St. Mary's Law Journal

Volume 5 | Number 1 Article 14

3-1-1973

Absent Provisions in a Collective-Bargaining Contract or the Union's Constitution or Bylaws Restricting a Union Member's Right to Resign, any Imposition of Fines upon Employees Who Resign from the Union Prior to Breaking Strike Rules Is an Unfair Labor Practice under Section 8(b)(1)(A) of the National Labor Relations Act .

John S. Strickland

tion to the *Olson* decision when drafting a self-incrimination provision. Unless there is strong reasoning to the contrary, the wording of the new provision should be identical to that in the fifth amendment. As long as the courts have construed the different wordings to mean the same thing,[54] the legislature should act accordingly. The Texas provision should be changed to agree with the fifth amendment while the opportunity is available in order to avoid future litigation on the same issue.[55] Quite possibly this will be *Olson*'s most significant and lasting contribution to Texas jurisprudence.

David Brian Armbrust

LABOR LAW—UNION DISCIPLINE—ABSENT PROVISIONS IN A COLLECTIVE-BARGAINING CONTRACT OR THE UNION'S CONSTITUTION OR BYLAWS RESTRICTING A UNION MEMBER'S RIGHT TO RESIGN, ANY IMPOSITION OF FINES UPON EMPLOYEES WHO RESIGN FROM THE UNION PRIOR TO BREAKING STRIKE RULES IS AN UNFAIR LABOR PRACTICE UNDER SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT. *NLRB v. Granite State Joint Board, Textile Workers, Local 1029,* 409 U.S. ———, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972).

Prior to the expiration of a collective-bargaining agreement, Textile Workers Union, Local 1029, was the collective-bargaining representative for certain employees of the International Paper Box Machine Company.[1] Upon expiration of the bargaining agreement the union initiated a strike, pursuant to a vote by its membership authorizing such action if contract renewal negotiations failed. Thereafter the union membership unanimously approved a resolution specifying that any member who aided the company during the

54. Olson v. State, 484 S.W.2d 756, 761 n.8 (Tex. Crim. App. 1969).

55. *Id.* at 761. "[N]othing turns upon the variations of wording in the constitutional clauses. . . . It is therefore immaterial that the witness is protected by one constitution from 'testifying,' or by another from 'furnishing evidence,' or by another from 'giving evidence,' or by still another from 'being a witness.' These various phrasings have a common conception, in respect to the form of the protected disclosure."

1. The collective-bargaining agreement designated the union as the bargaining representative for the company's production and maintenance employees and provided for a 3-year term. Although the agreement contained a maintenance of membership provision, membership in the union was wholly voluntary. The maintenance of membership clause provided that all employees who were union members when the contract began, or who joined the union during the term of the agreement would remain members in good standing for the duration of the agreement. NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 446 F.2d 369, 370 (1st Cir. 1971), *rev'd,* 409 U.S. —, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972).

strike would be subject to a $2,000 fine.[2] After approximately 6 weeks, two union members sent letters of resignation to the union and subsequently returned to work.[3] Although neither the union's constitution nor its by-laws contained any provision restricting a member's right to resign, the union responded by notifying the employees that their resignations were ineffective and that they would be subject to the strike-breaking fine. After a subsequent notification to the employees that union charges had been filed against them and that they should appear at a hearing in regard to the charges, the union tried and fined each member, *in absentia.* The employees refused to pay the fines imposed and the union brought suit against the workers in the state courts to collect the fines. The employees filed a complaint with the NLRB charging that the union had committed an unfair labor practice by restraining the employees in the exercise of their rights guaranteed to them under Section 7 of the National Labor Relations Act.[4] The Board ruled that the union's imposition of fines and subsequent legal actions were in derogation of the employees' section 7 right to refrain from concerted activities, and therefore constituted a violation of section 8(b)(1)(A).[5] The Court of Appeals for the First Circuit denied enforcement of the Board's decision and held that the union's actions did not constitute an unfair labor practice under section 8(b)(1)(A).[6] Held—*Reversed.* In the absence of provisions in a collective-bargaining contract or the union's constitution or bylaws restricting a union member's right to resign, any imposition of fines upon employees who resign from the union prior to breaking strike rules is an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act.

---

2. In a footnote the court stated that "[m]ost of the employees who subsequently resigned and returned to work had probably voted in favor of the strike and very likely for the fines as well. The Board conceded at oral argument that all 31 [of the employees who violated the strike action] had voted to strike." *Id.* at 370 n.2.

