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Labor Law - National Labor Relations Act - Section 8(b)(1)(A) - Union Restriction on Resignation and Post-Resignation Conduct

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LABOR LAW—NATIONAL LABOR RELATIONS ACT—SECTION 8(B)(1)(A)—UNION RESTRICTION ON RESIGNATION AND POST-RESIGNATION CONDUCT—The National Labor Relations Board has held that any union restriction on a member's right to resign or otherwise refrain from engaging in Section 7 activities is invalid.

International Association v. Machinists, Local 1414, 270 N.L.R.B. 1330 (1984)

On September 8, 1980, employees in a bargaining unit represented by International Association of Machinists and Aerospaceworkers, Local 1414 (hereinafter the Union), commenced an economic strike against Neufeld Porsche-Audi, Inc., their employer.¹ The strike ended approximately six-months later, on March 1, 1981.² Before the strike ended, on January 23, 1981, Branislav Locki, a member of the Union and of the striking bargaining unit, delivered a letter of resignation to the Union and returned to work.³ Thereafter, the Union filed internal charges and imposed a \$2,500 court-collectable fine against Locki⁴ for returning to work during the strike in violation of the Union's constitution.⁵

In response to the Union's actions against Locki, employer Neufeld Porsche-Audi, Inc. filed a charge with the National Labor Relations Board (hereinafter the Board) alleging that the Union had engaged in an unfair labor practice within the meaning of the

1. *International Ass'n of Machinists, Local 1414*, 270 N.L.R.B. 1330, 1331 (1984). The parties submitted, and the Board approved, a proposed record consisting, in part, of the parties' stipulation of facts. *Id.*

2. *Id.* at 1331.

3. *Id.* at 1330-31.

4. *Id.* at 1331.

5. *Id.* Article L, Section 3 of the International's constitution provides in pertinent part:

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 if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

Id. at 1330.

National Labor Relations Act (hereinafter the NLRA or Act)⁶ by its imposition of a fine against Locki.⁷ Thereafter, the General Counsel of the National Labor Relations Board issued a complaint against the Union alleging that it had violated section 8(b)(1)(A)⁸ of the Act. On November 16, 1981, upon the Union's answer to the complaint, denying that it had violated the Act, the parties jointly moved the Board to transfer the proceedings to the Board, without benefit of a hearing before an Administrative Law Judge.⁹ The motion to transfer was granted.¹⁰

The issue before the Board was whether the Union violated section 8(b)(1)(A) of the Act when it imposed a fine upon an employee who had resigned from the Union and returned to work during a strike. The employer and General Counsel relied upon the decision in *Dalmo Victor I*, in which the Board held that a similar provision in a union's constitution violated section 8(b)(1)(A), because it was regarded as a restriction upon post-resignation conduct. Generally, the union relied on the Ninth Circuit's denial of enforcement of *Dalmo Victor I* and argued that the provision in the Union's constitution was a restriction on resignation rather than a restriction on post-resignation conduct.¹¹

The Board¹² held that the Union's 1981 restrictions on resignation, as well as *any* restrictions a union may impose on resignation, are invalid, and that the Union violated section 8(b)(1)(A) of the Act by imposing a fine against Locki.¹³ In so doing, the Board expressly overruled its decision in *Dalmo Victor II*¹⁴ and its prog-

6. National Labor Relations Act, as amended, 29 U.S.C. § 151 (1976).

7. 270 N.L.R.B. at 1330.

8. National Labor Relations Act, as amended, section 8(b)(1)(A), 29 U.S.C. § 158 (b)(1)(A) (1976). The pertinent provisions of section 8(b)(1)(A) are as follows:

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 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

Id.

9. 270 N.L.R.B. at 1330.

10. *Id.*

11. *Id.* at 1331. See *infra* note 14 and accompanying text.

12. 270 N.L.R.B. at 1331. The Board majority consisted of Chairman Dotson, and Members Hunter and Dennis. *Id.* at 1337. Member Zimmerman dissented in part. *Id.*

13. *Id.* at 1331.

