In the

Supreme Court of the United States

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY, Respondents.	)	No. 71-1417
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO Respondents.	)	No. 71-1607

Washington, D. C.
March 26, 1973

Pages 1 thru 65

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v.	No. 71-1417
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- - - - and - - - -	
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v.	No. 71-1607
THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Respondents.	

Washington, D. C.,

Monday, March 26, 1973.

The above-entitled matters came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice

POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BERNARD DUNAU, ESQ., 912 Dupont Circle Building, N.W., Washington, D. C. 20036; for Booster Lodge No. 405, etc.

NORTON J. COME, ESQ., Assistant General Counsel, National Labor Relations Board, Washington, D. C. 20570; for the National Labor Relations Board.

SAMUEL LANG, ESQ., Kullman, Lang, Inman & Bee, Post Office Box 60118, New Orleans, Louisiana 70160; for the Boeing Company.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 71-1417, Booster Lodge No. 405 against the National Labor Relations Board, consolidated with No. 71-1607, National Labor Relations Board against the Boeing Company.

Mr. Dunau, you may proceed whenever you're ready.

ORAL ARGUMENT OF BERNARD DUNAU, ESQ.,

ON BEHALF OF BOOSTER LODGE NO. 405, ETC.

MR. DUNAU: Mr. Chief Justice, and may it please the Court:

There are two questions in this case.

One, where a union rule prohibits a member from engaging in strike-making -- strikebreaking, may that rule be thoroughly, reasonably, and validly interpreted to require that an employee who is a member of the union at the time the strike began is required to observe the existing union obligation he had to restrain from strikebreaking for the duration of that strike notwithstanding his resignation in the midst of the strike.

The second question we have is whether the Labor Board is empowered to determine the reasonableness of the size of a union fine imposed against a member for engaging in strikebreaking.

These two questions arise in these circumstances:

Boeing and Booster Lodge have a collective bargaining agreement. It expires on September 15, 1965. No agreement is reached. The next day a strike begins. The strike lasts 18 days. On October 3 an agreement is reached; the strike ends.

There were 1900 employees in the unit that was struck. Of these, 143 returned to work during the course of the strike; 24 never resigned, they retained their membership throughout the strike, but engaged in strikebreaking; 119 did resign, of these 119, 61 returned to work after their resignation and 58 returned to work before their resignation.

All, without regard for whether they resigned or when they returned to work, were found guilty at their internal union proceedings: that they had engaged in misconduct in violation of the Machinists Constitution, which defines as misconduct of a member, accepted employment in any capacity in an establishment where a strike or lockout exists, as recognized under this constitution without permission.

Those accused that appeared for trial apologized and pledged future loyalty to the Union were in substance fined fifty percent of their strikebreaking earnings; what they earned from the struck employer was the measure of their fine, one-half was the fine.

Those who did not appear for trial and were found guilty were fined a flat sum of $450.

This case came before the National Labor Relations Board on a complaint which alleged that the imposition of the fine, which were court collectible, the Union sought the right to two court proceedings, and did institute court proceedings to collect these fines.

The claim before the Board was that the imposition of fines constituted restraint and coercion of the employees in the exercise of their right to refrain from concerted activity for mutual aid or protection.

The claim divided into two parts: as to those employees who never resigned; and as to those employees who resigned but engaged in strikebreaking prior to their resignation. It was said that the restraint and coercion resided in the unreasonableness of the size of the fine. It was too large, and therefore it was restraint or coercion.

The Board dismissed that part of the complaint. It said, given the validity of the Union rule against strike-breaking, the size of the fine was not its business, it was the business of a State court on a suit to collect or set aside that fine; the State court would decide whether or not the fine was too large.

As to the second claim, the complaint alleged that those who engaged in post-resignation strikebreaking, no fine in any amount could be levied against them, and so the restraint and coercion with respect to people who engaged in

post-resignation strikebreaking was that any internal Union discipline by way of a court collectible fine was of itself restraint and coercion.

The Board held that it was. The Court of Appeals agreed with that determination. The Court of Appeals disagreed with the Board's determination that it had no power to determine the reasonablness of a fine; and both questions are here on the Union's petition and the reasonableness of fine issue on the Board's petition as well.

QUESTION: Mr. Dunau, does the Union have the right to discharge, dismiss from the membership of the Union an employee who doesn't pay his fine, or is their only remedy the power to go into the State courts to collect it?

MR. DUNAU: With respect to a person who did not resign, the Union can do a number of things: it can expel him; it can fine him and say that the penalty or the sanction for not paying the fine will be expulsion; or it can do as it did in Allis-Chalmers, and was validated in Allis-Chalmers, it can sue in court for the collection of a fine.

With respect to a resigner, it can do virtually the same things. It can say: because you engaged in prior strike-breaking, you will never again be admitted to membership in this union. Or it can say: we will fine you, and until you pay that fine, we will never again admit you to membership in this Union. Or it can do as it did in this case: it can sue

in court to collect the fine.

Now, no one, as I understand it, contests the Union's power to debar the fellow who engaged in strikebreaking, notwithstanding resignation; defining it's a sanction for enforcement of a fine as saying, You will pay or never be readmitted to the Union. The entire controversy centers here on the court collectibility of the fine, and that, it seems to us, is the identical question which was before the Court in Allis-Chalmers. The sole difference being that in Allis-Chalmers, the worker retained his membership; here he resigned in the course of a strike.

Our question is whether we can have a Union rule which says, if you are a member and the obligation to refrain from strikebreaking attached at the commencement of a strike, can we require, as a condition of resignation, you can resign but the one obligation you cannot shed by resignation is your obligation to refrain from strikebreaking for the duration of the existing controversy. Any --

QUESTION: Mr. Dunau, it may not be important, but I'm a little fuzzy on one or two facts here. Do we know whether each fined member voted in favor of the strike, as we did in Granite State?

MR. DUNAU: No, sir. We do not know, and we can never know, because under the Machinists Constitution the decision whether or not to go out and strike is taken by

secret ballot. At the time this strike was called, it required a three-quarter vote in favor of the strike, by secret ballot, and the whole notion of a secret ballot is that we shall not know who voted for or against the strike.

QUESTION: Does the record show whether each person fined here initially participated in the strike?

MR. DUNAU: I believe the record will show that, Your Honor.

Well, now I have to withdraw that. I think the record will show that most did, I'm not sure whether all of them did. There may be a handful who returned to work on the first day of the strike, but without checking the record more closely than I now have a recollection of, I could not say.

But most of them did go out and then resign in the course of the strike. But I cannot say whether all participated in it.

QUESTION: One last question. I take it it does show the date of the respective resignations?

MR. DUNAU: Yes, sir, it will show when the letter of resignation was sent. It may show when it was received. The Board holds that resignation is effective upon the Union's receipt of the letter of resignation.

I don't think there's any question about the operative fact, namely, that as to a substantial number they engaged in strikebreaking prior to resignation -- as to a

substantial number, they engaged in strikebreaking only after their resignation was effective.

Now, we have a preliminary question in this case, of the interpretation of the provision in the Union Constitution barring strikebreaking. It says that a member shall refrain from strikebreaking. It doesn't say what happens when, in the course of a strike, a member resigns.

You have two ways, one has two ways that one can interpret that prohibition. It can say, one can say that a member is barred from strikebreaking notwithstanding resignation; or one can say a member is barred from strikebreaking except following resignation.

As between those two interpretations of a Union prohibition against strikebreaking, it seems to us at least fair and reasonable to say, given the fact that it is a Union prohibition against strikebreaking, given the fact that the whole purpose of a rule against strikebreaking is to keep a man from returning to work during the course of a strike, that the fair and reasonable interpretation of that rule is that it means that a member who was a member when the strike began is required to refrain from strikebreaking for the duration of that controversy.

