Vanderbilt Law Review

Volume 38
Issue 1 *Issue 1 - January 1985*

Article 4

1-1985

Protecting a Union Member's Right to Resign-Resolution of the Conflict Between Dalmo Victor and Rockford-Beloit

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RECENT DEVELOPMENT

Protecting a Union Member's Right to Resign—Resolution of the Conflict Between *Dalmo Victor* and *Rockford-Beloit*

I. INTRODUCTION

The inherent conflict between section 7 of the National Labor Relations Act[1] (the Act) and the proviso to section 8(b)(1)(A) of the Act has troubled the National Labor Relations Board (the Board), courts, and commentators for many years.[2] Section 7 guarantees workers the right to refrain from concerted activities,[3] while section 8(b)(1)(A) states that a union commits an unfair labor practice if it restrains or coerces employees in the exercise of their section 7 rights.[4] The conflict between these two sections of the Act arises in the proviso to section 8(b)(1)(A), which permits a union to govern its internal affairs without violating section 8(b)(1)(A).[5] In particular, this conflict has perplexed the Board and courts when a union member has attempted to resign from the union during a strike. Unions have claimed that the proviso gives them an absolute right to restrict resignations.[6] Employees, on the other hand, have argued that the proviso does not give a union the authority to restrict resignations because the restriction would violate the employee's section 7 right to refrain from concerted activities.[7]

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1. 29 U.S.C. § 157 (1982).

2. *See, e.g.*, W. CONNOLLY, JR. & M. CONNOLLY, WORK STOPPAGES AND UNION RESPONSIBILITY (1977); Gould, *Solidarity Forever—or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980); Johannesen, *Disciplinary Fines as Interference with Protected Rights: Section 8(b)(1)(A)*, 24 LAB. L.J. 268 (1973); Levin & Werhan, *Restrictions on the Right to Resign: Can a Member's Freedom to "Escape the Union Rule" Be Overcome by Union Boilerplate?*, 42 GEO. WASH. L. REV. 397 (1973-74); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975); Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022 (1976); Note, *Union Power to Discipline Members Who Resign*, 86 HARV. L. REV. 1536 (1973); 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 (1983).

3. Section 7 provides in pertinent part that "[e]mployees shall have the right . . . to refrain from any or all [concerted] . . . activities except to the extent that such right may he affected hy 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 (1982).

4. Section 8(b)(1)(A) states in pertinent part that "[i]t 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] . . . ." 29 U.S.C. § 158 (b)(1)(A) (1982).

5. The proviso to § 8(b)(1)(A) states: "*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.* (emphasis in original).

6. *See, e.g.*, Pattern Makers' League v. NLRB, 724 F.2d 57, 59 (7th Cir. 1983), *cert. granted*, 53 U.S.L.W. 3203 (U.S. Oct. 1, 1984) (No. 83-1894) (Rockford-Beloit).

7. *Id.* at 58-59; *see* W. CONNOLLY, JR. & M. CONNOLLY, *supra* note 2, at 209-10; Johannesen, *supra* note 2, at 277-78; Schatzki, *supra* note 2, at 914 n.45.

Until recently neither the Board nor the courts had defined the extent to which a union may restrict its members' right to resign. Within the past year, however, the United States Courts of Appeals for the Ninth and Seventh Circuits and the Board addressed this issue and reached conflicting results.[8] The Supreme Court has granted certiorari to resolve this question.[9]

This Recent Development contends that a union restriction on a member's right to resign constitutes an unfair labor practice under section 8(b)(1)(A). Part II of this Recent Development focuses on judicial and Board treatment of the inherent conflict between an employee's section 7 right to refrain from collective activity and a union's authority to regulate internal affairs. Part III examines three recent decisions addressing a union's authority to restrict a member's right to resign. Finally, part IV suggests that the Supreme Court should apply the *Scofield v. NLRB*[10] three-part test to union rules restricting resignation. Part IV also asserts that while the union rules may pass the first part of the *Scofield* test, they definitely fail the second and third parts of the test.

II. JUDICIAL AND BOARD TREATMENT OF THE INHERENT CONFLICT BETWEEN SECTIONS 7 AND 8(B)(1)(A): PRE-*Dalmo Victor*

As early as 1954, the Board addressed the right of a union to fine its members for crossing a picket line and returning to work during an economic strike.[11] The Supreme Court, however, did not resolve this question until 1967 when it decided *NLRB v. Allis-Chalmers Manufacturing*.[12] In *Allis-Chalmers* the Court held that a union did not violate section 8(b)(1)(A) of the Act by bringing a state action to collect fines imposed on members who crossed the union picket line and returned to work during a lawful economic strike.[13] First, the majority noted that Congress designed national

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8. *See* Machinists Local 1327 v. NLRB, 725 F.2d 1212 (9th Cir. 1984) (Dalmo Victor II); *Rockford-Beloit*, 724 F.2d 57; IAM, Local Lodge 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257 (June 22, 1984).

9. *Rockford-Beloit*, 724 F.2d 57, *cert. granted*, 53 U.S.L.W. 3203 (U.S. Oct. 1, 1984) (No. 83-1894).

10. 394 U.S. 423 (1969); *see infra* text accompanying note 33 (*Scofield* test).

11. Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954).

12. 388 U.S. 175 (1967).

13. *Id.* at 178. The Act does not protect a union that fines members who engage in punishable conduct during *unlawful* union activity. *See* Insurance Workers Int'l Union, Local 60 (John Hancock Mutual Life Ins. Co.), 236 N.L.R.B. 440, 441 (1978) (Board stating in dicta that a union violates the Act if it disciplines members for reprehensible conduct during unprotected union activity); Local 1101 Communications Workers & New York Tel. Co., 208 N.L.R.B. 267, 267 (1974) (union fines imposed on members who crossed the picket line

labor policy to assist unions in maintaining their bargaining power.[14] The Court emphasized that a union's authority to protect its status by reasonably disciplining members who violate membership rules and regulations is an integral part of federal labor policy and essential during a strike.[15] Second, the Court implied that discipline and the method of enforcement are part of the contract between the member and his union, and the Court felt responsible for enforcing the contract.[16]

The Court then focused on the legislative history of section 8(b)(1)(A). After determining that Congress did not intend to prohibit "traditional internal union discipline in general, or disciplinary fines in particular,"[17] the Court concluded that the Act per-

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during an unlawful strike violated § 8(b)(1)(A)); CWA, Local 1127 (New York Tel. Co.), 208 N.L.R.B. 258, 260 (1974) (unlawful strike); *see also* NLRB v. GAIU Local 13-B, Graphic Arts Int'l Union, 682 F.2d 304, 307-09 (2d Cir. 1982) (union violated § 8(b)(1)(A) by disciplining a member for engaging in unprotected activity that did not violate the Act or the collective bargaining agreement, but still would jeopardize the member's job), *cert. denied*, 459 U.S. 1200 (1983).

14. 388 U.S. at 181; *see* Gould, *supra* note 2, at 93; Levin & Werhan, *supra* note 2, at 400-01.

15. 388 U.S. at 181. The NLRB contended that the union's power to expel a member for his offending conduct under the proviso to § 8(b)(1)(A) sufficiently served the purpose of maintaining union strength to negate the need for fines. *Id.* at 183. The Court, in rejecting this argument, reasoned that such an interpretation would not effectuate the policies of the Act. *Id.* at 183-84. Although expelling a member from a strong union is a far more severe penalty than a fine because of the value of union membership, the penalty of expulsion from a weak union is not as harsh as a fine because of the diminished value of union membership. If a weak union does not have the authority to fine members, the union may have little choice but to condone its members' transgressions because expulsion would diminish further the power of the union. Disciplinary fines play a necessary role in aiding weaker unions, an important policy of the Act. *Id.*

16. *Id.* at 182 (quoting Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 180 (1960)). The Court reached this conclusion because the contract theory of labor relations law widely prevailed when Congress enacted § 8(b)(1)(A). *Id.* Under the contract theory union memhership created a contract that imposed obligations on the member; the court's role was to enforce the contract. Johannesen, *supra* note 2, at 274. Commentators have criticized the contract theory because it insufficiently incorporates important considerations of labor relations policy. *See, e.g.*, *id.* at 274-75; Levin & Werhan, *supra* note 2, at 400. Although the Supreme Court never has expressly overruled the contract theory language in *Allis-Chalmers*, the Court has rejected the unions' contract theory arguments. *See* Booster Lodge No. 405, IAM v. NLRB, 412 U.S. 84, 89 (1973) (per curiam); NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. 213, 217-18 (1972); *infra* notes 44-47 and accompanying text; *see also* Levin & Werhan, *supra* note 2, at 401-05 (discussing the Court's rejection of the contract theory in *Booster Lodge* and *Granite State*).

17. *Allis-Chalmers*, 388 U.S. at 186. The Court stated that permissible internal actions were actions that applied to full union members and followed democratic principles and fair procedures. *Id.* at 195. Impermissible external actions were actions that interfered with a member's employment status, *id.*, or interfered with the rights of nonmembers, *id.* at 189

mitted the Court to enforce disciplinary fines.[18] Finally, the Court declined to decide whether the union members' status as full members had any effect on their rights, because the parties did not present evidence that any of the fined employees were less than full members.[19] The Court, however, implied that the result might be different if any of the employees had been less than full union members.[20]

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n.25; *see* Machinists Local 1327, IAM (Dalmo Victor II), 263 N.L.R.B. 984, 988 (1982) (Van de Water, Chairman, and Hunter, Member, concurring); *see also* Silard, *Labor Board Regulation of Union Discipline After* Allis-Chalmers, Marine Workers, *and* Scofield, 38 GEO. WASH. L. REV. 187, 190 (1969-70) (arguing that "[s]tatutory freedom in internal union regulation generally exempts union discipline from Board intrusion unless the member would be required to violate rights of others that the statute protects); *see generally Allis-Chalmers*, 388 U.S. at 184-91 (containing the Court's complete discussion of relevant legislative history).

18. 388 U.S. at 192-95. The Court, reasoning that the efficacy of a contract depends on the parties' ability to enforce it, reaffirmed the contract theory of union-member relationship. *Id.* at 192.

19. The Court mentioned this issue because the Act mandates that "[m]embership as a condition of employment [must be] whittled down to its financial core." NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). Sections 8(a)(3) and 8(b)(2) declare that an unfair labor practice occurs if either an employer or a union causes an employee to lose his job because be is not a union member, unless the employee is not a member because he has not paid dues or initiation fees. These provisions expressly limit a union member's obligation under a union-security agreement to a payment of initiation fees and monthly dues. *Id.* at 742; *see also* Independent Shoe Workers (The U.S. Shoe Corp.), 208 N.L.R.B. 411, 411 (1974). This financial obligation, however, does not include payment of fines, assessments, or untimely back dues. A union would commit an unfair labor practice if it conditioned employment on the payment of these obligations. *See* Zipp, *Rights and Responsibilities of Parties to a Union-Security Agreement*, 33 LAB. L.J. 203, 211 (1982).

