In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL-CIO,

Respondent.

No. 71-711

Washington, D. C.
November 13, 1972

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Washington, D. C.

Monday, November 13, 1972

The above-entitled matter came on for argument at 10:03 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BACKMUN, Associate Justice
LEWIS P. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
BYRON R. WHITE, Associate Justice

APPEARANCES:

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

HAROLD B. ROITMAN, ESQ., 11 Beacon Street, Boston, Massachusetts 02108, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-711, National Labor Relations Board against Granite State Joint Board.

Mr. Come.

ORAL ARGUMENT OF NORTH J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on certiorari to the First Circuit which denied enforcement of the Board's order against respondent union, the local of the Textile Workers Union. The case involves an application of the principles formulated by this Court in the Allis-Chalmers and Scofield cases. Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights which includes the right to engage in concerted activity and the right to refrain from engaging in concerted activity.

The question presented here is whether a union violates Section 8(b)(1)(A) by fining employees who return to work during the strike after they had resigned from union membership and by seeking judicial enforcement of the fines. The facts are briefly these:

The Union for many years has been the collective

bargaining representative of the employees of the International Paper Box Machine Company in New Hampshire.

On September 14, 1968, 6 days before the scheduled expiration of the collective bargaining agreement, the union membership voted to strike if a new agreement was not reached by September 20th. No agreement was reached and the strike with attendant picketing began on that day.

On September 21, the union held a meeting to discuss strike organization, at which the membership approved the resolution that anyone aiding or abettiing the company would be subject to a fine of $2,000. All but 3 or 4 of the 160 employees in the bargaining unit were union members, and all of the union members went out on strike. The contract that had just expired had a maintenance of membership provision in it which required employees who, or union members at the time the contract became effective or who joined the union during the term of the contract, remain members during the contract term.

Practically all of the Union members attended both the strike authorization and the fine authorization meetings. The members assented to the strike by a standing vote with only one member dissenting. The motion to levy the fine was adopted unanimously without discussion.

On November -- yes, sir.

QUESTION: Mr. Come, were those public votes in

the sense that they were not secret ballots?

MR. COME: That is correct, Your Honor, they were standing votes. They were not secret ballots.

QUESTION: Do you know what attendance there was? Or is that in the record?

MR. COME: The record shows that practically all of the members attended. The Court of Appeals and the Trial Examiner indicated that there might be some problem in future compliance proceedings as to whether all of the 31 who were subsequently fined were there or not. But the record shows that practically the entire membership was present at the meeting.

QUESTION: And I gather there is no issue here of membership. It is conceded all were members of the union.

MR. COME: That is correct. And the question here is the right of the union to fine the members after they had resigned from the union.

QUESTION: Is there any issue of reasonableness of the fine?

MR. COME: That is not in this case. That is pending in the Boeing case which is on petition for certiorari, but the Court has not acted on that.

QUESTION: Would it make any difference to your position, Mr. Come, when they resigned?

MR. COME: Yes.

QUESTION: Where would you have the cutoff date?

MR. COME: Under the principle that the Board is applying, the cutoff is whether they resigned before they engaged in the activity for which they are being fined. In other words, if they went to work before they resigned, in the Board's view under Allis-Chalmers, the fine would be O.K. If they resigned before they went to work and then were fined, in the Board's view that would not be protected. And that is what you had in this case.

In the Boeing case, you have also a mid-position where you have some people who resigned after they went back to work. And what the Board did in Boeing was to sustain the fine as to the strike-breaking activity that occurred before the resignation, but thereafter held that the fine was improper. But you don't have that mid-position here because it's perfectly clear that all of the 31 employees who were fined first took the step of notifying the union of their resignation before they went back to work.

Now, as I have indicated, during the course of this strike which was still going on at the time of the Board's second hearing which was 18 months after its inception, you had 31 employees who, beginning some month and a half to two months and the bulk occurring seven and a half to twelve months during the course of the strike, submitted resignations to the union and went back to work.

The union notified them that the were in violation of the union rules, ordered them to appear for a hearing before the union tribunal. They did not. They were tried in absentia and fined the equivalent of a day's wages for each day worked during the strike. And when none of the employees paid the fines, the union filed suits in the State courts to collect the fines. These suits are still pending. And the employees in turn filed unfair labor practice charges with the Board.