QUESTION: Mr. Dunau, what is the nature of our review here? I take it the Board found against you on that, and the Court of Appeals found against you on that. Is it

simply a preponderance of the evidence? Would you have to show that there was no substantial evidence to support that, or do you treat it as a conclusion of law? How do we get at it?

MR. DUNAU: I suppose, since the Board tells us that what it is doing is interpreting a contract, and the conventional formulation as I understand it is that the interpretation of a contract is supposed to be a question of law open to unrestricted judicial review, that we are free here to decide whether the Union's Constitution is fairly and reasonably interpreted to bar strikebreaking.

None of us have focused on Your Honor's precise question, namely, given the Board's interpretation, what is the scope of judicial review with respect to that interpretation. And I suppose that none of us have focused on it because the Board has never said that this is not a fair and reasonable interpretation of the Union prohibition. What it has said is that you cannot have such an interpretation. That the Union's authority over a member is limited to the time that he was a member, and that, ipso facto, once he resigns, the Union's authority over him is at an end.

If that is correct, if that is the way they read any Union Constitution, as I read their decision, if that is correct, one never reaches a question of how do you interpret this prohibition, no matter how reasonably and fairly it is

interpreted as a matter of reading the prohibition, you cannot have that interpretation because there is a superseding, according to the Board, rule of contract law that the authority of the Union over the member ceases on resignation; hence, this rule, even were it explicit, as explicit as the Machinists made it in September 1972, when it amended this prohibition, to tate, in turn:

"Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement."

That gives us -- no one -- any problems of interpretation; it is now absolutely explicit.

As I read the Board's decision, they will say: As a matter of contract law you cannot have that kind of restriction, because your authority over the member ceases with the resignation; therefore, there can be no post-resignation implication of continuing obligations to perform any part of the Union obligation. And it is that on which this litigation has centered as a matter of how do you read a Union Constitution? Do you say that once resignation occurs, every obligation, ipso facto, stops? If that is the way you read it, then our prohibition cannot apply.

QUESTION: It's also a definition of the word

"member", isn't it? Once you resign, you're not a member, you're a former member.

MR. DUNAU: Which presents the problem whether you are -- if you are a former member -- or put it, rather, this way: if during the period of membership, if the condition of acquiring and retaining membership is that on resignation a particular obligation will endure beyond your resignation, can that be interpreted --

QUESTION: Beyond your membership.

MR. DUNAU: Yes. -- beyond your membership, can a particular Union obligation subsist beyond your membership.

The Board says no as a matter of contract law. We think that has to be wrong as a matter of contract law. Because if it is not wrong as a matter of contract law, we could not, in September '72, have amended our constitution to say that: following resignation, nevertheless the obligation to refrain from strikebreaking shall subsist. It seems to us that as a matter of how one reads the relationship of a member to a union, it was said as well as I know it, in Section 65(3) of the British Industrial Relations Act of 1971: "Every member of the organization shall have the right, on giving reasonable notice and complying with any reasonable conditions, to terminate his membership of the organization at any time."

We are saying that a reasonable condition on resigna-

tion is that a fellow who is a member of the Union at the time the strike began shall, for the duration of that strike, respect his obligation that he had to refrain from strikebreaking.

QUESTION: Regardless of how long the strike goes on?

MR. DUNAU: Yes, sir, regardless of how long the strike goes on, because the whole notion, it seems to us, of strike solidarity is that the majority decides when to strike and the majority decides when to stop striking, and that the whole point of strike solidarity and concerted activity for mutual aid and protection is that the unit as a unit determines its destiny for good or ill, not any individual.

QUESTION: But that was the rationale of, what was it, the First Circuit in Granite State, and that was rejected by this Court last December, wasn't it?

MR. DUNAU: On a basis of decision, as we understand it, which said: we reject that where there is no limiting Union rule. We take it to mean, therefore, that when the Court decided to hear this case on the resignation issue, it wanted to decide a question of what do you do when there is an existing Union rule; and that is what we have in this case.

We have a rule against strikebreaking, which we think are reasonably and fairly interpreted to bar resignation -- not to bar resignation, to bar strikebreaking by a resigner

for the duration of the existing controversy. What he does in any future controversy, we cannot treat him in any way except as a man on the street; but when we have a rule that says that for the duration of an existing strike you will respect the obligation you undertook as a member, that we think was the question reserved in Granite State, that we think is the question which is presented here.

And with respect to --

QUESTION: Would you make any distinction, Mr. Dunau, between members of unions who are members as a matter of compulsion and those who are members as a matter of choice?

MR. DUNAU: We make no such distinction, Your Honor.

In this case it happens that every member was a member by choice, because the collective bargaining agreement explicitly stated that every non-member could join or could not join the union as he saw fit; every person on employment was told, you have a free choice to join or not to join; therefore, every one who joined joined because he wanted membership.

But that is this case. We make no distinction with respect to employees who are required under a union security agreement to acquire membership, even they are voluntary members in the sense of being full members, because all a union security agreement can do is obligate the person to pay his union dues and initiation fees, every

other obligation of membership is his to acquire if he wants it, there is no compulsion on him to acquire that membership.

QUESTION: Well, can he be a member but reject this provision with reference to strikebreaking?

MR. DUNAU: If the Union is willing to enforce against him the obligation of a contract to pay his dues and fees, that is the limit of it. If the Union is willing to say, Okay, we will take you only on that basis, the Union can do that. Or it can say to the fellow, You will become a full member or not be a member at all. In that event, he doesn't even pay union dues or initiation fees.

But it is his choice as to whether he adopts the full obligation to Union membership or does not.

QUESTION: Do you define those who resign, to use your phrase, as men in the street?

MR. DUNAU: I don't know what the usual phrase means, Your Honor.

QUESTION: You said that he's just like any other men in the street. These men who resign, are they in that category so far as the Union is concerned?

MR. DUNAU: So far as the Union is concerned, once they resign, subsequent to the termination of that strike, they are like any other member in the street, indeed in this case --

QUESTION: Except that they can't work.

MR. DUNAU: They cannot work for that employer for the duration of the strike.

QUESTION: But the man in the street can, is that it?

MR. DUNAU: You're correct.

QUESTION: As any other man in the street can?

MR. DUNAU: That is the price difference, Your Honor, between being a Union member subject to the obligations of the Union membership and not being a Union member.

QUESTION: He's not really a member, he's a former member.

MR. DUNAU: He was a former member, and the question here is whether we can bind a former member for the duration of a strike to his obligation to refrain from strikebreaking. Under the Machinists Constitution it takes a three-quarters majority vote to call a strike. If you want to terminate the strike, it takes a majority vote of the people who are participating in the strike. That we think is the democratic means by which we achieve both freedom and unity.

The majority rules.

QUESTION: Is the termination vote a secret vote, too?

MR. DUNAU: Yes, Your Honor. It appears on page 138 of the record: "A proposal to settle or declare off an existing strike must be presented at a regular or called meeting of a local lodge, or a meeting of the members

affected (as the case may be), and decided by majority vote, by secret ballot, of the members involved."

Now, the Executive Council of the Union, of the International Union, reserve the authority to discontinue a strike notwithstanding the wishes of the employees; but their authority is limited to saying: If we think this strike should be over, we will stop paying strike benefits. But they cannot otherwise affect the continuation of the strike.

But the men themselves can call it off by a majority vote, by secret ballot.

Now, if we are right, that we can interpret our prohibition against strikebreaking, to pertain to find a member who resigns, and it's for the duration of the strike, and if we are right that as a matter of contract law, the association of law: An association, a labor organization, any voluntary association can reasonably condition the circumstances under which resignation can be effectuated; we have only one other question left in this case: Is it a violation of Section 8(b)(1)(A) for a Union expressly or impliedly to say that a fellow who is a member when the strike begins will stay -- will respect his obligation to refrain from strikebreaking?