14. International Ass'n of Machinists, Local 1327, 263 N.L.R.B. 984 (1982), *enf. denied*, 725 F.2d 1212 (9th Cir. 1984) (hereinafter cited as *Dalmo Victor II*). In International Ass'n of Machinists, Local 1327, 231 N.L.R.B. 719 (1977), *enf. denied and remanded*, 608 F.2d 1219 (9th Cir. 1979) (hereinafter cited as *Dalmo Victor I*), the Board found invalid a

eny.¹⁵ The majority adopted the approach advocated by the concurring opinion in *Dalmo Victor II*¹⁶ in which Chairman Van de Water and Member Hunter had argued that any restriction on a union member's right to resign or otherwise refrain from engaging in section 7 activities,¹⁷ would be invalid.¹⁸

Tracking the concurring analysis in *Dalmo Victor II*, the majority relied on applicable principles espoused by the Supreme Court in four cases: *NLRB v. Allis-Chalmers*;¹⁹ *Scofield v.*

union's constitution that provided that resignations during strikes or picketing or within 14 days prior to commencement of such activities would not relieve members of their obligation to refrain from accepting employment at the struck establishment. The rule provided for the fining of so-called strikebreakers as a means of enforcement. In concluding that the rule violated section 8(b)(1)(A) of the Act, the Board determined that the rule was designed as a restriction not on resignations, but on post-resignation conduct. 231 N.L.R.B. at 720-21.

On petition for review and cross-application for enforcement of the Board's order in *Dalmo Victor I*, the Ninth Circuit rejected as "hypertechnical" the Board's conclusion that the union's rule was a restriction on post-resignation conduct and remanded the case to the Board to decide the extent to which contractual restrictions on members' rights to resign are consistent with the policies of the Act. 608 F.2d at 1222.

On remand, the Board majority concluded that by limiting the right to resign to non-strike periods, the union's rule constituted an "unreasonable restriction" and was, therefore, invalid, 263 N.L.R.B. at 985. However, the *Dalmo Victor II* majority indicated that it would uphold a union rule prohibiting a resignation. *Id.* at 987. In their concurring opinion, [former] Chairman Van de Water and Member Hunter concluded that any restriction on a member's right to resign from a union would be violative of section 8(b)(1)(A) of the Act. On petition for review and cross-application for enforcement of the Board's order, the Ninth Circuit denied enforcement.

In concluding that, in *Dalmo Victor II*, deferral to the Board's expertise in construing and applying the labor laws was not warranted, the Ninth Circuit concluded that the Board's holding, including the thirty day rule articulated by the concurring opinion therein, would frustrate federal labor policies. 725 F.2d at 1215. Further, the Ninth Circuit determined that the union's rule passed muster under the test articulated by the Supreme Court in *Scofield v. NLRB*, 394 U.S. 423 (1969), 725 F.2d at 1216-17. *See also infra* note 27 and accompanying text.

15. 270 N.L.R.B. at 1331.

16. 263 N.L.R.B. at 987 (Chairman Van de Water and Member Hunter concurring). *See supra* note 14.

17. National Labor Relations Act, ch. 372, § 7, 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 157 (1976)). Section 157 of 29 U.S.C. provides:

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 mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157.

18. 270 N.L.R.B. at 1331.

19. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). In this case, a union fined full union members who had crossed a picket line and returned to work during an authorized strike in violation of the union's constitution and bylaws. *Id.* at 176-77. After a thor-

NLRB;²⁰ *NLRB v. Textile Workers Local 1029*;²¹ and *Machinists Booster Lodge 405 v. NLRB*.²² All four cases analyzed the extent of a union's authority to enforce its rules against member and non-member employees, without running afoul of section 8(b)(1)(A) and related provisions of the Act.

In *Allis-Chalmers*, the Supreme Court held that a union may sanction its full members if they violate union rules by returning to work during a strike.²³ From this case, the Board examined the Court's definition of union actions that are "internal"²⁴ in nature and those that are "external"²⁵ in nature and noted that the Court, through its analysis of the Act and its legislative history, intended to insulate only "internal" union actions from the proscriptions of section 8(b)(1)(A) of the Act. Thus, where a union takes action which interferes with an employee's employment status or at-

ough review of legislative history and federal labor practices, the Court determined that the imposition of fines pursuant to the rule was not violative of section 8(b)(1)(A) of the Act. *Id.* at 197. The Court noted a distinction between individuals who enjoy "full membership" and those whose affiliation with the union is limited to a mere tender of periodic dues and initiation fees in compliance with a union security provision in a contract, but the Court stated that it expressed no opinion as to whether fines could be imposed on such limited members. *Id.*

20. *Scofield v. NLRB*, 394 U.S. 423 (1969). In *Scofield*, the Supreme Court upheld a union's imposition of fines on members who had violated a union rule that provided for a production ceiling on piecework. *Id.* at 424-27.