The Board concluded that the 31 employees had effectively resigned from the union before returning to work and that the union violated Section 8(b)(1)(A) of the Act by -- yes.

QUESTION: I want to be clear. No resignation was submitted in any of the 31 cases, is this so, until after that meeting at which the resolution was passed that anyone who crossed the picket line would be subject to a fine of $2,000?

MR. COME: That is correct.

QUESTION: And is it that fact the Board relies on particularly?

MR. COME: It was that fact that the Court of Appeals relied on in reversing the Board. The Court of Appeals said that since they had participated in the strike vote, they in effect had by analogy to the charitable subscription line of

cases made a contract with the union to see the strike through.

In the Board's submission that strike vote is not sufficient to override the employees' Section 7 right to resign from the union and go back to work. That's the issue that we have in the case.

Well, in Allis-Chalmers this Court held that a union did not violate Section 8(b)(1)(A) of the Act by fining employees who went to work during the strike authorized by the union membership and by suing in court to enforce the fines. The Court, balancing the union's need to preserve solidarity during the strike against the employees' Section 7 right to refrain from engaging in concerted activities, concluded that the union discipline there did not violate Section 8(b)(1)(A) because, as we read the Court's opinion, it was imposed against the member pursuant to the contract of membership. The employees there were full members of the union and the infraction of the union's strike rule occurred while they were full members of the union, and therefore, they were subject to the union discipline.

In the subsequent Scofield case, the Court in holding that the union did not violate Section 8(b)(1)(A) by leving a court-enforced fine against employees who violated a union production rule that was acquiesced in by the employer laid down this test, which we think is applicable here for applying Section 8(b)(1)(A), namely, that it "leaves a union free to

enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."

Now, we think that the principle to be distilled which is relevant here is that the power to levy a court-enforceable fine on an employee for breach of a legitimate union rule which this is co-terminus with the union member contract or relationship. And in the Board's view that was terminated here by the resignation for this reason:

The union's constitution and by-laws contain no provision defining or limiting the circumstances under which a member could resign from the union. Under the law governing voluntary associations where there is no specific provision with respect to resignations, it's settled that a member may resign at will.

Now, the union contends, however, that even if the 31 employees could thus effectively sever ties with the union -- even the Court of Appeals was willing to concede that, absent any provision, the resignation here was effective for most purposes -- these 31 employees were nonetheless bound to support the strike until its conclusion because it's only reasonable to construe the union's constitution and by-laws as imposing by implication an obligation to see a strike through to its end, or in any event, that conclusion is warranted here

in view of the employee participation in the strike vote.

We submit that neither of these arguments warrants a different conclusion here. In the first place, with respect to implying by implication an obligation in the union's constitution and by-laws to see the strike through to the end, we are coming across a very important right that's guaranteed by Section 7 of the Act which gives to all employees, including union members,the right to refrain from engaging in concerted activities.

QUESTION: Do you proposed that the result would be the same in your submission, Mr. Come, if there were an express provision to that effect in the constitution?

MR. COME: I would say, Your Honor, that the Board has not yet had occasion to consider whether a different accommodation between the Section 7 rights of the employees and the union's right to impose reasonable discipline would be warranted if there were such a provision.

QUESTION: I expect if the Board prevails in this case, you will get that chance pretty soon.

MR. COME: I would assume so. But all I can tell you is that up until now the Board has not had occasion to face that question and it has reserved it. The closest that the Board has come to it is in dealing with a provision in the union constitution that provided for resignation only 10 days at the end of a fiscal year. And the Board has held

that that provision doesn't give any meaningful right to resign in terms of a strike situation and reached the same result in that case as it did in this case where there is no such provision. But it has not yet indicated what it would do where you had a rule that was specifically tailored to a particular strike situation.

QUESTION: But to hold for the employee in the face of such a provision would be tantamount to saying that Section 7 rights were unwaiverable, I suppose.

MR. COME: That is correct. That would be the conclusion that the Board would have to --

QUESTION: Aren't there some other instances where you have upheld waivers?

MR. COME: There are instances where waivers have been upheld and it really comes down to how basic the Board's and the Court's judgment will be as to the right to refrain is in Section 7. There are some rights that have been held not to be waiverable.

QUESTION: Right.