As to that, I think the best place to begin is the wording of the proviso themselves, the proviso excludes from restraint or coercion, this paragraph shall not affect the

right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

And when we say that the condition of resignation is that you will refrain from strikebreaking for the duration of the existing strike, that is a rule with respect to the acquisition or retention of membership. That is all it is. And that is expressly reserved to the Union and carves out from any notion of restraint or coercion.

QUESTION: Now, you are placing this, as I take it, as a matter of contract law?

MR. DUNAU: No, sir. At this point I'm placing it as a matter of what the statute allows us to do. If, as a matter of contract law, we cannot do it, then that is a question of our lack of authority under State law to have this kind of a restriction.

QUESTION: Well, is it not the combination of the section of the statute you just referred to and the contract that's made pursuant to that? That is, when the man joined the Union, he has a contract obligation -- at least I have understood that to be your argument -- a contract obligation to comply with those provisions of the Union about not breaking the strike.

MR. DUNAU: Yes, sir.

QUESTION: So that has it been not -- coming back to my original question -- at least a combination of the

statute and the contract made pursuant to that statute?

MR. DUNAU: Yes. And if one wants to look at it that way, the first question we have to answer is: Do we have, with respect to the contract between the Union and the member, a contract which says that the member on resignation will refrain from strikebreaking?

If we have that, the next question is: Is there anything in the National Labor Relations Act which bars that kind of a contractual restriction, that kind of a contract; and for us the answer seems to be right in the words of the proviso, namely, that we can prescribe our own rules with respect to acquisition or retention of membership.

It seems also to us to be quite in keeping with the rationale of Allis-Chalmers, with the whole notion of union solidarity, namely, that the reason you can collect, impose a court collectible fine against a member for engaging in strike-breaking is that that is necessary in order to maintain the cohesion of the Union as an effective organization, as an organization which can prosecute strikes; that is the whole meaning of majority rule, centering your economic power so that the majority controls.

If, in order to further that end, we can impose a court collectible fine against a member, what is the difference in rationale, in terms of preserving strike solidarity when we are reaching out for the defector; either case, whether he's

a resigner, a strikebreaker, or a resigner member. Our concern is identical, namely, that a fellow who is a member when he starts out on this enterprise shall at least respect his obligation to refrain from strikebreaking.

QUESTION: Well, if this is the rule, then, as to acquisition or retention of membership, to us the statutory language, then what we're really on to is that you cannot resign during a strike?

MR. DUNAU: No.

QUESTION: That's what it has to do with; it doesn't have anything to do with acquisition or retention of membership.

MR. DUNAU: It means that you can resign.

QUESTION: Well, then, --

MR. DUNAU: But that obligation of membership which inheres in being a member you cannot shed. It's the same thing --

QUESTION: I have very great difficulty in seeing what that has to do with acquisition or retention of membership, within the meaning of the statute.

Unless -- unless you argue that what you may say is, that you cannot resign during a strike.

MR. DUNAU: Well, --

QUESTION: Which would have to do with acquisition or retention of membership.

MR. DUNAU: We are putting it, then, the same thing, I think, in inverse order. You are free to resign every obligation of membership except that which inhered in respecting your obligation to refrain from strikebreaking; or if one wants to put it the other way, if one wants to say that you cannot resign during a strike, then surely one can say you can resign during a strike but you cannot shed that part of your obligation which --

QUESTION: The greater includes the less.

MR. DUNAU: The greater includes the less. If we can say you cannot resign at all, we can surely say you can resign but you're required to observe the pre-existing obligation to refrain from strikebreaking.

QUESTION: Would this apply in the situation where a member is -- this is outside of this case, of course -- where a member is permitted not to join the union if he pays the equivalent in a contribution for dues, he then has no obligation under the constitution, I take it?

MR. DUNAU: That's correct. If the only thing that he's undertaking to do is to pay his union dues and fees, he has not undertaken any obligation of union membership, and therefore we cannot enforce against him any obligation of union membership.

So that the fellow who wants, in the words used in Allis-Chalmers, who wants to be a limited member, to pay only

dues and fees, as to that kind of a fellow, the union has no claim with respect to his fealty, he has not undertaken any obligation of union membership, he can engage in strikebreaking to a fare-thee-well because he has not undertaken to refrain from strikebreaking.

QUESTION: Do employees have that option under this contract?

MR. DUNAU: Under this contract they have the option not to join at all, if they join they have the option that every member in this country has, every employee, to pay only dues and fees and undertake no other obligation of union membership.

Now, that did not happen in this case. There is nothing in this case to show that every employee who joined did not join and become a full member.

But anyone who wants to limit his obligation is free, under the statutes of this country, to limit his obligation. The Union, in turn, is free to say: Sorry, we don't want limited members. In which case, that person pays neither dues nor undertakes any other obligation.

But if the Union says, We want your money, but you don't have to have any other obligation of membership, that is possible. And what is obviously the most overwhelming situation in this country is that the person who pays his dues also acquires full union membership; in that event we

think he is subject to the entirety of union obligation and that means, we think, that for the duration of an existing strike, he's required to refrain from strikebreaking.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dunau.

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

MR. COME: Mr. Chief Justice, and may it please the Court:

The Board is in the middle in this case, in the sense that we agree with the Union that the reasonableness of the fines that were levied on members is not for the Board but for the State court.

But we agree with the company that, with respect to the fines that were imposed on the resignees being violative of 8(b)(1)(A).

Let me turn to that issue first. We're now talking about the fines that were levied on employees who resigned from the Union for work done after their resignation. We believe that Granite State, which this Court decided in December, requires the conclusion that those fines violate Section 8(b)(1)(A) of the Act. In Granite State, the Court held that the Union's authority to impose a court collectible fine on a member for a breach of a valid Union rule is co-terminus with the contract of membership between the Union and

its members, and thus when a member lawfully resigns and thereafter engages in conduct which the rule proscribes, the Union commits a violation of 8(b)(1)(A) to levy a court enforcible fine on him.

Finding no provision in the Union's Constitution or By-laws which limited the circumstances under which a member could resign, the Court in Granite State concluded that the Union members were free to resign at will, and that their right thereafter to return to work was protected by Section 7 of the Act, which gives the employees, including Union members, not only the right to engage in Union activities, but the right to refrain from engaging in such activity.

Now, the Board found here, and the court below agreed, the Union's Constitution and By-laws in the present case, like those in Granite State, contain no express provision limiting the circumstances under which a member could voluntarily resign from the Union. And Union Business Agent Higgins confirmed this at page 111 of the Appendix, when he pointed out that there was no provision in the Union's Constitution whereby a man could resign by letter. The only way that he could resign was involuntarily, in the sense that if he fell in arrears in his dues the Union could suspend him, or he could get a withdrawal card if he left the industry, or by death.

But there was no provision by which he could volun-

tarily resign. And, as a matter of fact, consistent with that, the Union, as Higgins acknowledges in his testimony, ignored the letters of resignation when they came in, treated these employees who sought to resign just as though they continued to remain members of the Union.

Now, the Union contends, however, that unlike in Granite State here they have a constitutional provision which obligates a former member notwithstanding his resignation to refrain from abandoning a strike which was called while he was a member.

Now, whether or not a constitutional provision which expressly prohibited a member from resigning during a strike or which expressly committed him to adhere to a strike, notwithstanding a mid-strike resignation, would be valid for purposes of --

QUESTION: The Board, I gather, hasn't dealt with this?

MR. COME: The Board has not passed on that question, and we do not think that it is presented in this case. That will be the third case, Your Honors, after this case and Granite State.

QUESTION: Then it may come up under the --

MR. COME: -- new constitutional provision of the Machinists contract, which, being enacted in 1972, obviously could not have served notice on the employees here in 1965

that this was the obligation that they were assuming when they joined the Machinists in 1965.

QUESTION: Of course the Court in Granite State spoke generally of a constitutional provision, did it not? Generally.