The Board has held that a union committed an unfair labor practice when it failed to inform employees of their option not to become full-fledged union members. *See, e.g.*, United Stanford Employees, Local 680, 232 N.L.R.B. 326, 326 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979); Retail Clerks Int'l Ass'n, Local 322, 226 N.L.R.B. 80, 90 (1976). For a general discussion of union-security agreements and their relationship to the financial obligation of membership, see F. BARTOSIC & R. HARTLEY, LABOR RELATIONS IN THE PRIVATE SECTOR 239-52 (1977); Zipp, *supra*, at 211-13.

The question that the *Allis-Chalmers* Court left open—whether a financial core member could be subject to union discipline for matters other than failing to pay initiation fees and dues—still is unresolved. *See, e.g.*, Johannesen, *supra* note 2, at 273-74; Levin & Werhan, *supra* note 2, at 410-11. Two commentators have suggested that an employee whose only union obligation is to pay initiation fees and dues is not a union member subject to union discipline. *See* Levin & Werhan, *supra* note 2, at 408-11. These commentators argue that the Board in Marlin Rockwell Corp., 114 N.L.R.B. 553 (1955), distinguished between full members and mere dues-paying members when it held that employees may resign during the term of a union-security agreement and not be subject to union discipline if they pay dues. Levin & Werhan, *supra* note 2, at 408-11. This view of membership, the commentators contend, should apply in strike situations; if financial core members do not wish to participate in a strike, tbey should not be subject to union discipline for crossing the picket line and returning to work if they continue to meet their financial obligations. *Id.*

20. *Allis-Chalmers*, 388 U.S. at 196-97.

In dissent, Justice Black criticized the majority's reliance on the proviso to section 8(b)(1)(A). He believed that the union's right to prescribe membership rules did not include the right to restrain a member from working and to fine him for exercising his section 7 right to refuse to participate in a strike.[21] The dissent reasoned that regardless of whether fines were enforceable by expulsion from the union or by judicial action, the mere threat of fines would absolutely restrain employees from strikebreaking.[22] Justice Black also attacked the majority's implication that judicial enforcement of fines was an internal union matter that the proviso protected.[23] He noted that section 8(b)(2) prohibits a union from attempting to enforce fines by persuading the employer either to discharge the employee for nonpayment or to withhold the fines from the employee's wages.[24] To Justice Black, the union's reliance on the courts to enforce a fine was "equally effective outside assistance," not internal union discipline.[25]

Finally, the dissent criticized the majority's reliance on contract theory to enforce the union's disciplinary fines.[26] The dissent termed the contract theory a fiction that courts had used in the past "to justify judicial intervention in union affairs" to help employees, not unions.[27] According to Justice Black, the majority's use of contract theory to bind employees was unsatisfactory, especially when the contract was "the involuntary product of a union shop."[28]

Although subsequent Board and court decisions have ap-

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21. *Id.* at 203 (Black, J., dissenting).

22. *Id.* at 203-04 (Black, J., dissenting). The dissent rejected the argument that a member might ultimately prevail by showing that the fine was unreasonable or that he was not a full member. *Id.* (Black, J., dissenting). Few members, the dissent asserted, would have the financial resources or knowledge of labor law to take such action. *Id.* at 204 (Black, J., dissenting).

23. *Id.* at 205-06 (Black, J., dissenting).

24. *Id.* at 206 (Black, J., dissenting). Section 8(b)(2) reads in pertinent part:

> It shall be an unfair labor practice for a labor organization . . .
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> . . . .
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> (2) to cause or attempt to cause an employer 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
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> . . . .

29 U.S.C. § 158(b)(2) (1982); *see also supra* note 19.

25. 388 U.S. at 206 (Black, J., dissenting).

26. *Id.* at 207-08 (Black, J., dissenting).

27. *Id.* at 207 (Black, J., dissenting).

28. *Id.* at 207-08 (Black, J., dissenting).

proved *Allis-Chalmers*,[29] much of the controversy surrounding the authority of a union to restrict its members' right to resign continues to focus on the policy issues discussed at length in the majority and dissenting opinions. In *Scofield v. NLRB*[30] the Supreme Court applied *Allis-Chalmers* to a union rule imposing fines on members who violated union production ceilings.[31] The Court concluded that the union rule did not violate section 8(b)(1)(A).[32] According to the Court, under section 8(b)(1) "a union may enforce a properly adopted rule that (1) reflects a legitimate union interest, (2) does not impair congressional labor policy, and (3) reasonably applies against union members who are free to leave the union and escape the rule."[33]

Finding that the record did not indicate that the fines were unreasonable or that union membership was involuntary, the Court focused on the first two parts of its test.[34] The Court first determined that the union's production ceiling served a legitimate union interest—limiting the negative impact of an unlimited piecework pay system.[35] The Court then analyzed the rule's effect on

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29. *See, e.g.*, NLRB v. Granite State Joint Bd., Local 1029, 409 U.S. 213, 215-16 (1972); Scofield v. NLRB, 394 U.S. 423, 428-30 (1969); Machinists Local 1327 v. NLRB, 725 F.2d 1212, 1215-16 (9th Cir. 1984) (Dalmo Victor II); Pattern Makers' League v. NLRB, 724 F.2d 57, 60 (7th Cir. 1983) (Rockford-Beloit); IAM, Local Lodge 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257, 1258-59 (June 22, 1984); *cf.* Gould, *Some Limitations upon Union Discipline Under the National Labor Relations Act: The Radiations of* Allis-Chalmers, 1970 DUKE L.J. 1067 (analyzing the effect of *Allis-Chalmers* and *Scofield* on national labor policy); Silard, *supra* note 17 (same); Note, *Labor Policy: Judicial Enforcement of Fines After* Allis-Chalmers, 53 CORNELL L. REV. 1094 (1968) (criticizing the Court's implicit authorization of the application of state law regarding fines as eroding the uniformity of national labor policy); Recent Case, *Suit to Enforce Union Fine Against Member Who Crosses Picket Line Is Not Unfair Labor Practice Under Section 8(b)(1)(A)*—NLRB v. Allis-Chalmers Manufacturing Company, 388 U.S. 175 (1967), 36 U. CIN. L. REV. 709, 714 (1967) (criticizing decision because the "right to refrain from concerted union activities is substantially diminished when the union is given the right to invoke the full power of the court to implement measures which limit § 7 rights"); Recent Decision, *Supreme Court Rules Court Enforced Union Fines for Refusal to Participate in Lawful Strike Do Not Constitute Unfair Labor Practice*—NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967), 19 SYRACUSE L. REV. 177 (1967) (predicting that the decision will significantly enhance union solidarity and power).

30. 394 U.S. 423 (1969).

31. *Id.* at 424-25, 428.

32. *Id.* at 436.

33. *Id.* at 430.

34. *Id.* at 430-31.

35. Unlimited piecework pay systems increase employee productivity and create pressures to lower the piecework pay rate. As a result, employees work harder, but earn little more than before. Unions fear that resulting competitive pressures can "endanger workers' health, foment jealousies, and reduce the work force." *Id.* at 431.

federal labor policy and concluded that the rule did not contravene any policy of the Act.[36] The Board and courts have implemented this three-part standard in many cases since *Scofield*.[37]

Following *Scofield* the Court in *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*[38] specifically addressed the validity of fines that a union imposed on members who resigned from the union during a strike and returned to work. The Court held that absent a contractual provision in the union's constitution or bylaws restricting the member's right to resign, the union's fines violated section 8(b)(1)(A).[39] To reach this conclusion, the Court relied heavily on *Scofield* for the proposition that a union's power over a member ends when he lawfully resigns from the organization.[40] The majority distinguished *Allis-Chalmers* because the union in *Allis-Chalmers* had imposed fines on full union members.[41] Once a member " 'leave[s] the union and escape[s] the rule,' "[42] according to the Court, the union "has no more control

36. The petitioners contended that the production ceilings impaired collective bargaining, but the Court rejected this argument. *Id.* at 432-33. Similarly, the Court denied the petitioners' claims of featherbedding. *Id.* at 434. Petitioners also asserted that the union rule discriminated against union members who were not free to earn what the contract allowed because the union imposed production ceilings. The Court, however, had little sympathy for this argument, stating that "[i]f members are prevented from taking advantage of their contractual rights bargained for all employees it is because they have chosen to become and remain union members." *Id.* at 435. If union members were dissatisfied with the union's collective activity, the Court reasoned, they were free to leave the union. *Id.*

37. *See* NLRB v. Granite State Joint Bd., Local 1029, 409 U.S. 213, 215-16 (1972); Machinists Local 1327 v. NLRB, 725 F.2d 1212, 1216-18 (9th Cir. 1984) (Dalmo Victor II); Pattern Makers' League v. NLRB, 724 F.2d 57, 60 (7th Cir. 1983) (Rockford-Beloit); IAM, Local Lodge 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257, 1258-59 (June 22, 1984); Machinists Local 1327 (Dalmo Victor II), 263 N.L.R.B. 984, 988-89, 992 (1982).

38. 409 U.S. 213 (1972) (Granite State).

39. *Id.* at 217-18. Subsequent Board decisions have interpreted this rule to permit resignation at will when no clause exists that provides for a member's voluntary resignation. *See, e.g.*, IBEW, Local 66 (Houston Lighting & Power Co.), 262 N.L.R.B. 483, 485-86 (1982); United Paperworkers Int'l Union, Local No. 725 (Boise Southern Co.), 220 N.L.R.B. 812, 813 (1975); Bookbinders Union Local 60, 203 N.L.R.B. 732, 735 (1973). A member must express the desire to resign. *Houston Lighting & Power Co.*, 262 N.L.R.B. at 486; Sheet Metal Workers' Int'l Ass'n, Local 170, 225 N.L.R.B. 1178, 1180 (1976). Notice is effective when the union receives it. San Diego County Dist. Council of Carpenters, 243 N.L.R.B. 147, 148 (1979); *cf.* IBEW, Local 1260 (Western Telestations), 239 N.L.R.B. 923, 927 (1978) (member of union at another local who did nothing to maintain his union membership constructively resigned so that IBEW violated § 8(b)(1)(A) when it fined him for working during a strike).

40. *Granite State*, 409 U.S. at 215-17 (citing *Scofield*, 394 U.S. at 429-30).

41. 409 U.S. at 215.

42. *Id.* at 216 (quoting *Scofield*, 394 U.S. at 430).

over the former member than it has over the man in the street."[43]

In addition, the Court rejected the mutual subscription theory on which the First Circuit had relied in upholding the union provision.[44] Under this theory the First Circuit concluded that the union did not violate section 8(b)(1)(A) because the employees waived their section 7 right to refrain from collective activity when they participated in the strike vote and the vote to authorize fines against strikebreakers.[45] The Supreme Court ruled that the vitality of section 7 requires that members retain the right "to refrain in November from the actions [they] endorsed in May."[46] The Court reasoned that employees should not have to sacrifice their section 7 rights to the "union's plea for solidarity or . . . its pressures for conformity."[47]

The Court addressed a related issue in *Booster Lodge No. 405, IAM v. NLRB*.[48] In *Booster Lodge* the Court held that a union committed an unfair labor practice when it sought to enforce fines that it imposed on employees who had resigned lawfully from the union before crossing the picket line and returning to work.[49] As in *Granite State*, the union constitution did not explicitly restrict the

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43. 409 U.S. at 217. The Court based this holding on "the law which normally is reflected in our free institutions"—the right to resign from or join organizations as the individual sees fit. *Id.* at 216.