MR. COME: Now, given this statutory right in Section 7, however, it's well settled that a waiver of statutory right, if it can be waived, has got to be expressed. And you against that principle if you found a waiver by implication in the constitution and by-laws here.

Secondly, there is very good reason for not departing

from the principle of requiring an expressed waiver because a contract of membership is a rather unusual contract. A member becomes bound by the union constitution and by-laws upon joining the union, even though he had no real part in formulating the provisions of the contract. It's like a contract of adhesion similar to an insurance policy. And the principle applicable there is that as between two possible interpretations you give the break to the party who had no part in formulating the terms of the contract.

And thirdly, the decision whether to resign from a union and return to work during a strike presents the employee with a very, very difficult choice, a choice that can be most meaningfully made in the particular strike situation. And therefore, it can't readily be assumed that an employee if he could waive the right would willingly want to do so by implication.

Four, while the employees may be sympathetic to a strike when it is first called, events occurring thereafter which he may not have anticipated may lead him to alter his view and a desire to return to work. For example, he may have underestimated the time that the strike is going to take. This strike, as I indicated, was going on for at least 18 months. And in underestimating the duration, he may have underestimated the resultant hardship to himself and to his family, or he may have underestimated the employer's ability to find replacements

for him.

On the other hand, the decision to resign from the union and abandon the strike is going to deprive the employee, the individual, of his right to participate in union meetings at which policies are formulated, to vote for union officers, it may deprive him of certain union benefits, subject him to a certain social stigma.

So he has a difficult choice to make here. And we submit that the policies of the Act are best effectuated by holding, as the Board has, if he can waive this right at all, it has to be an expressed waiver.

Now, what about the strike vote here which is what the Court of Appeals relied on as making the difference? We believe that the strike vote is an unreliable basis for determining rights and obligations under the Act, particularly where it was by a voice vote such as you had here, because the employees may be induced to strike by a bandwagon psychology. As a matter of fact, one of the employees here testified that, yes, he stood up, but he stood up because everybody else was standing up. But be that as it may, assuming that he really wanted to support the strike, we believe that it's unrealistic to conclude that any employee voting to strike in 1968 knowingly made a waiver to suppor that strike to the bitter end no matter how long it went on or no matter what his own personal situation may have developed.

Certainly, we believe that it's unreasonable to attribute to the employee an intention to support the strike even after he would be willing to take the very severe step of resigning from the union.

QUESTION: You say it was a severe step to resign from the union.

MR. COME: Yes, sir.

QUESTION: What adverse consequences flowed to these particular union members as a result of their resignation in this case?

MR. COME: Well, the record doesn't show specifically what happened to them. I can only generalize that normally by resigning from the union, the individual loses the right to participate in union meetings at which policies are determined, and also the right to vote for the officers of the union who are going to be his bargaining representatives.

QUESTION: If the union had gotten a similar contract to the one which expired at the conclusion of the strike, could it have prevented these men from being re-employed?

MR. COME: No, it could not have prevented them from being re-employed. One thing that the union cannot do is to affect job rights.

You talked about the kind of contract that they had. The contract that they had was a maintenance of membership contract which doesn't require you to be a member in order to

keep your employment. If they had been successful in getting a union shop agreement, which they did not have, under a union shop agreement you have to become a member of the union within 30 days, they might have been able to require that they pay dues as a condition of continuing employment. Under the Taft-Hartley Act, that kind of thing. But you could not require them, at least as we understand the law, to actually become a full member of the union and thus subject themselves to union discipline.

The further point that I wanted to make is that in most strike situations, the vote is not by standing vote but by secret ballot and to try to find out how somebody voted where it's by secret ballot would impair the secrecy of a ballot and lead to further complications.

And finally, if you made the strike vote determinative, we believe this is a serious risk of deterring union democracy, because employees would be fearful that by participating in the vote or in the discussions that they might be hooked forevermore irrespective of what may develop, might decide to play it safe and not participate, which is certainly not a desirable result.

MR. COME: Mr. Come, do I understand correctly that basically the Board's position is that without regard to all these special factors, the union's authority begins and ends with what it may do with a member, and once one has resigned

he is no longer a member, and therefore conduct after resignation is simply not subject to union discipline. Is that it basically?

MR. COME: That is it. And for these reasons we submit that the judgment of the Court below should be reversed and the case should be remanded with directions to enforce the Board's order.

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

Mr. Roitman.