MR. COME: That is correct, Your Honor.

However, let's take a look at this constitutional provision here, which is set forth at page 142 or 143 of the Appendix.

It talks about improper conduct of a member. It says: "The following actions or omissions shall constitute misconduct by a member", and then you get down to "Accepting employment in any capacity in an establishment where a strike or lockout exists".

On its face, this provision is applicable only to a member, it does not provide that the obligation to refrain from strikebreaking continues, even after the member has resigned from the Union, nor is there any indication that the Union ever informed its members that it interpreted this provision as being applicable even after the member resigned, nor is there any indication that the employees ever thought when they joined the Union that they were buying this kind of an obligation.

As I indicated earlier, the Union simply ignored the letters of resignation, because in its view you couldn't resign

from this Union.

As a matter of fact, it was not until after this Court decided Granite State that the Union began to really argue that it had a specific provision in its constitution which obligated a member to refrain from strikebreaking even after he resigned from the Union. Because if you look at the Union's petition, at page 12 in the case, the issue which the Union poses in the petition is whether a member is bound for the duration of the strike by the group decision to strike, irrespective of whether he was individually opposed to that group decision.

And the distinction that they try to draw between this case and Granite State was that in Granite State you could show that each of the employees individually voted to strike, whereas here, since there was a secret ballot to strike, you couldn't show that they, that each one voted; but, nonetheless, whether he voted for it or not, he was bound by the group decision to strike.

What was the reason for this? The reason was because, in a strike situation, it is only reasonable, in view of the reliance factor that each employee that goes to strike depends upon the support of his fellow employees, it's only reasonable, in view of the reliance consideration, to imply a commitment on the part of one and all to see the strike through.

Now, that's essentially the very same sort of reliance consideration which this Court in Granite State said is not enough to constitute a waiver of the employee's Section 7 right to forego abandoning the strike if he finds that he cannot stick it out.

Now, there are sound reasons for this Court's Granite State view, which I submit is controlling here. The basic reason is that Section 7 of the Act gives the employees the right to resign from the Union and thereby avoid Union obligations; and a waiver or qualification of a statutory right must be clear and unmistakable.

The contract between the member and the Union, the Union Constitution, is analogous to a contract of adhesion, in the sense that the member really has no choice as to the terms that are presented and therefore if he is going to be deemed to have waived his Section 7 rights, the provisions of the constitution or the by-laws must be clear and unmistakable.

We submit, from the terms that I read to you, that is not the situation here.

And thirdly, there is the consideration that this Court pointed out in Granite State. Events after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind.

We submit that a member should not be deemed as giving up his freedom to protect against the serious hardship,

unless, at least, there is clear evidence that he knowingly waived that right.

We submit that on this record the Board and the court below were justified in finding that there had not been such waiver.

Now, with respect to the fines that were levied on the members who either did not resign from the Union or that portion of the fines that are allocable to the pre-resignation work activity of those who did resign, we submit that those fines are not violative of Section 8(b)(1)(A) on the authority of this Court's decision in Allis-Chalmers.

To be sure, the fines in Allis-Chalmers were conceded to be reasonable in amount, so, therefore, this Court did not specifically pass upon the reasonableness point that we have presented in this case, but we submit that the logic and reasoning of the Court's decision in Allis-Chalmers supports the Board's conclusion that the reasonableness of the amount of the fine is not a matter for the Board but for the State court. It does not go to the question as to whether or not the fines which, apart from reasonableness, would not violate 8(b)(1)(A) are brought within the ban of 8(b)(1)(A).

QUESTION: Do you have any idea of what percentage of these situations are dealt with in the suit in the State court as compared with making reinstatement in the Union conditioned upon payment of the fine?

In other words, in most of the situations, does not the Union simply say: If you want to be reinstated, you pay your fine. And therefore there is no State court jurisdiction action in most of them; or is that evaluation wrong?

MR. COME: Well, I think that court collectible fines are not the major form of Union discipline.

QUESTION: As a practical matter, why would a Union go to the trouble of bringing an action in the State court when they have such a simple remedy for collection, namely, to say We won't reinstate you until you pay the fine. No lawyer's fees, no delay, no problem.

That's really a hypothetical route, isn't it?

MR. COME: No, it's not a hypothetical route, because there are enough of the cases so that you cannot say that it is an academic matter, and as this Court pointed out in Allis-Chalmers, with respect to some unions where membership rights don't mean very much, expulsion is not a very effective remedy for breach of a union rule.

So I can't say that it is an academic matter, although it is not the major form of discipline.

QUESTION: What if the union rules required a fine of five times the amount of wages earner, would you think the Board should not concern itself with that?

That's hypothetical, of course, because no union does so. But I'm addressing to the point you make in your

argument.

MR. COME: The Board's position is that Congress did not give it that power. Now, it might make good policy for the Board to handle it, but this is a judgment that --

QUESTION: Mr. Come, didn't we, at the time Allis-Chalmers was argued, am I not right there was an amicus who argued in connection with a fine of $20,000 --

MR. COME: That is correct. There was an amicus brief that was filed by, I think, someone in the entertainment field, that was bringing to the Court's attention a fine of that amount.

But let me explain briefly why I think the Congress, at least up to now, has kept the Board out of this field. Of course Congress is free to amend the statute if it wants to change its mind on this score.

QUESTION: So that it's your position, then, that it is a matter of power not of expertise in the Board?

MR. COME: That is correct. I think that --

QUESTION: You feel the Board could handle this if it had the power so to do?

MR. COME: Well, I think that the courts are more expert in this matter than the Board, because they have been handling it for years. It also turns on the kind of equitable considerations that the courts are better equipped to handle than the Board.

But -- so from that standpoint I think that the courts are better suited to it. I don't want to say that it's impossible for the Board to handle this thing, because we all know that there is a genuis in administrative innovation; if we had to deal with it, we'd have to assume the burden.

But I believe that Congress kept the Board out of it because -- for several reasons, one of which is that they thought that the courts were better equipped to handle it.

QUESTION: Now, Mr. Come, the only reason, as I understand it, that these fines are alleged to be unreasonably high is that they violate 8(b)(1)(A) of the Act. Isn't that right?

MR. COME: That is correct, sir.

QUESTION: Now, what criteria would you suppose that a State court would apply in gauging the reasonableness vel non of these fines?

The criterion is whether or not -- the whole claim is that they were so unreasonable that they violated 8(b)(1)(A) of the National Labor Relations Act as amended; and doesn't the Labor Board know a good deal more about that Act than your -- than the mine-run of State trial courts?

MR. COME: That is correct if the question were whether it was a violation of 8(b)(1)(A), --

QUESTION: Well, that is the only question, isn't it?

MR. COME: But if I am correct in my submission, that Congress did not intend the reasonableness of the amount of a court collectible fine to be a relevant consideration in determining whether the fine is violative of 8(b)(1)(A), then the fact that it is unreasonable in amount doesn't make it violate 8(b)(1)(A), it may violate --

QUESTION: What?

MR. COME: -- State common law --

QUESTION: What possibly could it violate in the law, if, after due process, the Union procedure, the fine of X dollars was levied, and under Allis-Chalmers that can be collected in a State court; what possible criterion could a State apply to say it's unreasonable, when the only claim that's ever been made in this case is that it is unreasonable by reason of, and only by reason of, 8(b)(1)(A) of the National Labor Relations Act, as amended?

MR. COME: But if -- if we are sustained in our view that this does not violate 8(b)(1)(A), it will then have to go to the State court --

QUESTION: Under what criterion? What will they be asked to apply to measure whether it's reasonable or unreasonable? There's no claim that it's unreasonable except in terms of 8(b)(1)(A).

MR. COME: Well, but the defense that the employees are, will be asserting in the State court cases, or suits that

have been brought to collect the fine, will weigh the issue that the fine is inequitable or usurious or unreasonable, under the State --

QUESTION: This has nothing to do with usury.