21. *NLRB v. Textile Workers Union of America, Local 1029*, 409 U.S. 213 (1972) (hereinafter cited as *Granite State*). The Supreme Court held unlawful the imposition of fines on individuals who had returned to work during a strike after they had resigned from the union. While noting that neither the contract nor the union's constitution or bylaws contained a provision restricting a member's right to resign, the Court expressed that its decision in this case would not decide whether the right to resign could be curtailed by the contractual relationship between a member and his union. *Id.* at 217.

22. *International Ass'n of Machinists, Local 405, v. NLRB*, 412 U.S. 84 (1973) (hereinafter cited as *Booster Lodge*). The Court rejected the union's contention that fines levied against members who had resigned were lawful, as a matter of contract law, inasmuch as the union's constitution had in the past been consistently interpreted to bind employees to a strike despite their resignations. *Id.* at 89. The union made this argument because its constitution contained no express language providing for any such obligations on resignees. *Id.* Although it acknowledged that none of these cases expressly addressed a union's authority to restrict members' resignations, the Board determined that these cases provided an "analytical framework" from which to decide the issue of resignation restrictions. 270 N.L.R.B. at 1331-32.

23. 388 U.S. at 175, 178-95.

24. 270 N.L.R.B. at 1332 (citing *Allis-Chalmers*, 388 U.S. at 195). The Board interpreted the Court's definition of "internal" union actions as "those taken against full union members pursuant to a nonarbitrary rule aimed at achieving a legitimate union objective." 270 N.L.R.B. at 1332.

25. *Id.* The Board defined "external" union actions as those that are "aimed at interfering with an employee's employment status" or those actions that "are taken against non-members or employees outside the bargaining unit." *Id.*

tempts to discipline non-members, the union is in violation of section 8(b)(1)(A).²⁶

The second component of the Board's "analytical framework" was supplied by *Scofield* in the form of a test (hereinafter the "*Scofield* test") set forth by the Court for evaluating the lawfulness of a union rule. A union rule passes the "*Scofield* test" if it "reflects a legitimate union interest, impairs no policy that Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."²⁷

Third, the Board emphasized the Court's application of the *Scofield* test in *Granite State*, where, during a strike, employees had resigned their memberships before returning to work in violation of a union rule.²⁸ Essentially, the Board noted that while the *Granite State* Court determined that a union had a legitimate interest in prohibiting members who had already resigned from returning to work during a strike, the rule failed the *Scofield* test because it impaired employees' section 7 rights to refrain from engaging in union or other concerted activities and because it impaired members' rights to "leave the union and escape the rule."²⁹

The Board completed its "analytical framework" by examining principles espoused by the Court in *Booster Lodge*.³⁰ In that case, the Court rejected the union's contention that fines levied against members who had resigned were lawful inasmuch as the union's constitution had, in the past, been consistently interpreted to bind employees to a strike despite their resignation.³¹

In applying the *Scofield* test to the instant case, the Board recognized that a union rule restricting resignation clearly reflected legitimate union interests and thus satisfied the first prong of the test.³² However, the Board also determined that the rule was inconsistent with the policies Congress had embedded in the Act, in that it impaired employees in the exercise of their section 7 rights

26. *Id.*

27. *See supra* note 20 and accompanying text.

28. *See supra* note 21 and accompanying text.

29. 270 N.L.R.B. at 1332. The Board noted further the Court's rejection in *Granite State* of the union's argument that its rule was justified, in spite of *Scofield*, because of the union's strong interests in strike solidarity. *Id.* at 1332-33.

30. *See supra* note 22 and accompanying text.

31. 270 N.L.R.B. at 1333.

32. *Id.* The Board said that "a union rule restricting resignations plainly advances legitimate union interests of maintaining strike solidarity and protecting the interests of employees who desire to continue a strike." *Id.*

to "refrain from any or all" protected union or other activities.³³ Further, in examining the nature of the Union's action in promulgating such a rule in light of the *Allis-Chalmers* Court's distinction between internal and external activities, the Board concluded that the union had overstepped its authority by expanding the definition of internal action in a manner that could enable it to regulate conduct over which it would otherwise have no control.³⁴