ORAL ARGUMENT OF HAROLD B. ROITMAN, ESQ.

ON BEHALF OF THE RESPONDENT

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

There are several points that I think bear some emphasis in analyzing this case. First of all, I think it should be pointed out that in this case the Board is now seeking to have what is an already rendered decision of the State Court of New Hampshire reversed. In this case the union sought enforcement of the fines and sought collection of other contract remedies that it had against these 31 individuals in the New Hampshire Court; a motion to dismiss that action was filed, and after a hearing there was the ruling by Mr. Justice Flynn of the New Hampshire Superior Court denying the motion to dismiss and asserting jurisdiction for the New Hampshire Court for the determination of these membership issues acting

as the opinion points out, and I have attached the opinion as a slip to the brief of the responsdent. The judge pointed out that the New Hampshire Court was acting in the federally unentered enclave mentioned by this Court in the Scofield case and in the earlier decision of Machinists v. Gonzales where you will recall the State Court's ruling that the union had improperly expelled an individual was held to be a matter for the decision of the State Court and not a matter reserved to the Board under the National Labor Relations Act.

Secondly, the Board now seeks, of course, to have that decision of the New Hampshire Court reversed without in any way proceeding against the decision in New Hampshire, either by way of Federal Court injunction or otherwise.

Secondly, it seems to me that we have here three distinct classes of members. It gets somewhat lost in the intricacies of the case. But there were 160-odd employees of this company. Three or four of the employees at all times elected to act pursuant to their Section 7 right not to join the union and not to engage in concerted activities. Those employees never joined the union and never participated in union affairs. They refused to join in the strike and, in fact, the record shows that they continued to work all during the lengthy strike that occurred passing to and from the picket line. And there is, of course, nothing in the record which in any way indicates that any of their Section 7 rights to

refrain were in any way infringed upon by the actions of the union. On the contrary, those rights were scrupulously observed by the union. And these people, we say, come squarely within the Section 7 rights and don't come within the special proviso of Section 8(b)(1) which gives the union the right to act in the situations making membership rules. But those employees carefully had their rights reserved under Section 7.

Now, it's our position that with respect to the other 160 employees, they were all mature men who voluntarily elected to join the union. There was no pressure of a union shop or any other outward pressure with respect to their jobs which would compel them to join the union. They freely elected to join the union on their own. And then, as the contract was about to expire, they met in democratic meeting and voted to engage in a strike if a new contract could not be reached with the company.

Now, that vote for a strike was a part of the democratic process and a part of the union's legislative activities which this Court referred to in the Allis-Chalmers case as part of the national labor policy. But these individuals and the 31 individuals whom the Board seeks to protect in their strike-breaking activities in this case, all of these employees, first of all, met and voted to engage in the strike, secondly --

QUESTION: Suppose at that point some of them had voted against the strike and the strike vote having been taken

thereupon resigned. Would your position as to them be any different?

MR. ROITMAN: Yes. Our position with respect to them is that there was an established union procedure -- now be it not spelled out in the constitution, but there was an established union procedure -- set forth in the membership application card and check-off authorization card under which an employee was free to resign his membership in the 10-day period following termination of the contract. That was an appropriate time for any employee who did not want to participate in the concerted activity of the strike to resign. The union pointed out that there had been an established practice and, in fact, one of the 31 members whom the Board is seeking to protect here, whose name was Hazen Johnson, was an employee who had joined the union after spending some time in the employment of the company. Then he had decided to resign from the union. His resignation had been timely filed at a previous contract termination and was accepted by the union. Then he changed his mind again and reapplied for admission to the union. And now, after many months of the strike, he resigned again for the second time and the union at all times has taken the position that those second resignations were untimely but they would have been timely had they been filed at the conclusion of the contract and at the inception of the strike in that 10-day period.

QUESTION: I take it you are insisting, sticking upon the 10-day provision.

MR. ROITMAN: Well, it's the union's position with respect to that position that, under Section 8(b)(1) the union is the appropriate party to determine what its rules are with respect to retention of membership.

Now, it's true that the union did not spell out explicitly in the constitution that there was this escape period, but the union did establish,and that's documented in the testimony, that it honored as a matter of practice any resignations that were submitted during this period. And the application for membership card, of course, contained this 10-day escape period immediately above the signature of every member of the union, every member who applied for membership in the union signed one of these cards for membership application which contained within it the recitation that the application could be withdrawn during this 10-day period.