MR. COME: All I know, Your Honor, is that there are a number of State court cases in which the question of the unreasonableness of the fine has been raised as a defense to the suit to collect the fine --

QUESTION: I know, but what is there, what measure is the court -- we're assuming by hypothesis, by assumption, that it was a due process, union, internal union procedure that resulted in the imposition of a fine of X dollars. The only attack upon its amount has been under the Act, under the Act.

Now, the State court is not, certainly with all the pre-emption cases on this book, you say a State court has the expertise to decide that question under the Act, and that the Labor Board does not.

MR. COME: Your Honor, I hate to be repeating myself, but --

QUESTION: Well, I'm repeating myself, too.

MR. COME: I submit that the State court would not be deciding this question under the Act.

QUESTION: Well, what would it be deciding it under, then?

MR. COME: It would be deciding whether or not to fine a man, to use the Chief Justice's example, five times his --

QUESTION: His what?

MR. COME: -- strike earnings, violates --

QUESTION: What? Violates what?

MR. COME: -- State law.

QUESTION: Would it take into consideration its own notions of labor policy in making that determination?

MR. COME: With respect to this issue, it would, if it is not a matter for the Board to consider under Section 8(b)(1)(A) of the statute.

QUESTION: I'm finding it hard to square with prior arguments the Board has made on pre-emption in this Court. When we have State courts undertaking to restrain a union on even grounds that it's necessary to control violence and damage to property, the Board, I thought, consistently takes the position that the Congress has pre-empted this whole relationship.

MR. COME: Not with respect to violence, Your Honor. It depends upon whether or not --

QUESTION: We are confronted with the arguments frequently, even in claims of violence.

MR. COME: Well, let me see if I can just outline very briefly that considerations that we think lead to the

conclusion that we do not have power to get into the reasonableness of the amount of the fine.

This Court recognized in Allis-Chalmers that the Taft-Hartley prohibitions against restraint and coercion had to be interpreted in the light of the repeated refrain throughout the debates on 8(b)(1)(A) and other sections, that Congress did not propose any limitations with respect to the internal affairs of unions. Aside from barring enforcement of union's internal regulations with respect to it.

QUESTION: Well, I know, Mr. Come, but didn't we also say, and I'm looking at 195 of the Allis-Chalmers opinion, whether 8(b)(1)(A) proscribes arbitrary imposition of fines for punishment of disobedience of a fiat of the union leader are matters not presented by this case upon which to express those views.

Didn't we put to one side, perhaps, the very question that's presented in this case?

MR. COME: I thought I indicated that the Court did not decide that question. I'm just trying to show you -- explaining why --

QUESTION: Well, perhaps then I misunderstood. I thought the Board was relying primarily on Allis-Chalmers, in its recorded position.

MR. COME: Well, we're relying on the reasoning of Allis-Chalmers. The fine in Allis-Chalmers was conceded to be

reasonable in amount. You did not have that problem.

QUESTION: Well, that suggests, by the use of the word "reasonable" --

MR. COME: Yes.

QUESTION: -- perhaps suggested that if it were unreasonable we might have a different case under 8(b)(1)(A).

MR. COME: You left it open, as we read it. I'd like to explain why the considerations that were advanced in Allis-Chalmers however would lead to the same conclusion with respect to the open question.

Now, the fines here were levied for breach of a union rule against strikebreaking, a rule which the Court, in Allis-Chalmers, said was not only to serve a legitimate union interest but was compatible with the policy of the National Labor Relations Act.

They were imposed for working while the employees were members of the Union, so you don't have the Granite State problem that you have on the first part of this case. They were not sought to be enforced by unacceptable means, namely, violence or affecting the man's job rights. The only means used was a court suit, a means which the Court in Allis-Chalmers and in Scofield recognized was a legitimate means; and which, we submit, will provide the member a full opportunity to contest the reasonableness of the fine.

Now, to require the Board to determine whether the

amount of the fines is reasonable would bring it inevitably deeply into the area of internal union affairs, much more deeply than Congress entered with Landrum-Griffin, because in Landrum-Griffin, in 1959, they enacted a provision that said that you can fine and suspend and expel a member, and enacted only procedural safeguards that limits the use of that power.

Now, the court below here, at 29-A of the Appendix, directed the Board to take into account such factors as: the compensation received by the strikebreakers; the level of strike benefits made available to the striking employees; the individual needs of the person being disciplined; the detrimental effects of the strikebreaking upon the effectiveness of the strike effort; the length of time of the work stoppage; the strength of the particular union involved; the availability of other less harsh union remedies; and other similar considerations. And the court --

QUESTION: No matter what you're saying, I gather, Mr. Come, that Congress wanted the Board to stay out of the internal affairs of the unions --

MR. COME: That's correct.

QUESTION: -- and to get into the question of the reasonableness of the fine is to get your neck into the question of internal union affairs, and that violates the congressional policy?

MR. COME: That is correct, Your Honor.

QUESTION: But it's all right for a State court to get an arm into that?

MR. COME: Because Congress, and this Court too, in both Allis-Chalmers and Scofield, pointed out that the extent that Congress has not gotten into this area, and it was a very limited intrusion, the matter of union discipline is a matter for the State court, where it was traditionally and has been traditionally handled.

So we have a very --

QUESTION: So the State courts often, when they thought the union membership discipline was too harsh, they've taken steps to set it aside, is that it?

MR. COME: That is correct, Your Honor. And I submit that if you get in on the reasonableness of the fine, there's no way that you can rationally stop getting -- having the Board inquire into the fairness of the procedure followed in imposing the fine. You have to get into questions as to whether or not the member should have exhausted his union remedy, which gets you even further into internal union democracy. And it is --

QUESTION: Yes, Mr. Come, in this case, as I recall, the trial examiner did determine what he thought were factors entering into the reasonableness of these fines. Did he not?

MR. COME: The trial examiner did, and he came up with

the conclusion that a fine that was more than 35 percent of straight-time earnings and more than 80 percent of overtime earnings would be unreasonable. And the Board, of course, did not pass on the propriety of his evaluation, because they found that they were not empowered to do so.

But I submit that examining his opinion indicates perhaps better than anything else the reason as to why this matter should be left in the first instance to the State courts, because to come up with a standard is going to be very likely to give you a situation that is divorced from the realities of the particular strike situation.

He made the judgment, for example, that the fine had to be left in total deterrent. Now, these are the very essence of internal union democracy. Whether forgiveness should be a factor, the union here, for example, reduced the $450 fine to 50 percent of strikebreaking earnings, which the court below found was reasonable.

For those who appeared and begged forgiveness, as it were, whether there's a particular hardship that warrants special adjustment, these are things that have to be handled on a case-by-case basis and to promulgate a broad rule, we submit, bears little relation to reality.

QUESTION: Mr. Come, if it appeared, and apparently we haven't anything in this record and perhaps none of us has any means of knowing at this time; but if it appeared that

80 to 90 percent of all the fines were collected by a restriction that there would be no reinstatement to the Union member to membership until he paid his fine, leaving only 10 percent or so to collection in the State courts, then all this discussion about State courts recedes in importance, doesn't it?

Because in the 80 to 90 percent of the hypothetical situation no one is reviewing the reasonableness.

MR. COME: Oh, I don't -- I wouldn't agree with that, Your Honor, because I think that even where the only penalty is expulsion from the Union, or suspension from Union membership for failure to pay the fine, you will find suits where the individual would contest the reasonableness of the fine or the fairness of the --

QUESTION: Where would he contest it?

MR. COME: In the State court, because it would be his --

QUESTION: Well, I'm thinking of --

MR. COME: -- if he's being deprived of his membership in the Union, that is a valuable right that in many cases may affect his job, and I didn't mean to suggest that the only court suits attacking the fairness of union discipline are those where the union seeks to enforce a fine, as in suits to contest other forms of discipline as well.