Next, the Board rejected the Union's contention that its rule was justified because it sought to preserve strike solidarity and protect the right of employees who choose to strike. The Board noted that the Court had rejected a similar argument in *Granite State* where employees had unanimously voted for imposition of sanctions on anyone who sought to return to work during a strike,³⁵ and in *Booster Lodge* where the union's constitution had been consistently interpreted to bind employees to strikes despite their resignation.³⁶ From these cases, the Board drew an inference that the Court would likewise reject the Union's argument that an express constitutional provision would still bind its members.³⁷

33. *Id.* In so concluding, the Board stressed that even under the provisions in section 8(b)(2) of the Act and the second proviso to section 8(a)(3) of the Act, no employee can be compelled to become a "full" union member, and that, under these sections, employees still remain free to refrain from union or other protected concerted activities. *Id.*

Section 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(2) (1976), provides, in pertinent part:

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 in violation of subsection (a)(3) or to discriminate against an employee with respect 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.

Id. Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), (3) (1976), including the second proviso to section 8(a)(3), provide in pertinent part:

(a) 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 . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization 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

Id.

34. 270 N.L.R.B. at 1333 n.16.

35. *Id.* at 1334.

36. *Id.*

37. *Id.* The Board, relying on the concurring opinion in *Dalmo Victor II*, 263 N.L.R.B. at 990-91 (Chairman Van de Water and Member Hunter, concurring), expressed that any

In support of its decision, the Board noted that recently *Pattern Makers League of North America v. NLRB*³⁸ enforced the Board's order and held that a union's rule restricting resignations was unreasonable and, therefore, invalid. In *Pattern Makers*, the Seventh Circuit embraced the reasoning of the concurring opinion in *Dalmo Victor II*, which the Board has now adopted as representative of the Board majority.³⁹ However, since the instant case arose within the Ninth Circuit, which recently denied enforcement of *Dalmo Victor II*,⁴⁰ the Board set forth its reasons for its disagreement with the Ninth Circuit rationale. In its decision to deny enforcement of *Dalmo Victor II*, the Ninth Circuit relied on a "mutual subscription" theory, which, the Board notes, was rejected by the Supreme Court in *Granite State*.⁴¹ Under this theory, members who seek to escape their obligations to their fellow members by resigning from the union and returning to work should not be able to do so without retribution.⁴²

Significantly, the Board majority agreed with the Ninth Circuit's general theory that the wishes of individual members are subservient to the majority will, represented by the union in such a way that an employee's absolute power to order his relationship with management is restricted. However, the Board disagreed with the Ninth Circuit's particular invocation of that principle where a member's or non-member's section 7 rights are impaired to justify restrictions on the authority of employees to order their relationships with unions.⁴³ Moreover, the majority rejected the Ninth Circuit's view that the proviso to section 8(b)(1)(A)⁴⁴ authorizes un-

effort to equate the institutional interests of a union with the statutory rights of employees is inappropriate, and that a union's institutional interests could not overcome an employee's section 7 rights. 270 N.L.R.B. at 1334. The Board further reasoned that to permit unions to restrict resignations would compromise the neutrality of the Act by affording more protection to those who choose to engage in protected activities than to those who choose to refrain from such activities. *Id.* Finally, in applying the third prong of the *Scofield* test, the Board concluded that restrictions on resignations are invalid since employees must be "free to leave the union and escape the rule." *Id.*

38. *Pattern Makers League of N. Am. v. NLRB*, 724 F.2d 57 (7th Cir. 1983), *enforcing*, 265 N.L.R.B. 1332 (1983). On a petition for review and a cross-petition for enforcement, the Seventh Circuit granted enforcement of the Board's order, and affirmed the Board's finding that the union had violated section 8(b)(1)(A) of the Act by fining members who had resigned their membership and had returned to work during a strike. *Id.*

39. 270 N.L.R.B. at 1334-35 n.18. *See also id.* at 1335.

40. *See supra* note 14 and accompanying text.

41. 270 N.L.R.B. at 1335.