QUESTION: Is it your position, Mr. Roitman, that as to all 31, none having resigned within the 10-day period at the termination of the contract and within the first 10 days of the strike, they remained members after that 10-day period?

MR. ROITMAN: Yes, that's always been our position throughout this case. We argued that point before the Trial Examiner. It's mentioned again in the Court of Appeals decision. The Court of Appeals did not attack that particular phase of

our argument. It decided the case on the contract argument rather than this membership argument. But I would say that it is still the position of the union and always has been that the union has the right under 8(b)(1) to determine its rules with respect to retention. This was a rule that the union put forth, and the union is the proper party to determine any ambiguity in those rules, not the Trial Examiner or some party outside the union. We just say that the Act puts the union in the position of being the determiner of those.

QUESTION: Since the union constitution does not provide for this 10-day resignation period and the rules do not apply and the contract doesn't apply, is that something the union could withdraw at will unilaterally?

In other words, what is the status --

MR. ROITMAN: The union membership is a contract of membership.

QUESTION: You called it a practice. Now, is it something that he could enforce?

MR. ROITMAN: Yes, I think so. I think this was in fact the union rule which was part of the contract of membership which any member could enforce. I think he could absolutely enforce his right to resign at that time.

We would point out also that the construction given that particular aspect of the case is that apparently the Board would allow an individual to resign at any time regardless

of this limitation which the union says is there, but if the Board's position is taken and you say that a member can resign at any time during the course of a contract, it would appear that he would continue to pay dues until this escape period for the payment of his dues applied and you have the incongruous result of an individual continuing to pay dues to an organization of which he is no longer a member.

QUESTION: Sometime the consequence of that form of provision in the collective bargaining agreement is --

MR. ROITMAN: Yes, it is. But I think the union construction that the two things juxtapose there is a more logical one.

QUESTION: What is New Hampshire law on the question whether one is still a member if he doesn't resign within a period like this?

MR. ROITMAN: The Court in its decision merely stated that that was one of the issues that the Court would take after it heard the case.

QUESTION: Which court?

MR. ROITMAN: The New Hampshire Court. Judge Flynn's decision again, which is appended to the back, indicates that the question of resignation would be one for the Court to decide on the merits.

QUESTION: What is your view whether that's a matter for State law or whether it becomes involved --

MR. ROITMAN: Well, I think this Court has said in effect in the Gonzales case that that is the kind of an issue that the Federal Government has not entered into and therefore it is a matter for the State Court to determine.

QUESTION: Mr. Roitman, the Court of Appeals apparently and the Trial Examiner concluded perhaps as you suggested that there was no evidence that the employees knew of the union's practice or that they consented to it. Your position is that notwithstanding that conclusion, this was something that was up to the union and it didn't make any difference if the employees knew about it or consented to it, is that right?

MR. ROITMAN: Well, we say on the face of the evidence that when they signed the application card, this provision was right in front of them, that was certainly some indication of knowledge that certainly in the case of Johnson whom I mentioned previously, he knew about it because he had resigned at the appropriate time, had his resignation accepted, and then chose to apply for readmission.

QUESTION: Are you contesting this factual conclusion then of the Trial Examiner that was upheld by the Court of Appeals?

MR. ROITMAN: Well, it's our position that basically, yes, the union does have the right to make that determination. I don't think the issue is central to the upholding the Court

below at all. It's just another facet that can be used to uphold the final result here which is that it was the union's position that these were not effective resignations at the time they were made and therefore that the people were still bound.

The Court of Appeals of course, went on the other ground that this was a contract which bound the members, and we agree with that.

QUESTION: Mr. Roitman, I am still bothered a little bit about this 10-day provision. I take it your position essentially is that Section 7 rights have been waived except as to the 10-day provision during that period.

Now, suppose there weren't any 10-day provision at all.

MR. ROITMAN: Then I think you are perhaps back in the situation that this is a voluntary association and that absent restrictions, this voluntary association can be terminated by either party at any time as a matter of voluntary right of anybody to continue the association.

QUESTION: But with a 10-day provision, that is not so.

MR. ROITMAN: No. We say that that is a part of the membership contract commitment to be bound by that state of affairs.

QUESTION: If it were a one-day provision, it would

not be so.

