J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 1(3) 245-252, 1992-93

"VOLUNTARY" UNION MEMBERSHIP IS FIRMLY IN PLACE: PATTERN MAKERS AND PROGENY IN THE '90s

JAMES DUNLAVEY
California State University, Chico

ABSTRACT

It seems now, in the 1990s, that our courts are confirming what they believe was the congressional intent of the National Labor Relations Act (NLRA), i.e., that unionism[1] (even in the face of a contractual "union shop" clause) is voluntary and that resignation from the union to avoid the infliction of member penalties is approved. Extending from that belief, the Pattern Makers' case and its board, circuit court, and district court progeny are establishing a "financial core" status for any member, the qualifications for F.C. member still ongoing.

Probably without knowing that he was doing so, in early September, 1977, a Mr. William Kohl fired another of those shots " . . . heard round the world," in his instance a shot involving employer-employee relations and union membership. The war that followed his actions that month has created a national issue in labor law that is still going strong. Though it is doubtful that Mr. Kohl will ever be known as the modern-day minuteman, the fire he started has had an effect on every union member employed by an employer under the jurisdiction of the National Labor Relations Act, and its ramifications continue to affect many of us.

Mr. Kohl, after his union (Pattern Markers' League of North America, AFL-CIO) had seen the existing collective bargaining agreement terminate and had rejected a new contract offer, and after he had been on strike for four months in support of a wage increase, submitted a letter of resignation to his union and

[1] "Voluntary unionism," "Financial Core Member" Only; Ability to resign your union to avoid penalties; "Full" union membership; membership whittled down to its financial core.

doi: 10.2190/XVYM-L56W-MENV-7A6B
http://baywood.com

returned to work. Mr. Kohl's action was taken in direct conflict with what was called "League Law 13" of his union, which stated, "(n)o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent." When the strike ended in December, 1977, Kohl was expelled from the union; his local notified Kohl's employer that because he was no longer a member of the union he should be discharged pursuant to a "union shop agreement" in the new contract; and Kohl was notified by his union that he could regain admission to the union, and thus remain employed, only if he paid back dues, a readmission fee, and $4200 damages to the union for deserting the strike by returning to work. Kohl did not pay the several amounts and was denied readmission to the union. Kohl was not discharged by his employer.

Thus began what came to be, in 1985, the United States Supreme Court ruling in *Pattern Markers' League of North America, AFL-CIO et al., v. National Labor Relations Board et al.*, the landmark "*voluntary* unionism" decree and "shot" of William Kohl [1].

THE LAW OF UNION MEMBER DISCIPLINE PRIOR TO THIS CASE

During the years after 1935 (the initial year of the NLRA), several laws, case interpretations, and applications of the law had attempted union discipline. The existing legislation, in part, consisted of sections of NLRA, primarily these [2]:

1. *Section 7*: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . , and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).[2]
2. *Section 8(a)(3)*: . . . Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which ever is the later, . . .
3. *Section 8(b)(1)(A)*: . . . Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .
4. *Section 8(b)(2)*: It shall be an unfair labor practice for a labor organization or its agents—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

[2] Section 7, of course, is actually section 158 of 29 U.S.C. § 151 to 169. The industry or "market place" numbering of the NLRA sections will be used throughout.

> to tender the periodic dues and the initiation fees uniformly required as a condition or acquiring or retaining membership; . . .

The case law (i.e., that of the Supreme Court) was mainly comprised of two cases, those of *NLRB v. Allis-Chalmers Mfg. Co.* [3] and *Scofield v. NLRB* [4].

Allis Chalmers involved union members who crossed a picket line during a strike at their place of employment, in violation of their union's by-laws. Financial penalties were assessed against them by their union, and following this an 8(b)(1)(A) violation asserted. The Court in that case opined that there was, indeed, a power of the chosen union to protect against its own erosion of status caused by those who disobeyed rules and regulations governing membership. Referring to some 1959 amendments to the NLRA section, the Court expressly recognized a union's right to fine, suspend, expel or otherwise discipline its member for this type of activity. The Court closed with some seemingly puzzling wording that indicated that *"full"* union membership was not compelled by the union security clauses of the contract (a union shop agreement), that minority union members who did not favor unionism but were required to be members to hold their jobs might not be affected by the decision, and that the issue of a member whose union membership was limited to the obligation of paying monthly dues was not involved in that case [3].