42. *Id.*

43. *Id.*

44. *See supra* note 8 and accompanying text.

ions to impose at least temporary restrictions on members' rights to resign and to return to work during a strike.⁴⁵ In the Board's opinion, the Ninth Circuit overlooked the clear distinctions drawn by the *Allis-Chalmers* Court between "internal" and "external" union action,⁴⁶ because it interpreted the proviso as authorizing unions to take action against an employee who has resigned from the union.⁴⁷ Also criticized was the Ninth Circuit's view that the guarantees of the 8(b)(1)(A) proviso and employees' section 7 rights to refrain from engaging in concerted activities "must—and do—coexist".⁴⁸ Such "coexistence", the majority observed, would result in a negation of expressed statutory rights in favor of a union's institutional interest.⁴⁹

Finally, the Board pointed out that the Ninth Circuit overlooked the third prong of the *Scofield* test requiring that members should be "free to leave the union and escape the rule."⁵⁰ The Board adopted the rationale of the Seventh Circuit emphasizing that attention to this component of the *Scofield* test is essential to the maintenance of a balance between employee rights and the collective power of their union.⁵¹

Board Member Zimmerman, dissenting in part, agreed with the majority that the union's rule was invalid, but only because it lacked sufficient temporal limitations and was thus, in his view, unreasonable.⁵² In so holding, Zimmerman expressly adhered to the position taken by the majority in *Dalmo Victor II*.⁵³ Zimmerman labeled as erroneous the majority's conclusion that any restriction on resignations is invalid, since that conclusion was based on a presupposition that the right to refrain from union or other protected activity is an absolute right upon which no intrusions could be permitted.⁵⁴ In support of his position that such rights are not absolute, Zimmerman noted that in *Allis-Chalmers* and *Scofield*, the Supreme Court upheld some union rules that restricted union members in the exercise of section 7 rights.⁵⁵

45. 270 N.L.R.B. at 1335.

46. See *supra* notes 24-25 and accompanying text.

47. 270 N.L.R.B. at 1335.

48. *Id.*

49. *Id.* at 1336.

50. *Id.* (citing 724 F.2d at 61).

51. *Id.*

52. *Id.* at 1337.

53. *Id.* at 1340 n.6.

54. *Id.* at 1337.

55. *Id.* at 1338.

While the *Scofield* Court held that for a union rule to be valid, union members must be free to leave the union and escape the rule,⁵⁶ Zimmerman interpreted *Scofield* as implying that at least limited and reasonable restrictions on resignations would be valid.⁵⁷ As to the majority's reliance on *Granite State* in support of its position that the right to refrain from union activity is absolute, Zimmerman emphasized that the Court in that case limited its decision to situations where no restrictions on resignations existed in the union's constitution and bylaws.⁵⁸ Zimmerman inferred, moreover, that by prefacing its holding with this caveat, the Supreme Court was suggesting that one's freedom to resign could be curtailed by the contractual relationship between a union and its members.⁵⁹ In support of this criticism, Zimmerman noted that the Supreme Court in *Booster Lodge*, though finding the union rule unlawful, nonetheless took notice of the absence in the facts of any expressed restrictions on resignations.⁶⁰

Continuing his dissent, Zimmerman challenged the majority's interpretation of Supreme Court precedent as providing for bright line distinctions between "internal" and "external" actions and proposed that such distinctions are not as clear as the majority asserted.⁶¹ Zimmerman argued that in any event, merely because some "external" effects would result from a rule that is designed to be "internal" in nature, the rule would violate section 8(b)(1)(A) of the Act only if it also impaired some federal labor policy.⁶² In this regard, Zimmerman balanced a union's interest in its economic strength vis-a-vis the employee's stronger interest in statutory rights and concluded that at least a limited intrusion on the section 7 rights to refrain from union or other protected activities is warranted.⁶³ Accordingly, Zimmerman supported adoption of the *Dalmo Victor II* majority's reasonableness test that requires sufficient notice, specificity and temporal limitations prior to restraints on that intrusion.⁶⁴

56. See *supra* note 20 and accompanying text.

57. 270 N.L.R.B. at 1338. Member Zimmerman observed that, under *Scofield* and *Alis-Chalmers*, a "reasonable restriction, such as that stated in *Dalmo Victor II*," would be permissible under the Act. *Id.*

58. *Id.*

59. *Id.* at 1338-39.

60. *Id.* at 1339.

61. *Id.*

62. *Id.* at 1339-40.

63. *Id.* at 1340.

