 3066 (1985).

2. *Id.*

## II. HISTORICAL BACKGROUND

### A. Prior Statutory Provisions

Prior to the passage of the Wagner Act of 1935,<sup>3</sup> labor law had progressed erratically from its early roots.<sup>4</sup> In the early stages, courts were quick to condemn the mere existence of labor organizations as a threat to legitimate enterprise.<sup>5</sup> Just prior to the Civil War, however, the judicial system began to recognize their existence as being noncriminal.<sup>6</sup> By 1930, it became apparent that the development of labor law rested primarily in the hands of the judicial system.<sup>7</sup> The emerging judicial policy was to selectively suppress any organized labor activity whenever it began to invade other aspects of society.<sup>8</sup> That began to change, however, with the onset of economic disaster which was to strangle the nation's economy during the 1930's.

#### 1. The Wagner Act of 1935

With the arrival of a democratic administration in 1932 came policies designed to promote and rehabilitate a dying business climate. In 1933, Congress passed the National Industry Recovery Act ("NIRA"),<sup>9</sup> intending to promote employees' rights to organize and bargain collectively.<sup>10</sup> Employers rebuffed such efforts by instead creating their own unions with which to bargain.<sup>11</sup> The Supreme Court, sympathetic to the urgings of employers, negated the intent and substance of the NIRA in *Schechter Poultry Corp. v. United*

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3. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)) [hereinafter cited as Wagner Act].

4. See generally Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931).

5. *Id.* at 168. In Pennsylvania, eight bootmakers were convicted of the then-common law crime of "conspiracy to raise their wages" as a result of bonding together to bargain with the footwear industry. *Id.*

6. S. COHEN, LABOR LAW 98-103 (1964). In *Commonwealth v. Hunt*, 4 Metcalf 411 (1842), the Massachusetts Supreme Court reversed the conviction of Hunt and six co-defendants who demanded the discharge of an employee for failure to join the Boston Bootmaker Journeyman Society. Chief Justice Shaw's opinion, which was accepted in virtually all later cases, stated "that the mere act of combination did not make a labor organization an unlawful body." S. COHEN, *supra*, at 100.

7. S. COHEN, *supra* note 6, at 138-39. There were three forces at work influencing the status of labor law in the early 1900's: first, a prevailing property ideology; second, a relative access to the important loci of political power enjoyed by labor and management; and third, an attitude of the courts which encompassed and overlapped the first two factors. As a result, the courts demonstrated a bias toward management over the union. *Id.*

8. 1 C. MORRIS, THE DEVELOPING LABOR LAW 12-13 (1983) [hereinafter cited as DEVELOPING LABOR LAW].

9. Law of June 16, 1933, ch. 90, 48 Stat. 195 (1933) (amended by Act of June 14, 1935, ch. 246, 49 Stat. 375).

10. DEVELOPING LABOR LAW, *supra* note 8, at 25.

11. *Id.* at 26.

*States*,<sup>12</sup> stating that Congress lacked authority to enact such legislation. Of greater significance, however, was the creation of the National Labor Board, to which Senator Wagner was appointed. Quickly sensing the inadequacy of the NIRA, Wagner began promoting broader reforms which dramatically effected labor-management relations. Wagner's intent was to give employees bargaining power by allowing them to unite and organize rather than fight management alone. This in turn would create a greater purchasing power, thereby revitalizing American industry.<sup>13</sup>

The National Labor Relations (Wagner) Act,<sup>14</sup> passed on July 5, 1935,<sup>15</sup> espoused four basic principles: 1) employees have the right to determine whether they want a union organization; 2) employees are to select their own bargaining representatives; 3) employers are not

12. 295 U.S. 495 (1935). The Court held that Congress could not impose legislation which indirectly affected commerce pursuant to U.S. CONST., art. I, § 8, cl. 3. It stated that legislation indirectly affecting commerce was within the province of the state. *Schechter*, 295 U.S. at 554-55. Because the National Industrial Recovery Act developed around the concept of affecting commerce, its impact was virtually negated.

13. Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571, 573 (1967).

14. See *supra* note 3. The purpose of the Act was to protect the interstate flow of goods. The employer, by denying organizational rights and refusing to accept collective bargaining, in essence interfered with commerce. It was assumed that such interference would result in industrial strife that would restrict the physical movement of goods. The resulting inequality of bargaining power would lead to a recurring business depression. S. COHEN, *supra* note 6, at 149.

15. Of particular importance were sections 7 and 8, which provided:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in sec-

to interfere with the rights of the employees; and 4) employers must recognize and deal with the union representatives the employees have selected.<sup>16</sup> The Wagner Act was revolutionary in that it placed restrictions on the employer's right to interfere with the employees' choice of bargaining representatives.<sup>17</sup> By eliminating the employers' ability to control the bargaining process, as employers had traditionally done through dealing with their own approved agents, employees were given the right of self-representation in the bargaining process.<sup>18</sup> In essence, the Wagner Act effected a dramatic change in labor-management relations, providing freedom and power to employees in areas traditionally denied to them.<sup>19</sup>

The Court, in contrast to *Schechter Poultry*,<sup>20</sup> upheld the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*<sup>21</sup> A consistent policy then began to emerge in a number of contemporaneous cases as the Court upheld the findings of the National Labor Relations Board ("NLRB").<sup>22</sup> Of even greater significance was the Court's resolve to bring an end to its overt bias favoring the employer.<sup>23</sup> While the sudden change in position by the Court was welcomed by employees, the momentum of anti-unionism that employers had built up over the years made change a difficult task.<sup>24</sup> Nonetheless, Congress and the

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tion 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

National Labor Relations (Wagner) Act, ch. 372, §§ 7-8, 49 Stat. 452-53 (current version at 29 U.S.C. §§ 157-58 (1982)).

16. S. COHEN, *supra* note 6, at 144.

17. *Id.* at 149.

18. *Id.*

19. Senator Wagner stated: "Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the employee] can attain freedom and dignity only by cooperation with others of his group." 79 CONG. REC. 7565 (1935).

20. *See supra* note 11.

21. 301 U.S. 1 (1937). The Court recognized that the National Labor Relations Act can be construed to operate within the sphere of constitutional authority. The Act is constitutionally valid where applied to a situation where an employer engages in unfair labor practices that coerce and interfere with employee's right to self-organization.

The dramatic departure from *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), can be attributed to President Roosevelt's court-packing policy, where Roosevelt increased the number of "liberals" on the bench who would support his policies. *See generally* 2 M. PUSEY, CHARLES EVANS HUGHES (1963).

22. *See* *Washington, Virginia and Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Freuhauf Trailer Co.*, 301 U.S. 49 (1937). In each of the above cases, all decided on the same date, the Court affirmed the findings of the NLRB.

23. S. COHEN, *supra* note 6, at 159.

24. *Id.* at 164.

Between 1935 and 1947, over 45,000 unfair complaints were filed with the NLRB. About 43,000 of these cases were closed and employer violations were

Court, recognizing the need for economic rehabilitation, took a significant step toward establishing and promoting the rights of the individual worker.

## 2. The Taft-Hartley Act of 1947

During the years immediately following the enactment of the Wagner Act, employers complained bitterly about the NLRB's reformist zeal.<sup>25</sup> With the election of a Republican majority to the Senate and House in 1946, a change was in the making.<sup>26</sup> As a result, Congress amended the NLRA in 1947 by enacting the Labor-Management Relations (Taft-Hartley) Act.<sup>27</sup> The Taft-Hartley Act attempted to reestablish the balance of power between labor and management.<sup>28</sup> It gave new rights to the employee and imposed new restrictions on the union.<sup>29</sup> The Taft-Hartley Act, however, went far beyond the provisions of its predecessor. It expanded the scope of the NLRB, created the Federal Mediation and Conciliation Service, and granted authority to the President to intercede when strikes imperiled national health or safety. It also contained a provision allowing suits to

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found in 45 percent of the instances. In the same time period, litigation for enforcement or review of Board orders resulted in 705 decisions by the Circuit Court of Appeals and 59 Supreme Court rulings. Remedial action ordered by the Board when employers were found guilty of unfair practices included the award of over 12 million dollars in back pay to 40,691 employees. In 8,516 cases employers were required to post notices that unfair practices would be discontinued and 1,709 company unions were disestablished. More than 75,000 workers found to have been discriminatorily discharged were reinstated to their jobs.

*Id.* at 163-64.

25. *Id.* at 164.

26. DEVELOPING LABOR LAW, *supra* note 8, at 36. By the end of the first week of the new Congress, 200 bills had been introduced on the subject of labor reform. *Id.*

27. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-169 (1982)) [hereinafter cited as Taft-Hartley Act].

28. DEVELOPING LABOR LAW, *supra* note 8, at 35. Union membership had grown between 1935 and 1947 from three million to fifteen million. Union leaders had gained such prominent position that they were often consulted by the government in an attempt to maintain industrial peace. One commentator stated that the labor movement in 1947 was the "largest, most powerful, and the most aggressive that the world has ever seen; and [that] the strongest unions . . . are the most powerful private economic organizations in the country." *Id.* (quoting S. SLICHTER, THE CHALLENGE OF INDUSTRIAL RELATIONS 154 (1947)).

