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Voluntary Unionism versus Solidarity - Restricting a Union Member's Right to Resign: Pattern Makers' League of North America v. National Labor Relations Board

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VOLUNTARY UNIONISM VERSUS
SOLIDARITY — RESTRICTING A UNION
MEMBER'S RIGHT TO RESIGN:
*PATTERN MAKERS' LEAGUE OF
NORTH AMERICA V. NATIONAL LABOR
RELATIONS BOARD*

THE Pattern Makers' League of North America, a national labor union, amended its constitution in 1976 by adding League Law 13 that prohibited resignations of members during a strike.¹ The following year the League's collective bargaining agreement with the Rockford-Beloit Pattern Jobbers Association expired, and a strike ensued. Eleven of the League's members tendered resignation of their memberships and returned to work after the League rejected a new contract proposed by the Association. In the eighth month of the strike the League agreed to a new contract and its remaining members returned to work. The League notified ten of the workers who had returned to work during the strike that it had not accepted their resignations.² The League asserted that these employees were still members of the union subject to its discipline and then fined the ten workers an amount roughly equivalent to the wages they earned during the strike. Subsequently, the Association filed charges with the National Labor Relations Board (the NLRB) alleging that the fines constituted an unfair labor practice under section 8(b)(1)(A) of the National Labor Relations Act.³

The NLRB ruled that the League's practice was unlawful, reasoning that it violated the workers' right to refrain from concerted activity,⁴ and entered

1. League Law 13 provides that "[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." *Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 3064, 3066, 87 L. Ed. 2d 68, 71 (1985).

2. The union expelled the eleventh worker, the first union member to resign.

3. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1982) provides:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 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

4. *Id.* § 7, 29 U.S.C. § 157 (1982) establishes a worker's right to refrain from concerted activity:

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 collec-

an order upholding the resignations and striking down the fines.⁵ The United States Court of Appeals for the Seventh Circuit enforced the order over a challenge by the League.⁶ The League appealed, and the Supreme Court granted certiorari in order to resolve a conflict between the circuits over the correct interpretation of section 8(b)(1)(A) of the Act.⁷ *Held, affirmed*: The restriction on a union member's right to resign constitutes restraint and coercion under section 8(b)(1)(A) of the National Labor Relations Act and violates the member's right to refrain from concerted activity. *Pattern Makers' League of North America v. National Labor Relations Board*, 105 S. Ct. 3064, 87 L. Ed. 2d 68 (1985).

I. THE BACKGROUND OF THE RIGHT TO RESIGN CONFLICT

A. General History of Labor Regulation

The Wagner Act (National Labor Relations Act) of 1935 instituted a new era for American labor organizations.⁸ Prior to its passage, American courts in the nineteenth century enforced the English common law doctrine of criminal conspiracy against striking workers.⁹ Later, the courts considered workers as acting in violation of the Sherman Antitrust Act¹⁰ when they resorted to concerted labor action.¹¹ The depression of the 1930s, however, effectively ended management's stronghold over labor. Congress enacted the Wagner Act as an integral part of New Deal legislation.¹² Congress hoped the Wagner Act would stimulate the economy by raising workers' wages and avoiding strikes.¹³

Three provisions of the Wagner Act proved especially significant for labor. First, section 7 granted workers the right to form labor organizations

tive bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

5. *Pattern Makers' League of North America*, 265 N.L.R.B. 1332, 1334-35 (1982).

6. *Pattern Makers' League of North America v. NLRB*, 724 F.2d 57, 61 (7th Cir. 1983).

7. *Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 79, 83 L. Ed. 2d 27 (1984). The Ninth Circuit had upheld union restrictions on members' rights to resign in *Machinists Local 1327 v. NLRB*, 725 F.2d 1212, 1218 (9th Cir. 1984).

8. National Labor Relations Act of 1935 (Wagner Act), Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-68 (1982)). See B. TAYLOR & F. WHITNEY, *LABOR RELATIONS LAW* 156-57 (1st ed. 1971). The authors state that modern industrialism and the growth of big business led to the general realization that bargaining individually was obsolete. See *id.*

9. See H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 5 (1950). The authors state that criminal conspiracy doctrines gave management a powerful weapon against labor organizations and resulted in harsh punishment of many union leaders. See *id.*; see also B. TAYLOR & F. WHITNEY, *supra* note 8, at 69-70 (authors conclude the judiciary proved a willing ally to employers in labor-management disputes).

10. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1973 & Supp. 1986)).

11. See B. TAYLOR & F. WHITNEY, *supra* note 8, at 69-70.

12. See *id.* at 157.

13. *Id.* Congress aimed the New Deal legislation at pulling the country out of the depression. Under New Deal policy the public's wages were to be increased. These higher wages would result in an increase in the demand for goods. The collective bargaining authorized by the Wagner Act was one step toward increasing the workers' wages. *Id.*

and bargain collectively.¹⁴ Second, section 8 prohibited employers from interfering with employee efforts to organize, discriminating against union members, and refusing to bargain with union representatives.¹⁵ Third, the Wagner Act created the NLRB with limited powers to administer the Act.¹⁶