64. *Id.*

An understanding of the historical circumstances under which relevant provisions of the Act were enacted is key to comprehending the mind set of the Board when it decided *International Association v. Machinists Local 1414* (hereinafter *Porsche-Audi*). In 1947, Congress passed the Labor Management Relations Act (hereinafter the Taft-Hartley Act)⁶⁵ which amended but did not displace the National Labor Relations Act (Wagner Act) of 1935.⁶⁶ Under the auspices of the Wagner Act, between 1935 and 1947, organized labor experienced significant increases in prosperity and bargaining strength. Unfortunately, during this period, some labor leaders resorted to practices of dubious social value and thus invited public criticism. In 1946, amid a myriad of social and economic problems growing out of World War II, including a sharp increase in the length and intensity of work stoppages,⁶⁷ Congress and the public were convinced that new labor legislation would alleviate many of the shortcomings of the Wagner Act in checking perceived abuses by organized labor. Congress' attitude toward organized labor during this period is reflected in various provisions of the Taft-Hartley Act which placed narrowing restrictions on certain union security arrangements, provided for union unfair labor practices and ensured greater freedom of choice for employees to determine representation status free from union as well as employer interference.⁶⁸ The most significant aspect of the Taft-Hartley Act, at least for this discussion, were Congress' efforts to enhance the rights of employees as individuals. Such efforts are most clearly evident in Congress' amendment of section 7 to include employees' rights to *refrain from* engaging in collective activities.⁶⁹ Against this backdrop, it is understandable that, at least as far as the Board was concerned, the debate over the resignation issue culminated with the Board's decision in *Porsche-Audi* that *any* restriction on resignation is invalid.

Prior to its decision in *Porsche-Audi*, the Board's vacillation on the issue of whether unions may restrict members in their right to

65. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 29 U.S.C. §§ 141-97.

66. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, 29 U.S.C. §§ 151-68.

67. B. TAYLOR & F. WITNEY, LABOR RELATIONS LAW 211 (1979). In 1946, this nation experienced 4,985 strikes with an estimated working time lost amounting to 1.43 percent. The prior year, the nation had experienced 4,750 strikes, but the estimated loss to working time was only 0.47 percent. *Id.*

68. *Id.* at 213.

69. See *supra* note 17 and accompanying text.

resign together with the split of opinion between the Seventh and Ninth Circuits caused anxiety and uncertainty among both labor and management and undoubtedly resulted in instability in the fragile relationships between unions, employers and union members. With the *Porsche-Audi* decision and its progeny,⁷⁰ it began to appear that the Board had finally adopted a definitive and clear rule with respect to restrictions on resignations. This new-found consistency was recently threatened, but then enhanced, as the Supreme Court squarely addressed the resignation issue in *Pattern Makers League v. NLRB*.⁷¹

In *Pattern Makers*, by a 5-4 decision, the Supreme Court upheld the *Porsche-Audi* Board's ruling that a union's rule that restricted resignations was invalid.⁷² However, it did so on the basis of now traditional administrative law principles, and in light of these principles, the Court narrowed the issue to whether the Board's construction of section 8(b)(1)(A) was "reasonable."⁷³ The Supreme Court explained that because the Board has "special competence" in the field of labor relations, its interpretation of the Act should be accorded substantial deference.⁷⁴ In determining that the Board's construction was reasonable and that deference was warranted, the Court reviewed prior Board decisions and noted particularly the Board's consistent construction of section 8(b)(1)(A) as prohibiting the imposition of fines on employees who had tendered resignations that were invalid under union constitutions.⁷⁵ The Court also noted that in past cases involving similar issues, including *Allis-Chalmers*, *Scofield*, *Granite State* and *Booster Lodge*, the Supreme Court had "invariably yielded" to the Board's decisions.⁷⁶ Finally, the Court reviewed its own prior decisions, as well as pertinent legislative history, and determined that the Board's conclusions were not inconsistent with any principles expressed therein.⁷⁷ In short, the effect of the Court's decision in *Pattern Makers* has

70. In *Sheet Metal Workers*, 274 N.L.R.B. No. 54, slip op. at 5 (1985), the Board made it clear that its holding in *Porsche-Audi* was not limited to restrictions on resignations during strikes or lockouts and that any restrictions on resignations were invalid. *Id.*

71. 119 Lab. Rel. Rep. (BNA) 2928 (1985). See also *supra* note 38 and accompanying text.

72. 119 Lab. Rel. Rep. (BNA) at 2929.

73. *Id.* at 2933.

74. *Id.* at 2931. The Court stated that where the Board's construction of the Act is "reasonable," it should not be rejected "merely because the Courts might prefer another view of the statute." *Id.* at 2936 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

75. 119 Lab. Rel. Rep. (BNA) at 2932, 2937 n.28.

76. *Id.* at 2937 n.27.

77. *Id.* at 2930-36.

been that the *Porsche-Audi* Board decision, that no restrictions on resignations are valid, has become the controlling law in the area.