29. R. NEWMAN, THE LAW OF LABOR RELATIONS 11 (1953). The overriding philosophy of the Taft-Hartley Act was to create employee collective bargaining organizations free from employer interference, and at the same time create rights which affirmatively or negatively restricted union power. *Id.*

be brought by or against labor organizations.<sup>30</sup>

The most significant changes, however, occurred in sections 7 and 8 of the Act.<sup>31</sup> While the additions to sections 7 and 8 were a sharp blow to the unions, they were considerably milder than those proposed by the House of Representatives.<sup>32</sup> In spite of this milder version, employees were given, *inter alia*, the freedom to refrain from participation in union activities and the right to bring charges against unions engaging in unfair labor practices.<sup>33</sup> To offset these rights, the Taft-Hartley Act contained a provision<sup>34</sup> to keep the government from interfering with the internal affairs of the union.<sup>35</sup>

Following President Truman's upset victory in 1948, union leaders

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30. S. COHEN, *supra* note 6, at 179.

31. Section 7, as amended, stated:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*

Taft-Hartley Act, ch. 120, § 7, 61 Stat. 140 (1947) (emphasis added).

Section 8(b)(1) stated in pertinent part:

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

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(1) *to restrain or coerce (A) Employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .*

Taft-Hartley Act, ch. 120, § 8, 61 Stat. 140 (1947) (emphasis added).

32. S. COHEN, *supra* note 6, at 171. The House favored a law which would have had a greater punitive effect on the union than the Senate version. Among the House proposals that were eliminated in the final version were limitations on industry-wide bargaining, a ban on mass picketing, and a detailed regulation of the internal affairs of a union, including preserving the right to resign.

The House Committee Report stated that "the right to resign from any organization is a fundamental right. This section [proposed section 8(c)(4)] preserves the right for union members." H.R. REP. NO. 245, 80th Cong., 1st Sess. 32 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 272, 323 (1948).

33. *See supra* note 31.

34. Section 8(b)(1)(A) states that the Act does not attempt to impair the union's right to function or create and enforce its own rules regarding membership. *See supra* note 30. The goal is to give the union room to operate, but to do so within defined parameters to avoid the overreaching that was predominate in the era following the enactment of the Wagner Act.

35. S. COHEN, *supra* note 6, at 186-95. While the intent was admirable, it was also impractical. By 1959, union corruption had become so rampant that Congress enacted the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 73 Stat. 519 (1959). The Landrum-Griffin Act provided an expanded bill of rights for union members, while closely regulating disclosure and the internal affairs of the unions. Government had moved away from the umpire role established in the Taft-Hartley Act to the role of the policeman in the Landrum-Griffin Act, a role totally despised by the unions. *See* S. COHEN, *supra* note 6, at 186-95.

believed the time had arrived to return to the Wagner Act era.<sup>36</sup> In response, both the House and Senate passed bills which substantially re-enacted the Wagner Act,<sup>37</sup> thereby reaffirming employees' rights.

By mid-century, Congress had given employees the right to organize, the right to select their own collective bargaining representatives, the right to participate in union activities, the right to refrain from participation, and the right to report unfair union labor practices. Unions were given the right to exist and act as collective bargaining representatives. Because unions sometimes abused this acquired power, Congress quickly imposed restrictions on unions to create a realistic balance of power in labor-management relations.

### *B. Prior Supreme Court Decisions*

In spite of the specific language of the Wagner and Taft-Hartley Acts, there developed a wide area of controversy regarding their implementation, thereby necessitating Supreme Court involvement. Three such areas are addressed here.

#### 1. Right Given To Unions To Enforce Internal Regulations

While the issue of a union's right to enforce its internal rules and regulations through fines had surfaced prior to 1967,<sup>38</sup> the Supreme Court did not resolve the question until *NLRB v. Allis-Chalmers Manufacturing Co.*<sup>39</sup> The Court in *Allis-Chalmers* reaffirmed the NLRB decision that a union may fine its members,<sup>40</sup> but only follow-

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36. DEVELOPING LABOR LAW, *supra* note 8, at 46. Labor viewed the election as a "popular mandate" to "return to the good old days of the Wagner Act." *Id.* (quoting Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 INDUS. & LAB. REL. REV. 327, 329 (1958)).

37. DEVELOPING LABOR LAW, *supra* note 8, at 47.

38. *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727 (1954) (imposition of \$500 fine by Union did not violate section 8(b)(1)(A) of the NLRA because that section precludes any such interference with the internal affairs of a labor organization).

39. 388 U.S. 175 (1967). During lawful economic strikes at two Allis-Chalmers plants, members of the United Auto Workers Locals 248 and 401 returned to work and crossed the picket lines. After the strikes were over, charges were brought against those members for conduct unbecoming a union member. The union imposed fines ranging from \$20 to \$100, which were subsequently ignored by some of the members. The union obtained a judgment against one of the members in a test suit brought in the Milwaukee County Court. Allis-Chalmers, on behalf of the fined employees, filed an unfair labor practice charge against the various locals alleging a violation of section 8(b)(1)(A). 388 U.S. at 176-77.

40. *Allis-Chalmers Mfg. Co. (Local 248)*, 149 N.L.R.B. 67 (1964). The Board sustained the examiner's decision to dismiss the complaint as the alleged restraint or coercion referred to in section 8(b)(1)(A) fit within the proviso. When the union acts in a



ing a violation of the union's by-laws or constitution.<sup>41</sup> The Court noted that, consistent with the Landrum-Griffin Act<sup>42</sup> and federal labor policy, the union has the inherent power to fine or expel strike breakers as part of its role as an effective bargaining agent.<sup>43</sup> The Court saw its role as an enforcer of the contractual agreement between the union and its members relating to representation and responsible conduct.<sup>44</sup> When the conduct of a member was irresponsible in light of the union's constitution, fines were a natural consequence.

The Court implied a sharp distinction between internal and external matters to which the proviso applied.<sup>45</sup> Recognizing that regulation of internal matters through fines fell within the scope of the proviso, the Court affirmed the unions' right to discipline its members.<sup>46</sup> However, the Court failed to fully resolve the issue whether the judicial system could or should act as an enforcer of subsequent fines.<sup>47</sup>

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manner consistent with the right "to prescribe its own rules with respect to the acquisition or retention of membership therein," the prohibition of section 8(b)(1)(A) is inapplicable. 149 N.L.R.B. at 69.

41. *Allis-Chalmers*, 388 U.S. at 178. Such a decision cannot be extended beyond violation of lawful union activity. The NLRB has repeatedly recognized unfair labor practices when unions have fined members who engaged in conduct which exceeded these boundaries. See, e.g., *Communications Workers of Am., Local 1101*, 208 N.L.R.B. 267 (1974) (union ordered to cancel and repay fines levied on workers who crossed picket line after resigning from union); *NLRB v. Local 13-B, Graphic Arts Int'l. Union*, 682 F.2d 304 (2d Cir. 1982), cert. denied, 459 U.S. 1200 (1983) (union ordered to rescind disciplinary action against members who violated union rule banning overtime work).

42. S. COHEN, *supra* note 6, at 186-95.

43. *Allis-Chalmers*, 388 U.S. at 181 (quoting Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951)). The Court recognized the fine balance between labor and management, including the major weapon in labor's arsenal for achieving realistic labor agreements, i.e., the strike. To deny the union the right to fine non-striking union members would be equivalent to the denial of unions' rights to use the weapon. At that point, a shift would occur favoring management over the employees. This was not the intent of the Taft-Hartley amendments. 388 U.S. at 181.

44. 388 U.S. at 182 (quoting Summers, *The Law of Union Discipline: What The Courts Do In Fact*, 70 YALE L.J. 175, 180 (1960)). The Court's position was anchored on the premise that a contract existed between a union and its membership, imposing responsibilities and obligations on the members. Breach of the contract resulted in justifiable fines. The role of the Court was merely to enforce the contract and, when reasonable, affirm the fines. However, the strength of the contract theory has been eroded by subsequent decisions. See *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Granite State Joint Bd., Textile Workers Union of Am.*, 409 U.S. 213 (1972).

45. *Allis-Chalmers*, 388 U.S. at 186. The Court, citing Senator Taft's comments, 93 CONG. REC. 4435-36 (1947), regarding external matters which are regulated by section 8(b)(1)(A), noted that a union cannot fine members for failure to participate in threatening bodily harm and coercion preventing employees not involved in a labor dispute from going to work. *Allis-Chalmers*, 388 U.S. at 189. Internal matters that allowed for the application of democratic principles, fair procedures, and freedom of speech were beyond the scope of prohibitions found in section 8(b)(1)(A). 388 U.S. at 195.

46. 388 U.S. at 192.