QUESTION: Mr. Come, you said a moment ago that you

thought this matter should be left in the first instance to the State courts. That suggests there is a second instance somewhere else.

MR. COME: If I did, Your Honor, I misspoke myself; I meant to say in the first instance to the union, in the sense that they would be empowered, I believe, to require exhaustion of internal union remedies. Then if -- after those had been exhausted, the court would have the right to review what the union has done.

QUESTION: But the question of exhaustion, I take it, would be a matter of State law; is that it? If the State didn't want to follow that doctrine, it wouldn't have to?

MR. COME: That is correct; that is correct.

QUESTION: Mr. Come, is it, then, basically your position that an extremely high fine, an unreasonably high fine, however one might define it, let's begin with the supposition it's an unreasonably high fine, would simply not be a violation of 8(b)(1)(A); is that it?

MR. COME: Yes, Your Honor. Yes, Your Honor.

And I would like to point out, if I may --

QUESTION: $100,000 fine on somebody who worked for two days would simply -- would not be a violation of anything in the National Labor Relations Act; is that your position?

MR. COME: Yes, it is, Your Honor.

And I'd like to, if I might, -- I know I'm going

over for a moment -- point out that everyone seems to agree that if that $10,000 fine were merely enforced by suspension or expulsion from union membership, the proviso of Section 8(b)(1)(A) would clearly take it outside of the --

QUESTION: Of acquisition or retention?

MR. COME: That is correct. So that the only point for bringing the Board into the picture is because it's going to be court enforcible, and that is the point at which the court, I submit, certainly has more expertise than the Board has to do it.

QUESTION: But I still do not --

MR. COME: But not as a violation of 8(b)(1)(A).

QUESTION: Yes. But that was the only claim in this case.

MR. COME: That is right, but all that means is that if we win here, they will not be able to charge it's a violation of 8(b)(1)(A). They will have to charge it's a violation of something else.

QUESTION: What else?

MR. COME: It might violate Landrum-Griffin, I don't --

QUESTION: And it's your -- well, I understood you to say that it's your position that an extremely, grossly, unreasonably high fine, by assumption, violates nothing in the National Labor Relations Act, as amended. Is that your

position?

MR. COME: Nothing in -- it does not violate Section 8(b)(1)(A), yes.

QUESTION: But you say the Board has no jurisdiction over that.

MR. COME: That is correct, I --

QUESTION: So it must mean that it doesn't violate anything in the Act that the Board is charged with enforcing.

MR. COME: Yes, but I just wanted to find out, when I talked about the Landrum-Griffin Act, I'm talking about Title I, which gives you remedy --

QUESTION: In court.

MR. COME: -- in court; the Board has no connection to that.

QUESTION: Right.

QUESTION: So that a suit by the union against a member, a former member, in the State court, when the former member raises his defense, this might not be collectible because it violates the National Labor Relations Act; the court is moved to say -- what? The court's supposed to rule on that defense by striking it?

MR. COME: Well, if the Board is sustained here, in our position here, yes.

QUESTION: Well, does the court have any power to rule on that?

MR. COME: As to whether or not the matter would be pre-empted or not?

QUESTION: Well, does it have power to rule on it? I mean, if you don't have any power, surely the court won't.

MR. COME: Yes.

QUESTION: So it's supposed to rule this does not violate 8(b)(1).

MR. COME: That's right, but of course it would be applying a decision by this Court which would define what the rules are that govern the application of 8(b)(1)(A).

QUESTION: Yes, but when?

MR. COME: If we got it --

QUESTION: No, you have actually ruled -- did the Board decide, in this case, in so many words that it doesn't make any difference how big the fine is, it never violates 8(b)(1)(A)?

MR. COME: Yes. What the Board was to --

QUESTION: Well, you said that it has no power.

MR. COME: Well, it said that it had no power to determine if a fine was violative of 8(b)(1)(A), merely because of --

QUESTION: What if we disagree with that and say that under that section you do have the power? Could we turn it back and ask you to decide it?

MR. COME: Yes. I think that -- what the -- what the Court of Appeals --

QUESTION: I think you are saying this is on a different basis than usual.

MR. COME: Well, I don't know that we are talking about the same thing here. I don't --

QUESTION: Well, all right.

MR. COME: The Board's position, when they apply the rationale of their Aero-development case in here, is that they do not have the power to determine that a fine violates 8(b)(1)(A), a fine levied on a member just because of its excessive amount. The Court of Appeals disagreed.

QUESTION: Is that a piece of statutory construction, or what?

MR. COME: Yes.

QUESTION: What is that? The Board's construction of the Act, or are you saying something, it's just something beyond your power?

MR. COME: It's the Board's construction of the Act, reached, for the reasons that Mr. Justice Brennan summarized a moment ago, that in order to effectuate Congress' intention to keep the Board out of the area of internal union affairs, the Board --

QUESTION: How about the Board? If the Board can't -- can't the Board get in?

MR. COME: Yes.

QUESTION: How do you -- if you're supposed to stay out and not decide whether this violates 8(b)(1).

MR. COME: The Court can stay in it, as it was before 8(b)(1)(A) was enacted. Not determining whether it violates 8(b)(1)(A), but whether it violates State law. That would be the question.

QUESTION: Mr. Come.

MR. COME: Yes, Your Honor?

QUESTION: Has the Board consistently adhered to the position you gave here today?

MR. COME: Yes, Your Honor, it --

QUESTION: In its administrative interpretation of the Act?

MR. COME: Yes, it has, Your Honor. This has been the Board's position since 8(b)(1)(A) was first enacted in 1947, or --

QUESTION: Could you give any rough estimate of how many opportunities it has had to take that position? Are you talking in terms of two or three or four, or a dozen?

MR. COME: Well, there have been dozens of cases that have --

QUESTION: And the Board has simply said, We have no jurisdiction?

MR. COME: No power.

QUESTION: No power.

MR. COME: Right.

MR. CHIEF JUSTICE BURGER: Mr. Lang.

ORAL ARGUMENT OF SAMUEL LANG, ESQ.,

ON BEHALF OF THE BOEING COMPANY

MR. LANG: Mr. Chief Justice, and may it please the Court:

The individual employee who is not specifically represented by counsel here would ask whether the words "refrain from concerted activity" in a strike situation should be so narrowly construed as to put him completely at the mercy of the power struggle between the employer and the Union, which may last for 18 months or more; as frequently has occurred.

It seems to me that in the realistic world of this individual employee and his Union, which is often as powerful or more powerful than his employer, unless the statutory language "refrain from concerted activity" gives him some freedom of range, then when he and some of his fellow employees make an attempt to bring the strike to an end, that is, when they engage in concerted activity to refrain from continued participation in the strike, and a fine is levied of $1,000, $2,000, $5,000 -- and these are commonplace; they are not only not unusual, they're commonplace.

After the admonition, "if you try a back-to-work

movement, we'll get you", he and his fellow employees in that movement are fine one, two or five thousand dollars for that concerted activity, that is a violation of the Act in the very plainest terms.

QUESTION: What evidence, Mr. Lang, do you point to in the record, other than the fact that 119 more or less employees went back to work? What evidence of concerted activity other than that do you --

MR. LANG: There is not in this record here, sir, but the jurisdiction attaches with the allegation. Once it is alleged that the fines were levied for this concerted activity of returning to work, of opposing the Union, of strikebreaking, then it is the Labor Board's ballgame. It's the Labor Board's province. And it may not be disturbed by any other tribunal.

Now, the Board may find that there is no violation of 8(b)(1)(A) because of the evidence; it may find that the fines were uniformly imposed; that they were regularly handled; that due process was accorded to all the parties; all of the criteria which it may establish and which may stand the test of time and which may be uniform for all fines, and there it is in a peculiar position to establish uniformity. The Board may dismiss the 8(b)(1)(A) charge, as it has dismissed thousands of 8(a)(1) and 8(a)(3) charges. But it hears the evidence, it considers the case, when the allegation is

made. And that is the thing of paramount importance here.