The Taft-Hartley Act of 1947¹⁷ shifted the focus of concern from the employee-employer relationship to the employee-union relationship. Congress intended the Taft-Hartley amendments to the Wagner Act to protect the individual worker from the union.¹⁸ Congress thus amended section 7 of the Wagner Act to allow workers the right to refrain from union activities¹⁹ and added section 8(b)(1)(A), which prohibited unions from restraining or coercing employees in the exercise of their section 7 rights.²⁰ These provisions gave workers an important freedom previously unavailable under the Act.²¹ Within this background the NLRB and the courts have struggled to define the proper role of union discipline over its members.²²

B. Substantive Limitations on Union Discipline

The National Labor Relations Act allows a labor organization to enact rules enforcing internal discipline.²³ The Supreme Court, however, has limited the union's right to discipline in two important ways. First, the Court has interpreted the Act's internal discipline proviso at section 8(b)(1)(A) as limiting union discipline to solely internal affairs.²⁴ While that section of the Act prohibits restraint and coercion of employees, the internal discipline

14. See C. MORRIS, *THE DEVELOPING LABOR LAW* 26, 28 (1971). The right to concerted activities was essential to a balance of power between labor and management. Prior to the Act, management would often create a company union and bargain solely with that union. See *id.* at 26.

15. See H. MYERS, *LABOR LAW AND LEGISLATION* 450 (1968). The protection given by §§ 7 and 8 allowed unions to grow and prosper under congressionally sanctioned collective bargaining.

16. See H. MILLIS & E. BROWN, *supra* note 9, at 31. The NLRB has the power to investigate, hold hearings, and issue orders, but only the United States courts of appeals can enforce these orders. 29 U.S.C. §§ 159(c), 160(e) (1982).

17. Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1973 & Supp. 1986)).

18. See B. TAYLOR & F. WHITNEY, *supra* note 8, at 207. The new amendments expressed concern for individual freedoms. Congress intended to deal with union coercion, excessive union fees, and union use of pressure on employers to affect an employee's job status. See Silard, *Labor Regulation of Union Discipline After Allis-Chalmers, Marine Workers, and Scofield*, 38 GEO. WASH. L. REV. 187, 188-89 (1969). The author argues that Congress originally intended the amendments to protect the nonmember, but subsequent national sentiment differed from the intent of Congress. See *id.*

19. 29 U.S.C. § 157 (1982); H. MILLIS & E. BROWN, *supra* note 9, at 421.

20. 29 U.S.C. § 158(b)(1) (1982).

21. See C. MORRIS, *supra* note 14, at 40.

22. At the time of the Taft-Hartley Act's passage, Archibald Cox predicted substantial future litigation concerning the Act due to the vagueness of terms such as "restraint" and "coerce." "The scope and variety of . . . problems suggest that Section 8(b)(1) may plunge the Board into a dismal swamp of uncertainty." Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 33 (1947).

23. 29 U.S.C. § 158(b)(1)(A) (1982); see *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 178 (1967).

24. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967). The NLRB first announced this limitation in *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727, 729 (1954).

proviso also authorizes union rules relating to the acquisition and retention of membership. The Court has resolved this apparent inconsistency by holding that if the matter truly involves an internal affair, the union may discipline the member.²⁵ Section 8(b)(2) of the Act enforces this distinction by providing that the union cannot pressure the employer to discriminate against or fire an employee or otherwise affect the employee's employment status for any reason other than his failure to pay dues.²⁶ If the union regulation or its enforcement affects the member's employment status, the courts consider the regulation external enforcement and will disallow it.²⁷

The Court has held that fines levied by unions constitute internal enforcement of union regulations and are valid.²⁸ In *NLRB v. Allis-Chalmers Manufacturing Co.*²⁹ the Supreme Court determined that fines are necessary for the survival of weaker unions.³⁰ Without the availability of fines, weak unions have the option of either expelling an offending member and further weakening their ranks through lost membership or tolerating the misconduct the regulation prevents.³¹ The Court stated that without the internal enforcement provision the unions could not continue in their role as exclusive statutory bargaining agents under section 9(a) of the Act.³²

The second substantive limitation on union discipline rests in the Court's

The NLRB ruled in favor of a union fine imposed on a member who failed to carry out his picket duties.

25. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967).

26. The National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1982) provides: It shall be an unfair labor practice for a labor organization or its agents—

...
(2) to cause or attempt to cause an employer to discriminate against an employee . . . to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership, . . .

27. See Comment, *The Inherent Conflict Between Sections 7 and 8(b)(1)(A) of the National Labor Relations Act—Union Attempts to Discipline Resigning Strikebreakers*, 1978 WIS. L. REV. 859, 861; Note, *Into the Mire of Uncertainty: Union Disciplinary Fines and NLRA Section 8(b)(1)(A)*, 84 W. VA. L. REV. 411, 413 (1982). The Note's author states that disciplinary action that affects the employee's job rights is within the NLRB's jurisdiction. Disciplinary action affecting the relationship of the union and member is internal, and the NLRB has no jurisdiction. *Id.* The following acts have been identified as concerning internal affairs: (1) returning to work while still a member of the union during a strike (*NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967)); (2) producing in excess of union imposed ceilings (*Scofield v. NLRB*, 394 U.S. 423, 429 (1969)); and (3) voluntarily turning in other members to the employer for violating work rules (*Communication Workers of America*, 192 N.L.R.B. 556, 557 (1971)).

28. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967).

29. 388 U.S. 175 (1967).

30. *Id.* at 183.

31. *Id.*; see Millan, *Disciplinary Developments Under Section 8(b)(1)(A) of the National Labor Relations Act*, 20 LOY. L. REV. 245, 246 (1974).