47. *Id.* Justice Brennan noted that the legislative history of the Act indicated a

Two years later, the issue resurfaced in *Scofield v. NLRB*.<sup>48</sup> The Court, in determining whether the union violated unfair labor practices, established a three-prong test.<sup>49</sup> The Court determined that a rule regarding the implementation of a piecework ceiling was a legitimate internal matter,<sup>50</sup> and its imposition did not impair the labor policy developed by Congress.<sup>51</sup> As a result, the Court found the imposition of fines not to be a violation of section 8(b)(1)(a) of the Wagner Act.<sup>52</sup>

## 2. Unions Cannot Enforce Regulations Against Non-Members

Approximately three years after *Scofield*, the Court was faced with the issue whether fines could be imposed on members who resigned during a strike. In *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*,<sup>53</sup> the Court determined that the union's power over its members ends when the members lawfully resign from the

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complete lack of congressional concern regarding judicial enforcement of fines. If Congress was acting on a contract theory of the union-member relationship and if the efficacy of a contract includes its legal enforceability, then it would be a logical conclusion to assume that courts would enforce union fines.

Justice Brennan questioned the wisdom of enforcing unreasonably large fines. He noted, however, that such a concern should not result in interpreting the Act to allow for enforcement of only reasonable fines. *Id.* at 192-93.

The issue regarding enforcement of unreasonable fines is frequently resolved by state courts, who "find ways to strike down 'discipline [which] involves a severe hardship.'" Summers, *supra* note 43, at 1051. In *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), the Court stated that the determination of the reasonableness of fines was within the discretion of state courts, not the NLRB. *Id.* at 74-76.

48. 394 U.S. 423 (1969). In *Scofield*, union rules required its members to allow the company to withhold immediate payment of wages earned for production above a piecework ceiling. The company was to "bank" the wages and make payment when the ceiling was not reached by an individual employee due to machine failure or some other reason. Failure to comply resulted in fines ranging from \$1 to \$100. *Id.* at 424-25. Some members exceeded the ceiling rate and were subsequently fined. They refused to pay the fines alleging unfair union labor practices based on section 8(b)(1)(A). 394 U.S. at 426.

49. Comment, *Protecting a Union Member's Right to Resign-Resolution of the Conflict Between Dalmo Victor and Rockford-Beloit*, 38 VAND. L. REV. 201, 224 (1985). The three prong test, which determines whether a union rule violates section 8(b)(1)(A), is as follows: 1) whether the union rule furthers a legitimate union interest; 2) whether the rule impairs congressional labor policy; and 3) whether the rule reasonably applies against union members who are free to leave the union and escape the rule. 38 VAND. L. REV. at 224 (citing *Scofield*, 394 U.S. at 430).

50. *Scofield*, 394 U.S. at 431. "The fear is that the competitive pressure generated will endanger workers' health, foment jealousies, and reduce the work force." *Id.*

51. *Id.* at 432.

52. *Id.* at 436.

53. 409 U.S. 213 (1972).

union.<sup>54</sup> Referring to *Scofield*,<sup>55</sup> the Court noted that where there is a lawful dissolution of a union-member relationship, the union abrogates its control.<sup>56</sup> The Court consequently refused to allow the union to impose fines on a member who had resigned.<sup>57</sup> The majority saw no conflict with its prior holding in *Allis-Chalmers*, where fines were imposed on full union members.<sup>58</sup>

In a related case, *Booster Lodge No. 405 v. NLRB*,<sup>59</sup> the Court reaffirmed its position that fines imposed on employees who crossed picket lines after lawfully resigning constituted an unfair labor practice.<sup>60</sup> Utilizing the rationale of *Granite State*,<sup>61</sup> the Court applied the law of free institutions: "[T]he right of the individual to join or resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated."<sup>62</sup> Because the resignations of sixty one members were tendered prior to crossing the picket lines, nothing was "due and ow-

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54. *Id.* at 216.

55. 394 U.S. at 429-30.

56. *Granite State*, 409 U.S. at 217. The Court found that "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street." *Id.*

There is more than a single classification of union "member" as implied by the courts. In *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), the Court recognized "quasi-members" as those who paid dues and initiation fees but did not become participants in the union. This classification is usually found in union shops which force union membership as part of the union security agreement. A second form of membership exists in agency shops where employees are required to reimburse the union for costs incurred while representing the bargaining unit. A third form of membership occurs where the union, as part of its security agreement, imposes no obligation upon the employees to join the union. The only obligation involves the payment of dues as a condition to employment. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 642 (1976).

The issue as to whether a financial-core member can be fined remains unresolved. See, e.g., Johannesen, *Disciplinary Fines as Interference With Protected Rights: Section 8(b)(1)(A)*, 24 LAB. L.J. 268 (1973); Levin & Werhan, *Restrictions on the Right to Resign: Can a Member's Freedom to "Escape the Union Rule" Be Overcome by Union Boilerplate?*, 42 GEO. WASH. L. REV. 397 (1974).

57. *Granite State*, 409 U.S. at 217-18. The union had argued that it had a practice of accepting resignations only during an annual ten day period, during which the employees could revoke their "dues-check-off authorizations." However, the court of appeal found no evidence that the employees knew of the practice or had consented to a restriction on their right to resign. *NLRB v. Granite State Joint Bd., Textile Workers Union*, Local 1029, 446 F.2d 369, 372 (1st Cir. 1971).

58. *Granite State*, 409 U.S. at 215.

59. 412 U.S. 84 (1973). The union had called a lawful strike against the Boeing Company which lasted 18 days. During that period, 143 of the 19,000 employees represented by the union crossed the picket lines and returned to work. Of this group, 61 resigned prior to returning to work, while 58 others resigned after returning. The union constitution and bylaws contained no provision expressly permitting or forbidding such resignations. *Id.* at 85-86.

60. *Id.* at 90.

61. *Granite State*, 409 U.S. at 216.

62. *Id.* (quoting *Communications Workers of Am. v. NLRB*, 215 F.2d 835, 838 (2d Cir. 1954)).

ing the group."<sup>63</sup> Thus, any attempt by the union to impose and collect fines on these individuals constituted a violation of section 8(b)(1)(A) of the Wagner Act.

### 3. Union Members Have A Right to Resign

Inherent within the provision of section 7 of the Wagner Act is the right to refrain from concerted union activities, i.e., the right to resign.<sup>64</sup> To restrict this right in the wake of *Granite State* and *Booster Lodge*, unions inserted clauses into their bylaws regulating the tendering of resignations.<sup>65</sup> The effectiveness of such language is highly questionable.<sup>66</sup> Dicta of *Granite State*,<sup>67</sup> relied on by the NLRB,<sup>68</sup> reaffirms the right to resign in spite of union constitutional provisions to the contrary.<sup>69</sup> Even though an increased number of unfair labor practice charges have been filed in light of newly-imposed restrictions on resignations, the Court has avoided the issue of a union member's right to resign until recently.<sup>70</sup>

63. *Booster Lodge*, 412 U.S. at 88-89.

64. 29 U.S.C. § 157 (1982). Section 157 states in pertinent part that "[e]mployees shall have the right to . . . refrain from any or all of such activities except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3). . . ." *Id.*

65. See Note, *A Union's Right to Control Strike-Period Resignations*, 85 COLUM. L. REV. 339 (1985). In numerous instances, unions attempt to restrict resignations to a time period outside the scope of any impending or actual strike. One extreme example is a clause in the constitution of the American Guild of Musical Artists which bars resignations altogether without the consent of the Board. *Id.* at 342 n.19.

66. See *General Elec. Co.*, 197 N.L.R.B. 608, 609 (1972); *Ex-Cell-O Corp.*, 219 N.L.R.B. 729, 729-30 (1975). In both cases, the Board relied on prior court holdings that restrictions on resignations were impermissibly broad and violated section 8(b)(1)(A). See generally Gould, *Solidarity Forever — Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980).

67. *Granite State*, 409 U.S. at 216. The Court implied that a union member can resign at any time, the only requirement being that he fulfill any financial obligations due and owing at the time of resignation. *Id.* (quoting *Communications Workers of Am. v. NLRB*, 215 F.2d 835, 838 (2d. Cir. 1954)).

68. *Ex-Cello Corp.*, 227 N.L.R.B. 1045, 1051 (1977).

69. See *George Banta Co., Inc.*, 250 N.L.R.B. 850, 851 (1980); *San Diego County Dist. Council of Carpenters*, 243 N.L.R.B. 147, 148 (1979); *Able Sheet Metal Prods., Inc.*, 225 N.L.R.B. 1178, 1180 (1976); *Metal-Fab, Inc.*, 222 N.L.R.B. 1156, 1159-60 (1976). In each of these cases, the Board invalidated restrictive resignation clauses holding the provision to be unenforceable and the member free to resign at will. Comment, *supra* note 49, at 211.