44. *Id.* at 217. The "mutual subscription" theory is similar to the "contract" theory, discussed *supra* note 16. Under the "mutual subscription" theory, a union member who participates in the strike vote is obligated to remain on strike until its conclusion because his fellow members depended on him. *Id.* The Ninth Circuit in *Dalmo Victor II*, relying on this theory, stated that " '[t]he strike vote itself involves mutual reliance on the promise to honor it.' " Machinist Local 1237 v. NLRB, 725 F.2d 1212, 1217 (9th Cir. 1984) (Dalmo Victor II) (quoting Note, *Union Power to Discipline Members Who Resign*, 86 HARV. L. REV. 1536, 1554 (1973)).

45. 409 U.S. at 217.

46. *Id.* at 217-18.

47. *Id.* at 218.

48. 412 U.S. 84 (1973) (per curiam) (Booster Lodge). The Court decided *Booster Lodge* the same term that it decided *Granite State*.

In another case during that term, NLRB v. Boeing Co., 412 U.S. 67 (1973), the Court held that the Board does not have the authority to determine whether the amount of a union disciplinary fine is reasonable. *Id.* at 78. The Court believed that the issue of reasonableness would involve the Board in internal union affairs over which the NLRB does not have jurisdiction. *Id.* at 74. In reaching this result the Court again applied the contract theory of union membership and stated that state courts should determine the reasonableness of a union's fine based on contract law. *Id.* at 74-76; *see* Recent Development, *NLRB Has No Authority to Determine Reasonableness of Union Fines*—NLRB v. Boeing Co., 412 U.S. 67 (1973), 62 GEO. L.J. 1033, 1033 (1974) (criticizing decision because it places an unjustifiable burden on individual union members who claim that a union fine is unreasonable).

49. 412 U.S. at 85.

right to resign.[50] Unlike the union in *Granite State,* however, the union in *Booster Lodge* argued that the prohibition against strikebreaking in the union's constitution was sufficient to make the fines lawful against members who had resigned because the union had interpreted the provision that way in the past.[51] The Court rejected this argument because the union failed to show that its constitution extended union sanctions to nonmembers.[52]

The Board rejected a similar argument in *Local Lodge No. 1994, IAM (O.K. Tool Co.).*[53] In *O.K. Tool Co.* the union's constitution specifically prohibited former members from strikebreaking.[54] The union enacted this provision to correct a defect that existed in the union's constitution at the time of the *Booster Lodge* strike.[55] The Board, however, ruled that the union's imposition of a court-collectible fine on a former member for postresignation conduct that the union's constitution expressly prohibited violated section 8(b)(1)(A) because section 7 protected the member's right to engage in this postresignation activity.[56] The Board explicitly declined to address the issue of the extent to which a contractual restraint could curtail the freedom to resign, because neither the union's constitution nor its bylaws contained a restriction on a member's right to resign.[57]

The Board and the courts did not address the issue of a member's right to resign until the Board's decision in *Machinists Local 1327 (Dalmo Victor I)*[58] in 1977. In the period between the Supreme Court's decisions in *Granite State* and *Booster Lodge* and the Board's decision in *Dalmo Victor I,* the Board carefully avoided reaching this issue. Instead, the Board disposed of challenges to union clauses that restricted a member's right to resign by developing a number of important corollaries. First, the Board

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50. *Id.* at 88 (citing *Granite State,* 409 U.S. at 214).

51. 412 U.S. at 89.

52. *Id.*

53. 215 N.L.R.B. 651 (1974).

54. *Id.* at 652-53.

55. *Booster Lodge,* 412 U.S. at 89 n.9. In *Booster Lodge* the union's constitution contained only an express prohibition against strikehreaking. *Id.* at 89. The union argued that this explicit prohibition implicitly applied to resigned memhers. *Id.*

56. The Board stated that "the Lodge's proscription of postresignation strikebreaking [not only] impair[s] a former member's Section 7 right to refrain from concerted activity, but it also is plainly contrary to *Scofield*'s requirement that union members be free to leave the union to escape membership conditions that they consider onerous." *O.K. Tool Co.,* 215 N.L.R.B. at 653.

57. *Id.*; *accord Booster Lodge,* 412 U.S. at 88; *Granite State,* 409 U.S. at 217.

58. 231 N.L.R.B. 719 (1977), *enforcement denied,* 608 F.2d 1219 (9th Cir. 1979).

ruled that the Act imposed a duty on unions to give notice to their members of any constitutional restriction on a member's right to resign.[59] The Board held that a member's lack of knowledge of the restrictive resignation provision rendered the clause invalid. The employee thus retained the right to resign at will, and any union attempt to fine the employee for crossing the picket line after he had resigned violated section 8(b)(1)(A).[60] Second, the Board permitted only reasonable restrictions on resignation. If the Board determined that a restriction was unreasonable, either because it was unduly restrictive[61] or ambiguous and vague,[62] the Board would hold the provision unenforceable, and the member would be free to

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59. *See, e.g.*, NLRB v. IAM, Merrit Graham Lodge No. 1871, 575 F.2d 54, 55 (2d Cir. 1978) (per curiam), *enforcing* 231 N.L.R.B. 727 (1977); Oil, Chem. & Atomic Workers Int'l Union, Local 6-578, 238 N.L.R.B. 1227, 1230 (1978), *enforced*, 619 F.2d 708 (8th Cir. 1980); General Teamsters Local 439 (Loomis Courier Serv., Inc.), 237 N.L.R.B. 220, 223 (1978); United Stanford Employees, Local 680, 232 N.L.R.B. 326, 332 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979); Local 1384, UAW (Ex-Cell-O Corp.), 227 N.L.R.B. 1045, 1048-49 (1977) (Supplemental Order to 219 N.L.R.B. 729 (1975)); IAM, Local 778, 224 N.L.R.B. 580, 581 (1976). The Administrative Law Judge (ALJ) or the Board in these cases found that the employee had no knowledge or notice of the restrictive provision and, therefore, could not consent to be hound by it.

One problem with this corollary is that it places a tremendous burden on the union to ensure that every member is aware of any restrictions in the union constitution or bylaws. The ALJ and, later, the Board, recognized this burden and attempted to ease it in Miscellaneous Drivers, Local Union No. 610 (Browning-Ferris Indus.), 264 N.L.R.B. 886 (1982). In *Browning-Ferris* the ALJ stated that the union's duty to communicate restrictions should be limited "to situations where the members specifically ask for an explanation or where the union has reason to suspect the development of actual problems involving the interpretation of union rules." *Id.* at 901. In *Browning-Ferris* the union neglected to fulfill its duty to inform employees of the correct method of resignation because nonconforming resignation letters that the union received indicated that employees wanted to resign. *Id.* at 901-02. In this situation the ALJ held the resignations were effective unless the union took prompt steps to inform its members about the restrictions on resignations. *Id.* at 901-02.

60. *See Granite State*, 409 U.S. at 217.

61. The Board has found union prohibitions against voluntary resignation unduly restrictive. *See* Graphic Arts Int'l Union, Local No. 32B, 250 N.L.R.B. 850, 851 (1980); Sheet Metal Workers' Int'l Ass'n, Local Union No. 170, 225 N.L.R.B. 1178, 1180 (1976). Similarly, the Board has held unduly restrictive clauses prohibiting resignations during a strike. *See* San Diego County Dist. Council of Carpenters, 243 N.L.R.B. 147, 148 (1979); *Sheet Metal Workers, Local Union No. 170*, 225 N.L.R.B. at 1180; Sheet Metal Workers Int'l Ass'n, Local Union No. 29, 222 N.L.R.B. 1156, 1159-60 (1976). In addition, the Board has deemed unduly restrictive clauses that leave acceptance of a member's resignation to the discretion of the local union. *See San Diego County Dist. Council of Carpenters*, 243 N.L.R.B. at 148; *Sheet Metal Workers, Local Union No. 170*, 225 N.L.R.B. at 1180; *Sheet Metal Workers, Local Union No. 29*, 222 N.L.R.B. at 1160. Finally, the Board has held unduly restrictive clauses that allowed effective resignation only during certain escape periods of the year. *See San Diego County Dist. Council of Carpenters*, 243 N.L.R.B. at 148-49 (annual 15-day revocation period or 15-day term before the contract expired was too restrictive); Oil, Chem. & Atomic Workers Int'l Union, Local 6-578, 238 N.L.R.B. 1227, 1230 (1978), *enforced*, 619 F.2d 708 (8th Cir. 1980) (provision in union constitution allowing resignation within 10-day

resign at will.[63]

In the decade following *Granite State,* the Board developed and extended its interim rules in an effort to avoid facing the issue that *Granite State* left unresolved. In *Dalmo Victor II*[64] and *Pattern Makers' League (Rockford-Beloit),*[65] however, the Board finally confronted the question and specifically ruled on the extent to which a union's contract provision may restrict a member's right to resign. In each case the union appealed the Board's decision. The federal courts of appeals reached contrary conclusions regarding the union's power to restrict a member's right to resign. Part III of this Recent Development reviews these two decisions and an-

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period preceding each member's date of membership was too restrictive); Engineers Union Local 444 (Sperry Rand Corp.), 235 N.L.R.B. 98, 103 (1978) (restricting resignation period to last 10 days in year or last 10 days of existing contract was unacceptable).

In Local 1384, UAW (Ex-Cell-O Corp.), 219 N.L.R.B. 729 (1975), the Board held overly restrictive a clause limiting resignation to the last 10 days of the calendar year, followed by a 60-day waiting period. *Id.* at 735-36. In a Supplemental Order to this case, 227 N.L.R.B. 1045 (1977), the Board held that a union's restriction must be "narrowly tailored to the Union's legitimate needs" and reasonably accommodate the conflicting interests of the union and the employee. *Id.* at 1051. *Sperry Rand Corp.* and *Oil, Chem. & Atomic Workers Int'l Union, Local 6-578* utilized the *Ex-Cell-O* standard in determining that the escape period was too restrictive. *Oil, Chem. & Atomic Workers Int'l Union, Local 6-578,* 238 N.L.R.B. at 1230; *Sperry Rand,* 235 N.L.R.B. at 103.

62. The Board has held unreasonably vague a restriction based on conduct unbecoming a union member. *See* IAM, Merrit Graham Lodge No. 1871, 231 N.L.R.B. 727, 728 (1977), *enforced,* 575 F.2d 54 (2d Cir. 1978) (per curiam). In addition, the Board found unreasonable an ambiguous provision that gave the local union power to withhold consent, but set no standard for evaluating resignations. Coast Valleys Typographical Union Local 650 (The Daily Breeze, Div. of Copley Press, Inc.), 221 N.L.R.B. 1048, 1051 (1975).

The Board also has held that threatening to impose fines, General Teamsters Local Union No. 298, 236 N.L.R.B. 428, 436 (1978); Local Union No. 1233, United Bhd. of Carpenters, 231 N.L.R.B. 756, 761 (1977); Local Union 2131, IBEW, 217 N.L.R.B. 46, 47 (1975); Communications Workers, Local 1127 (New York Tel. Co.), 208 N.L.R.B. 258, 263 (1974), refusing to allow an employee to post material that criticized the union on a union bulletin board, Helton v. NLRB, 656 F.2d 883, 894-95 (D.C. Cir. 1981), instituting court action against union members for filing a union decertification petition, Television Wis., Inc. 224 N.L.R.B. 722, 780 (1976), and imposing discipline in derogation of the collective bargaining agreement, Stationary Eng'r, Local 39 (The San Jose Hosp. and Health Center), 240 N.L.R.B. 1122, 1124 (1979), all constituted coercive union activity within the meaning of § 8(b)(1)(A).