Until the Board hears the evidence once a charge of 8(b)(1)(A) has been filed, it cannot tell whether it is a violation of the Act; it cannot tell whether the fine is excessive for the concerted activity,that is the crux of the matter, which I believe has to be decided by the Court.

My reading of Allis-Chalmers, in the problems it presented to the Court, which was somewhat divided in its analysis of the legislative history of 8(b)(1)(A), leads me to believe that were it not for a special factor in that situation, and which is here present also, the case would have been decided differently.

That special factor is quite relevant to a decision in this case. In weighing the balances, in balancing the interests between the employees as a whole and the individual employees, both having interests and rights under the Act, the Court decided that the erosive effect of permitting members to escape penalty, wholesale, any time they desired to go back to work, would operate against the purposes of the statute.

That one single thought pervades the majority opinion in Allis-Chalmers. Were it not for that, I believe that the clean language which gives the employee the right to refrain as well as to engage in concerted activity would have been interpreted to allow him to refrain at any time.

But I believe Allis-Chalmers should be limited to that interpretation, should be limited to that narrow rule, and should be limited to the period of membership. Otherwise, unions would be able to subvert the plain meaning of the statute by writing 8(b)(1)(A) virtually out of it, insofar as strikebreaking situations were concerned, despite whatever hardship might come to an employee.

In fact, the language by which the Union in this case sought to repair its constitution by a subsequent amendment would freeze the employee forever, since he couldn't effectively resign -- and I don't care what words they use, whether it's resignation or obedience to a rule which carries the same effect as continued membership. But the amendment to this constitution would not allow this employee to go back to work without severe penalty, penalties which might destroy his opportunity for employment, because he might be discharged for garnishment, or he might lose his home, he might lose all his possessions, he might be replaced in the meantime and lose his job entirely.

This amendment would prevent him during the period of the controversy for a foreseeable period prior to the strike from going back to work, and then when the controversy ended, if it were a union shop contract, he would be frozen again for the duration of the contract.

I don't read the statute or the practicalities of

labor relations the way that my brother representing the Union does. I read Section 8(a) to provide that an employer may, without violating the statute, enter into a contract which requires union membership for the duration of that agreement. That's the language of Section 8 -- the proviso of Section 8(a)(3). And while we don't have it in this particular case, in this case we have a very unusual type of provision, from my long experience in labor relations, which, instead of requiring the employee to join within thirty days, as is usually the case, allows him not to join and to remain free of union membership.

But, except in right-to-work States, the contracts are legion, almost universal, requiring membership, with all of the concomitants of membership and all of the requirements of membership.

I can't concede of any freedom of action on the part of an individual, who frequently must let -- more frequently than we read the fine print of insurance policies, is totally ignorant of what is going on between his employer and his employee in matters of this kind and his Union in matters of this kind, and is totally ignorant of the fine print of union constitutions, which often contain 100 and more pages of fine print.

In fact, it's notorious that unions have an extremely difficult time obtaining attendance at meetings. I

can't conceive of the individual, caught up in this world, having any freedom at all under this statute, any freedom under this statute in strikebreaking situations, which are the most crucial to him, unless he has the right to get out from under when the going gets tough.

And I cannot conceive of a rational rule which allows a union, by hocus-pocus and fancy language, to keep this employee under its thumb, no matter how meritorious, no matter how much credence we should give to the term "solidarity". There must be, if 8(b)(1)(A) means anything at all, if the statute means anything t all; and Taft-Hartley was adopted in 1947 primarily for the benefit of the individual.

I can't conceive of his not being allowed to get out any time after a contract expires. Just as he has the right any time a contract expires to go to the Board and file a petition for decertification to get rid of the union.

So far as interference with the internal affairs of the Union is concerned, the Union complains, on the one hand, that the Board shouldn't do it; and, on the other hand, asks that the courts be allowed to do it. That poses a question, since we all agree that somebody should do it, to the extent of protecting this individual; that poses the question: Who is the best qualified to do it?

And if the Labor Board, with all of its expertise

in thousands of strike situations, has any business in this field at all, that is if it has any authority to entertain the question of whether or not an employee may be fined, then it has the business to decide all of it.

In case after case, the Board does not get only those cases, only those situations where employees have not resigned and therefore can follow Allis-Chalmers, in case after case there will be employees who have resigned, and employees who have not resigned. Moreover, as to those who have resigned, there will be problems requiring interpretation of the language, even of this amendment in this case, as to what it means; so that the Board cannot escape dealing with the problem of fines.

The question is, is it going to deal with that problem piecemeal? Is it going to handle just this little bit and say the rest belongs to the courts? Or is it going to be required to do what I think is its duty, to handle the whole ball of wax and dispose of the whole ball of wax, one way or the other.

That seems to be the rationale of this Court, running from Garner v. Teamsters through Garmon v. San Diego and all the other pre-emption cases. I don't say that this is a case of pre-emption. I say it is, as a practical matter, tied to a clear legal right that all of this belongs to the Board, including the decision as to whether or not the fines

are reasonable.

QUESTION: Mr. Lang, under your theory, supposing the Court were to agree with you, and after we decided the case the Union brings an action to collect the fine in the State court, can the State court entertain that action?

MR. LANG: I think that as in -- I'm not sure of the answer; but I would say that at the very least once the Board decides that the fine is reasonable, it could be enforced in the same manner in which a -- well, that decision would be binding upon the State court for collection, since the Board itself has no collection powers it can't, it can't tell an employee to pay the fine. I don't know, maybe it has very broad remedial powers. Perhaps the Board could say, the fine is reasonable, pay it.

But even if it couldn't do that, once it decided that the fine was not unreasonable, and that's the way I prefer to put it, that the Board's power should be limited to finding that the fine is not excessive, because it would be the excessive nature of the fine for discriminatory reasons, for discriminatory purpose, that would cause the violation.

Once the Board found that the fine was not excessive, then the collection, if it had to go to State court, would be automatic. The State court would have no power except to enforce a judgment, as it would a judgment in another

jurisdiction.

QUESTION: So the Union would almost be forced to first bring an action before the Board, to get a kind of a declaratory judgment that the fine was reasonable before it could go into the State court?

MR. LANG: It wouldn't be the Union that would bring the action, it would be the individual who is fined, who could go, counsel-free, without the heavy expense of having to go into court. He could go to the Board and file the 8(b)(1)(A) charge on the basis that the fine was discriminatory --

QUESTION: But supposing he doesn't do that, supposing the Union simply brings the action in the State court without ever -- without any prior proceedings on the point before the Board?

MR. LANG: Then I think that the Court would have to say we don't have jurisdiction, it must go to the Board.

QUESTION: So then, as a practical matter, if the Union wants to collect its fine, it's got to first go to the Board and then to the State court --

MR. LANG: In one way or another, yes. Yes, sir.

QUESTION: The Court of Appeals, of course, dealing with the discriminatory situation you mentioned, would always have review powers.

MR. LANG: Yes, sir.

QUESTION: And I suppose when you refer to a discrim-

inatory situation, that if, out of 119 people involved here, they had admitted the reasonable fines as to 110 of them but picked out nine and had much larger fines, then the Board should review a claim that they were being subject to a discriminatory fine because they were the leaders of the return-to-work movement, or something of that kind. Is that the kind of discrimination you're talking about?

MR. LANG: Yes. Yes, sir.

The trial examiner dealt with it, the Board didn't. The Board said it didn't have the power, or authority to deal with the question of reasonableness of the fine.