70. The Court decided this issue in *Pattern-Makers' League of N. Am. v. NLRB*, 105 S. Ct. 3064 (1985).

### C. Prior Appellate Court Decisions

#### 1. Ninth Circuit Court of Appeals — *Machinists Local 1327 v. NLRB*

In 1979, the NLRB petitioned the Ninth Circuit Court of Appeals to enforce the Board's order in *NLRB v. Machinists Local 1327 (Dalmo Victor I)*.<sup>71</sup> The Board had held that a union provision restricting resignations,<sup>72</sup> in spite of its language, unjustifiably attempted to regulate the conduct of its members following the submission of letters of resignation.<sup>73</sup> The Board had relied heavily on its prior decision in *O.K. Tool Co., Inc.*,<sup>74</sup> noting that the union's proscription of post-resignation strike breaking had impaired a former member's section 7 right to refrain from concerted activity. This ruling conflicted with the *Scofield* requirement that union members be free to leave the union to escape membership conditions that they considered onerous.<sup>75</sup> The court of appeals refused to enforce the order and remanded the matter back to the NLRB.<sup>76</sup>

The court concluded that the majority had applied a hypertechnical reading to the union's constitution.<sup>77</sup> Instead of construing the provision as one which regulates post-resignation conduct, the majority sided with the Board's dissenting opinion.<sup>78</sup> The provision should

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71. 608 F.2d 1219 (9th Cir. 1979). In 1974, the union apprised its members of an amendment to its constitution providing that a member can be fined for "improper conduct of a member" if the member accepts employment in an establishment where a strike or lockout exists. Resignation did not release the member from the obligation if it was submitted within 14 days preceding the strike.

Three members submitted resignations and went back to work at least 8 months after the picket lines were established at Dalmo Victor. The union, pursuant to the provision in its constitution to which each of the members had been alerted, fined those three members. *Id.* at 1220-21.

72. The union provision stated:

*Improper Conduct of a Member:* . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

*Id.* at 1220.

73. *Machinists Local 1327 (Dalmo Victor I)*, 231 N.L.R.B. 719, 720 (1977).

74. 215 N.L.R.B. 651 (1974), *overruled*, *NLRB v. Machinists Local 1327 (Dalmo Victor I)*, 608 F.2d 1219 (9th Cir. 1979).

75. *Dalmo Victor I*, 231 N.L.R.B. at 720 (quoting *O.K. Tool Co.*, 215 N.L.R.B. 651, 653 (1974)).

76. *Dalmo Victor I*, 608 F.2d at 1222.

77. *Id.*

78. *Dalmo Victor I*, 231 N.L.R.B. at 724-25. NLRB members Jenkins and Murphy concluded that the language of the provision was primarily intended to limit members' right to resign and not to regulate post-resignation conduct. Jenkins interpreted the

have been read as a restriction on the right to resign rather than a restriction on post-resignation activity.<sup>79</sup> The court concluded the Board had reached a decision and generated an order based on a non-issue. Since the validity of restrictions on resignation was not before the court, the case was remanded to the Board for further deliberations along those lines.<sup>80</sup>

The Board, on remand, in *Dalmo Victor II*,<sup>81</sup> considered the possibility of a balance between the competing interests of the employee's right to resign and the union's right to impose reasonable restrictions.<sup>82</sup> The Board stated that "the restrictions by [the union] here are unreasonable in that they failed to protect sufficiently the interest of individual employees."<sup>83</sup> Had the union instituted a rule restricting the right to resign to a thirty day time period following the tender of the resignation, it would have protected the interests of the employee while providing adequately for the needs of the union during strike periods.<sup>84</sup> The plurality concluded that the restriction on resignations was unenforceable and violated section 8(b)(1)(A) of the Wagner Act.<sup>85</sup>

The union petitioned the Ninth Circuit Court of Appeals for review. The Board cross-appealed for enforcement of its order ruling that the union had committed unfair labor practices.<sup>86</sup> The court once again refused to enforce the Board's order, noting that the restrictive language regarding resignations comported with both the national labor policy and the test previously set out in *Scofield*.<sup>87</sup> The court also refused to validate the thirty day rule advanced by the

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phrase "resignation shall not relieve a member of his obligation [to honor a strike]" as indicating the union's intent to restrict resignation. *Id.* at 724.

79. *Dalmo Victor I*, 608 F.2d at 1222.

80. *Id.*

81. *Machinists Local 1327 (Dalmo Victor II)*, 263 N.L.R.B. 984 (1982).

82. *Id.* at 985.

83. *Id.* The Board, recognizing employee interest based on section 7, did not hold that that interest is absolute. Referring to the Supreme Court's decision in *Allis-Chalmers* that a union may discipline members for crossing a picket line, there is a recognition that limited restrictions may be imposed on the right to resign, so long as the rules are equally applicable in strike and non-strike periods. *Id.* at 985-87.

84. *Id.*

85. *Id.* at 987. NLRB chairman Van De Water and member Hunter concurred, relying on NLRB v. Granite State Joint Bd., Textile Workers Union, Local 1029, 409 U.S. 213 (1972), stating that any restriction on resignation was unacceptable. *Dalmo Victor I*, 263 N.L.R.B. at 988.

86. *Machinists Local 1327 v. NLRB (Dalmo Victor II)*, 725 F.2d 1212 (9th Cir. 1984), *vacated*, 105 S. Ct. 3517 (1985).

87. *Dalmo Victor II*, 725 F.2d at 1214. Neither *Granite State* nor *Booster Lodge 405 v. NLRB*, 412 U.S. 84 (1973), ever resolved the issue as to whether a union rule

Board.<sup>88</sup>

The court's rationale for denying enforcement of the order was that the nation's labor policy does not conflict with imposing restrictions on resignations. While the court recognized the union's fiduciary duty, it noted that neither Congress nor the United States Supreme Court gave individual union members the license to avoid union rules designed to protect the overall welfare of the bargaining unit.<sup>89</sup> Congress implied that the welfare of the bargaining unit should take precedence over the interests of the individual.<sup>90</sup>

The court stated that the test set out in *Scofield*<sup>91</sup> was not designed to be a balancing act, but rather was a three-step analysis designed to determine whether a union rule could be enforced.<sup>92</sup> The union's rule regarding resignations satisfied each of the three prongs, and therefore did not constitute a violation of section 8(a).<sup>93</sup> Referring to

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that expressly penalized a member for resigning during a strike and subsequently returning to work for the same employer was valid. 725 F.2d at 1214 n.1.

88. *Dalmo Victor II*, 725 F.2d at 1215.

89. *Id.* at 1216. The court believed Congress intended to support the union's right to control and limit the actions of its members by including the proviso of section 8(b)(1)(A), which reserves to unions the right to make reasonable rules as to the retention and acquisition of its members. The court quoted *Allis-Chalmers*, 388 U.S. at 181-82, which stated: "The power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." *Dalmo Victor II*, 725 F.2d at 1216.

90. *Allis-Chalmers*, 388 U.S. at 181-82. "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Id.* at 180 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

91. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). As previously noted, the test to determine whether a union rule is valid involves three prongs: 1) whether the rule reflects a legitimate union interest; 2) whether the rule impairs congressional labor law policy; and 3) whether the rule is reasonably enforced against union members. *Id.*

92. *Dalmo Victor II*, 725 F.2d at 1216-17.

93. *Id.* at 1217-18.

With regard to the first prong, the court held that a legitimate union interest existed. Post-resignation strikebreaking is a major threat to the union's viability. It could potentially create a chain reaction leading to the ultimate breakdown of the bargaining unit, thereby defeating the purpose of organization.

Second, post-resignation strikebreaking defeats the inherent principle of mutual reliance among the members once a strike vote is taken. To fine those who attempt to resign and return to work is merely to enforce a contract between each of the members. With regard to the second prong, the court stated that the rule did not reflect an impairment of congressional labor policy. The conflict created by the Board between section 7 and section 8(b)(1)(A) were non-existent; the right to resign can co-exist with the right to restrict resignations. The union rule did not proscribe resignations altogether, but merely placed some obstacles in the way. The member was free to resign and return to work; the only prohibition was against returning to work for the same employer.

Third, the rule was reasonably enforced against union members. The rule was not only reasonable, but it was critical. The restrictions on resignations occur during a time when the union needs to present a solid front to the employer. If enforcement is not permitted, then the union would be unable to fine recalcitrant members, and would have no means to prevent them from working for the struck employer. As a

the requirement regarding reasonableness, previously alluded to in *Allis-Chalmers*,<sup>94</sup> the court stated that the fining of strikebreakers is a reasonable restriction on the right of a union member to resign.<sup>95</sup>

## 2. Seventh Circuit Court of Appeals — *Pattern Makers' League of North America v. NLRB*

Approximately three months after *Dalmo Victor II*, the Board reached a similar decision in *Pattern Makers' League of North America*.<sup>96</sup> Similar to *Dalmo Victor II*, the Pattern Makers' union adopted an amendment to its constitution known as League Law 13.<sup>97</sup> Some employees subsequently tendered their resignations during the course of a strike and returned to work for the employer, which resulted in notification of impending fines under League Law 13.<sup>98</sup> Because of the similarity to *Dalmo Victor II*, the Board saw its decision in that instance as controlling.<sup>99</sup> Consequently, the Board ruled that the union's decision to fine the employees constituted an unfair labor practice.<sup>100</sup>

The union appealed to the Seventh Circuit Court of Appeals.<sup>101</sup> Recognizing the conflict between the employees' right to resign or refrain from union activity under section 7,<sup>102</sup> and the union's right to regulate its internal affairs as stated in the proviso to section 8(b)(1)(A),<sup>103</sup> the court attempted to resolve the inherent tension.

The union first argued that the proviso to section 8(b)(1)(A) vali-

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result, the effectiveness and value of the union is defeated. *Dalmo Victor II*, 725 F.2d at 1217-18.