32. 388 U.S. at 183. National Labor Relations Act § 9, 29 U.S.C. § 159(a) (1982) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees . . ." For a criticism of the use of fines, see Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1023 (1976). Wellington does not agree that enforcing fines in a court constitutes internal enforcement. He argues that fines affect the employment status since unions impose the discipline for working and concludes that fines thus touch on external affairs. *Id.*

concern over public policy. The union may not discipline a member when doing so contravenes established national labor policy.³³ The Supreme Court first established this limitation in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*.³⁴ In this case, a union constitution provided that no employee could file charges with the NLRB without first exhausting all available union remedies. The Court held that the overriding public policy of unimpeded access to the NLRB outweighed any union interest in the matter.³⁵ The Court stated that any act limiting access to the NLRB was not a legitimate interest of the labor union, even if the regulation involved internal union affairs.³⁶ The effect of this limitation is that any rule invading or frustrating an overriding policy of the labor laws may not be enforced.³⁷

C. *The Worker's Right to Resign Prior to Pattern Makers' v. NLRB*

Four United States Supreme Court cases have specifically addressed the relationship between the National Labor Relations Act's internal discipline proviso and the right of a union member to resign. The earliest of these, *NLRB v. Allis-Chalmers Manufacturing Co.*³⁸ dealt with members who returned to work during a strike without first resigning their union membership. The union attempted to fine the workers and urged that the internal discipline proviso of section 8(b)(1)(A) allowed the union to make rules concerning the retention of membership. The Court held that the union could discipline members who crossed the picket line and returned to work during

33. See Rapore, *Protected Rights and Union Sanctions Under Section 8(b)(1)(A) of the National Labor Relations Act*, 21 LAB. L.J. 728, 732 (1970); Note, *Union Disciplinary Fines and the Right to Resign*, 30 WASH. & LEE L. REV. 664, 668-69 (1973). The author states that discipline is allowable only if a two-part test is met: that the discipline involves a legitimate union interest, and the discipline impairs no labor policy. *Id.* at 669.

34. 391 U.S. 418 (1968).

35. *Id.* at 424.

36. *Id.* One commentator has criticized the public policy limitation as being too vague. Because of the vagueness of the policy test, members do not have sufficient guidelines in advance of the potential consequences of a particular action. Wellington, *supra* note 32, at 1028.

37. See Scofield v. NLRB, 394 U.S. 423, 429 (1969); see also Millan, *supra* note 31, at 255 (public policy limitation separate and distinct from internal affairs limitation analysis); Note, *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, 405 (1974) (courts place additional emphasis on national labor policy involved).

Other limitations on union discipline also exist. The Landrum-Griffin Act of 1959 imposed procedural limitations on union discipline. See 29 U.S.C. § 411(a)(5) (1982). Before a member may be disciplined, he must be served with specific, written charges, given a reasonable time to prepare his defense, and afforded a full and fair hearing. *Id.*; see D. MCLAUGHLIN & A. SCHOOMAKER, *THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY* 74 (1979); see also Beard & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383, 400-15 (1975) (discussing development of case law concerning procedural due process); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 819-23 (1960) (although statute contains ambiguities, procedural guarantees will aid long-term development of labor law).

38. 388 U.S. 175 (1967). For a background on the dispute over the right to resign, see Gould, *Solidarity Forever—Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74, 79-86 (1980); Johannesen, *Disciplinary Fines as Interference with Protected Rights*, 24 LAB. L.J. 268, 269-77 (1973).

a lawful strike.³⁹ The Court based its decision on two arguments, one based on policy and one based on legislative history.

First, the *Allis-Chalmers* Court noted that the national labor policy was based on the theory that employees could get better wages and working conditions acting as a unit, and that in return for these benefits, the employee should surrender his individual rights to bargain with the employer.⁴⁰ Furthermore, the Court pointed out that the union could not effectively carry out its function as the exclusive statutory bargaining agent without the power to discipline its members.⁴¹

Second, the *Allis-Chalmers* Court relied on the legislative history of the Taft-Hartley Act to reach its holding.⁴² Senators stated several times during debate that Congress did not intend to interfere with the union's internal affairs.⁴³ The internal discipline proviso states that section 8(b)(1)(A) will not prevent the union from making its own rules concerning the acquisition or retention of membership. The Court concluded that since the union can make such rules, and since section 8(b)(1)(A) was not intended to regulate internal affairs, fines were permissible for members who crossed the picket line.⁴⁴ The distinguishing feature between this case and the subsequent cases is that the employees remained members of the union during the time they returned to work.⁴⁵

*Scofield v. NLRB*⁴⁶ offered the Court a chance to refine the *Allis-Chalmers* holding. In this case the employer paid the workers based on their output. The union, however, set a ceiling on the amount that each member could produce. The union rule called for fines and expulsion as punishment for violators.

In upholding the validity of the union's disciplinary measures the Court outlined a three-part test to determine the enforceability of a union rule.⁴⁷

39. 388 U.S. at 195.

40. *Id.* at 180. The Court has stated previously that the union is similar to a legislative body. The union has the power to "create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944).