63. The union must have made an attempt to enforce the provision by disciplining or threatening to discipline the member. *See* Meat Cutters Union Local 81, 241 N.L.R.B. 821, 822 (1979) (dismissing the complaint because "no employee . . . is subject to any union discipline under the bylaw provision here in question").

For a discussion of various restrictions on resignation, see Gould, *supra* note 2, at 87-91; Levin & Werhan, *supra* note 2, at 413-26; Wellington, *supra* note 2, at 1041-45.

64. Machinists Local 1327 (Dalmo Victor II), 263 N.L.R.B. 984 (1982), *enforcement denied,* 725 F.2d 1212 (9th Cir. 1984).

65. 265 N.L.R.B. 1332 (1982), *enforced,* 724 F.2d 57 (7th Cir. 1983).

other more recent Board decision, *IAM, Local Lodge 1414, (Neufeld Porsche-Audi)*,[66] which addressed the tension between a union's authority to restrict resignations and a member's right to refrain from collective activity.

III. Recent Developments

A. Dalmo Victor

The Board's first decision in *Dalmo Victor*[67] closely paralleled its earlier decision in *O.K. Tool Co.*[68] In both cases the provision at issue prohibited strikebreaking by any member or resigned member of the union.[69] The majority in *Dalmo Victor I* held that rather than imposing a restriction on the right to resign, this provision impermissibly attempted to regulate postresignation conduct.[70] Once the Board invalidated the union's restriction on its members' right to resign, the Board then ruled that members were free to resign at will and that any fines which the union levied in response to members' postresignation conduct would violate section 8(b)(1)(A).[71]

The United States Court of Appeals for the Ninth Circuit refused to enforce the Board's order.[72] The court believed that the

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66. 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257 (June 22, 1984).

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

68. Local Lodge No. 1994 (O.K. Tool Co.), IAM, 215 N.L.R.B. 651 (1974). For a discussion of *O.K. Tool Co.*, see *supra* notes 53-57 and accompanying text.

69. In *Dalmo Victor I* the union provision stated:

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

Dalmo Victor I, 231 N.L.R.B. at 719 (emphasis in original).

70. *Id.* at 720-21; *see supra* note 56 and accompanying text. The Board reached this issue because the Board found that the employees were aware of the provision at all times, and the union warned the employees that they would be fined for crossing the picket line during the strike. *Dalmo Victor I*, 231 N.L.R.B. at 719-20.

71. *Dalmo Victor I*, 231 N.L.R.B. at 722. The dissent strongly criticized the majority for sidestepping the legal issue that *Granite State* had left unanswered. *Id.* at 723 & n.16 (Jenkins, Member, dissenting). Labelling the majority's holding a "flagrant exercise in semantic douhle-think," the dissent would have found the provision a clear restriction on the right to resign. *Id.* at 724 (Jenkins, Memher, dissenting). Memhers Jenkins and Murphy, who dissented separately, both viewed the restriction as a reasonable exercise of the union's right to regulate its internal affairs under the proviso to § 8(b)(1)(A). *Id.* at 723, 725.

72. NLRB v. Machinists Local 1327, 608 F.2d 1219 (9th Cir. 1979) (Dalmo Victor I).

provision plainly limited the circumstances under which a member could resign, and the court termed the Board's holding "hypertechnical."[73] Seeking to bolster its construction of the provision, the court indicated that the union's asserted purpose was to impose " 'contractual restrictions on a member's right to resign.' "[74] The court concluded that because the provision restricted resignation, the case presented the same issue that the Supreme Court reserved in *Granite State* and *Booster Lodge*.[75] Accordingly, the court remanded the case to the Board for consideration of that question.[76]

On remand in *Dalmo Victor II*[77] the plurality[78] attempted to strike a balance between an employee's right to refrain from collective activity and a union's need to protect the collective interests of the employees that it represents.[79] The plurality maintained that neither interest was absolute, but held that a union could impose reasonable restrictions on member resignations when necessary for the orderly management of union affairs.[80] The plurality, however, found that a provision limiting a member's right to resign exclusively to nonstrike periods was unreasonable.[81] The provision must apply equally to strike and nonstrike periods, the plurality declared.[82]

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73. *Id.* at 1222.

74. *Id.* (quoting Booster Lodge No. 405, IAM v. NLRB, 412 U.S. 84, 88 (1973) (per curiam)).

75. *Id.*

76. *Id.* The dissent stated that the court should have invalidated the provision either because it controlled postresignation conduct, *id.* (Kennedy, J., dissenting), or hecause it was not a direct and unambiguous restriction on the right to resign. *Id.* at 1223 (Kennedy, J., dissenting); *see supra* note 62 (discussing the validity of a vague constitutional provision).

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

78. Members Fanning and Zimmerman wrote the Board's plurality opinion. Chairman Van de Water and Member Hunter concurred only in the result. *Id.* at 987.

79. *Id.* at 985.

80. *Id.*

81. *Id.* at 986-87.

82. *Id.* The plurality felt that a union provision requiring a 30-day waiting period (the "30-day rule") before resignation took effect reasonably would accommodate the conflicting interests of the union and its individual members. *Id.* at 987. This restriction would serve two union interests: first, the union would maintain solidarity during a strike, and second, the union would be able to handle any administrative matters tbat might arise before the resignation would become effective. *Id.* Commentators have recognized the union's administrative interest. *See, e.g.*, Gould, *supra* note 2, at 90. Gould also advocated the adoption of a 30-day "grace period." Gould, *supra* note 29, at 1103. In a footnote, the plurality stated that in extraordinary circumstances a union might need more than 30 days to dispose of administrative matters. *Dalmo Victor II*, 263 N.L.R.B. at 987 n.21; *see* Comment, *supra* note 2 (favoring the 30-day rule).

The two members of the Board who concurred in the plurality opinion agreed that the provision unreasonably restricted the right to resign and that the union violated section 8(b)(1)(A) by fining members who had resigned.[83] The concurring members, however, disagreed with the plurality's contention that in certain circumstances a union could impose restrictions on its members' right to resign. The concurrence would have held that any restriction was unreasonable.[84]

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83. *Dalmo Victor II*, 263 N.L.R.B. at 987 (Van de Water, Chairman, and Hunter, Memher, concurring).

84. *Id.* at 988 (Van de Water, Chairman, and Hunter, Member, concurring); *accord* W. CONNOLLY, JR. & M. CONNOLLY, *supra* note 2, at 209-10; Johannesen, *supra* note 2, at 278. The concurrence regarded the 30-day rule as an "arbitrary exercise of this Board's authority" tbat represented a "transparent effort to achieve a legislative result rather than a reasoned legal conclusion." 263 N.L.R.B. at 987 (Van de Water, Chairman, and Hunter, Member, concurring).

The concurring members argued that Supreme Court precedent prohibited any restriction on resignation. According to the concurrence, the Supreme Court consistently has focused on the internal-external dichotomy of union affairs. *Id.* at 988-89 (Van de Water, Cbairman, and Hunter, Member, concurring); *see Booster Lodge*, 412 U.S. at 89; *Granite State*, 409 U.S. at 215-16; *Allis-Chalmers*, 388 U.S. at 184-95. Internal actions designed to achieve a legitimate union interest and applied to full union members are permissible, while external actions desigued to interfere witb an employee's employment status or with the rights of nonmembers violate the Act. *Dalmo Victor II*, 263 N.L.R.B. at 988-90 (Van de Water, Chairman, and Hunter, Member, concurring). The concurring members contended that the Court empbasized this distinction in *Granite State* when tbe Court held that a union violated § 8(b)(1)(A) in seeking to enforce a union rule against strikebreaking in an external matter. *Id.* at 989 (Van de Water, Chairman, and Hunter, Member, concurring).

The concurring members relied on *Granite State* because they felt that the 30-day rule was inconsistent with the Court's reasoning in that case. *Id.* (Van de Water, Chairman, and Hunter, Member, concurring). First, the concurrence placed importance on the Court's statement that the power of the union over a member ends when the member dissolves the union-member relationship by resigning. *Id.* (Van de Water, Chairman, and Hunter, Member, concurring). Second, the concurrence found significant tbe Court's rejection of the mutual subscription theory. *See supra* notes 44-47 and accompanying text. The concurrence relied on *Scofield* for the proposition that a union member must be free to leave the union and avoid the union's rules if he chooses. *Dalmo Victor II*, 263 N.L.R.B. at 989-90 (Van de Water, Chairman, and Hunter, Member, concurring).

The concurring opinion then attacked the majority's premise that the 30-day rule would successfully balance the confiict between an employee's § 7 rights and a union's interest in solidarity. Pointing out that a union's institutional interests are not and never have been on equal footing with the employees' § 7 rights, *id.* at 990-91 (Van de Water, Chairman, and Hunter, Member, concurring); *accord* Jobannesen, *supra* note 2, at 275, tbe concurring members criticized the balancing that the majority engaged in to arrive at the 30-day rule as improper legislating under the Act, *Dalmo Victor II*, 263 N.L.R.B. at 991 (Van de Water, Chairman, and Hunter, Member, concurring).

The concurrence also accused the majority of altering the dichotomy between external and internal affairs under § 8(b)(1)(A). Tbe majority had created a fiction of continued membership in which an employee had to remain a union member and, therefore, subject to internal union discipline, for 30 days against his will. *Id.* at 991 (Van de Water, Cbairman, and Hunter, Member, concurring). The concurrence caustically inquired whether the major-

The Ninth Circuit again refused to enforce the Board's order.[85] Federal labor policy, according to the court, restricts the individual's bargaining freedom and vests in a single representative the power to bargain for and protect the interests of all employees.[86] Noting that a collective representative inevitably will create

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ity would diminish other rights that the Act guaranteed if the majority felt that those rights also conflicted with a union's or an employer's legitimate interests. *Id.* at 991 (Van de Water, Chairman, and Hunter, Member, concurring).

Finally, the concurring members discussed the *Scofield* test and stated that the majority's purported analysis confused and distorted the proper approach under this test. *Id.* at 992 (Van de Water, Chairman, and Hunter, Member, concurring). The concurrence conceded that the union's legitimate interest in maintaining strike solidarity satisfied the first part of the *Scofield* test. *Id.* at 992 (Van de Water, Chairman, and Hunter, Member, concurring). The concurrence, however, felt that the 30-day rule did not pass the second part of the test, because the rule ran counter to three policies of the Act: (1) the right of employees to refrain from collective activity; (2) the policy limiting the coercive authority of unions wholly to internal affairs; and (3) the policy behind § 8(b)(2) and the proviso to § 8(b)(3) that allows a union to compel only core membership. *Id.* (Van de Water, Chairman, and Hunter, Member, concurring). For a discussion of this third policy, see *supra* note 19. The concurrence argued that the only way the majority could uphold any restriction on the right to resign, including the 30-day rule, would be to allow a union's interest to override the basic policies of the Act. According to the concurring members, this alternative was impossible because the standard that the Supreme Court applied in *Scofield* separated union interest and labor policy into two distinct questions, of which legitimate union interest was merely a threshold issue. *Dalmo Victor II*, 263 N.L.R.B. at 992 (Van de Water, Chairman, and Hunter, Member, concurring). Failing to separate these tests "renders the three-part test redundant and virtually useless." *Id.* (Van de Water, Chairman, and Hunter, Member, concurring).