The web of litigation that led to the Supreme Court's review of *Pattern Makers* spawned many divergent theories on the correct construction of section 8(b)(1)(A). Three distinct positions were discussed above and can be generally summarized as follows. First, the *Dalmo Victor II* Board majority and the *Porsche-Audi* Board dissent would uphold union rules that restrict resignations for not more than thirty days. Second, the *Dalmo Victor II* Board concurrence, the *Porsche-Audi* majority and the Seventh Circuit agreed that any restrictions on resignations would be unlawful. Third, the Ninth Circuit would uphold a rule restricting resignations for at least two weeks before a strike and then for the duration of the strike. An analysis of the holdings in these cases and the clues contained therein as to the Supreme Court's logical direction reveals that the Court was signalling that ultimately, it would reject the extreme construction of section 8(b)(1)(A) that restrictions on resignations for the duration of a strike, or that *any* restrictions are invalid. Upon weighing employees' interests in statutory rights to engage in or refrain from section 7 activities, a union's interests in self-preservation and members' interests in mutual reliance, the Court should have acted consistently with its own precedent and adopted what would resemble, for the most part, the *Dalmo Victor II* thirty-day rule. In this way, the Court could have best facilitated the certainly legitimate, but not always equal, concerns of employees, management and unions. Under this view, the Court could have continued to give top priority to the right to refrain from section 7 activities and could still have avoided the needless sacrifice of legitimate concerns of unions and union members.

In *Allis-Chalmers*, the Court legitimized the imposition of fines on "full members" who had crossed the union picket line in violation of the union's constitution and bylaws.⁷⁸ Although the Court did not address the issue of whether unions may impair members in their efforts to resign and avoid union discipline, the Court at least signalled that the right to refrain from section 7 activities is not an absolute one. In determining that restrictions on the conduct of "full members" are permissible, the Court noted that national labor policy has long been predicated on extinguishing an individual's right to order his own relation with his employer in

78. See *supra* note 19 and accompanying text.

favor of greater economic strength through collective activity.⁷⁹ As to the Court's proper role in the enforcement of union rules affecting "internal" union affairs, the Court observed that, historically, the judiciary has recognized the existence of a contractual relationship between unions and their members, and that its role has been "but to enforce the contract."⁸⁰

In *Scofield*, the Supreme Court gave its approval to a union rule that imposed restrictions on full members in their performance of piecework for which the union had set certain production ceilings.⁸¹ Although the *Scofield* Court was again confronted with a union rule that in some way restricted rights of full members, the Court articulated clear parameters within which it might analyze union rules. Of particular importance in the Court's analysis were the Court's stipulations that the rule has been "properly adopted" and that it has been "reasonably adopted against union members who are free to leave the union and escape the rule."⁸² The requirement that the rule have been "properly adopted" signalled that the Court might not tolerate rules that were enacted with disregard of the union's own guidelines, or in such a way that members did not receive adequate notice of a rule in time to ponder the ramifications of non-adherence. That members "must be free to leave the union and escape the rule," suggests merely that the union members must not be held as captives to union laws with which they disagree. However, it does not follow, necessarily, that the Court meant to say that members still must be free to leave the union *at any time*. To so conclude would be to ignore the Court's past expressed considerations of the importance of the obligations that are inherent in the contractual relationship between members and unions, as well as a union's ability, as the exclusive bargaining representative, to order the relationship between employer and employee.⁸³ To allow union members to resign at any time would allow these members to enjoy the best of both worlds at their unfettered convenience. Moreover, the expense for this

79. *Allis-Chalmers*, 388 U.S. at 180. The Court stated that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Id.* The Court continued and held that these powers are especially vital in regulating members' conduct during strikes, which the Court viewed as a union's ultimate weapon against an employer. *Id.* at 181-82.

80. *Id.* at 182.

81. See *supra* note 20 and accompanying text.

82. *Id.*

83. 388 U.S. at 180.

luxury would not be borne in the least by the resigning member. Rather, those who choose to support the collective effort would pay most dearly for this right by way of mass defections when some economic action, such as a strike, is imminent or in progress and by either the lengthening of the conflict or the premature abandonment of the action. In addition, the resulting inability on the part of the union to assess its own bargaining power at critical points in negotiations would create a windfall for employers who would likely advertise the attractiveness of defection in an effort to undermine any collective action.