41. 388 U.S. at 181. One commentator pointed out that the alternative to fines, expulsion, would lead to the expelled members joining rival unions or returning to work during the strike. The union's effectiveness depends on its control of labor, and the threat of expulsion does not necessarily aid in this control. Summers, *Disciplinary Powers of Unions*, 3 *INDUS. & LAB. REL. REV.* 483, 487-88 (1950). Another commentator argues that if a mass exodus of members has weakened the strike movement, the strike may not be the preferred action of the members. Wellington, *supra* note 32, at 1044.

42. 388 U.S. at 183-85.

43. Senator Ball stated, "[i]t was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions." 93 *CONG. REC.* 4272 (1947). In referring to the proviso of § 8(b)(1)(A), Senator Ball remarked: "That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized." 93 *CONG. REC.* 4433 (1947). Concerning § 8(b)(2) Senator Taft explained "[t]he pending measure does not propose any limitation with respect to the internal affairs of unions." 93 *CONG. REC.* 4193 (1947).

44. 388 U.S. at 195.

45. *See id.* at 176. In cases following *Allis-Chalmers* the workers resigned their membership, presenting a different scenario.

46. 394 U.S. 423 (1969).

47. *Id.* at 430. The test evolved from *NLRB v. Marine & Shipbuilding Workers*, 391 U.S.

The Court stated that for a union rule to be enforceable, it must reflect a legitimate union interest, impair no policy Congress has imbedded in the labor laws, and be reasonably enforced against union members who are free to leave the union and escape the rule.⁴⁸ The Court recognized that under the production ceiling rule the possibility of discrimination between the members and nonmembers existed since the ceiling did not limit the nonmembers.⁴⁹ The Court stated that any differences between the two classes existed because the members had voluntarily chosen to retain their union membership.⁵⁰ The Court held that the union met the three-part test.⁵¹

*NLRB v. Granite State Joint Board*⁵² involved members who resigned union membership before returning to work during a lawful strike.⁵³ Although neither the union constitution nor the labor contract contained provisions restricting the members' ability to resign, the union fined these workers. The workers charged that the fines restrained and coerced them under section 8(b)(1)(A) in violation of their section 7 rights to refrain from concerted activity.⁵⁴ The Court relied on the *Scofield* test in reaching its decision that the union's power over a member ceases when he resigns from the union.⁵⁵ The Court determined that the union had failed the second part of the *Scofield* test, which states that a union rule cannot impair public policy, because the union fined members for resigning when no contractual obligation prohibited resignations.⁵⁶

The union advanced an argument that members should be subject to fines for resigning membership because of the mutual reliance of all union members. In rejecting the mutual reliance theory, the *Granite State* Court focused on the practical effects on the member.⁵⁷ The Court noted that the

418, 424-25 (1968). In that case the Court held that if a union rule violated public policy, the rule went beyond the legitimate interest of the union.

48. 394 U.S. at 430.

49. *Id.* at 434-35.

50. *Id.* at 435. The Court noted that one factor involved in its holding was the voluntary nature of the membership. *Id.*

51. *Id.* at 436; see Note, *Union Power to Fine Members for Overworking*, 10 CASE W. RES. 669, 673 (1969). The author criticizes the *Scofield* holding as being outside the *Allis-Chalmers* rationale since the production ceilings, in effect, are a condition of employment, and thus beyond the scope of internal affairs. See also Note, *A Union's Suit Against Members to Collect Fines Assessed for Violation of a Union Bylaw Imposing a Production Ceiling is not Restraint or Coercion Under Section 8(b)(1)(A)*, 48 TEXAS L. REV. 238, 241 (1969) (criticizing *Allis-Chalmers* holding because it restrains members' right to earn income).

52. 409 U.S. 213 (1972).

53. See Note, *Absent Provisions in a Collective-Bargaining Contract or the Union's Constitution or Bylaws Restricting a Union Member's Right to Resign, Any Imposition of Fines Upon Employees Who Resign From the Union Prior to Breaking Strike Rules is an Unfair Labor Practice Under Section 8(b)(1)(A) of the National Labor Relations Act*, 5 ST. MARY'S L.J. 176, 179-87 (1973); Note, *Illegality of Union Fines*, 40 TENN. L. REV. 521, 523-26 (1973).

54. 409 U.S. at 215. The workers argued that if they must make a choice between striking or paying fines, they are in effect being coerced into joining concerted activity. *Id.*

55. *Id.* at 215-16.

56. *Id.* at 216-17.

57. *Id.* at 217. The mutual reliance theory states that when a worker votes to strike, he casts his vote believing all other members will support him if a strike follows. According to the theory, each member makes a promise to the other members to abide by the union vote. The theory concludes that each member should be bound by his vote. See Note, *The Rights of*

longer a strike lasts, the greater the hardship on each worker. Because the hardships may be much more severe than originally anticipated, the member must be free to change his mind.⁵⁸ The Court held that when a union constitution is silent concerning the right to resign, the individual may resign at will.⁵⁹ The Court, however, specifically reserved judgment on the legal effect of a restriction on the right to resign in a union constitution.⁶⁰

In *Booster Lodge v. NLRB*⁶¹ the union constitution expressly prohibited members from returning to work during a strike. Sixty-one members attempted to circumvent the constitution by first resigning their memberships and then returning to work. The union imposed fines on these workers. The employer asserted that the fines were coercive under section 8(b)(1)(A) and that the *Granite State* holding prohibited the union from fining members who had resigned. The union countered that since the workers agreed to the provision in the union constitution prohibiting strike-breaking while they were still members, the workers remained bound even after they resigned. The Court rejected the union's argument, concluding that the fines constituted an unfair labor practice.⁶²

As in the *Granite State* case, the Court relied on the theory of free institutions. The theory of free institutions states that an individual has the right to join and resign from an association at will, provided he has not agreed to any limitation on that right.⁶³ The Court reasoned that since the constitution did not expressly apply to nonmembers, it was inapplicable to the resigning workers.⁶⁴ The Court once again expressly left open the question of what effects a union provision restricting resignations would have.⁶⁵

Unions to Fine Members Who Have Engaged in Strike-Breaking Activities After Resigning from the Union During a Strike, 72 COLUM. L. REV. 1272, 1281 (1972).