94. 308 U.S. at 180. See *supra* note 90.

95. *Dalmo Victor II*, 725 F.2d at 1218.

96. 265 N.L.R.B. 1332 (1982), *enforced sub nom.*, *Pattern Makers' League of N. Am. v. NLRB*, 724 F.2d 57 (7th Cir. 1983).

97. 265 N.L.R.B. at 1332. League Law 13, adopted and ratified in May, 1976, to stop a growing pattern of strike breaking by employees, stated: "[N]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent." *Id.*

98. *Id.*

99. *Id.* at 1333. Because the provision clearly restricted resignations during a strike period, or when one "appears imminent," and because *Dalmo Victor II*, which was reached after examining the Court's holdings in *Scofield v. NLRB*, 394 U.S. 423 (1969), and *NLRB v. Granite State Joint Bd., Textile Workers Union of Am.*, Local 1029, 409 U.S. 213 (1972), was controlling, the decision required minimal amplification. *Id.*

100. *Id.*

101. *Pattern Makers' League of N. Am. v. NLRB*, 724 F.2d 57 (7th Cir. 1983).

102. 29 U.S.C. § 157 (1982). See *supra* note 31 for the full text of section 7.

103. 29 U.S.C. § 158(b)(1)(A) (1982). See *supra* note 31 for the full text of section 8(b)(1)(A).



dated League Law 13,<sup>104</sup> thereby giving the union authority to fine its members. The court rejected this argument, relying on the language of the *Scotfield* Court which stated that "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating section 8(b)(1)."<sup>105</sup> Citing other decisions in which the court determined that union fines frustrated the right of employees to resign,<sup>106</sup> the court concluded that League Law 13 frustrated "the overriding policy of labor law that employees be free to choose whether to engage in concerted activities."<sup>107</sup> The union's interest in maintaining strength and solidarity during a strike, while significant, cannot justify compelling membership in the union which improperly infringes on the employees' rights.<sup>108</sup> Thus, the court concluded that a union rule requiring retention of membership cannot be considered an internal matter and is therefore outside of the scope of the proviso.<sup>109</sup>

The union advanced a second argument based on a mutual reliance theory to support League Law 13.<sup>110</sup> Relying on *Granite State*<sup>111</sup> and the lack of qualitative difference between the facts of that case and *Pattern Makers*, the court concluded that the mutual reliance theory cannot control.<sup>112</sup>

In conclusion, the court, quoting *Scotfield*, stated that a member must be free to leave the union when a rule to which he was opposed could not be changed.<sup>113</sup> "[T]his fundamental principle is the embodiment of individual's Section 7 rights and safeguards the balance between individual rights and the collective power of the union."<sup>114</sup> Utilizing that principle, as it applied to the facts of *Pattern Makers*, the court granted enforcement of the Board's order.

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104. *Pattern Makers*, 724 F.2d at 59.

105. *Id.* (quoting *Scotfield*, 394 U.S. at 429).

106. *Id.* at 59-60. See, e.g., *Granite State*, 409 U.S. at 214-16; *Scotfield*, 394 U.S. at 428-20; *Booster Lodge*, 412 U.S. at 89-90.

107. *Pattern Makers*, 724 F.2d at 60.

108. *Id.*

109. *Id.*

110. *Id.* at 60-61. The union contended that each member, in voting on whether to strike, waives his section 7 rights to abandon the strike at a later date by resigning. Since each employee retains his membership with full knowledge of the restrictions contained in League Law 13, the relationship between the membership is one of voluntary association and its mutual covenants are enforceable. *Id.*

111. *Id.* at 61. The Court in *Granite State*, 409 U.S. at 217, gave little weight to the "mutual reliance" theory. In spite of the First Circuit's conclusion that members waive their section 7 rights when they vote to strike, the Court decided that the interests of the individual employees took precedence. *Pattern Makers*, 724 F.2d at 61.

112. *Pattern Makers*, 724 F.2d at 61.

113. *Id.* at 61. The court stated: "If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result. . . ." *Id.* (quoting *Scotfield*, 394 U.S. at 435).

114. *Pattern Makers*, 724 F.2d at 61.

The conflicting holdings in *Dalmo Victor II* and *Pattern Makers* resulted in the United States Supreme Court's grant of certiorari to resolve the matter.<sup>115</sup>

### III. THE PROBLEM

Consistent with what the Pattern Makers' League of North America, AFL-CIO, believed to be included in the proviso to section 8(b)(1)(A) of the Wagner Act,<sup>116</sup> League Law 13's restriction on resignation was added to the League's constitution.<sup>117</sup> Approximately one year later, two locals began an economic strike with forty three participating members against several manufacturing companies.<sup>118</sup> During the ensuing seven months, ten members submitted letters of resignation and returned to work.<sup>119</sup> The union notified each member that their resignations had been rejected as violative of League Law 13, and that they were subject to fines equal to their earnings

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115. 105 S. Ct. 79 (1984).

116. 29 U.S.C. § 158 (1982). Subsection (b)(1) states:

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

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(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .

*Id.*

117. *Pattern Makers' League of N. Am. v. NLRB*, 185 S. Ct. 3064, 3066 (1985). In May, 1976, League Law 13 was added; it became effective in October, 1976. There was no contention that the fined members were unaware of the amendment or its language.

Donald L. Hansen, the business agent for the League, testified that each member had to take an "oath of membership obligating them to adhere to the 'Constitution, Laws, Rules and Decisions' of the League and its Associations. . . ." *Pattern Makers' League of N. Am.*, 265 N.L.R.B. 1332, 1338 (1982).

118. *Pattern Makers*, 105 S. Ct. at 3066.

119. *Id.* Although the Court referred to ten employees who submitted resignations, there were actually eleven.

On September 11, 1977, William Kohl became the first to tender his resignation, returning to work the following day. On that date, the League expelled him from its membership. On September 26, 1977, four additional employees tendered their resignation letters; they were followed by six more members at subsequent intervals. Of this group, only Kohl was expelled from membership, with the remainder receiving notice that their letters of resignation were ineffective.

John Nelson was the only other exception. He began working a few months prior to the strike and had never technically joined the League. On January 17, 1978, the League returned his check for payment of union dues, claiming that he was not a member of the League and therefore did not owe any dues. *Pattern Makers*, 265 N.L.R.B. at 1337.

during the strike.<sup>120</sup>

The Rockford-Beloit Pattern Jobbers' Association, which represented the employers throughout the collective bargaining process,<sup>121</sup> filed charges with the NLRB stating that the League and two of its locals committed unfair labor practices in fining employees who had previously resigned from the union.<sup>122</sup> The NLRB, relying on *Dalmo Victor II* and the language of section 7, held that League Law 13 did not justify the fine.<sup>123</sup> The Seventh Circuit Court of Appeals enforced the order, thereby reaffirming the employees' right to resign.<sup>124</sup>

The League, throughout the appeals process, consistently argued that section 8(b)(1)(A) granted it the right to regulate its internal affairs through the prescription of rules relating to the acquisition or retention of its members.<sup>125</sup> Even though the Seventh Circuit had dismissed the contention, a strong possibility remained that inconsistent decisions would be rendered in other circuits.

To resolve the conflict between the Seventh Circuit, which affirmed the employees' section 7 rights, and the Ninth Circuit, which affirmed the union's section 8(b)(1)(A) proviso rights, the United States Supreme Court deferred to the Board's interpretation of the NLRA.<sup>126</sup> In so doing, the Court affirmed the judgment of the Seventh Circuit Court of Appeals.<sup>127</sup>

#### IV. MAJORITY OPINION

The key issue in *Pattern Makers* was whether the proviso to section 8(b)(1)(A) of the Wagner Act<sup>128</sup> applied to restrictions imposed on resignations. Justice Powell, writing the opinion for Justices Burger, O'Connor, and Rehnquist, attempted to resolve the issue which

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120. *Pattern Makers*, 265 N.L.R.B. at 1337. Since Kohl and Nelson were not members, the League sent letters to Atlas Pattern Works, their employer, requesting that action be taken to rectify the situation, since neither Kohl nor Nelson were in compliance with the union-security clause which was part of the collective bargaining agreement. *Id.*

121. *Id.* at 1336-37. The association existed only to collectively bargain with the League. The eleven members of the association sell and ship patterns for castings. Facilities are located throughout Rockford, Illinois and Beloit, Wisconsin. *Id.*

122. *Id.* at 1336. Charges were filed on January 23, 1978 by the association, and a complaint and notice of hearing was issued on March 7, 1978, alleging violation of sections 8(b)(1)(A) and 8(b)(2) of the NLRA. On June 7, 1978, an amended complaint was issued alleging additional violations. At the time of the hearing, amendments were made to the complaint by adding similar allegations. *Id.*

123. *Pattern Makers*, 265 N.L.R.B. at 1334.

124. *Pattern Makers*, 724 F.2d at 61.

125. *Id.* at 59.

126. *Pattern Makers*, 105 S. Ct. at 3076.