In *Granite State*, the Court found unlawful the imposition of fines on those who had already resigned from the union.⁸⁴ In essence, the Court concluded that it was the union's attempt to exert control over affairs that are "external" in nature that militated the Court against the union's conduct.⁸⁵ Thus, the Court reaffirmed its long-standing view toward rules that affect the internal affairs of unions and those that affect external affairs. However, inasmuch as the resignation issue has implications for both internal and external affairs, it is no wonder that the *Porsche-Audi* Board and the Seventh Circuit struggled in their review using the traditional internal/external analysis. While such analysis was indeed helpful to the Court in setting the parameters within which it would or would not tolerate union rules, it loses its utility when applied to conduct affecting the transition between these parameters.

In dicta, the Court in *Granite State* left open the extent to which the contractual relationship between union and member may curtail the freedom to resign.⁸⁶ In so doing, the Court expressly noted the absence in the facts of any restrictions in the union's constitution or bylaws concerning the right to resign. That the Court expended any effort at all in drawing this distinction hinted that the Court did not plan to eliminate the considerations of the importance of contractual relationships in later review.⁸⁷

Finally, it is important to note that the *Booster Lodge* Court rejected the union's argument that, as a matter of contract law, it could fine members who had resigned and crossed the union's picket line even though neither the union constitution nor its by-

84. See *supra* note 21 and accompanying text.

85. *Granite State*, 409 U.S. at 215-16. The Court explained, "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has on the man in the street." *Id.* at 217.

86. *Id.* at 217.

87. *Id.* at 216.

laws contained such restrictions.⁸⁸ Rather than address the question of the extent to which contractual restrictions on member's rights to resign may be limited by the Act, the Court majority chose to strike down the union's rule on the basis that the members lacked effective notice of the union's rule.⁸⁹ In a concurring opinion, Justice Blackmun reinforced the importance of notice considerations.⁹⁰ Nevertheless, he added that the existence of effective notice of union rules, in and of itself, would not be enough to give rise to a waiver of statutory rights.⁹¹ Before finding such a waiver, Justice Blackmun would have looked further to what he believed to be "more reliable indicia" of a member's intent. Specifically, Justice Blackmun would have looked to whether members had voted to strike, had ratified the strike breaking penalties and had participated in the strike.⁹²

While Justice Blackmun's view is consistent with that expressed by the *Dalmo Victor II* Board majority in that he would allow the union to impose restrictions on resignations under certain conditions, his test differs from the Board's test in that it places less emphasis on the technical provision of the rule while focusing keenly on the actual expectations of the members. Simply stated, Justice Blackmun emphasized not only the existence of the rule plus the effective notice by members of its existence; he would additionally require affirmative acts by members who manifest their consent to be bound by the rule as well.⁹³

From the decision of the *Booster Lodge* majority and Justice Blackmun's concurrence, it followed that the test that the Court would ultimately adopt would include considerations of members' effective notice of the the existence of the union's rule. However, adoption by the Court of Justice Blackmun's test of members' consent to the rule was unlikely since the union would have to wait until the strike was imminent or in progress before it could seek enforcement. Unfortunately, usually by the time a strike is imminent or in progress, the damage to the union's interest has already occurred. Contrasting a union's strong interest in avoiding strikes for which it has no support and the need for the proper environment in which to make crucial decisions affecting the welfare of all

88. See *supra* note 22 and accompanying text.

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

90. *Id.* at 91.

91. *Id.*

92. *Id.* at 90-91.

93. *Id.*

in the bargaining unit, with the relatively weak interest by members to resign at the latest possible moment, the Court should have utilized its review of the *Pattern Makers* case to carve out a finite time period, for example, thirty days, during which a union could restrict its members' right to resign.

With the Supreme Court's decision in *Pattern Makers*, it is clear that the issue of whether unions may restrict members' rights to resign is settled. That is, as the Board held in *Porsche-Audi*, any restriction on a member's right to resign is invalid.⁹⁴ Though this resolution is not necessarily inconsistent with any particular prior holding of the Court, the reliance on traditional principles of review of administrative action to reach this conclusion was characteristic of what Justice Blackmun called the Court's "supine deference" to the Board.⁹⁵ In this instance, the cost of the Court's deference to the Board was considerable because it required that the Court discard the wisdom of its carefully planned scheme which had been nearly twenty years in the making.

John Cerilli

94. 270 N.L.R.B. at 1331.

95. *Pattern Makers League*, 119 Lab. Rel. Rep. (BNA) at 2938.