58. 409 U.S. at 217-18. The Court stated that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May." *Id.* Factors the Court mentioned that would cause a member to change his mind included the length of the strike and the availability to the employer of replacement workers. *Id.* at 216. One commentator has disagreed with the applicability of the mutual reliance theory. He noted that a member does not waive his right not to strike unless the waiver is express and supported with knowledge of the anticipated consequences. Millan, *supra* note 31, at 263-64. Another problem with applying a contract theory such as mutual reliance to labor relationships is that the members are bound to the rules and discipline, but the union can change these rules at any time. See Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1101. Other problems include the turnover of employees, the conflicting interests of the members and the union, and the fact that the union does not always answer immediately to the majority. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 604 (1956).

59. 409 U.S. at 217.

60. *Id.*

61. 412 U.S. 84 (1973).

62. *Id.* at 90. The Court determined that the workers had resigned and were no longer subject to union rule. It held that the union can impose discipline only upon members. *Id.*

63. *Id.* at 88.

64. *Id.* at 89.

65. *Id.* at 88; see Note, *Union Power to Discipline Members Who Resign*, 86 HARV. L. REV. 1536, 1543-45 (1973) (arguing that mutual reliance should be rejected because member's contract is an adhesion contract and implying terms against the worker in such a situation is unfair).

II. *PATTERN MAKERS' LEAGUE OF NORTH AMERICA v. NATIONAL LABOR RELATIONS BOARD*

In *Pattern Makers' League of North America v. National Labor Relations Board* the Supreme Court squarely addressed a union's right to restrict members' ability to resign when a union rule forbids resignation during a strike. The Court determined that union fines imposed on workers who resigned in violation of such a rule violated sections 7 and 8(b)(1)(A) of the Taft-Hartley Act by infringing upon the workers' rights to refrain from concerted activities.⁶⁶ The Court's decision resolved a conflict between the circuits on the issue.⁶⁷

The Supreme Court began its analysis in *Pattern Makers'* by articulating the standard of review applicable to the NLRB's interpretation of the National Labor Relations Act.⁶⁸ Since the NLRB has expertise in labor law, the Court subjects the interpretations of the NLRB only to limited judicial review, thereby giving the NLRB's determinations substantial deference.⁶⁹ The Court noted that, in cases involving fines, it had historically granted great weight to the NLRB's decisions and that the NLRB had taken a consistent stand on these cases.⁷⁰ The Court thus limited the scope of its review to the reasonableness of the NLRB's interpretation.⁷¹

The Court's analysis of the case can be divided into three parts. First, the Court examined the Taft-Hartley Act itself. Second, the Court analyzed the public policy the Taft-Hartley Act manifests. Third, the Court addressed the arguments of the union.

A. *Taft-Hartley Act*

The Court began its analysis in *Pattern Makers'* with section 7 and section 8(b)(1)(A) of the Taft-Hartley Act. Under section 7 union members have

66. 105 S. Ct. at 3068, 87 L. Ed. 2d at 72.

67. The Seventh Circuit had held that union fines imposed on workers who resigned in violation of a union rule forbidding resignation during a strike frustrated the overriding public policy that employees be free to choose whether or not to engage in concerted activities. *Pattern Makers' League of North America v. NLRB*, 724 F.2d 57, 61 (7th Cir. 1983). See generally Comment, *Protesting a Union Member's Right to Resign—Resolution of the Conflict Between Dalmo Victor and Rockford-Beloit*, 38 VAND. L. REV. 201 (1985) (attempting to resolve conflicting holdings of Seventh and Ninth Circuits)[hereinafter cited as Comment, *Protesting*]; Note, *A Union's Right to Control Strike-Period Resignations*, 85 COLUM. L. REV. 339 (1985) (analyzing Seventh Circuit's holding). A Ninth Circuit decision directly conflicted with the Seventh Circuit decision. *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984); see Comment, *Union Security and Union Members' Freedom to Resign: The National Labor Relations Board's Thirty-Day Rule in Dalmo Victor*, 14 TEX. TECH. L. REV. 593, 610 (1983) (discussing NLRB's ruling and its consistency with previous Court holdings).

68. 105 S. Ct. at 3068, 87 L. Ed. 2d at 73.

69. *Id.*; see *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)). In *Weingarten* the Court stated that the NLRB had the responsibility of adapting the statute to modern industrial problems. 420 U.S. at 266. The Court has stated that the primary responsibility of the NLRB is to interpret the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

70. 105 S. Ct. at 3075-76, 87 L. Ed. 2d at 82-83.