127. *Id.*

128. 29 U.S.C. § 158 (1982). See *supra* note 121 for the full text of section 8(b)(1)(A).

the Court had consistently side-stepped.<sup>129</sup> The majority delineated three major propositions while responding to three of the petitioner's arguments, and ultimately reached a conclusion which affirmed the decision of the Seventh Circuit Court of Appeals.<sup>130</sup>

#### A. *Enforcement of Union Regulations Has Qualified Recognition*

Relying on the language of *NLRB v. Allis-Chalmers Manufacturing Co.*,<sup>131</sup> the majority noted that unions are not barred from fining members as long as they meet three requirements.<sup>132</sup> First, unions cannot fine former members who have resigned and engaged in activity which would otherwise subject them to punishment.<sup>133</sup> Activities of individuals who had resigned from the union are classified as "external affairs," outside of the scope of union regulations and fines.<sup>134</sup>

Second, fines can be levied as punishment only for violation of internal matters.<sup>135</sup> Since union constitutions at the time of the enactment of the Taft-Hartley Act in 1947 did not include restrictions on resignations,<sup>136</sup> extending such provisions into the area of "internal affairs" is unjustified.<sup>137</sup> As a result, fines levied for non-internal

129. See *supra* note 87.

130. *Pattern Makers*, 724 F.2d at 61.

131. 388 U.S. 175 (1967). The Court in *Allis-Chalmers* recognized that the practice of imposing fines was not an automatic violation of an employee's section 7 rights. *Id.* at 192. The Court noted that the sponsor of the section 8(b)(1)(A) proviso never intended it to "interfere with the internal affairs of organization of unions." *Id.* at 187 (quoting 93 CONG. REC. 4272 (1947) (statement of Sen. Ball)).

132. *Pattern Makers*, 105 S. Ct. at 3068.

133. See generally *NLRB v. Granite State Joint Bd.*, Textile Workers Union of Am., Local 1029, 409 U.S. 213 (1972); *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973). Both opinions reinforce the premise of *Scofield v. NLRB*, 394 U.S. 423 (1969), that fines may be levied only against full union members, not those who had left the union and participated in post-resignation activity forbidden by the union constitutions. However, neither opinion resolved the issue as to the extent limitations may be placed on the right to resign.

134. *Allis-Chalmers*, 388 U.S. at 187-90.

135. *Scofield v. NLRB*, 394 U.S. 423, 428 (1967); *NLRB v. Boeing Co.*, 412 U.S. 67, 74 (1973).

136. Millan, *Disciplinary Developments Under § 8(b)(1)(A) of the National Labor Relations Act*, 20 LOY. L. REV. 245, 269 (1974).

Until the 1970's, very few unions had constitutional provisions limiting membership resignations. At the time of the Taft-Hartley debate, there were virtually no union constitutions which embodied such restrictions. Consequently, such restrictions, at that time, were not considered an internal concern. *Id.*

137. *Pattern Makers*, 105 S. Ct. at 3069.

In an analysis of *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 N.L.R.B. 1330 (1984), one commentator stated: "A union's unilateral extension of an employee's membership obligation through restrictions on resignation artificially expands the definition of internal action and allows the union to continue to regulate conduct over

matters were not within the scope of prior Court decisions.<sup>138</sup>

Third, unions cannot punish those members not free to resign. Referring to *Scofield*,<sup>139</sup> the majority stated that the freedom to resign was critical in determining whether the imposition of fines constituted restraint or coercion as outlined in section 8(b)(1)(A) of the Wagner Act.<sup>140</sup> When the union fines members who are unable to escape its rules, there is the curtailment of freedom that the *Textile Workers* Court held paramount.<sup>141</sup> Since League Law 13 failed to meet any of these requirements, the fines were outside of the realm of permissible union regulation.

#### *B. Enforcement of Union Regulations Cannot Violate Congressional Policy*

Justice Powell stated that a restriction on resignations violates the policy of voluntary unionism inherent in congressional labor policy as espoused by the NLRB.<sup>142</sup> Since the intent of Congress was to recreate the spirit of voluntary unionism, which had disappeared dur-

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which it would otherwise have no control." Note, *Protecting a Union Member's Right to Resign-Resolution of the Conflict Between Dalmo Victor and Rockford-Beloit*, 38 VAND. L. REV. 201, 222 (1985).

138. See *supra* note 133.

139. 394 U.S. at 430. The *Scofield* Court stated that fines imposed on union members who violated a union rule prohibiting violation of ceiling production rates were justified. Because members were given the opportunity to resign and avoid the rule, enforcement was reasonable. *Id.*

If members found themselves unable to take advantage of the right to earn more money by exceeding the piecework limits, it was only because they had deliberately decided not to resign and remain members of the union. *Id.* at 435.

140. *Pattern Makers*, 105 S. Ct. at 3070. Justice Powell also looked to the decision in *NLRB v. Granite State Joint Bd., Textile Workers Union of Am., Local 1029*, 409 U.S. 213 (1972). He concluded that when a union prohibits resignations, fines imposed on former members "restrained or coerced them within the meaning of section 8(b)(1)(A)." *Pattern Makers*, 105 S. Ct. at 3070.

141. *Pattern Makers*, 105 S. Ct. at 3070.

142. *Id.* The Court referred to the Board's position in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 N.L.R.B. 1330 (1984), and *Machinists Local 1327 (Dalmo Victor II)*, 263 N.L.R.B. 984 (1982), wherein the Board found restrictions on the right to resign inconsistent with the policy of section 8(a)(3) of the Wagner Act. Section 8(a)(3) states:

It shall be an unfair labor practice for an employer - (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the peri-

ing the era following the Wagner Act, union rules such as League Law 13 violate that policy.<sup>143</sup> Since an employee would be unable to resign from the League, fining a union member would amount to a requirement that he maintain his membership, a concept directly in conflict with voluntary unionism.

The League unsuccessfully argued that the restriction on resignations was unrelated to union membership as a prerequisite to employment. The fines imposed, the League argued, did not violate or effect employment rights because they were intended only to punish those who had violated union rules.<sup>144</sup> The majority found the League's argument unpersuasive; it considered fines which equaled an employee's entire paycheck to be violative of his employment rights.<sup>145</sup> Consequently, the court determined that the restriction was an impairment of congressional policy.<sup>146</sup>

### C. *The League's Arguments Lacked Merit*

The League advanced three arguments to support its position. First, the League argued that union rules restricting the right to resign are protected by section 8(b)(1)(A) of the Wagner Act.<sup>147</sup> The League argued that because League Law 13 places restrictions on the right to withdraw from the League, it relates to the retention of membership.<sup>148</sup> The majority noted that neither the Board nor the Court has ever interpreted the proviso to reflect the League's position, but have instead interpreted the language as referring to expulsion of union members.<sup>149</sup> The legislative history of the Act supports

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odic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

29 U.S.C. § 158(a)(3) (1982).

143. *Pattern Makers*, 105 S. Ct. at 3071. The Taft-Hartley Act eliminated the closed shop which required compulsory union membership. The Act gave employees the freedom to resign or refrain from full membership, as long as they paid their dues. The only requirement for employment in a union security agreement is their payment. "Membership' as a condition of employment, is whittled down to its financial core." *NLRB v. General Motors*, 373 U.S. 734, 742 (1963).

144. *Pattern Makers*, 105 S. Ct. at 3071.

145. *Id.* The majority quoted a commentator who stated that the fines had not left a "worker's employment rights inviolate when it exacts a portion of his paycheck in satisfaction of a fine imposed for working." Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1023 (1976).

146. *Pattern Makers*, 105 S. Ct. at 3071.

147. *Id.* See *supra* note 121 for the full text of section 8(b)(1).

148. *Pattern Makers*, 105 S. Ct. at 3072.

149. *Id.* The majority referred to the interpretation in *Allis-Chalmers*, 388 U.S. at

this view.<sup>150</sup>

Second, the League argued that the legislative history of the Taft-Hartley Act indicates that Congress had no intention of eliminating resignation restrictions.<sup>151</sup> Justice Powell noted that this contention lacks support, as the proposal regarding the right to resign was introduced in the context of closed shops which were prevalent in the 1935-1947 era.<sup>152</sup> The final version of the Act, which eliminated any language regarding restrictions on resignations, is inconclusive because numerous employee rights were not specifically addressed.<sup>153</sup> As a result, the legislative history does not conflict with the Board's interpretation, in spite of its recognized ambiguity, at least not sufficiently to demonstrate that the Board's interpretation is unreasonable.<sup>154</sup>

Third, the League argued that the nature of voluntary association does not proscribe restrictions placed on resignations.<sup>155</sup> The majority was quick to note that even though common law principles regarding voluntary associations had some weight, the common law concept was inapplicable in this case,<sup>156</sup> especially because it violated public policy.<sup>157</sup> Deferring to the Board's conclusions, and giving little regard to the common law, Justice Powell concluded that League Law 13 violated the principle of voluntary unionism.<sup>158</sup>

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191-92, where the Court assumed the provision gave unions the authority to impose fines and carry out the threat of expulsion. *Id.*

150. *Pattern Makers*, 105 S. Ct. at 3072. Senator Holland, who sponsored the proviso, stated that the proviso was for the purpose of assuring there to be no restriction on union rules that have to do with either the admission or expulsion of members. 93 CONG. REC. 4271 (1947). During the debate, Senator Taft accepted the proviso because he believed that a union should retain the right to refuse admission to, as well as expulsion from, the union. *Id.* at 4272.