In the *Scofield* case, union members were fined by their union for exceeding ceilings on production as set by the union; again, an 8(b)(1)(A) attack was made against the practice. The Court found the application of the rule to be valid, suggesting that a union member, so long as s/he chooses to remain one, *is* subject to union discipline for violations of union policy that reflects a legitimate union interest, does not impair the NLRA and is reasonably enforced against union members *who are free to leave the union and escape the rule* [4], without explaining exactly what the justices meant by the underlined portion of their decision.

One other Supreme Court case, that of *NLRB v. General Motors Corp.* [5] had indicated thoughts along these same lines, stating that membership in a union as a condition of employment had been essentially whittled down to its *financial core* (i.e., under 8(a)(3) and 8(b)(2). Both *Allis-Chalmers* and *Scofield* made reference to this notion without further explanation.

PATTERN MAKERS' LEAGUE AND THE COURT

Returning to Mr. Kohl and his 1977 activity, recall that Mr. Kohl resigned his union and worked during a strike in violation of the union's by-laws denying him this right during the strike or when the strike was imminent. In the wording of the Supreme Court decision, the Court examined the Section 7 rights of employees, the *Allis-Chalmers* and *Scofield* analyses of union-charged unfair labor practices under sections 8(b)(1)(A) and 8(b)(2), and the fact that the National Labor

Relations Board had held that these restrictions on his right to resign *did* violate section 8(b)(1)(A)! The language of the Court on this point was devastating to *compulsory* unionism [6, 473 U.S. at 106]:

> The union security agreements permitted by 8(a)(3) require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules or policies with which he disagrees.
>
> Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns. . . .
>
> By allowing employees to resign from a union at any time, 8(a)(3) protects the employee whose views come to diverge from those of his union.
>
> Under 8(a)(3) the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. (cites) Therefore, an employee required by a union security agreement to assume financial "membership" is not subject to union discipline. Such an employee is a "member" of the union only in the most limited sense.

The leagues' answers to these wordings were, of course, rather obvious—we are not trying to get the worker fired, only disciplined for violating union rules that had been formulated to follow the *Scofield* and *Allis-Chalmers* allowances. To these suggestions, the Court responded by finding that it would (at least a majority would) defer to the board's interpretations of the act, meaning essentially that a finding of discipline allowance when firing cannot be promoted would be inconsistent [6, 473 U.S. at 110]:

> We find no basis for refusing to defer to the Board's conclusion that League Law 13 is not a "rule with respect to the retention of membership" within the meaning of the proviso [i.e., the proviso of 8(b)(1)(A)].

The meaning of the decision seemed clear: a union member may resign his union at any time, even in the face of a union restriction against doing so, as long as the financial obligation is continued during a period of time (the collective bargaining agreement duration) when s/he is required to tender dues. But, in resigning during a period of time when the agreement is not in force, the member is immune from any union discipline for doing so and is not required to tender dues. Not only was this message devastating to "compulsory unionism," but the Court had also indicated something about a "financial core" member only and the fact that this type of member was, apparently, to be immune from discipline also, **at any time**, whether during a contract duration or not! It did not take long for this to become clarified, at least at the circuit court level. The Supreme Court has not spoken to the issue of the financial core member since *Pattern Makers*.

THE PROGENY OF *PATTERN MAKERS'*

In 1987, the Eighth Circuit Court of Appeals was called upon to determine whether or not the *Pattern Makers* case rule applied to employers under the jurisdiction of the Railway Labor Act, and to determine the status of "permanent" employees who returned to work during the strike after resignation *vis a vis* other "permanent" employees who had stayed out during the strike but who had greater seniority at the time the strike started—the employer had granted continuing seniority to the "cross-overs" [7].

With reference to the application of the *Pattern Makers* decision to the RLA, the court assumed, without deciding, that it did apply to cases under the RLA. With reference to the issue of seniority the court said [7, p. 844]:

> In the present case, cross-overs have apparently ceased their union memberships. . . . This action only exacerbates the division among union members along lines of union loyalty. Furthermore, if the Union cannot penalize its members for working during a strike, neither may TWA reward those members with permanent replacement status. Accordingly, the cross-overs cannot be granted permanent replacement status because such action discriminates on the basis of union activity.