71. *Id.* at 3068, 87 L. Ed. 2d at 73.

the right to refrain from concerted activities.⁷² Section 8(b)(1)(A) enforces section 7 by prohibiting the restraint and coercion of workers exercising these rights.⁷³ Upon finding that earlier judicial interpretations of the Act departed from strict literal reading of sections 7 and 8(b)(1)(A), the Court analyzed the legislative history of the Taft-Hartley Act in an effort to define the section 7 and 8(b)(1)(A) rights.

In interpreting the language of section 7 the Court distinguished between the internal and external affairs of the union.⁷⁴ The Court, relying on the legislative history of the Act, stated that Congress did not intend the Act to interfere with a union's internal affairs.⁷⁵ The Court noted that internal affairs had never been interpreted to encompass the right to resign, and pointed out that in 1947, when Congress passed the Act, the right to resign was not a major issue.⁷⁶ The Court reasoned that since Congress did not contemplate the idea of resignation restrictions when it debated the Taft-Hartley Act, it did not intend the Act's definition of internal affairs to include the right to resign.⁷⁷ The Court thus ruled that unions can enact rules to retain membership under the internal discipline proviso, but these rules must be limited to matters concerning legitimate internal affairs and must not include restrictions on the right to resign.⁷⁸

The Court further supported its interpretation of the internal discipline proviso by analyzing prior Supreme Court opinions concerning the right to resign. In *Scofield* the Court set forth a three-part test to determine the enforceability of a union rule.⁷⁹ The third part of that test required that members be free to escape the rule by leaving the union.⁸⁰ *Granite State* further emphasized the importance of the right to resign by requiring that a member must be free to change his mind from an earlier strike vote.⁸¹ The Court reasoned that the two cases further proved that Congress did not intend internal affairs to encompass restrictions on the right to resign.⁸²

72. 29 U.S.C. § 157 (1982).

73. *Id.* § 158(b)(1)(A).

74. 105 S. Ct. at 3069, 87 L. Ed. 2d at 75.

75. *Id.*

76. See Wellington, *supra* note 32, at 1042. Even as late as the 1970s restrictions on the right to resign were uncommon. One of the motivating factors behind the appearance of these restrictions is the Court's language in the *Granite State* and *Booster Lodge* decisions. See *supra* notes 52-65 and accompanying text. Because the Court reserved judgment on the effect of right-to-resign restrictions, unions began to include the restrictions in their constitutions and bylaws. Millan, *supra* note 31, at 269.

77. 105 S. Ct. at 3069, 87 L. Ed. 2d at 75. In addressing § 8(b)(1)(A) Senator Taft stated that the section "would not outlaw anybody striking who wanted to strike All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." 93 CONG. REC. 4436 (1947).

78. 105 S. Ct. at 3069, 87 L. Ed. 2d at 75.

79. 394 U.S. at 430; see *supra* notes 46-51 and accompanying text.

80. See 105 S. Ct. at 3070, 87 L. Ed. 2d at 76. One commentator has suggested that giving this third part too much weight would swallow up the first two parts of the test and has suggested that the third part should be used only to support the second element of the test that makes unenforceable union rules that impair congressional labor policy. Comment, *supra* note 67, at 234.

81. 409 U.S. at 217-18; see *supra* notes 52-60 and accompanying text.

82. 105 S. Ct. at 3070, 87 L. Ed. 2d at 76.

B. Public Policy of the Taft-Hartley Act

The Court next weighed the policy considerations Congress manifested in the Taft-Hartley Act. The Court determined that the controlling policy of the Act and of American labor law in general was voluntary unionism.⁸³ Although section 8(a)(3) of the Act validates union security agreements requiring all employees hired by the company to pay dues to the union,⁸⁴ the Court held that security agreements may not compel union members to honor union rules with which they disagree.⁸⁵

The Court noted that the original Wagner Act permitted closed shop agreements that required employees to become and remain union members.⁸⁶ Because of the unpopularity of such agreements Congress amended the Act to dispose of the closed shop.⁸⁷ Under section 8(a)(3) of the current Act an employer may not fire an employee for disagreeing with union policy.⁸⁸ The employee need not agree with union policy; his only obligation is to pay dues.⁸⁹ The Court thus determined that the past history of section 8(a)(3) implied a strong national policy of voluntary unionism.⁹⁰ The Court then stated that although the discipline imposed by the union in *Pattern Makers'* took the form of a fine as opposed to a firing, the distinction made little difference as a fine equal to wages earned affects employment rights to the same extent as being discharged.⁹¹ Relying on this analysis, the Court held the restriction on the right to resign imposed by the Pattern Makers' League to be inconsistent with the policy of voluntary unionism.⁹²

83. *Id.*; see Millan, *supra* note 31, at 260.

84. National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1982) provides:
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 further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (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 periodic dues

85. 105 S. Ct. at 3071, 87 L. Ed. 2d at 77. Under the union security agreement, the union membership requirement has been "whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). As a practical matter, however, the worker may wish to become a full member. The union is his exclusive statutory bargaining agent. See *supra* note 32. If a worker does not become a full member, he will have no influence in the union. Thus, the union will determine how much dues will be and how they are spent without his voice. The union could make expenditures for which the so-called limited member would receive no benefits, such as strike compensation and recreational facilities. See Wellington, *supra* note 32, at 1045-47.

86. 105 S. Ct. at 3070, 87 L. Ed. 2d at 77.

87. *Id.* at 3071, 87 L. Ed. 2d at 77.