3. Within the next 6 or more months following the initiation of the strike, an additional 29 employees submitted their resignations to the union. These employees joined the original resignees, crossed the picket line and returned to work. NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, —, 93 S. Ct. 385, 386, 34 L. Ed. 2d 422, 424 (1972).

4. Section 7 provides in part:

> Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protections, *and shall also have the right to refrain from any or all such activities* . . . .

29 U.S.C. § 157 (1970) (emphasis added).

5. Granite State Joint Bd., Textile Workers, Local 1029, 187 N.L.R.B. No. 90 (1970). Section 8(b) provides in part:

> It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

29 U.S.C. § 158(b) (1970).

6. NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 446 F.2d 369 (1st Cir. 1971).

The Supreme Court first approved the concept that a union might legitimately discipline members who engage in strike-breaking activities in *NLRB v. Allis-Chalmers Manufacturing Co.*[7] The decision was predicated upon an extensive review of the legislative history of section 8(b)(1)(A) and included special emphasis on the section's proviso.[8] The Court found that the union's disciplinary action was a proper exercise of its statutory power granted in the proviso to prescribe its own rules in regard to the retention of its membership.[9] Furthermore, the section 8(b)(1)(A) prohibitions against restraint or coercion of an employee in the exercise of his rights could not be construed as precluding the imposition of disciplinary fines on union members who return to work in derogation of a lawful strike action.[10]

In 1968 the Court rendered *NLRB v. Local 22, Marine & Shipbuilding Workers*,[11] stating that although section 8(b)(1)(A) assures union freedom

---

7. 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967). This case presents a fact situation similar to that of *Granite State*. The most important distinguishing characteristic is that in *Allis-Chalmers* the employees who participated in the strike-breaking activities did so as union members in good standing, since none of the employees had attempted to resign their membership prior to disobeying the union's rules. Consequently the union's imposition of fines and legal actions in *Allis-Chalmers* were directed against employees who were union members at the time of the breach.

8. In reviewing the history and policy basis of section 8(b)(1)(A) the Court stated:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."

Id. at 181, 87 S. Ct. at 2007, 18 L. Ed. 2d at 1128 (footnote omitted). The Court quoted Senator Ball, who was a cosponsor of the amendment which added section 8(b)(1)(A) to the National Labor Relations Act: "That modification [the 8(b)(1)(A) proviso] is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees." *Id.* at 187, 87 S. Ct. at 2010, 18 L. Ed. 2d at 1132 (citations omitted).

9. *See generally* Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

10. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 195, 87 S. Ct. 2001, 2014, 18 L. Ed. 2d 1123, 1136 (1967).

11. 391 U.S. 418, 88 S. Ct. 1717, 20 L. Ed. 2d 706 (1968). A union member complained that the union had unlawfully expelled him from membership because he had filed a previous unfair labor practice charge against the union before exhausting all internal remedies and appeals, as required by the union's constitution. The Court noted that the policy of maintaining free and unrestricted access to the NLRB was important to the effective functioning of the National Labor Relations Act. Any interference with this free access to the Board could not be condoned or regarded as a matter within the legitimate internal affairs of the union. *Id.* at 428, 88 S. Ct. at 1724, 20 L. Ed. 2d at 714. The Court also noted that although unions were authorized to establish procedures for processing member grievances, "a court or agency might consider whether a particular procedure was 'reasonable' . . . ."

of self regulation when its internal affairs are concerned, the section does not authorize the union to discipline its members in regard to matters that are clearly beyond the internal affairs of the union. *Allis-Chalmers* was again qualified in 1969 by the case of *Scofield v. NLRB*.[12] In that case the Court held that a union had not violated section 8(b)(1)(A) by imposing disciplinary fines on members who exceeded a production quota.

> . . . § 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.*[13]

In considering the *Granite State* case the Court was presented with a question concerning section 8(b)(1)(A) not resolved by the preceding decisions:[14] Did the union's imposition of fines upon employees, who had resigned from the union prior to the breach of any union rule, represent an attempt to restrain or coerce the employees in the exercise of their rights to refrain from concerted action?[15] The NLRB had previously decided the same question in *Booster Lodge No. 405, Machinists*[16] (generally referred to as the *Boeing* case) holding that a union's right to fine a strike-breaking member was extinguished by the member's formal resignation prior to breach

---

12. 394 U.S. 423, 89 S. Ct. 1154, 22 L. Ed. 2d 385 (1969).