During subsequent House debates concerning the Landrum-Griffin Act, a proposal was introduced to prohibit expulsion of members from a union for discriminatory reasons. The two sponsors of the Act opposed the proposal on the ground that they did not seek to repeal the proviso. 105 CONG. REC. 15722-23 (1959).

151. *Pattern Makers*, 105 S. Ct. at 3073. While the House bill contained a provision making it an unfair labor practice to deny a union member the right to resign at any time, H.R. 3020, § 8(c)(4), 80th Cong., 1st Sess. 23 (1947), the Senate Bill, as eventually enacted, eliminated the specific language of the House version. H.R. 3020, § 8(b)(1)(A), 80th Cong., 1st Sess. 81 (1947).

152. *Pattern Makers*, 105 S. Ct. at 3073.

153. *Id.*

154. *Id.* at 3073-74.

155. *Id.* at 3074. The League relied on the language of *Granite State*, 409 U.S. at 216, and *Booster Lodge*, 412 U.S. at 88, where the Court stated that when a union's rules do not claim to restrict the right to resign, then the common law normally reflected in "free institutions" is applicable. Since the common law does not prohibit restrictions on resignations, such limitations do not violate section 8(b)(1)(A). *Pattern Makers*, 105 S. Ct. at 3074.

156. *Pattern Makers*, 105 S. Ct. at 3074.

157. *Id.* at 3075.

158. *Id.*

*D. The Board's Conclusions and Interpretations Should Be Given Deference*

The third proposition advanced by the majority was the continued recognition by the Court that the Board's conclusions, interpretations, and constructions of the NLRA must be given deference.<sup>159</sup> If the Board espoused a reasonable construction of the Act, the Court should not reject it simply because another interpretation might be preferred.<sup>160</sup> The majority felt bound to affirm the Board's decision because it has invariably yielded to the Board's decision that fines imposed on employees after they have tendered their resignations constitute an unfair labor practice.<sup>161</sup>

In light of these three propositions and the unconvincing arguments advocated by the League, the majority affirmed the decision of Seventh Circuit Court of Appeals.<sup>162</sup>

*V. CONCURRING OPINION OF JUSTICE WHITE*

Justice White concurred with Justice Powell's opinion even though he saw greater ambiguity in the interpretation of the proviso. Justice White noted that the proviso could be interpreted to allow restrictions on resignations within the meaning of the phrase "retention of membership."<sup>163</sup> Unable to resolve the conflict between the two interpretations, he yielded to the Board's interpretation.

In justifying deference to the Board, Justice White, relying on *NLRB v. United Steelworkers of America*,<sup>164</sup> restated the position that the Board is entitled to deference because Congress has given it the primary responsibility for construing the general provisions of the Act.<sup>165</sup> "Where the statutory language is rationally susceptible to contrary readings, and the search for congressional intent is unenlightening, deference to the Board is not only appropriate but necessary."<sup>166</sup> He concluded the Board's interpretation should be given

159. *Id.* at 3076-77; *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), quoting *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362-63 (1958)) (the NLRB has the paramount duty to apply "the general provisions of the Act to the complexities of industrial life. . .").

160. *Pattern Makers*, 105 S. Ct. at 3075 (quoting *Ford Motor Co.* 441 U.S. at 497).

161. *Pattern Makers*, 105 S. Ct. at 3075-76.

162. *Pattern Makers' League of N. Am. v. NLRB*, 724 F.2d 57 (7th Cir. 1983).

163. *Pattern Makers*, 105 S. Ct. at 3076 (White, J., concurring).

164. 357 U.S. 357, 362-64 (1958).

165. *Pattern Makers*, 105 S. Ct. at 3076.

166. *Id.*



deference.<sup>167</sup>

## VI. DISSENTING OPINION

### A. *Opinion of Justices Blackmun, Brennan, and Marshall*

#### 1. The Narrow Interpretation of the Majority is Unwarranted

Justice Blackmun<sup>168</sup> believed that the interpretation of the majority was too narrow and without valid support in light of the language of section 8(b)(1)(A) and its legislative history. First, with regard to the proviso itself, Justice Blackmun noted that unions need internal regulations and the freedom to enforce those regulations in order to remain viable organizations.<sup>169</sup> The Board's interpretation of section 7 would necessarily limit the nature of the proviso, giving the NLRB the ability to enter into and regulate the internal affairs of unions.<sup>170</sup> Such a situation, Blackmun argued, was never intended.<sup>171</sup> In the past, the Court recognized the distinction between internal and external affairs. Internal affairs involved voluntary obligations incurred by the members. External affairs involved coercive activities of the union, which were intended, through the indirect use of the employer's power, to compel the employee to take on duties or join undesired activities.<sup>172</sup> Section 8(b)(1)(A) was not intended to limit the internal affairs of the union; it was intended only to eliminate the coercive and restraining acts of unions while organizing employees.<sup>173</sup>

Since League Law 13 is outside the intent of section 8(b), it is protected by the proviso.<sup>174</sup> The existence of the rule requires the assent of prospective members prior to joining and therefore literally involves the acquisition and retention of membership under section 8(b).<sup>175</sup> Since the rule does not coerce the employee, it is outside of the scope and purpose of section 8(b).<sup>176</sup>

Second, Justice Blackmun contended that the majority's interpretation was too narrow in light of legislative history. The House version of the Act divided section 7 into two subsections: subsection (a) "gave employees the right to refrain from concerted activit[ies]," and

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167. *Id.* at 3077.

168. Justice Blackmun authored the dissent, and was joined by Justices Brennan and Marshall.

169. *Pattern Makers*, 105 S. Ct. at 3077 (Blackmun, J., dissenting).

170. *Id.* at 3078.

171. *Id.* (quoting *NLRB v. Boeing Co.*, 412 U.S. 67, 71 (1973)).

172. *Pattern Makers*, 105 S. Ct. at 3078.

173. *Id.* (quoting *Allis-Chalmers*, 388 U.S. at 195).

174. *Pattern Makers*, 105 S. Ct. at 3078.

175. 29 U.S.C. § 158 (1982). See *supra* note 121 for the full text of section 8(b)(1).

176. See 93 CONG. REC. 4431-33 (1947) (statement of Sen. Ball). Senator Ball argued that clearly all that was covered by section 8 is the "coercive and restraining acts of the union in its efforts to organize unorganized employees." *Id.* at 4433.

subsection (b) gave union members rights regarding the affairs of the union.<sup>177</sup> To enforce these rights, Congress added section 8(b) and 8(c) to the enacted version. The Senate rejected sections 7(b) and 8(c), not because it considered these two subsections to encompass the right to refrain language of section 7(a), but because it believed more study was warranted.<sup>178</sup> The right to resign protection incorporated in the House version of section 8(c) was rejected because the Senate was unwilling to "impose conditions on the contractual, [internal] relationship between the union and its members" when it did not affect employment status.<sup>179</sup> This legislative history, Justice Blackmun argued, clearly indicates that the proviso of section 8(b)(1)(A) must be interpreted in a broad manner, and must therefore include the right to restrict resignations.

Third, Justice Blackmun argued that the majority interpreted the significance of voluntary unionism from an unjustifiably narrow perspective.<sup>180</sup> The majority failed to distinguish between internal affairs, which relate to relationships within the union organization, and external affairs, which relate to coercive activities of the union.<sup>181</sup> The proviso was intended to limit the Board's ability to regulate those internal affairs, including binding one employee to another through mutual promises as a prerequisite to union admission. The dissent stated that the Court viewed voluntary unionism only within the scope of freedom from enforceable commitments. This resulted in a paternalistic attitude designed to protect the employee from the consequences of promises previously made.<sup>182</sup> Justice Blackmun implied that such an approach ignores the intent of the legislation.

## 2. The Restriction is Reasonable

Justice Blackmun believed that the common law of associations is applicable in the instant case. Associations, including unions, therefore have a common law right to restrict the ability of their members

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177. *Pattern Makers*, 105 S. Ct. at 3079. Justice Blackmun is referring to H.R. 3020, 80th Cong., 1st Sess. (1947).

178. *Pattern Makers*, 105 S. Ct. at 3079 (quoting 93 CONG. REC. 6443 (1947) (Statements of Sen. Taft)).

179. *Pattern Makers*, 105 S. Ct. at 3080.

180. *Id.* at 3081.

181. *Id.* Justice Blackmun, referring to *Scofield*, 394 U.S. at 429, noted that the provisions added to section 8(a)(3) were designed to prevent unions from inducing employers to use their inherent power to enforce union rules. Such union activity was categorized as "external." *Pattern Makers*, 105 S. Ct. at 3081.