I think that the Board should do in this case what it does in 8(a)(3) cases, what it does in cases of unfair labor practices against employers, it should draw inferences from all the facts. It should reach out, as broadly defined an unfair labor practice against a Union, particularly in a situation of this kind where there are very sensitive problems involved, it should reach out to find out whether or not there is an unfair labor practice, just as broadly as it reaches out in cases involving employers.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lang.

Mr. Dunau, you had run out of time, but we extended Mr. Come's time here, even though he was aiding and abetting your position, but I have a question or two to put to you, if you don't mind.

REBUTTAL ARGUMENT OF BERNARD DUNAU, ESQ.,

ON BEHALF OF BOOSTER LODGE NO. 405, ETC.

MR. DUNAU: I would be delighted, Your Honor.

QUESTION: I suppose there are somewhere between 1,000 and 2500 courts of general jurisdiction in the systems of the fifty States, but, in any event, it's a very large number. Doesn't your position and that of Mr. Come's open this whole area to very great disparity of evaluating these union fines, in those cases which would get into the State courts?

MR. DUNAU: It doesn't open the area, Your Honor; the area has been open ever since unions have been administering internal union discipline. As a matter of the right of a union member under his constitution with the union, as a matter of State law, every State court in this country has been, from the time a union has imposed discipline and a claim has been made that the discipline has been arbitrarily imposed, State courts have been deciding just these questions.

QUESTION: How many of your particular Union here, your clients, in the past year, or in any year, how many cases got into State courts on strikebreaking fines?

MR. DUNAU: I can't say, Your Honor. I have no idea how many got in. I know one fact which we ascertained, because we wanted to know, in view of the Court of Appeals determination, that not only was the Board in this business,

but that you could not have a rule which eliminated -- you could not have an exhaustion rule, you could not require the member to exhaust his internal union remedies. We wanted, therefore, to find out how many times in the course of a two-year period we have had internal union appeals. We found out that we had had 42 internal union appeals, of which 15 pertained to strikebreaking or picketing activity, and that with respect to those internal union appeals we reversed about half of what the local lodge did.

So that if the Board is to do its business, it's either going to have to decide you don't have to exhaust your internal union remedies, in which case you throw away a whole body of law which we have always taken for granted, or it decides you had no excuse for not exhausting your remedies, or you had an excuse for exhausting your remedies, in which case you're completely within the interstices of internal union affairs.

In other words, there is no way of considering an issue of the reasonableness of a union fine without getting into the internal business of the union.

Well, if that's what Section 8(b)(1)(A) requires, fine, that's what it requires. So it requires a really different fundamental question: Is it a violation of Section 8(b)(1)(A) to impose an unreasonably large fine?

Now, there are two places in this statute that one

can look to for an answer to that question: one, the words "restraint and coerce"; are you restraining and coercing by imposing an unreasonable fine?

But we know you are not restraining and coercing when you impose a reasonable fine, because that's what Allis-Chalmers is all about. So what does a reasonable fine do? The whole purpose of a reasonable fine is to compel a total restraint from strikebreaking during the course of a strike.

There is no point to a fine which does not completely restrain strikebreaking, so that restraint exists by virtue of a reasonable fine. It won't add any more restraint by making the fine unreasonable. What you do when you say the fine is unreasonably large is not that it restrains or coerces; any fine restrains and coerces, and there's no point to it if it doesn't restrain or coerce.

What you say when a fine is unreasonable, if you tell a man it's $2,000, you're going to pay it because you engaged in strikebreaking, and the State court has figured out that this man has got take-home pay of $50 and ten children, no State court is going to enforce that fine because no State court is going along with the collection of a $2,000 fine against a man who has $40 in take-home pay or $100 and ten children. But that has nothing to do with the fact that you're enforcing a rule against strikebreaking.

Exactly the same results would obtain, whether you were enforcing any union rule.

QUESTION: But what body of law would the Court apply, to do what you say --

MR. DUNAU: State law, Your Honor.

QUESTION: -- they inevitably will do.

MR. DUNAU: State law.

QUESTION: State law saying what?

MR. DUNAU: That in the interpretation of the constitution between a union and its member, part of that constitution says that a union will not arbitrarily impose discipline, an unreasonably large fine is the arbitrary imposition of discipline, it is therefore forbidden as a matter of State law.

QUESTION: Equity, or --?

MR. DUNAU: Certainly, Your Honor. Equity.

QUESTION: But this is going to be a suit for money damages, it's not in equity.

MR. DUNAU: Well, I suppose that most courts have combined equity and law courts; but I don't care about that.

QUESTION: But isn't the answer the exact same common law that that State applies before the enactment of the Federal law?

MR. DUNAU: Exactly, Your Honor. And the whole purpose, aside from saying you can't have any restraint or

coercion out of an unreasonable fine that you don't have out of a reasonable fine, because the whole purpose of a reasonable fine is so that you will not engage in strikebreaking, you don't add restraint and coercion by an unreasonable fine. You go to the proviso. The proviso deliberately says you will not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

Now, what does it mean to say you will be able to prescribe your own rules? It means that if you have a rule and it's violated, you can impose internal union discipline to enforce it, and that's part of the game, it's no part of the Board's business.

QUESTION: You think, then, it's better, it's more cohesive and consistent with the whole history of the Labor Act to have the courts assisting different States doing this instead of one policy by the Board itself?

MR. DUNAU: Let me answer that question, Your Honor, by telling the Court precisely what happened in David O'Reilly, which is the case in which the Board said it had no power, and it has no power because it's not a violation of Section 8(b)(1)(A). Were it a violation of Section 8(b)(1)(A), there would be all the power in the world.

In David O'Reilly, the man engaged in strikebreaking, he was a member and he remained a member, so we have no

resignation issue in that case. He was fined $500 for engaging in strikebreaking. The fine of $500 was equivalent to his take-home pay from his strikebreaking earnings. So the fine said, you engaged in strikebreaking in violation of the rules, your penalty is: give up your strikebreaking earnings.

That case was taken by the union, the local union there, into a California court to seek a judgment to recover the $500 fine. In that court the issue presented by the employee: the fine is unfair and unreasonable.

There were two proceedings in the Knightsen trior's court in California, and two appeals. We finally got a judgment which said, The fine for $500 is reasonable. The judgment became final and unappealable, and it was paid.

Okay. That is the situation in the State court. It had a State suit to collect. It had a defense the fine was unreasonable. It rejected the defense. The judgment was entered, and the judgment was satisfied.

What does the Labor Board do now with that situation?

The Ninth Circuit says, Go back and determine reasonableness.

There are only three alternatives: one, the State court had no power to consider the issue of reasonableness, because that is pre-empted to the Labor Board. If that's what you had, you have a totally impossible situation.

If the question is before the Board, it cannot render judgment in favor of the union for collection of a fine. You want to collect the fine, you have to go to a State court, and you're told, Sorry, the State court has no power to determine an issue critical, essential to your recovery of a fine.

Conceivably, then, what you could have is that, first, you get a determination out of a Board that the fine is reasonable. That will take you five years. And then you'll institute a suit in the State court to recover it, and then you'll have additional defenses in the State court. That makes no sense as a matter of dealing with this specific subject.

There is an alternative: you could have concurrent jurisdiction. The Board can decide it; the State court can decide it. Fine.

If you have concurrent jurisdiction, ordinarily it ends by the proceeding -- the proceeding which ends the suit and determines its disposition by collateral estoppel or res adjudicata; that's it.

If that's what we have, then in the California case the Board has no business in it any more, because there's been a final, unappealable collective judgment, it's res adjudicata.

So whether the Board decides the issue or the court will depend on the happenstance, the utter happenstance of whose proceeding ends first, or you can have it, as we think

we should have it: it's a State court matter, it was decided by the State court in David O'Reilly; that's where it begins, that's where it ends. That's the way we've been administering union discipline in this country since we've had unions, and union discipline.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:46 o'clock, a.m., the case in the above-entitled matter was submitted.]