13. *Id.* at 430, 89 S. Ct. at 1158, 22 L. Ed. 2d at 393 (emphasis added). In discussion of the last element of this test the Court stated that "[i]f a member chooses not to engage in [a] concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union . . . ." *Id.* at 435, 89 Ct. at 1161, 22 L. Ed. 2d at 396.

14. *See* Gould, *Some Limitations upon Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers,* 1970 DUKE L.J. 1067, 1096.

> [T]he [*Allis-Chalmers*] Court apparently intends to distinguish between gradations of membership and, presumably, employees who refuse to do more than pay dues and initiation fees may not be subject to the broad union imposed obligations upheld by the majority in *Allis-Chalmers.* At a minimum, one can state with certainty that this question has been left for future resolution.

15. *See* Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield,* 38 GEO. WASH. L. REV. 187, 195 (1969). The question posed

> reflects a fundamental tension between two separate principles espoused by the Congress . . . . On one hand, Congress did not desire, by the broad "restrain or coerce" clause of the new section 8(b)(1), to authorize Labor Board policing of the area of union membership regulations. On the other hand, there are rights which Congress did specifically safeguard from union intrusion. It would be quixotic to insulate such intrusion from Board relief wherever the union has resorted to its power of membership discipline. There should be no such blanket immunity. (Citations omitted.)

16. 185 N.L.R.B. No. 23 (1970). The Board stated:

> In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right. But the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished.

See Gould, *Some Limitations upon Union Discipline Under the National Labor Relations Acts The Radiations of Allis-Chalmers,* 1970 DUKE L.J. 1067, 1098-108.

of any union rules. The Board's holding on this question was sustained by the Court of Appeals for the District of Columbia Circuit.[17] The court justified such a holding by finding that it had become widely recognized that membership in a union was an indispensable requisite to a union's exercise of disciplinary authority over the employees it represents.[18]

In *Granite State* the Supreme Court relied primarily on the principles enunciated in *Allis-Chalmers* and *Scofield.* The Court found that although the proviso in section 8(b)(1)(A) allows unions to formulate and enforce disciplinary rules and controls over its membership and internal affairs,[19] such rules are permissible only if they are reasonably enforced against members who are free to leave the union and escape the rule.[20] Attention was next turned to the question of whether the employees were, in fact, *members* of the union at the time of their breach of strike rules. The Court relied heavily upon the fact that neither the union's constitution nor bylaws contained any provisions defining the circumstances under which a member could resign from the union.[21] In light of the absence of such resignation restrictions, the Court adopted the finding of the Court of Appeals for the

17. Booster Lodge No. 405, Machinists v. NLRB, 459 F.2d 1143 (D.C. Cir. 1972). Although the court denied the union's right to discipline members who had effectively resigned from the union prior to engaging in strike-breaking activities, it upheld the union's disciplinary right in cases where the members breached strike rules before they had resigned. The court remanded the case to the Board for further consideration of the reasonableness of the fines lawfully imposed.

Three separate petitions were filed with the Supreme Court requesting certiorari: NLRB v. Boeing Co., 40 U.S.L.W. 3603 (June 9, 1972) (No. 71-1607); Booster Lodge No. 405, Machinists v. NLRB, 40 U.S.L.W. 3550 (May 1, 1972) (No. 71-1417); Boeing Co. v. NLRB, 40 U.S.L.W. 3577 (May 31, 1972) (No. 71-1563). Certiorari was granted to the first two of the above petitions (41 U.S.L.W. 3346) (Dec. 19, 1972) and the cases were ordered consolidated. The Court will apparently consider a question presented by both of these petitions; the NLRB's obligation and power to determine the reasonableness of the fines imposed. Although a second question was presented which concerns the member's escape from disciplinary fines by resignation from the union prior to breach of strike rules, this question has apparently been resolved by the *Granite State* decision and will presumably not be considered by the Court. This presumption is strengthened by the Court's denial of certiorari (41 U.S.L.W. 3346) (Dec. 19, 1972) to the third of the above petitions. This petition raised the *exclusive question* of whether or not the union had, in fact, violated section 8(b)(1)(A) by its fining members who had effectively resigned prior to any breach of union rules—the exact question resolved in *Granite State.*

18. *Id.* at 1151. *See generally* Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 YALE L.J. 175 (1960)

19. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967).