MR. ROITMAN: Well, I suppose you can always stretch the elastic till it breaks. Our basic position would be that the union does have the right under again the proviso of Section 8(b)(1) to effectuate a rule with respect to retention of membership. And I suppose it can be a harsh rule as well as a liberal rule. There is nothing in the Act which in any way indicates that.

QUESTION: On that basis, it doesn't seem to me there should be any difference between one day or no day.

MR. ROITMAN: Well, no days is the same if there can be no escape from membership.

QUESTION: Once having accepted it.

MR. ROITMAN: You know, that is just not an impossible position. When we formed a more perfect union, there was no escape provision.

QUESTION: Where in the record is the union's position about this resignation? Were they notified that their resignation would not be accepted?

MR. ROITMAN: Yes, they were.

QUESTION: I can't find it. I must have missed it.

MR. ROITMAN: Each of the employees who resigned, the first two were sent letters by the head of the Granite State Joint Board, and it was called to their attention that their resignation would not be considered effective and the

fine would be imposed against them. And later on in the record, after the company --

QUESTION: Where is that in the record, the original of it? Is it in there?

MR. ROITMAN: Yes. Page 79, Your Honor, is -- well, no, page 79 is the letter --

QUESTION: Page 35, would that be it? "Dear Felix:"

MR. ROITMAN: Yes, that's correct. There are two letters set forth, one of which has a P.S. on it and the other one does not, page 34 and page 35 and page 36 indicate that.

QUESTION: Where in here is it they are relying on the 10-day rule?

MR. ROITMAN: That is not spelled out in the letter.

QUESTION: Is it spelled out any place?

MR. ROITMAN: Spelled out -- Well, the evidence with respect to that appears in connection with the examination of Mr. Pitarys at the first case. I think it's about page 20 or 21.

QUESTION: But you are relying on that now. When did you start relying on the 10-day provision?

MR. ROITMAN: Well -- in the decision of the Trial Examiner, the first decision in the case, he sets forth some of the union arguments which he deals with, and that is one of them that he mentions. The point that was brought out, I think, by my brother in his examination was that the Board had

considered this type of issue, the 10-day escape period, in connection with the Automobile Workers Union in a case that went up to the Court of Appeals for the First Circuit called the Paulding case, which is referred to in the briefs. In that case the Automobile Workers did have a provision in the constitution which allowed resignations only in that 10-day period. The Board held that that did not apply, but the Court of Appeals reversed the Board in that case. There was no petition for certiorari. The decision of the Court of Appeals was accepted. That's at 320 F. 2d and is referred to in several instances in the briefs.

QUESTION: Am I correct, up through the case in New Hampshire and the later charges filed with the NLRB, that this 10-day period didn't become an issue until then?

MR. ROITMAN: No. That's right.

QUESTION: It wasn't an issue when they were fined, am I right?

MR. ROITMAN: No, nobody raised that question. The union always took the position that it had a right to fine these individuals on the basis of their strike vote, on the basis of their participation in the vote for the fine, and in the fact that their resignations were defective. All three of these things were part of the --

QUESTION: Even if they were made within the 10-day period, they still would have fined them, am I right?

MR. ROITMAN: No, I don't think so. These resignations came not within any stretch of a 10-day period, but months and months after the strike had not only started, but after these 31 individuals had not only voted for the strike but had actively participated in the strike. These employees all went on strike, these 31 employees all participated in the picketing. They all participated, mor most all of them, participated in the decision of the union to secure group health insurance for the strikers, they participated in union benefits for strikers. They were actively and affirmatively supporting the strike for many months. And we say that all of these factors are part of the reliance item which entitles the union to fine them for their subsequent strike-breaking, because they broke their contract which they affirmatively had worked to promote by engaging in the strike-breaking.

I would suggest that --

QUESTION: May I ask -- I have been looking in the printed record, but can't locate a form of application for membership which includes that 10-day provision. Have I --

MR. ROITMAN: You will find it in the original application, petition for certiorari, where the decision of the Trial Examiner is set forth. He sets it forth in his first opinion. I think it is also set forth in the record at page 34, your Honor.

QUESTION: Thank you.

MR. ROITMAN: The last paragraph here says that "the authorization shall remain in effect unless I revoke it within 10 days," and each individual signed that, as you notice, right underneath the recitation.