182. *Pattern Makers*, 105 S. Ct. at 3082.

to resign when to do so would defeat the purpose of the association's existence.<sup>183</sup> League Law 13 would comport to such a concept because the League was formed for the purpose of ensuring solidarity during collective bargaining. Congress never intended the Act to interfere with, impede, or diminish that purpose.<sup>184</sup>

Once an employee promises not to resign during a strike, and has been given the opportunity to participate in a strike vote, faithfulness to his promise is expected.<sup>185</sup> To allow a disenchanted member to ignore his promise and return to work is to allow him to enjoy the benefits of membership without requiring him to live with the risks that those who enjoy the benefits must share. In light of the potential snowballing effect, such a rule restricting resignations is reasonable.<sup>186</sup> Enforcement of a promise is not a limitation of the employees' section 7 rights; it is merely a "vindication of that right to act collectively and engage in collective bargaining, so long as the promise is voluntarily made."<sup>187</sup> As a result, League Law 13 is a condition of union membership that can be reasonably imposed, and is therefore an internal rule protected by the proviso.

### 3. Deference to the Board is Unjustified

Justice Blackmun argued that the deference the Court affords the Board is misplaced. Reliance by the majority on the Board's interpretation of the Act is unjustified because it conflicts with congressional purpose.<sup>188</sup> The Court is not to "stand aside and rubber-stamp . . . administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."<sup>189</sup> It may be dangerous to continually defer to an administra-

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183. *Id.*

184. *Id.* at 3082. Justice Blackmun referred to 29 U.S.C. § 163 (1947), which states: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.*

185. *Pattern Makers*, 105 S. Ct. at 3083.

186. *Id.*

187. *Id.*

188. *Id.* at 3083-84.

189. *Id.* at 3084 (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965)). The Court has repeatedly deferred to the Board's decision as the agency created by Congress to administer the Act. However, the Board's decisions are not immune from judicial review. *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 166 (1971).

As Justice Blackmun notes, Congress has given the Court authority to review the decisions and interpretations of any agency, implying that the decisions of the NLRB are not sanctioned by Congress as the final word in labor matters.

To the extent necessary for a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings and conclusions found to be —

tive agency. The Court may end up sanctioning unauthorized interpretations by the agency, resulting in a destructive judicial inertia which may, in turn, lead to an interpretation of congressional policy inconsistent with congressional intent.<sup>190</sup> Therefore, the Court should be cautious, and avoid giving deference to the Board in this case.

#### 4. Enforcement of Conscious Commitments is Proper

Justice Blackmun pointed out that where a union member consciously and knowingly makes a promise to his fellow members, he should be bound to respect it, consistent with the nature of voluntary unionism.<sup>191</sup> An employee, after promising not to resign, has other avenues available to rectify his disenchantment with union policies other than breaching his promise by submitting his resignation during a strike.<sup>192</sup>

Justice Blackmun suggested that the Board and the Court have done a disservice to the Wagner Act and the employee by overly protecting the employee's apparent right to resign.<sup>193</sup> In so doing, they give the employee freedom to breach his commitment at the expense of fellow employees who have relied on it to their detriment, thereby diminishing the strength of the collective body. Justice Blackmun concluded that such an action is at odds not only with the structure and purpose of labor law, but with the very autonomy of the American worker.<sup>194</sup>

#### B. *Concurring Opinion of Justice Stevens*

Justice Stevens concurred with Justice Blackmun's dissenting opin-

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- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706 (1982).

190. *Pattern Makers*, 105 S. Ct. at 3084.

191. *Id.* at 3085.

192. *Id.*

193. *Id.*

194. *Id.*

ion, especially regarding the conclusions drawn from the legislative history of the Taft-Hartley Act.<sup>195</sup> He also noted that in light of the language of the proviso, the "right to refrain" language of section 7 does not encompass the right to resign.<sup>196</sup>

## VII. IMPACT

The potential impact of the Court's decision, while considerably broad on the surface, remains somewhat questionable in light of the plurality voting and the absence of a clear majority supporting a particular position. The decision leaves unresolved a number of issues which the Board addressed, ranging from the validity of a thirty day rule to the conditions under which restrictions on resignations would be acceptable. Notwithstanding the Court's continuing tendency to avoid addressing these correlative issues, the opinion will undoubtedly affect the overall scope of labor relations.

### A. *Impact on the Union*

Since the sole weapon in the union's arsenal is the strike, the Court's reaffirmation and reemphasis of the employees' section 7 rights will undoubtedly reduce the union's effectiveness. If a snowballing effect occurs once members begin to resign, as Justice Blackmun fears, unions will find themselves in a pre-Wagner Act situation, rendered virtually powerless. Unions could be faced with difficult decisions, not as to whether a strike is appropriate, but whether a strike is feasible. While it is doubtful that unions will experience massive resignations at the outset of an economic strike, it is conceivable that such could occur should the strike last for an extended period of time, especially with smaller locals.

The freedom given to employees to resign during a strike may also have a secondary impact. When prolonged strikes occur, the level of frustration felt by striking union members usually increases; frustration that is caused by a slow bargaining process, loss of wages, and watching other employees return to work. Such frustration may, in turn, result in coercive and violent behavior directed at former members who voted for the strike, but later tendered their resignations. The general president of the Pattern Makers' League, Charles Romelfanger, stated at a union meeting that "[t]here has [sic] been instances where people crossing picket lines have ended up with broken arms and broken legs. . . ."<sup>197</sup> Walter Burk, financial secretary and business manager of the Rockford Association, similarly stated:

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195. See *supra* notes 177-79 and accompanying text for the dissents' discussion of the legislative history of the Taft-Hartley Act.

196. *Pattern Makers*, 105 S. Ct. at 3085.

197. *Pattern Makers' League of N. Am.*, 265 N.L.R.B. 1332, 1338 (1982).

"Well, it has been known that some car and house windows have been broken."<sup>198</sup> Whether these statements were intended as threats or as statements of fact is unclear. One thing is certain, however, as the frustration level is elevated by an increase in employees returning to work during a strike: there is a greater likelihood for increased acts of violence.

Second, the threat and fear of mass resignations may force union bargaining representatives to reshape their traditional bargaining strategy. As a result of the Court's decision, the balance will shift in favor of companies which can withstand prolonged strikes. The longer the strike, the greater the likelihood the company will prevail if employees are able to resign their union membership and return to work. Consequently, unions could conceivably be forced to develop a brief and totally debilitating strike strategy in order to force the company to bargain in good faith. Should the company be able to withstand such a strike, the advantage could quickly shift in its favor.

Third, increased resignation rights could force union leaders to become more responsive to their members. If they recognized the constant threat of resignation, union leaders would have to move away from the traditional style of management to a more democratic format. The threat of mass resignation during a strike could undermine the union's strength and indirectly shape union policy, perhaps in an even more dramatic manner. In order to defuse that situation, union officials must readjust their management styles and become more attentive to the wishes of the individual members as well as the majority.

#### *B. Impact on the Employees*

Individual employees are most greatly affected by the Court's decision. First, they are given an unrestricted right to resign before or during a strike. They are no longer bound by union rules or the hardships which accompany prolonged economic strikes. They are given the freedom to choose between retaining their union membership and enjoying the benefits of worker solidarity or resigning when the circumstances demand it.

Second, the solidarity of the union is threatened by the unlimited right to resign. Such a right could lead to the loss of employee bargaining power and parity with the employer. Each employee who re-

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198. *Id.*

signs is left virtually powerless, while those who retain their union membership face a dwindling leverage previously enjoyed through worker solidarity. What the employee gains in terms of his relationship with the union is lost in terms of his relationship to the employer.

### *C. Impact in General*

Two signals are clearly sent to those involved in the area of labor relations. First, the Supreme Court will continue to defer to the decisions of the NLRB. This suggests that the employee, employer, and union should take a second look when appealing a NLRB decision to the court of appeals and to the Supreme Court. It is highly unlikely, notwithstanding significant evidence to the contrary, that the circuit court or the Supreme Court will reverse or refuse to enforce an order of the NLRB.

Second, the Supreme Court sends out the message that it is moving further away from a pro-union posture. Even though the Court's decision failed to reflect a decisive stance, its division on the issues may be a warning to unions that, barring blatant unfair labor practices by an employer, the Court is moving away from enforcing the rights of the union in labor-management relations.

As previously noted, the issue of the right to resign has been highly contested over the past fifteen years, perhaps more so in theory than in reality. The impact of the Court's decision may be felt the greatest in the area of labor law theory rather than in the union halls themselves. Since restrictions on the right to resign are a relatively recent phenomenon instituted to counteract a trend which union officials have feared, their elimination, where unreasonable, may prove to be less than devastating.

## VIII. CONCLUSION

The National Labor Relations Act was designed to protect the employee from unfair labor practices committed by both the employer and the union. The Court reaffirms this protection by emphasizing the right to refrain, inherent within section 7, over the right to restrain, found within section 8, and confirms its resolve to support the rights of the employee regardless of the situation.

The Court's analysis of the nature of unions, the legislative history of the section 8(b)(1)(A) proviso, and the deference it gave to the NLRB reinforced the intent of the National Labor Relations Act, but ignored crucial public policy matters. The Court avoided a needed balancing approach, leaving unions, employers, and the NLRB with-

out a clear basis for determining when, or if, resignations can be reasonably restricted.

While the Court provided some direction towards a resolution of the controversy, the path remains uncertain for other closely-related issues.

LAWRENCE M. BUREK