20. Scofield v. NLRB, 394 U.S. 423, 430, 89 S. Ct. 1154, 1158, 22 L. Ed. 2d 385, 393 (1969).

21. Although the existing collective-bargaining agreement contained a maintenance of membership clause which required members to remain in good standing "as to the payment of dues" for the duration of the contract, that clause had expired with the agreement, thus removing the last possible impediment to full severance of the union-member contract. NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, —, 93 S. Ct. 385, 386, 34 L. Ed. 2d 422, 424 (1972).

Second Circuit in *Communications Workers v. NLRB*:[22] "[A] member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association."[23] By adopting this common law right, the Court found that the employees had effectively resigned from the union prior to any breach. Since the language of *Scofield* explicitly states that union rules are permissible *only* if reasonably enforced against *members* who are free to resign,[24] the necessary finding of the court was that the disciplinary actions were without the protection of the section 8(b)(1)(A) proviso and therefore constituted unfair labor practices. This finding is based upon the fact that the union actions were imposed on *non-members*, for breaches of union rules occurring *after* the union membership status has been severed by resignation.

The majority opinion in *Granite State* was vigorously criticized in an innovative dissent filed by Mr. Justice Blackmun.[25] His opinion suggests that the question facing the Court may be decided in favor of the union by reliance upon either of two alternative theories. The first theory is based upon the contractual doctrine of charitable subscription,[26] and is predicated upon

---

22. 215 F.2d 835, 838 (2d Cir. 1954). In discussing the validity of voluntary resignations from the union the court stated:

> We agree that the proviso protects the Union's right to make its own rules with respect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignations, the *proviso* is inapplicable. Concededly the Union Constitution and bylaws are absolutely silent as to whether a member can voluntarily resign. Hence we think that the common law doctrine of withdrawal from voluntary associations is apposite.

23. *Id.* at 838; *accord*, NLRB v. Local 444, Mechanical & Allied Prod. Workers, 427 F.2d 883 (1st Cir. 1970) (union member who quit union on expiration of former maintenance of membership agreement and before effective date of new agreement was free to do so); NLRB v. UAW, 320 F.2d 12, 16 (1st Cir. 1963) (discussion of express resignation period in regard to voluntary resignation from union); 6 AM. JUR. 2d *Associations and Clubs* § 26 (1963): "A member may lawfully resign at any time from an association or club and terminate his liability for dues and fees, upon payment of all accrued charges . . . . However, in order to relieve the member from the payment of dues, such resignation must be made . . . in compliance with the reasonable provisions of the bylaws."

24. Scofield v. NLRB, 394 U.S. 423, 430, 89 S. Ct. 1154, 1158, 22 L. Ed. 2d 385, 393 (1969) (emphasis added).

25. The tone of Justice Blackmun's dissent is reflected in his statement that he "cannot join the Court's opinion, which seems . . . to exalt the formality of resignation over the substance of the various interests and national labor policies that are at stake here." NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, —, 93 S. Ct. 385, 389, 34 L. Ed. 2d 422, 428 (1972).

26. The doctrine of charitable subscription is based upon the proposition that when an individual promises to subscribe or contribute to a charitable endeavor his promise may constitute a legally binding and enforceable agreement, *if* the promisee substantially alters his position in reasonable reliance upon the promise and the change was reasonably foreseeable by the promisor. For a complete discussion of the doctrine, see Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639, 644-53 (1952) and 1A A. CORBIN, CONTRACTS § 198 (1963).

The right of enforcement of the subscription promise may lie with the original

the belief that an enforceable contract exists between union members and the union.[27] After entering into a contractual relationship with the union by voluntarily joining its membership, the *Granite State* members subsequently agreed to engage in an economic strike and to fine those members who violated the strike action. These subsequent agreements purportedly represented promises upon which the union and other members relied in formulating their own strike decisions. Such a reliance was equated to the enforceable reliance inherent in charitable subscription contracts. By adopting the doctrine of charitable subscription the dissent suggests that even if a member is free to resign at any time, such resignation does not necessarily foreclose all of the obligations the employee incurred *during* his membership.[28] Certain actions by the member during his membership (the *Granite State* members' approval of the strike action and strike-breaking fine) may constitute enforceable agreements with the union, which may be enforced even after resignation.[29] This theory suggests that these residual obligations justi-