The matter is also referred to in Trial Examiner Janus' opinion, and I think he sets forth a copy of the check-off and membership application clause in his opinion.

QUESTION: Mr. Roitman, is it your position that the obligation of the union members continued for the duration of the strike regardless of how long the strike lasted?

MR. ROITMAN: Yes, I think that's essentially the position that we take. That is, when union members vote to go out on strike, they know they are engaging in a serious economic confrontation that can last for an indeterminate period. And they obligate themselves to see that enterprise through till its termination. And its termination, I might say, might come either because the exercise of the economic forces on both of the parties, it gets them into a compromise position,or one of the other side yields sufficiently to get an accommodation, or as in the case here, the union finally votes to abandon or discontinue the strike. That wasn't in the record here, but ultimately that is what happened.

QUESTION: Was there any meeting of the union membership subsequent to the September 21st meeting, 1968, when they voted to impose a fine?

MR. ROITMAN: Oh, yes. There were constant meetings where the officers reported back to the membership on the status of negotiations and the situation which the union was in, where they voted to undertake items, for example, like the insurance matter which I referred to a moment ago. That wasn't spelled out very carefully in the record, but I think there is perhaps a brief reference to it in some of the letters of resignation. One or more of the members complained he didn't like the way one of those meetings was run. But there were frequent meetings at which there was ample opportunity for these 31 employees to exercise their democratic right within the union to persuade any of the others to their cause.

And we say that that's the position that this Court left the parties in in the Scofield case, namely, that the union, the national labor policy is one that favors the democratic operation of union affairs, that the union has these legislative powers with respect to collective bargaining, that when they democratically vote to undertake a strike, the only thing that remains open after that is the settlement of the strike or the use of the democratic process to change the position. And in the Scofield quotation that's relied on by the Board, if you back up a few sentences, I think that's made clear by the Court. The Court points out that it's the right of an individual to exert his democratic influence or his

influence on the body and have his minority position, if you wish, changed to a majority position by persuasion. And that position is the one that's in accord with legislative policy under the Act and is in effect the only way that the contract commitment can be changed,by mutual agreement.

We point out that the Board itself in dealing with associations, for example, that are put together for the purpose of mutual collective bargaining lays down the rule that you can only withdraw from such an association prior to the time the association engages in collective bargaining. That a subsequent withdrawal must be by mutual consent rather than by any individual having an individual veto power.

If you allow the Board's position, of course, each individual has a right to veto the legislative determination of the majority, and you have not a democratic proposition, but an anarchy within the union which allows each member to be an individual breaker of the joint commitment. And there again, we pointed out situations where in the past the Court has held that an individual waives his right to engage in strikes when the union votes to accept a contract against striking. There are various other situations we have referred to in the brief where for one reason or another the individual member's right to either engage in a strike or not to engage in a strike is affected by the majority determination of the union in accordance with the National Labor Policy.

MR. CHIEF JUSTICE BURGER: Mr. Come, do you have anything further?

REBUTTAL ARGUMENT OF NORTON J. COME, ESQ.

ON BEHALF OF THE PETITIONER

MR. COME: I just wanted to point out, as I believe Mr. Justice Rehnquist noted, that the Court of Appeals found on pages 5a to 6a -- it's really 6a of the petition, -- adopted the Trial Examiner's finding that there was no evidence that the employees knew of this practice or that they consented to this limitation on their right to resign, that is, with respect to this 10-day point that Mr. Roitman has been making.

QUESTION: Some are of the point of view that, say, if you signed it, you did know about it and it was effective. What would you then say as to whether they were members at the time they actually resigned?

MR. COME: Well, I think that there you would have an issue that would probably have to be remanded to the Board, because as the Board found the facts here, this 10-day provision was not something,first of all, that had anything to do with resigning from the union. It was a combination membership and check-off clause. The Trial Examiner found that the 10-day provision related only to the check-off provision, not to the resignation from union membership.

He further found that there was no evidence in the record that showed that the employees were made aware that this

was the way that you have to resign from the union. The Court of Appeals sustained that finding. We submit that it is supported by substantial evidence for the additional reason, as Justice Marshall pointed out, that nowhere in the letters that were sent to the employees was any mention made of the fact that the resignation was improper because it didn't comply with the 10-day rule.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:59 o'clock a.m., the case in the above-entitled matter was submitted.]