Moreover, the concurrence stated, the 30-day rule certainly did not satisfy the third part of the *Scofield* test because the rule would not be a rule "reasonably enforced against union members *who are free to leave the union and avoid the rule.*" *Id.* (emphasis added) (Van de Water, Chairman, and Hunter, Member, concurring). The concurrence felt that the third part of the *Scofield* test was the most important because it embodies an essential protection of employee § 7 rights, while limiting the power of the union. *Id.* (Van de Water, Chairman, and Hunter, Member, concurring). Abrogating this protection would negate Congress' objective in passing the Act. *Id.* (Van de Water, Chairman, and Hunter, Member, concurring).

In conclusion, the concurring members offered their own resolution of the issue: "[a]ny union rule that restricts a member's right to resign is unreasonable and any discipline taken by a union against an employee predicated on such a rule violates Section 8(b)(1)(A)." *Id.* (Van de Water, Chairman, and Hunter, Member concurring). Moreover, the concurrence would not allow the union to condition a resignation upon the payment of monies owed. *Id.* at 993 (Van de Water, Chairman, and Hunter, Member, concurring). The concurrence reasoned that the union could recoup its losses through legal proceedings. *Id.* (Van de Water, Chairman, and Hunter, Member, concurring). In addition, the resignation must be delivered in writing to be effective. *Id.* at 992-93 (Van de Water, Chairman, and Hunter, Member concurring).

The dissent would have found the union rule reasonable and protected by the proviso to § 8(b)(1)(A). *Id.* at 993 (Jenkins, Member, dissenting).

85. Machinists Local 1327 v. NLRB, 725 F.2d 1212 (9th Cir. 1984) (Dalmo Victor II).

86. *Id.* at 1216.

some dissatisfaction among the employees that he represents, the Ninth Circuit stated that courts should allow " '[a] wide range of *reasonableness*' " when evaluating the actions of the bargaining representative.[87] The Ninth Circuit selected the *Scofield* test as the proper standard for determining the reasonableness of a union disciplinary rule. The court further held that a reasonable disciplinary rule must satisfy all three parts of the *Scofield* test.[88] In quoting the test, however, the court failed to include the words "who are free to leave the union and escape the rule," which are critical to the third part of the standard.[89]

Applying *Scofield* to the union rule in question, the Ninth Circuit concluded that the rule satisfied all three parts of the test.[90] The court held that the rule met the first requirement because the union had a legitimate interest in restricting its members' right to resign during a strike to maintain solidarity in the face of employer demands.[91] The court reasoned that unpunished postresignation strikebreaking could induce even loyal union members to return to work and thereby seriously undermine the union's ability to function as an effective collective bargaining unit.[92] The court also found a union interest under the mutual subscription theory[93] by noting that union members who participate in a strike vote and refuse to honor its outcome breach a promise to their colleagues.[94]

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87. *Id.* at 1216 (quoting *Allis-Chalmers*, 388 U.S. at 180) (emphasis added by Ninth Circuit).

88. *Dalmo Victor II*, 725 F.2d at 1216-17 (citing *Scofield*, 394 U.S. at 430).

89. The *Scofield* test provides that "[§] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" *Scofield*, 394 U.S. at 430 (emphasis added); *see infra* notes 199-204 and accompanying text. In employing this test, the Ninth Circuit rejected the Board's suggestion that the *Scofield* analysis was a balancing of interests. According to the Court, *Scofield* does not invite the Board or the courts "to conduct an ad hoc weighing of the allegedly competing interests described in the main text of § 8(b)(1)(A) on the one hand, and the proviso to § 8(b)(1)(A) on the other." *Dalmo Victor II*, 725 F.2d at 1217.

90. *Id.*

91. *Id.*

92. *Id.* The court based its concern for the union's maximum bargaining effectiveness on the desire to maintain the prevailing balance of power between the union and the employer. The court feared that "a substantial number of defections . . . [would] once again give the employer greater power to set the terms and conditions of employment." *Id.*

93. *Id.* The First Circuit used the mutual suhscription theory in *Granite State*. *See supra* text accompanying note 45. The Supreme Court specifically rejected the theory when it reviewed the case. *See supra* notes 44-47 and accompanying text.

94. *Dalmo Victor II*, 725 F.2d at 1217 ("There is little point in taking a strike vote if the people who disagree with the outcome are free to resign anytime and escape its

The court next focused on the second prong of the *Scofield* test and held that the union fine created an obstacle to members' resignations but did not impair federal labor policy.[95] The court first rejected the Board's finding that a conflict existed between the union member's right to resign and the union's interest in making rules regarding the acquisition and retention of membership. Noting that both the employee's right and a union's interest are important federal labor policies, the court concluded that neither policy could override the other.[96] Accordingly, a union rule that does not prevent a member from resigning during a strike, but merely "puts some obstacles [such as fines] in the way of resignation," does not impair federal labor policy under section 7.[97] The court believed that union members who are unwilling to face the threatened penalty have several options: (1) attempt to persuade other employees and the union leaders to end the strike; (2) resign from the union and get new jobs; (3) elect new union leaders who share their views; or (4) petition the Board to decertify the bargaining representative.[98] The court, however, emphasized that the union members "may not betray their colleagues and expect to get away without paying a price for weakening the collective bargaining environment."[99]

Finally, under the third part of the *Scofield* test, the *Dalmo Victor II* court rejected the Board's contention that the union rule was unreasonable because it prohibited resignations during a period beginning two weeks before the commencement of a strike and ending at the strike's termination.[100] To the court this rule was not only reasonable, hut critical.[101] The court emphasized that the mere appearance of uncertain membership support would encourage the employer to negotiate a harder bargain.[102] The court also believed that the fine was reasonable because the union had no other effective means of discouraging employees from working

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effects.").

95. *Id.* at 1217-18.

96. *Id.* at 1217.

97. *Id.* The court interpreted § 7 to allow a union member to resign from the union at any time. *Id.*

98. *Id.* at 1218.

99. *Id.*

100. *Id.* In applying the third part of the *Scofield* test, the Ninth Circuit did not consider the requirement that the union member must be free to leave the union and escape the rule. *See supra* text accompanying note 33; *infra* notes 199-204 and accompanying text.

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

102. *Id.*

for the employer during a strike.[103] Having decided that the union rule fining strikehreakers met all three requirements of the *Scofield* test, the court held that the rule was a reasonable restriction on an employee's right to resign from the union.[104] The court thus refused to enforce the Board's order.

B. Rockford-Beloit

The Board decided *Pattern Makers' League (Rockford-Beloit)*[105] shortly after it decided *Dalmo Victor II*. The challenged provision in *Rockford-Beloit* prevented members from resigning from the union during a strike or lockout or during a period in which a strike or lockout was imminent.[106] The Board held that because this provision was substantially similar to the invalidated provision in *Dalmo Victor II*, *Dalmo Victor II* was controlling.[107] The Board concluded that it should not enforce the provision because it prohibited resignations once a strike had begun.[108]

In *Pattern Makers' League v. NLRB*[109] the Seventh Circuit enforced the Board's order. The union argued that the proviso to section 8(b)(1)(A)[110] protected the union's restriction on its members' right to resign.[111] The court, however, rejected this argument and focused on the external-internal dichotomy in Supreme Court precedent.[112] Citing *Scofield*, the Seventh Circuit implied that a union rule that " 'invades or frustrates an overriding policy of the labor laws' " affects the external activities of a union member, and thus violates section 8(b)(1)(A) because the rule does not fit within the proviso to that section.[113] The court relied on language in *Granite State* and *Booster Lodge* for the proposition that fines

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103. *Id.* As a disciplinary measure, threatening to expel a memher who already wants to resign should have no effect on his decision to return to work because he already is prepared to resign. *Id.*

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

105. 265 N.L.R.B. 1332 (1982), *enforced*, 724 F.2d 57 (7th Cir. 1983).

106. 265 N.L.R.B. at 1332.

107. *Id.* at 1333.

108. *Id.* Despite the *Dalmo Victor II* dicta regarding a 30-day rule, the case held that the Board could not prohibit the union from restricting resignations during a strike. *See supra* notes 80-82 and accompanying text.

109. 724 F.2d 57 (7th Cir. 1983) (Rockford-Beloit).

110. *See supra* note 5 (text of proviso).

111. *Rockford-Beloit*, 724 F.2d at 59.

112. *Id.* at 59-60; *see, e.g., Booster Lodge*, 412 U.S. at 89; *Granite State*, 409 U.S. at 215; *Scofield*, 394 U.S. at 428-29; *Allis-Chalmers*, 388 U.S. at 184-95; *see also supra* notes 17-20 and accompanying text.

113. *Rockford-Beloit*, 724 F.2d at 59 (quoting *Scofield*, 394 U.S. at 429).

which the union levied against resigned members frustrate the individual's "overriding right" to join or to resign from the organization.[114]

Although the court acknowledged that the unions in *Granite State* and *Booster Lodge* did not restrict resignations, the court reasoned that the Supreme Court's analysis in *Granite State* and *Booster Lodge* applied in *Rockford-Beloit* because the Act protects the employee's section 7 right to refrain from union activities, which includes the right to resign from the union.[115] According to the court, a union rule that abrogates an employee's right to resign frustrates an "overriding policy of labor law"—allowing employees the freedom to choose whether to engage in the collective bargaining process.[116] Because the right to resign is part of an essential policy concern, even strong union interests in solidarity and mutual reliance cannot supersede this employee right.[117] The court also found that the employee has strong interests, in addition to his section 7 rights, in preserving the right to resign from the union. These interests include the employee's freedom to change his mind about the effectiveness of a strike and his desire to return to work for personal reasons.[118] Returning to the external-internal distinction, the court noted that although a union has the power to control its internal affairs through rules reflecting the will of the majority of its members, the union cannot exercise that power to prevent an employee from resigning his membership or to penalize an employee who resigns from the union.[119]

In conclusion, the *Rockford-Beloit* court stressed the concept

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114. *Rockford-Beloit*, 724 F.2d at 59-60 (quoting *Granite State*, 409 U.S. at 216); *accord Booster Lodge*, 412 U.S. at 89-90.

115. *Rockford-Beloit*, 724 F.2d at 60.