---

promisee; *i.e.*, the charitable organization, or with certain third parties who purport to have relied upon the original promise and thus were induced into subscribing themselves. Under the analogy presented by the dissent in *Granite State*, the union would be considered as the equivalent to the charitable organization-promisee, and the other union members would be equated to third party subscribers. *See* Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 465 (1970), where the author states that the right of enforcement should be limited to the promisee since it was to him that the promise was made. "It asks too much of the promisor to require that he consider whether or not his promise will induce action by a *third party*." (Author's emphasis.) For support of third party enforcement rights, see 1A A. CORBIN, CONTRACTS § 198, 210 (1963). "[I]t has been held that promises of the subscribers mutually support each other. On this theory the subscription contract is a bilateral contract between subscribers, of which the charitable organization is a donee beneficiary." *See also* RESTATEMENT OF CONTRACTS § 90, at 110 (1932). In regard to the charitable subscription type of obligation it is stated:

> A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise.

Brown v. Marion Commercial Club, 97 N.E. 958 (Ind. Ct. App. 1912); Martin v. Meles, 60 N.E. 397 (Mass. 1901); Allegheny College v. National Bank, 159 N.E. 173 (N.Y. 1927).

27. *See* International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618, 78 S. Ct. 923, 924, 2 L. Ed. 2d 1018, 1020 (1958). The Court addressed the issue of contract between union and member and found that the "contractual conception of the relation between a member and his union widely prevails in this country . . . . [and] membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and bylaws of the union . . . ." *See generally* Gould, *Some Limitations upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1100-01; Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1054-58 (1951).

28. *See* Brief for Appellee at 11, NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972).

29. The Court of Appeals for the First Circuit explained the concept in their opinion on *Granite State*:

fied the union's enforcement and disciplinary actions as a necessary extension of its right to prescribe rules with respect to the retention of its membership—and therefore a legitimate exercise of power under the section 8(b)(1)(A) proviso. But attention should be called to the fact that charitable subscription contracts are based, at least in part, on the doctrine of promissory estoppel.[30] That doctrine requires that any reliance made on the promise by the promisee or others be justifiable in nature.[31] Further, any actions taken in reliance by the promisee should have been reasonably foreseeable by the promisor.[32] A member could not have reasonably foreseen that he would be expected to forbear from returning to work for an indefinite term. Nor could he have foreseen that he would be expected to forbear from working even after he had resigned from the union for the express purpose of escaping the strike rule.[33] Consequently any contractual reliance made upon such expectations or promises might be considered void because it was unjustifiable or unforeseeable.

After finding that the employees had incurred residual obligations which justified the union's actions even after resignation, Justice Blackmun turned to the alternative theory under which the union's actions could be legitimized. This theory was based upon the concept that members of a union, *by implication,* waive their section 7 rights to refrain from concerted activities by joining the union and agreeing to undertake union obligations and activities. Although this theory of section 7 waiver has received little exposure in the courts, Justice Blackmun found authority for its adoption in the

---

> We can imagine a case involving three hypothetical employees whom we shall call Jones, Smith and Parks. Initially, Jones is anxious to strike but Smith and Parks hesitate, finally acquiescing on the condition that they all agree to stick it out for the duration of the strike. We suggest that this kind of mutual reliance is implicit in all strike votes; many employees would hesitate to forego several weeks or months of pay if they knew their cohorts were free to cross the picket line at any time merely by resigning from the union.

NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 446 F.2d 369, 372 (1st Cir. 1971).

30. Boyer, *Promissory Estoppel: Principle from Precedents,* 50 MICH. L. REV. 639, 644-653 (1952). Dean Boyer states that the courts gave the doctrine of promissory estoppel its first clear recognition in the enforcement of charitable subscription contracts. *Id.* at 652. The courts recognized that the contract-promise was based on a gift to a charity. If the promisee substantially changed his position in reliance on the promise, and the change was one that was reasonably foreseeable by the promisor, then the promisor would be estopped to plead a lack of consideration for his promise. *Id.* at 650 (citations omitted).

31. N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 739 (D.C. Cir. 1963) (reliance on a promise must be justifiable before recovery can be had on the basis of promissory estoppel); *see* 40 GEO. WASH. L. REV. 330, 342 (1971). *See generally* Boyer, *Promissory Estoppel: Principle from Precedents,* 50 MICH. L. REV. 639, 644-53 (1952).

32. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine,* 98 U. PA. L. REV. 459, 461-65 (1950).

33. *See* Brief for Appellant at 19, NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972).

case of *NLRB v. Shop Rite Foods, Inc.*,[34] in which the Court of Appeals for the Fifth Circuit stated that when an employee joins a union he agrees to exercise some of his section 7 rights only in accordance with the majority choice of the union membership. Justice Blackmun relies upon this theory when he states that "the policy of § 7 would not be frustrated by a holding that an employee could, in the circumstances of this case, knowingly waive his § 7 right to resign from the union and to return to work without sanction."[35] By comparison, the charitable subscription theory was adopted in order to justify the union's actions as legitimate under the section 8(b)(1)(A) proviso. By adopting the alternative theory of waiver, Justice Blackmun is again attempting to legitimize the disciplinary actions of the union, with the exception that under this theory the union's conduct is legitimized without a necessary resort to the protection offered to the union by the proviso. If a member waives his section 7 rights by joining a union it may be said that it is impossible for the union to violate those rights, since they effectively cease to exist.

Although the dissent presents an especially interesting and imaginative theory in the charitable subscription doctrine, neither of the alternative theories rise to the level of justifying or legitimizing the union actions, either within or without the proviso. Nor does the dissent effectively show that *Granite State* represents a departure from the rule of *Allis-Chalmers*.[36] The *Granite State* majority opinion is based upon an interpretation that

---

34. 430 F.2d 786 (5th Cir. 1970). The court stated that "[t]he extent to which any individual employee's Section 7 rights will be held limited by the needs of his collective bargaining unit has been the subject of case by case development. *Allis-Chalmers* limits those rights at least vis-a-vis the member's union in picketing situations." *Id.* at 789; *see* NLRB v. UAW, 320 F.2d 12, 15 (1st Cir. 1963). When an employee voluntarily joins a labor organization he "takes off the protective mantle of Section 7's 'refraining' provision and renders himself amenable to the reasonable internal regulations of the organization with which he chooses to cast his lot." *See generally* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 200, 87 S. Ct. 2001, 2017, 18 L. Ed. 2d 1123, 1139 (1967). The dissenting opinion filed by Justice Black indicated that the majority opinion suggested that "by joining a union an employee gives up or waives some of his § 7 rights . . . ."

35. NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, —, 93 S. Ct. 385, 390, 34 L. Ed. 2d 422, 429 (1972) (citations omitted).

36. Justice Blackmun's opinion implies that the majority opinion in *Granite State* is in disharmony with *Allis-Chalmers*. Justice Blackmun states that

> [i]n NLRB v. Allis-Chalmers this Court held that a union could enforce in a state court a fine levied against a strikebreaking member. The Court noted that, at the time § 8(b)(1)(A) was enacted, "provisions defining punishable conduct . . . constituted part of the contract between member and union and that 'The courts' role is but to enforce the contract.'" . . . That section was not viewed as prohibiting "the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines." . . .
>
> *Today the Court reaches an opposite result* . . . .

NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, —, 93 S. Ct. 385, 388-89, 34 L. Ed. 2d 422, 427-28 (1972) (citations omitted) (emphasis added).

Allis-Chalmers was modified or qualified by restrictions expressed in *Scofield*. Such an interpretation tends to indicate the decision as one in harmony with *Allis-Chalmers* rather than one in disharmony and departure.

It should be noted that there is strong dicta in both *Granite State*[37] and *Boeing*[38] that suggests that unions might effectively restrict or curtail a member's freedom to resign if such restrictions were lawfully enacted into union constitutions and bylaws.[39] Thus it may be predicted that unions will move quickly to adopt such restrictions and introduce them into their membership documents in an attempt to escape the rule and effect of *Granite State*. It may further be predicted that such action will only temporarily foreclose the matter from future litigation. Indeed, the *Granite State* Court in effect opened the door to litigation concerning the validity of such resignation restrictions when it states that "[w]e do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign."[40]

Future litigation on the subject of a member's freedom to resign will present the Court with opportunities to review its commitment to the theory of contractual relationship between union and member.[41] If the Court con-

---

37. The Court stated:

> We have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union. . . .
>
> . . . .
>
> We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign.

Id. at —, 93 S. Ct. at 387, 34 L. Ed. 2d at 426 (1972) (citations omitted).