88. *Id.*

89. *Id.*

90. *Id.* One commentator has argued that many problems could be cleared up if unions would explain the ramifications of union security agreements to employees before the employees become full union members. Most members are unaware that full membership is not required. This information might dissuade many dissidents from joining the union and strengthen solidarity in the long run. Gould, *supra* note 38, at 106.

91. 105 S. Ct. at 3071, 87 L. Ed. 2d at 77-78; see Wellington, *supra* note 32, at 1023.

92. 105 S. Ct. at 3071, 87 L. Ed. 2d at 78. The analysis of the policy issues is basically the second part of the *Scofield* test: no rule shall impair a policy Congress has imbedded in the

C. *The Union's Arguments*

The Court next addressed the union's three principal arguments: that the internal discipline proviso of the Act validates resignation restrictions; that the Act's legislative history supports such restrictions; and that unions should be granted treatment similar to other voluntary associations. The union first argued that the internal discipline proviso of the Act expressly authorized restrictions on the right to resign because the proviso allows the union to prescribe its own rules concerning the acquisition and retention of membership.⁹³ The Court responded that neither the NLRB nor the Supreme Court had ever interpreted the proviso to include restrictions on the right to resign.⁹⁴ Rather, the Court historically adopted the interpretation that the proviso only covers expulsion and admission of members and related enforcement mechanisms such as fines.⁹⁵ Since nothing in the legislative history indicated a contrary meaning, the Court granted deference to the NLRB's interpretation of the proviso as not allowing restrictions on the right to resign.⁹⁶

The union next argued that the legislative history of the Act expressed congressional intent to allow restrictions on resignations. Section 8(c)(4) of the original bill presented in the House of Representatives would have designated as unfair any labor practice that denied a member the right to resign from a union at any time.⁹⁷ Congress, however, did not include the prohibition of restrictions on the right to resign in the Taft-Hartley Act.⁹⁸ The union asserted that because Congress examined this issue and elected not to include the provision in the Act, Congress did not consider restriction of a member's right to resign an unfair labor practice. The Court rejected the union's reasoning. Upon examination of the House of Representatives' purpose in considering section 8(c)(4) the Court concluded that the provision was a reaction to closed shop agreements.⁹⁹ At the time of passage of the Taft-Hartley Act, closed shop agreements were a much more common limitation on the right to resign than specific union rules that limited the right.¹⁰⁰ Thus, the Court found that the House proposed section 8(c)(4) out of concern for closed shops.¹⁰¹ The Court reasoned that the exclusion of the House provision from the Act was only natural since the Act itself outlawed

labor laws. See *supra* notes 46-51 and accompanying text; see also Comment, *Protesting, supra* note 67, at 224-35 (hypothetical discussion of how resignation restrictions should be resolved under the *Scofield* test).

93. 105 S. Ct. at 3072, 87 L. Ed. 2d at 78.

94. *Id.*, 87 L. Ed. 2d at 79.

95. *Id.* The Court cited *Allis-Chalmers*, 388 U.S. at 191-92, as interpreting the internal discipline proviso to allow fines and expulsions. In *Allis-Chalmers*, however, the Court prefaced its statement with "At the very least," which implies that the internal discipline proviso may allow more than just fines and expulsions. *Id.*

96. 105 S. Ct. at 3073-74, 87 L. Ed. 2d at 79-81.

97. H.R. 3020, 80th Cong., 1st Sess. § 8(c)(4) (1947).

98. See 105 S. Ct. at 3073, 87 L. Ed. 2d at 80.

99. *Id.* Closed shops were outlawed by 29 U.S.C. § 158(a)(3) (1982); see *supra* note 84.

100. 105 S. Ct. at 3073, 87 L. Ed. 2d at 80.

101. *Id.*

closed shops.¹⁰²

The Court further addressed the exclusion of section 8(c)(4) by noting that section 8(c) of the House bill comprised a bill of rights for laborers.¹⁰³ The section listed acts that constituted unfair labor practices, including the use of intimidation tactics on union members' families.¹⁰⁴ The Court reasoned that although the conference committee omitted the list of specific prohibited acts from the final Act, Congress could not have intended to tolerate such action.¹⁰⁵ The Court concluded that Congress intended to cover many of the provisions of the bill of rights under the general language of the Taft-Hartley Act.¹⁰⁶ Therefore, based on the legislative history of the Act, the Court held as reasonable the NLRB's interpretation of restrictions on the right to resign as restraint and coercion under the general language of section 8(b)(1).¹⁰⁷ Again, the Court applied a standard that merely questioned the reasonableness of the NLRB's conclusions.¹⁰⁸

The final argument that the union advanced concerned the law of voluntary associations, otherwise known as the law of free institutions.¹⁰⁹ The union, relying on language from *Granite State*, asserted that the common law doctrine of voluntary associations should apply to permit restrictions on the right to resign.¹¹⁰ The Court distinguished the language in *Granite State* by noting that the *Granite State* opinion did not rely on the common law but merely claimed to be consistent with it.¹¹¹ The Court acknowledged that the Act is not entirely consistent with the common law and occasionally invalidates union rules that would pass common law scrutiny.¹¹² The Court thus ruled that section 8(b)(1)(A) of the Taft-Hartley Act superseded the common law and that the NLRB reasonably interpreted the Act to disallow League Law 13.¹¹³

D. Concurring and Dissenting Opinions

In his concurring opinion Justice White expanded on the Court's deference to the NLRB. His opinion noted that the statutory language in question in *Pattern Makers'* could reasonably be interpreted as having two conflicting meanings.¹¹⁴ Justice White wrote that in such a situation, when

102. *Id.*

103. *Id.* at 3073-74, 87 L. Ed. 2d at 80.