116. *Id.*

117. *Id.* The court indicated that "forced continued membership distorts the balance between encouraging collective activities among workers and protecting individuals from coercion." *Id.*

118. *Id.*

119. *Id.* According to the court, "[a]n employee's decision to resign is personal; a union rule requiring retention of membership cannot be considered merely an 'internal matter.'" *Id.*

The union made a second argument in favor of restricting resignation. The union used the mutual reliance theory to argue that the union members waived their § 7 right to resign from the union when they voted to strike. *Id.* at 60-61. Because each member joined the union or retained union membership with full knowledge that the union prohibited resignations during strikes or lockouts, the union argued that the union-employee relationship is voluntary and enforceable. *Id.* at 61. The court, however, in rejecting this argument, cited the Supreme Court's rejection of the same argument in *Granite State*. The court emphasized that "[t]he Supreme Court decided that the employees' interests took precedence." *Id.*

in *Scofield* that union members are free to leave the union and escape an undesired rule.[120] This fundamental principle, the court felt, "safeguards the balance between individual rights and the collective power of the union."[121] Holding that this principle directly applied to the facts in this case, the court enforced the Board's order.[122]

C. Neufeld Porsche-Audi

Recently, in *IAM, Local Lodge 1414*[123] (*Neufeld Porsche-Audi*) the Board held that a union restriction on an employee's right to resign violated section 8(b)(1)(A) of the Act. In *Neufeld Porsche-Audi* the union imposed a court-collectible fine on an employee who returned to work during a strike after he had submitted a written resignation to the union.[124] The Board, relying primarily on the concurrence in *Dalmo Victor II*,[125] expressly overruled *Dalmo Victor II* and invalidated the union's restriction on resignations.[126]

To establish an analytical framework for deciding whether a union can restrict its members' right to resign, the Board first discussed relevant Supreme Court precedent.[127] Initially, the Board focused on the *Scofield* test.[128] The majority acknowledged that a resignation restriction advances strike solidarity, a legitimate union interest, but also substantially impairs fundamental labor

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120. *Id.*

121. *Id.*

122. *Id.*

123. 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257 (June 22, 1984).

124. 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1257-58. The union's constitution held ineffective any resignations that occurred during a strike or lockout. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1257.

125. *See supra* notes 83-84 and accompanying text.

126. 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1258.

127. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1258-59. The Board analyzed the Court's decisions in *Allis-Chalmers, Scofield, Granite State,* and *Booster Lodge.* In discussing *Allis-Chalmers,* the Board noted the Supreme Court's emphasis on the internal-external dichotomy inherent in the proviso to § 8(b)(1)(A). *Id.* According to the Board, *Scofield* reinforced the *Allis-Chalmers* distinction between external and internal rules and developed a test for determining whether enforcement of a union rule is lawful. *Id.* The Board read *Granite State* as applying the *Scofield* test in holding that the union had violated § 8(b)(1)(A). *Id.* No. 209, 116 L.R.R.M. (BNA) at 1259. In reviewing *Granite State,* the Board emphasized the Court's ruling that union discipline is lawful only if a union member is free to resign from the union and refrain from concerted activities. *Id.* The Board also noted that *Granite State* and *Booster Lodge* rejected the union's asserted interest in union solidarity and the mutual reliance of its members. *Id.*

128. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1259-61; *see supra* text accompanying note 33.

law policies.[129] The Board ruled that the restriction impaired the employee's section 7 right to refrain from concerted activities, which includes "not only the right to refrain from strikes, but also the right to resign union membership."[130] In addition, restricting a member's right to resign creates the fiction of continued membership and undermines the policy of the Act against compelling full union membership.[131]

The Board also concluded that the restriction on resignations impaired the policy distinction between internal and external union actions.[132] The Board reasoned that "[a] consistent and enduring basis for distinguishing between internal and external actions is whether the union's action applies only to union members."[133] A union's unilateral extension of an employee's membership obligation through restrictions on resignation artificially expands the definition of internal action and allows the union to continue to regulate conduct over which it would otherwise have no control.[134] The union attempted to justify its rule by arguing that the rule "seeks to preserve strike solidarity and protect the rights of employees who choose to continue a strike."[135] The Board, however, noted that the Supreme Court expressly rejected this contention in *Granite State* and *Booster Lodge*.[136] Relying on this precedent, the Board rejected the union's argument.[137] The Board also agreed with the *Dalmo Victor II* concurring member's assertion that the institutional interests of a union cannot override an employee's section 7 rights.[138] In addition, the Board pointed out that a fundamental conflict exists between employees who wish to refrain from strike activities and employees who wish

129. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1259-60.

130. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1260. The Board did not have any authority for this assertion. The right to refrain from strikes is not absolute; a member remains subject to the union's internal disciplinary power if he returns to work without first resigning from the union. *See Allis-Chalmers*, 388 U.S. at 196-97.

131. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1260; *see Allis-Chalmers*, 388 U.S. at 196-97.

132. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1260-61.

133. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1260.

134. *Id.* The Board distinguished between an "internal union rule that carries incidental external effects" and a rule restricting resiguations. The rule restricting resignations "constitutes a unilateral reordering of the basic employee-union relationsbip tbat directly and fundamentally redraws the line between internal and external actions." *Id.* No. 209, 116 L.R.R.M. (BNA) at 1260 n.16.

135. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1260.

136. *Id.*

137. *Id.*

138. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1261.

to participate in the walkout. The Board, however, concluded that it could not compromise the neutrality of the Act by sanctioning a union's efforts to restrict resignations when the union rule favors striking employees at the expense of employees who choose not to strike.[139]

Focusing on the third prong of the *Scofield* test, the Board held that the union rule violates the principle that employees must be free to leave the union and escape the rule, because the rule "tells employees they cannot, in fact, escape the rule."[140] The Board then considered the Seventh Circuit's opinion in *Rockford-Beloit* and the Ninth Circuit's opinion in *Dalmo Victor II*. Although *Neufeld Porsche-Audi* arose in the Ninth Circuit, the Board declined to follow *Dalmo Victor II* because the Board found the Seventh Circuit's opinion more persuasive.[141]

The dissent agreed with the majority that the rule against resignations was unreasonable, but believed that the majority should not have overruled the plurality in *Dalmo Victor II*.[142] According to the dissent, the majority misread Supreme Court precedent in holding that the individual's section 7 rights are absolute.[143] Criticizing the majority's failure to balance the competing interests of the union and the individual in light of the overall scheme of the

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139. *Id.*

140. *Id.*

141. *Id.* The Board criticized the Ninth Circuit's approach for several reasons. First, the Board did not accept the mutual subscription theory. *Id.*; *see supra* notes 16 & 44-47 and accompanying text. Second, the Board rejected the Ninth Circuit's argument that an employee's wishes are subservient to the will of the majority of the union because the union represents the entire unit of employees. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1261-62. Although the Board conceded that the employee's wishes are less important than the majority's with respect to employee relations with management, the Board stated emphatically that the union cannot "unilaterally order an employee's membership relations with the union." *Id.* No. 209, 116 L.R.R.M. (BNA) at 1262.

Third, the Board rejected the Ninth Circuit's view that the proviso to § 8(b)(1)(A) gives unions the right to impose indefinite temporal restrictions on an employee's right to resign and return to work during a strike. *Id.* The Board stated that allowing the union to impose such restrictions would authorize a union to "unilaterally . . . shift the line of demarcation between internal and external actions." *Id.*

Fourth, the Board disagreed with the Ninth Circuit's contention that the union's interests in preserving solidarity and the employee's § 7 rights are coexistent. *Id.* The Board reiterated its position that institutional interests never can negate express statutory rights. *Id.* Last, the Board criticized the court for omitting the final portion of the *Scofield* test—that a union member is free to leave the union and escape its rule. *Id.*

142. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1263 (Zimmerman, Member, dissenting).

143. *Id.* No. 209, 116 L.R.R.M. (BNA) at 1263-64 (Zimmerman, Member, dissenting); *see supra* notes 39-43 & 51-52 and accompanying text.

Act,[144] the dissent advocated reaffirming the plurality dicta in *Dalmo Victor II* that a limited, temporal restriction on resignations is reasonable.[145]

IV. THE APPROPRIATE STANDARD

In deciding to hear an appeal from the Seventh Circuit decision in *Rockford-Beloit*, the Supreme Court has the opportunity to clear up this troubled area of labor law. If the Court rules narrowly in this case, it can avoid deciding whether a union may impose any restrictions on resignations. Labor law practitioners, the Board, and the circuit courts, however, would benefit much more if the Court resolved this major conflict. This Recent Development argues that the Supreme Court should reject the Ninth Circuit's approach in *Dalmo Victor II* and affirm the Seventh Circuit's decision in *Rockford-Beloit* that any restriction on resignations constitutes an unfair labor practice under section 8(b)(1)(A).

The Supreme Court may rely on ample precedent to analyze the issue of whether a union may impose restrictions on a union member's ability to resign from the union. The proviso to section 8(b)(1)(A) protects a union's interest in regulating its internal affairs,[146] but does not permit a union to regulate external matters.[147] Thus, in *Allis-Chalmers* the Court held that a union could fine a union member who returned to work during a strike, a violation of the union constitution, because the union's efforts to enforce the fine regulated only internal union affairs.[148] In *Scofield* the Court approved the *Allis-Chalmers* Court's distinction between internal and external enforcement of union rules and articulated a test to determine whether a union rule violates section 8(b)(1)(A).[149]

In *Granite State* the Court applied the *Scofield* test to a fact situation markedly similar to the fact situations in *Dalmo Victor II*

144. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1265 (Zimmerman, Member, dissenting).

145. *Id.* (Zimmerman, Member, dissenting); *see supra* notes 77-82 and accompanying text.

146. *See Scofield*, 394 U.S. at 428 (1969); *Allis-Chalmers*, 388 U.S. at 178 (1967).

147. *Granite State*, 409 U.S. at 217. For a discussion of the distinction between internal and external affairs, see *supra* note 17.

148. *Allis-Chalmers*, 388 U.S. at 195, 197.

149. *Scofield*, 394 U.S. at 430. The Court did not state clearly whether it meant to distinguish between internal and external rules, or between rules that violate federal labor law and rules that do not violate federal law. The Court, however, has used the *Scofield* test to determine whether a union rule violates federal labor law. *See, e.g., Granite State*, 409 U.S. at 216.

and *Rockford-Beloit*. The union in *Granite State* fined an employee who resigned from the union and returned to work in violation of a union provision prohibiting strikebreaking.[150] Unlike the cases on appeal, however, the union in *Granite State* did not restrict a union member's right to resign. The Court held that absent a contractual restriction on a member's right to resign, he may resign at will.[151] Focusing on the second and third prongs of the *Scofield* test, the Court ruled that a fine imposed on an employee who lawfully resigns from the union and returns to work during a strike impermissibly regulates external conduct and infringes on the employee's section 7 right to refrain from collective activity.[152]

Dalmo Victor II and *Rockford-Beloit* present the Supreme Court with the question that *Granite State* left unanswered: does a union provision restricting member resignations permissibly regulate internal union affairs or does it impermissibly regulate external affairs and constitute an unfair labor practice under section 8(b)(1)(A)? Since 1969 the Court has reviewed union rules in light of the three-part *Scofield* test to determine whether the rule violates section 8(b)(1)(A) by impermissibly regulating external affairs. The *Scofield* test remains the proper analytical tool for evaluating these questions. If the union rule restricting resignations fails to satisfy any of the three parts of the test, the Court should hold that the rule violates section 8(b)(1)(A). This Recent Development contends that while a union rule restricting resignations may pass the first part of the *Scofield* test, the rule definitely fails the second and third parts of the test.