In 1988, three cases were reported by the circuits bearing on the union and its members, two of these from the Ninth Circuit and one from the Seventh Circuit. The first of these, *NLRB v. General Teamsters Local No. 439* [8], saw an admission by the union that it could not restrict the member's right to resign nor fine her/him if s/he resigned before the employee crossed the picket line—thus the case actually turned only on the timing of the resignation and did not add anything of import to the instant issue (1988).[3] In the Seventh Circuit case, *NLRB v. Local 73, Sheet Metal Workers' International Association, et al.* [10], the court described itself as being asked whether or not *any* restrictions could be placed on a union member's right to resign, and upheld the board's determination that none could exist. In a portion of its discussion, however, the court touched on an issue that deserves the reader's attention also—at page 505 of the decision the court examined *Pattern Makers* and its possible holding that the ruling applied only to resignations *during or immediately prior to a strike.* This Court noted *dicta* from the Supreme Court case of *NLRB v. International Bhd. of Elec. Workers, Local 340*, that might allow for restrictions other than during those time periods [11, p. 577]:

[3] There is perhaps import, though, to this decision by the Ninth Circuit—prior to *Pattern Makers'* the Ninth Circuit had refused enforcement of a Board order in a case very similar to *Pattern Makers'* See [9].

> Apparently, the Justices themselves do not entirely agree about the scope of *Pattern Makers*. Recently, the Court revisited its *Pattern Makers* holding . . . [cite]. The *Electrical Workers* majority stated in dicta that *Pattern Makers* held "that union members have a right to resign from a union *at any time* and avoid imposition of union discipline" (cites and Edit). Justice White, however, who provided the determinative fifth vote in *Pattern Makers*, contended in his *Electrical Workers* dissent that *Pattern Makers* held only that union members have a right to resign during a strike or when a strike is imminent (Cite). Thus, there may be some room for debate about the precise scope and effect of the *Pattern Makers'* holding.

Before closing the issue of Justice White and his concurrences and his dissents, it is noteworthy that the Supreme Court has also seen a fair number of turnovers since 1985—the *Electrical Workers* dissent of Justice White was concurred in by Justice O'Connor and the Chief Justice on this issue.

In the *Local 73* case, the Seventh Circuit Court did refuse to substitute its judgment on the issue of the board's, and, enforced the board's order [10]. In the final 1988 case, the Ninth Circuit Court did order enforcement of a board over that struck down a union's ruling that *financial core members* (individually declared by the members prior to antistrike activity) could not participate in the union's pharmacy, dental and eye care benefits because of their "status" as financial core members only [12]. Here, after a strike was terminated, the union denied rights to these facilities to the FC members in defiance of a collective bargaining agreement with its employer that the union " . . . would not entertain any discriminatory retaliation . . . " against those members of the union. The Ninth Circuit majority seemed, in this case, to recognize that a union might treat FC members differently from full members, but ruled that this right can be (and was) waived by the CBA clause. This particular issue, among others, would seem to require U.S. Supreme Court action in the not too-distant future.

In a 1989 case of the Third Circuit, a true financial core member issue was determined in favor of the member of the union [13]. The decision, it seems, is particularly well-thought-out and reasoned—it granted the board's application for enforcement. Here, members of the union applied for financial core status before they refused to honor a union-called strike; the union refused the status application because its constitution did not provide such a type of membership. At page 32 of the decision, the court wrote, "Thus, the task before us is to decide if the Board may take the additional step of prohibiting the union from imposing fines on a member who has not resigned, but has elected to take the status of "financial core" even though the status is not reflected *ipsissimis verbis* in the Union's constitution or by-laws" [13, p. 32]. The answer was quick: yes, it may and the decision will get our enforcement [13].

Thus, at least for the Third Circuit and maybe for us all, it appears that any "history" of nonattendance at union meetings, nonparticipation in elections or

activities as might have been thought to be required from *Pattern Makers* is not required; what is required is an anytime declaration of status and that is all!