104. H.R. 3020, 80th Cong., 1st Sess. § 8(c)(9) (1947).

105. 105 S. Ct. at 3074 n.23, 87 L. Ed. 2d at 80-81 n.23.

106. *Id.* at 3073-74, 87 L. Ed. 2d at 80.

107. *Id.*

108. *Id.* at 3074, 87 L. Ed. 2d at 80.

109. See *supra* text accompanying note 63.

110. The Court stated in *Granite State* that "We have . . . only to apply the law which normally is reflected in our free institutions . . ." 409 U.S. at 216.

111. 105 S. Ct. at 3074, 87 L. Ed. 2d at 81. The Court noted that whether the common law of free associations allows restrictions or resignations is debatable. *Id.* at 3074 n.25, 87 L. Ed. 2d at 81 n.25.

112. *Id.* at 3074-75, 87 L. Ed. 2d at 81-82 (citing *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968)).

113. 105 S. Ct. at 3075, 87 L. Ed. 2d at 82.

114. *Id.* at 3076, 87 L. Ed. 2d at 83-84.

the legislative history fails to resolve the matter clearly, the Court must accord the NLRB an appropriate amount of deference.¹¹⁵

Justice Blackmun, in a dissenting opinion joined by Justices Marshall and Brennan, disagreed with the majority on three grounds. First, he asserted that League Law 13 regulated an internal affair and thus was not subject to the NLRB's review.¹¹⁶ He asserted that the line between internal and external affairs lies where the union attempts to pressure the employer to take action against an employee.¹¹⁷ Second, Justice Blackmun stated that the majority's interpretation of the internal discipline proviso of the Act was unjustifiably limited.¹¹⁸ He pointed out that the Senate rejected section 8(c)(4) of the House bill, part of the bill of rights for workers.¹¹⁹ He reasoned that the final Act did not intend to protect the member's right to resign, and since this right is not protected, the internal discipline proviso grants the union the power to make rules affecting that right.¹²⁰

Justice Blackmun concluded by contending that the law of voluntary associations should apply to League Law 13.¹²¹ Under the common law, associations may restrict a member's right to resign if a legitimate interest for such a rule exists.¹²² Justice Blackmun reasoned that since allowing members to venture into and out of the union at will would limit the effectiveness of a strike, the union has the legitimate interest to restrict its members' resignations.¹²³ Justice Blackmun urged that such a rule does not limit the members' section 7 rights; giving up the right to resign is merely a sacrifice to be made in order to gain the benefits of collective bargaining.¹²⁴ Justice Blackmun stated that no evidence showed that the workers were unaware of their promises to fellow workers not to resign.¹²⁵ Justice Blackmun thus concluded that the workers waived their right to resign and that the Court was wrong to rubber-stamp the NLRB's decision.¹²⁶

III. CONCLUSION

In announcing its holding in *Pattern Makers' v. NLRB* the Court made a clear policy choice. The original Wagner Act established the policy that

115. *Id.* at 3076, 87 L. Ed. 2d at 84.

116. *Id.* at 3078, 87 L. Ed. 2d at 85.

117. *Id.* at 3078, 87 L. Ed. 2d at 86. The majority responded to this argument by stating that in previous cases, the NLRB has regulated actions other than union pressure on employers. *Id.* at 3072 n.20, 87 L. Ed. 2d at 79 n.20.

118. *Id.* at 3079, 87 L. Ed. 2d at 87.

119. *Id.*; see *supra* text accompanying notes 97-107.

120. 105 S. Ct. at 3079, 87 L. Ed. 2d at 88. The majority responded to this contention by relying on Senator Taft's statement that under § 8(b)(1) the union could not "coerce employees, either their own members or those outside the union." 93 CONG. REC. 4023 (1947). Thus, the majority reasoned, Congress did not "explicitly reject" all of the bill of rights encompassed by House bill § 8(c). 105 S. Ct. at 3074 n.23, 87 L. Ed. 2d at 81-82 n.23.

121. 105 S. Ct. at 3082, 87 L. Ed. 2d at 90.

122. *Id.*

123. *Id.* at 3083, 87 L. Ed. 2d at 92.

124. *Id.* at 3083, 87 L. Ed. 2d at 92-93.

125. *Id.* at 3084-85, 87 L. Ed. 2d at 93-94.

126. *Id.* at 3084, 87 L. Ed. 2d at 93.

workers can accomplish more by acting collectively than they can by individual action. The Taft-Hartley amendments implemented the policy of voluntary unionism that demands that the worker be free to join in or refrain from concerted activities. The *Pattern Makers'* Court embraced the policy of voluntary unionism and thus protected the freedoms of individual workers.

Because of the Court's policy choice, a union cannot promote solidarity during strikes by imposing fines on those members who resign. Such fines levied by a union discourage the workers from resigning. This effect violates the policy of voluntary unionism.

The Court's decision is likely to diminish the role of labor unions. The practical effect of the decision, however, will benefit both workers and the economy. Without the ability to discipline resigning members, unions will be forced to act quickly, bargain in good faith, and avoid long strikes in order to prevent the resignation of members.

Thomas J. Irons