A. A Union Rule Must Reflect a Legitimate Union Interest

A union has at least two legitimate interests in limiting its members' right to resign. First, a union has an interest in protecting its solidarity because "[t]he economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . . ."[153] In *Dalmo Victor II* the Ninth

150. *Granite State*, 409 U.S. at 216-17.

151. *Id.* at 217. The Court explicitly declined to decide to "what extent the contractual relationship between union and member may curtail the freedom to resign." *Id.*

152. *Id.* at 217-18. In *Booster Lodge*, the fourth Supreme Court decision in this area, the Court reaffirmed its holding in *Granite State* and rejected the union's argument that the Court consistently has read into a provision prohibiting strikebreaking a restriction on the right to resign during a strike. *Booster Lodge*, 412 U.S. at 89. The Court refused to extend the union sanctions to nonmembers. *Id.*

153. *Allis-Chalmers*, 388 U.S. at 181.

Circuit acknowledged that postresignation strikebreaking seriously threatens a union's viability.[154] As members increasingly resign and escape obligations to their colleagues, loyal union members will feel increasing pressure to resign as well.[155] A substantial number of defections could break the union and shift negotiating power to the employer, who then could dictate less favorable employment terms.[156] The Seventh Circuit also recognized this legitimate union interest in *Rockford-Beloit*.[157]

The Ninth Circuit identified a second legitimate union interest in restricting its members' right to resign—the mutual reliance between union members who participated in the strike vote.[158] Noting that the strike vote is pointless if union members who disagree with the outcome can escape the effects of the vote by resigning, the Ninth Circuit stated that employees who vote to strike and later change their minds "may not betray their colleagues and expect to get away without paying a price for weakening the collective bargaining environment."[159] The Ninth Circuit, however, failed to acknowledge that the Supreme Court expressly rejected the mutual reliance theory in *Granite State*.[160] Even if a union rule restricting resignations satisfies the first part of the *Scofield* test because the rule serves a legitimate union interest, it certainly fails the second and third parts of the test.

B. A Union Rule Must Not Impair Congressional Labor Policy

1. The Employee's Choice to Engage in Concerted Activity

In defining the second part of the *Scofield* test, the Court stated that "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating [section] 8(b)(1)."[161] The different results that the Seventh Circuit and Ninth Circuit reached in *Rockford-Beloit* and *Dalmo Victor II* stemmed partly from the two circuits' contrasting views of when a rule frustrates an overriding policy of

154. *Dalmo Victor II*, 725 F.2d at 1217.

155. *Id.*

156. *Id.*

157. *Rockford-Beloit*, 724 F.2d at 60.

158. *Dalmo Victor II*, 725 F.2d at 1217; *see also Rockford-Beloit*, 724 F.2d at 60 (acknowledging the mutual reliance between union members).

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

160. 409 U.S. at 217-18; *see supra* text accompanying notes 44-47. In *Granite State* the Court did not indicate the outcome if a union contractually had imposed a restriction on its members. 409 U.S. at 217.

161. 394 U.S. at 429.

the labor laws. In *Rockford-Beloit* the Seventh Circuit recognized that a rule restricting resignations frustrates the overriding policy in section 7 that employees remain free to choose whether to engage in concerted activities.[162] In *Dalmo Victor II*, however, the Ninth Circuit held that a restriction on resignations merely placed "obstacles in the way of resignation, and did not 'override' any policy embedded in the labor laws."[163]

As the Seventh Circuit noted, restricting resignation impairs the section 7 goal of protecting an employee's right to refrain from collective activities.[164] The legislative history of sections 7 and 8(b)(1)(A) indicates that Congress enacted these provisions to prevent unions from intimidating and coercing employees during union organizational campaigns and to establish the employee's right to refrain from union activities.[165] This interpretation of the Act's legislative history by no means precludes the inference that section 8(b)(1)(A) forbids other coercive activity as well.[166] In fact, Senator Taft stated that the Wagner Act contains "express language in section 7 which would make the prohibition in section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or picket line."[167] Through section 7 Congress gave employees the right to refrain from concerted activity.[168] Accordingly, preventing an employee from resigning during a strike clearly frustrates labor policy by preventing him from exercising his right to refrain from con-

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162. 724 F.2d at 60. The Seventh Circuit stated that "[t]he Section 7 right to refrain from union activities encompasses the right of memhers to resign from the union." *Id.*

163. 725 F.2d at 1217.

164. *See* 29 U.S.C. § 157 (1982) ("[e]mployees shall have the right . . . to refrain from any or all [concerted] . . . activities . . . .").

165. *See, e.g.*, 93 CONG. REC. 4142 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1025 (1948) [hereinafter cited as LEGISLATIVE HISTORY].

166. *See* 93 CONG. REC. 4558 (1947), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 165, at 1199. Senator Ball, a cosponsor of the amendment that added §§ 7 and 8(b)(1)(A), stated:

> In my experience—and I know many employers and union leaders—they are very much the same kind of people. In fact, they are like all the rest of us. Give either one of them too much power and they tend to he corrupted; they begin to like the exercise of power just for the sake of power. Union leaders very often tend to think a great deal more of the strength and the funds of the union which pays their salaries than they do of the welfare of the employees whom they are supposed to serve.

Id.

167. 93 CONG. REC. 7001, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 165, at 1623.

168. *See* 29 U.S.C. § 157 (1982).

certed activity.[169]

The Supreme Court held in *Scofield, Granite State,* and *Booster Lodge* that a union's power over a member ends with the member's resignation.[170] The proviso to section 8(b)(1)(A), which gives the union the right to control its internal affairs, does not authorize the union to discipline a member who resigns because that member no longer participates in the union's internal affairs. Unions have argued that because the member's resignation does not take effect until after a strike or lockout ends, the union does not control postresignation conduct, but only governs internal affairs.[171] This distinction, however, is meaningless; the effect is the same because the rule gives the union control over the employee for the duration of the strike, even after he clearly has expressed the desire to sever his connection with the union and engage in his section 7 right to refrain from collective activity.

In *Dalmo Victor II* the Ninth Circuit disagreed with the Supreme Court's and the Seventh Circuit's logic. The Ninth Circuit asserted that both the union's interest in governing its internal affairs and the employee's right to refrain from collective activities are important federal labor policies.[172] The court, therefore, believed that neither policy could override or impair the other within the meaning of *Scofield.*[173] According to the court, "*Scofield* does not invite . . . [the] ad hoc weighing of the allegedly competing interests described in the main text of [section] 8(b)(1)(A) . . . and the proviso to [section] 8(b)(1)(A). . . ."[174] The *Dalmo Victor II*

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169. *See Rockford-Beloit,* 724 F.2d 57, 61 (7th Cir. 1983); *Neufeld Porsche-Audi,* 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1260. The Board, in *Neufeld Porsche-Audi,* endorsed the Seventh Circuit position. The Board stated:

> By unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus continue to regulate conduct over which it would otherwise have no control. We find no basis in the act for allowing unions to alter unilaterally the statutory structure so carefully elucidated by the Supreme Court.

Id. No. 209, 116 L.R.R.M. (BNA) at 1260 (footnote omitted).

170. *See Booster Lodge,* 412 U.S. at 88; *Granite States,* 409 U.S. at 216-17; *Scofield,* 394 U.S. at 435.

171. *See, e.g., Booster Lodge,* 412 U.S. at 89; *O.K. Tool Co.,* 215 N.L.R.B. at 652-53; *Dalmo Victor I,* 231 N.L.R.B. at 720-21.

172. *Dalmo Victor II,* 725 F.2d at 1217.

173. *Id.*

174. *Id.* Following the Ninth Circuit's argument to its logical extreme, a union rule must fail under the *Scofield* test. If all three parts of the test are mutually exclusive and require no balancing, then the interest of the union in maintaining solidarity has no place in the analysis of the second part of the test. The inquiry into union interests should only take place under the first part. A rule that impairs a policy embedded in the lahor laws, however,

court concluded that it should construe *Scofield* narrowly.[175] Acknowledging that an employee has a section 7 right to resign from the union, the court, nonetheless, ruled that when a union representative simply fines a resigned member for strikebreaking, the union has not coerced or restrained the employee in the exercise of his section 7 rights.[176] According to the court, the union has put "some obstacles in the way of resignation," but it has not impaired federal labor policy.[177]

The Ninth Circuit's reasoning is flawed. First, the court ignores the Supreme Court's holding in *Granite State* that fines constitute restraint and coercion within the meaning of section 8(b)(1)(A).[178] Second, the fine might impair the employee's section 7 rights if it is large enough to prevent him from exercising his right to resign, especially if he desires to return to work for economic reasons.[179]

The Ninth Circuit was correct in asserting that a rule restricting resignations implicates the union's interest in regulating the acquisition and retention of membership as well as the employee's interest in being free to refrain from collective activity. These two interests inherently conflict. If the court enforces the restriction on resignations, the employee's interest becomes subservient to the union's interest. On the other hand, if the court refuses to enforce the restriction on resignations, the court explicitly favors the employee.

The Ninth Circuit stated that it should not balance these competing interests because they are equally important.[180] The Seventh Circuit, however, engaged in the necessary balancing and concluded that a union's interest in preserving solidarity cannot override an employee's right to resign.[181] Relying on the Court's

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is invalid because the rule fails the second part of the test.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Granite State*, 409 U.S. at 216. In *Neufeld Porsche-Audi* the Board also criticized the Ninth Circuit for this argument. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1262.

179. The employees in *Neufeld Porsche-Audi* were fined $2250, *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1258, while the employees in *Rockford-Beloit* were fined the salary that they earned while working during the strike, *Rockford-Beloit*, 724 F.2d at 58. In *Dalmo Victor I* the union fined the employees the amount each employee received as strike benefits while out on strike—$2227.50 for two employees, and $1125 for the third. *Dalmo Victor I*, 231 N.L.R.B. at 720.

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

181. *Rockford-Beloit*, 724 F.2d at 60.

reasoning in *Granite State*, the Seventh Circuit ruled that although the union has a powerful interest in solidarity and conformity during a strike, the employee's section 7 rights must remain preeminent.[182] As Chief Justice Burger stated in his concurring opinion in *Granite State*:

> [T]he institutional needs of the Union . . . do not outweigh the rights and needs of the individual . . . . [W]e have given special protection to the associational rights of individuals in a variety of contexts; through [section] 7 of the Labor Act, Congress has manifested its concern with those rights in the specific context of our national scheme of collective bargaining. Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership.[183]

The Board in *Neufeld Porsche-Audi* also employed this balancing approach and thereby reaffirmed the position that the concurrence established in *Dalmo Victor II*.[184]

2. The Employee's Rights Under the Act

In *Scofield* the Supreme Court delineated a second reason to hold that an employee's section 7 right to refrain from union activities overrides the union's institutional interest. In establishing the second part of the test, the *Scofield* Court relied on *NLRB v. Industrial Union of Marine & Shipbuilding Workers*.[185] *Marine*

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182. *Id.*

183. *Granite State*, 409 U.S. at 218 (Burger, C.J., concurring), *cited in Rockford-Beloit*, 724 F.2d at 60.

184. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1261. In *Dalmo Victor II* the concurrence stated:

> [The argument] that neither the employee *rights* at issue nor the union *interests* being advanced are absolute . . . implicitly equate[s] the express Section 7 rights of employees with a union's institutional interest in strike solidarity . . . . Yet, such an equation ignores the fact that it is not the mere existence of conflict between labor disputants that mandates and justifies an "accommodation" or "balancing." . . . We contend most strongly that the express Section 7 rights of employees are surely more than mere "interests" subject to limitation because their operation somehow impinges upon the institutional desires of a union . . . . Thus, under the banner of "balancing," our colleagues negate . . . the express employee protections afforded by one of the Act's most important provisions.

Dalmo Victor II, 263 N.L.R.B. at 990-91 (Van de Water, Chairman, and Hunter, Member, concurring).

The Seventh Circuit added that an employee has a strong personal interest in preserving his right to resign. A union rule restricting resignations and compelling membership infringes on this interest and the employee's § 7 rights. *Rockford-Beloit*, 724 F.2d at 60. The court cited two employee interests: (1) the freedom to change opinions regarding the effectiveness of a strike; and (2) the employee's need to return to work for personal reasons, including family hardship. *Id.*

185. 391 U.S. 418 (1968) (Marine Workers).

Workers required a member to exhaust union remedies before filing an unfair labor practice grievance with the Board.[186] The Supreme Court struck down the rule because it frustrated the enforcement scheme of the Act and because the rule circumvented the Act's policy of allowing employees to bring complaints to the Board.[187]

Similarly, any rule restricting resignation violates the Act's policy of allowing employees to exercise openly their section 7 rights. Admittedly, a union's interest in maintaining its solidarity in the face of a strike may be greater than the union's interest in ensuring that it has the first chance to resolve an employee's problem. The *Scofield* test, however, does not take into consideration the degree to which a rule impairs a policy imbedded in the Act.[188]

A rule restricting resignations also impairs the section 8(b)(2) policy of allowing an employee to refuse to become a full member of the union.[189] In unions with a union security clause in the collective bargaining agreement, the member has no choice but to join the union.[190] Under section 8(b)(2), a union commits an unfair labor practice if it discriminates or causes the employer to discriminate against an employee who has been expelled from the union for any reason other than the failure to pay dues.[191] The extent of an employee's obligation under a union-security agreement thus is "whittled down to its financial core."[192] A rule restricting resignations, which the union imposes on an employee who must maintain membership according to a union-security clause, undermines the employee's right to limit his membership to a financial obligation.

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186. *Id.* at 420-21.

187. *Id.* at 425. One commentator maintained that a union is free to regulate its internal affairs unless exercise of that freedom would violate the rights of others protected by the Act. For instance, this commentator argued that in *Marine Workers* the union infringed on the right of the NLRB itself to secure employee access to Board process. Silard, *supra* note 17, at 196.

188. *See* Johannesen, *supra* note 2, at 275.

189. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1260 & n.15; *see supra* note 24 (text of § 8(b)(2)). The Seventh Circuit and the Ninth Circuit both failed to address this policy argument.

190. Section 8(a)(3) of the Act permits a union and an employer to write a union-security clause into the employment contract. 29 U.S.C. § 148(a)(3) (1982); *see* J.R. DEMPSEY, THE OPERATION OF THE RIGHT-TO-WORK LAWS (1961) (discussing the techniques of union security); *see also* F. BARTOSIC & R. HARTLEY, *supra* note 19, at 235. Even without a union-security clause, the member might not have joined the union voluntarily, but may have succumbed to pressure from his peers and the union, or he may have assumed mistakenly that a union-security clause actually did exist.

191. 29 U.S.C. § 148(b)(2) (1982).

192. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); *see supra* note 19.

A restriction on resignations would extend this right beyond a financial obligation to forced employee observance of a picket line for the duration of the strike. The union's unilateral creation of the fiction of continued membership clearly impairs the policy imbedded in section 8(b)(2).

3. The Neutrality of the Act

In *Neufeld Porsche-Audi* the Board recognized that a union rule restricting resignations would impair the neutrality of the Act by distinguishing between employees who wish to engage in concerted activities and employees who desire to refrain from those activities.[193] The Board felt that if it sanctioned union efforts to restrict resignations, implicitly it would favor striking employees at the expense of employees who chose not to strike. This kind of compromise, the Board declared, would ignore the literal prescription of section 7 to protect the rights of employees to engage in or refrain from union or other concerted activities.[194]

Traditionally, the neutrality of the Act has come to mean achieving equality of bargaining power between employers and unions through the free play of economic forces.[195] The Board's contention, however, is not without merit. Congress enacted sections 7 and 8(b)(1) to curb union abuses under the Wagner Act.[196] Congress also designed section 8(b)(1) to hold the agents of a labor organization, generally employees, liable for restraining or coercing fellow employees in the exercise of their section 7 rights.[197] The adoption of section 8(b)(1) demonstrates Congress' intent to strike a balance between employees who favor the union and employees who do not wish to participate in concerted activities.[198]

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193. *Neufeld Porsche-Audi*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) at 1261.

194. *Id.*

195. Pittsburgh Plate Glass Co. v. NLRB, 427 F.2d 936, 946 (6th Cir. 1970), *aff'd*, 404 U.S. 157 (1971).

196. *See* 93 CONG. REC. 4142, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 165, at 1025; 93 CONG. REC. 3554, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 165, at 647.

197. *See, e.g.*, 93 CONG. REC. 4143, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 165, at 1028.

198. In *Rockford-Beloit* the Seventh Circuit made passing reference to this policy. 724 F.2d at 60 ("[F]orced continued membership distorts the balance between encouraging collective activity among workers and protecting individuals from coercion."). In *Dalmo Victor II*, however, the Ninth Circuit did not address this issue. Instead, tbe Ninth Circuit attempted to assert a countervailing policy based on the mutual reliance theory. The court contended that "members who participate in the strike vote and then fail to honor the result [breach] a promise to their colleagues." *Dalmo Victor II*, 725 F.2d at 1217. The Supreme Court should reject the Ninth Circuit's assertion for two reasons. First, in *Granite*

4. Summary

Three policy reasons exist for concluding that a rule restricting resignations does not satisfy the second part of the *Scofield* test and, therefore, violates section 8(b)(1)(A). First, a rule restricting resignations frustrates the overriding policy in section 7 that employees remain free to choose whether to engage in concerted activities. Second, the rule violates the employee's section 7 and section 8(b)(2) rights. Last, a rule restricting resignations impairs the neutrality of the Act by distinguishing between employees who wish to engage in concerted activities and employees who desire to refrain from those activities.

C. A Union Rule Must Be Reasonably Enforced Against Members Who Are Free to Leave the Union and Escape the Rule

The specific language of the third part of the *Scofield* test is inapplicable to the issue of restricting resignations. In *Scofield* the Court reviewed a rule regarding union-imposed production ceilings.[199] For the rule to be valid, the Court said, the rule must be "reasonably enforced against union members who are free to leave the union and escape the rule."[200] A rule restricting production ceilings, however, differs dramatically from a rule restricting resignations. The language in *Scofield*, read in the context of a rule restricting resignations, automatically would invalidate the rule because a union member cannot be "free to leave the union and escape the rule" when the rule restricts the member's right to resign. This interpretation would make the first two parts of the *Scofield* test meaningless and would give too much weight to what is arguably dicta in the opinion. Neither the Seventh Circuit nor

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State the Court expressly rejected the mutual reliance theory. "[T]he vitality of [section] 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his [section] 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." 409 U.S. at 217-18. If the member must be free to refrain from actions he endorsed earlier, and he does not lose his § 7 rights to a union's plea for solidarity, the Ninth Circuit is not justified in putting a union's need for solidarity above an employee's § 7 rights.

Second, participation in the strike vote does not necessarily mean that the employee voted in favor of the walkout. If an employee voted against the strike, a rule restricting his right to resign compels him to participate in a concerted activity that he opposed and makes a mockery of his § 7 right to refrain from striking. On the other hand, if the employee voted in favor of the strike, his vote still should not operate to waive his § 7 rights because the court has given him the privilege to change his mind about the effectiveness of the strike and its impact on him. *Id.* at 218.

199. *Scofield*, 394 U.S. at 424-26.

200. *Id.* at 430.

the Ninth Circuit addressed this inherent tension, however.

In *Dalmo Victor II* the Ninth Circuit ignored the problem of applying the third part of the *Scofield* test to the rule restricting resignations by excising from the test the words "who are free to leave the union and escape the rule."[201] Although the *Scofield* Court did not focus extensively on this language, the Court's use of these words demonstrates that the Court gave at least some weight to a union member's right to resign from the union and escape its union rule. The Court reiterated this concern in *Granite State* by quoting the *Scofield* language.[202] The Ninth Circuit's failure to discuss this language, therefore, is untenable.

In *Rockford-Beloit*, on the other hand, the Seventh Circuit found central to the Supreme Court's analysis in *Scofield* the "concept that union members were free to leave the union and escape the rule."[203] Although the Seventh Circuit focused on the second part of the test, the court supported its conclusion by stating that the third part "safeguards the balance between individual rights and the collective power of the union."[204] Arguably, this analysis overstates the *Scofield* Court's emphasis on the employee's freedom to resign. If the Court's meaning was this clear, the Seventh Circuit would not have needed to consider the second part of the test at all.

The most practical resolution of the tension between the language in the third part of the *Scofield* test and the union rule is to conclude that the *Scofield* Court intended to give some weight to the member's freedom to leave the union, but intended to place major emphasis on the second prong of the test. This interpretation is similar to the Seventh Circuit's approach and would have the same result. Under this analysis, the rule restricting resignations still would fail the *Scofield* test and violate section 8(b)(1)(A).

V. CONCLUSION

This Recent Development has argued that a union violates section 8(b)(1)(A) of the National Labor Relations Act when the union imposes a rule restricting the rights of its members to resign. The Supreme Court should apply the *Scofield* test, as modified by

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201. 725 F.2d at 1216. In describing the third part of the *Scofield* test, the court merely stated that the union rule must be "reasonably enforced against union members." *Id.*

202. *Granite State*, 409 U.S. at 216; *see supra* notes 38-40 and accompanying text.

203. 724 F.2d at 61.

204. *Id.*

this Recent Development, to reach this outcome. The union rule probably satisfies the first prong of the *Scofield* test when the union advances its need for maintaining strike solidarity as a legitimate union interest. The second prong of the test, which focuses on whether a union rule violates federal labor policy, is the most significant part of the test. A union rule that restricts resignations fails to meet this prong because it infringes on an employee's section 7 right to refrain from union activities. While a union has an institutional interest in maintaining strike solidarity, the union interest should not outweigh the section 7 right imbedded in the National Labor Relations Act.

The third prong of the *Scofield* test mandates that a rule must be reasonably enforced against union members who are free to resign from the union and escape the rule. Courts should utilize this prong only to reinforce the second part of the test. The Supreme Court's emphasis on the member's freedom to leave the union and escape a union rule indicates that the employee's section 7 rights are paramount to the union's institutional interest in maintaining union strength. To give the third prong additional weight would be to ignore the first two prongs of the test and any union interest in imposing restrictions. The Supreme Court, therefore, should hold that any union restriction on a member's right to resign constitutes an unfair labor practice under section 8(b)(1)(A) of the National Labor Relations Act.

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