38. In the *Boeing* case the Court of Appeals for the District of Columbia Circuit stated that "[s]ince the International Union Constitution and By-laws contained no express restriction upon a member's right to resign it is clear that the strikebreaker/employees were free to resign at will, subject only to their being bound by any permissible collective bargaining agreement provision limiting this right." Booster Lodge No. 405, Machinists v. NLRB, 459 F.2d 1143, 1153 (D.C. Cir. 1972).

39. *See* 85 HARV. L. REV. 1669, 1676 (1972).

40. NLRB v. Granite State Joint Bd., Textile Workers, Local 1029, 409 U.S. —, —, 93 S. Ct. 385, 387, 34 L. Ed. 2d 422, 426 (1972).

41. Although the theory has achieved widespread acceptance and, in fact, prevails in this country today [International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618, 78 S. Ct. 923, 924, 2 L. Ed. 2d 1018, 1020 (1958)] it does not stand without criticism. *See* Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1055 (1951). The contract theory of union membership is denounced as a "legal fabrication." Although the contract is purportedly governed by the terms expressed in the union constitutions and bylaws, these ". . . constitutional provisions, particularly those governing discipline, are so notoriously vague that they fall far short of the certainty ordinarily required of a contract. The member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Even then, the union is not bound, for it retains the unlimited power to amend any term at any time." (Citations omitted.) Gould, *Some Limitations upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 Duke L.J. 1067, 1101. "[T]he Court in *Allis-Chalmers* was mesmerized by the contract theory of union constitutions . . . ." (Citation omitted.)

tinues to vindicate the theory it will be called upon to review the validity of the predicted abundance of resignation clauses. Where it finds the unions have enacted constitutional regulations which unduly restrict the circumstances under which a member may resign, the Court will be asked to void the contract.[42] To date, however, the NLRB and the courts have had little difficulty with such resignation restrictions, since the unions from which members have resigned have either denied such a right completely,[43] or else have imposed comparatively reasonable restrictions which the NLRB and courts have honored.[44] The Court has failed to suggest any other test by which the validity of such resignation clauses may be judged other than the general requirement for reasonability implied in the cases of *Marine Workers*[45] and *Scofield*.[46] Based on the authority represented in these and other court and Board decisions,[47] it is probable that future litigation on the subject of validity of constitution and bylaw clauses will continue to turn on the question of reasonability and the included question of undue restriction. "If the unions do not adopt reasonable rules, they will be saddled with the right to resign immediately . . . ."[48] The courts will thus be called upon to exercise the test of reasonability until specific guidelines are formed as a result of the litigation.

When Congress enacted section 8(b)(1)(A) at least one legal commentator saw the section as a "dismal swamp of uncertainty."[49] Although

---

42. Gould, *Some Limitations upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1102.

43. *Id.; see* Local 205, Lithographers, 186 N.L.R.B. No. 69 (1970). The Board refused to enforce a union's constitution which provided that resignation was permissible only if the member was in good standing with the union and had departed from the industry.

44. *Id. See also* NLRB v. UAW, 320 F.2d 12, 16 (1st Cir. 1963) (the court upheld and enforced the union's constitution and bylaws as viable provisions with which members were required to comply in order to effectively sever their relationship with the union).

45. NLRB v. Local 22, Marine & Shipbuilding Workers, 391 U.S. 418, 428, 88 S. Ct. 1717, 1724, 20 L. Ed. 2d 706, 714 (1968). The Court stated that "[w]e conclude that unions are authorized to have . . . procedures for processing grievances of members . . . but . . . a court or agency might consider whether a particular procedure was *'reasonable'* . . . ." [Emphasis added.]

46. Scofield v. NLRB, 394 U.S. 423, 430, 89 S. Ct. 1154, 1158, 22 L. Ed. 2d 385, 393 (1969). "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which . . . is *reasonably* enforced . . . ." [Emphasis added.]

47. *See generally* NLRB v. UAW, 20 F.2d 12, 16 (1st Cir. 1963): " '[T]here is a limit of reasonableness beyond which a union may not go' in structuring its internal regulations." NLRB v. UAW, 297 F.2d 272, 276 (1st Cir. 1961); "[T]here is a limit of reasonableness beyond which a union may not be permitted to go in holding captive its members." (Citation omitted.)

48. Gould, *Some Limitations upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1107.

49. Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1, 33 (1947). After reviewing section 8(b)(1) and examining potential problems reflected in the section, Mr. Cox states that "[t]he scope and variety of the