Thus, at the end of 1989, it seems to have been clear that a union member, in the face of a strike by his/her union, could resign from membership and be immune from discipline for that action from the union, or could declare him/herself (it was thought by actions or words with some history of the fact) financial core members only, and be immune. Nothing in the 1990 cases refuted that thought; something has added to it, however. In a 1990 Third Circuit case [14], that circuit continued its belief that *Pattern Makers'* allows for (i.e., that Section 7 allows for) member resignation from membership *at any time* [14, p. 1412].

Finally, the Fourth Circuit case of *NLRB v. Office and Professional Employees International Union, Local 2, AFL-CIO* [15], (the saga of one Janet Love) confirms for that circuit the understanding of *Pattern Makers* that an employee who resigns her membership of a union in a "right to work" state cannot have a second initiation fee applied to her request to join the same union in another, non-right-to-work state. It is a rather "novel" situation, but the interpretations of *Pattern Makers* previously cited are confirmed.

CONCLUSIONS

It seems clear that a union member—whether one is a *full* member of the union in the sense of historic activities and support or not—may enter a strike period with at least two weapons for protection in his/her desire to continue to work through any disruption of the work, **and**, not be subject to discipline by the union for having done so. One may resign from the union, work through the disruption, rejoin the union (if required to do so) at the end of the festivities and be absolutely immune from discipline. It also seems clear that one with an historic record of financial core membership only may disobey the union's call to arms in a strike, work through the strike, and be immune from any union discipline, at least if the member can prove his/her status historically as a financial core member and maybe simply upon declaration of that status "on the spot," no matter what the historic record would indicate. It appears to be unsettled whether or not this second weapon can be sought and obtained at "any time," rather than just being exercisable during or immediately prior to a work interruption.

It took pure voluntary unionism from at least as early as 1963 to 1985 to mature, and growth seems to be in full swing in favor of further liberal interpretations. Mr. Kohl ignited something that will not go away—no less than the case of *Roe v. Wade*! With what appears to be a solid, employer-oriented board in place at this time, and with a similar line-up of justices (it would seem), the probability is that these turns away from compulsory unionism, first commenced with the Taft-Hartley amendments to the NLRA, will continue in the '90s. As with all other areas of the law, it is notable that we can still change from time to time as conditions and the people expect.

* * *

Dr. Dunlavey practiced law in the San Francisco Bay Area for some 25 years following University of California, Berkeley graduation. His specific concentrations were litigation and labor law. Dr. Dunlavey has been a Professor of Labor Law at California State University, Chico for 12 years following private practice retirement.

REFERENCES

1. *Pattern Makers' League of North America*, AFL-CIO et al, v. NLRB, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985).
2. National Labor Relations Act, 29 U.S.C. §§151-169 (1992).
3. *Allis Chalmers Co. v. NLRB*, 388 U.S. 175, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967).
4. *Scofield v. NLRB*, 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969).
5. *NLRB v. General Motors Corp.*, 373 U.S. 734, at 742, 83 S.Ct. 1453 at 1459, 10 L.Ed.2d 670 (1963).
6. *Pattern Makers' League of North America, AFL-CIO et al, v. NLRB*, 473 U.S. at 106, 105 S.Ct. at 3071 (1985).
7. *Independent Fed. of Flight Attendants v. TWA*, 819 F.2d 839 (8th Cir. 1987).
8. 837 F.2d 888 (9th Cir. 1988).
9. *Machinists Local 1327 (Dalmo Victor II)*, 263 N.L.R.B. 984 (1982), *enf. denied*, 725 F.2d 1212 (9th Cir. 1984).
10. 840 F.2d 501 (7th Cir. 1988).
11. *NLRB v. International Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 1075. Ct. 2002, 95 L.Ed, 2d 557 (1987).
12. *Teamsters Cannery Local 670, etc. v. NLRB*, 856 F.2d 1250 (9th Cir. 1988).
13. *NLRB v. Local 54, Hotel Employees and Restaurant Employees International Union, AFL-CIO*, 887 F.2d 28 (3rd Cir. 1989).
14. *Tile, Marble, Terrazzo, et al v. Local 32*, 896 F.2d 1404 (3rd Cir. 1990).
15. *NLRB v. Office and Professional Employees Inter. Union, Local 2, AFL-CIO*, 902 F.2d 1164 (4th Cir. 1990).

Direct reprint requests to:

Dr. James Dunlavey
California State University
College of Business
Department of Management
Chico, CA 95929-0031