OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1894

TITLE PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL., Petitioners V. NATIONAL LABOR RELATIONS BOARD, ET AL.

PLACE Washington, D. C.

DATE February 27, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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PATTERN MAKERS' LEAGUE OF :
NORTH AMERICA, AFL-CIO, ET AL., :
Petitioners, :
V. : No. 83-1894
NATIONAL LABOR RELATIONS :
BOARD , ET AL. :

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Washington, D.C.

Wednesday, February 27, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 o'clock a.m.

APPEARANCES:

LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the Petitioners.

CHARLES FRIED, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Pattern Makers' League v. the National Labor Relations Board.

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

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

ON BEHALF OF THE PETITIONERS

MR. GOLD: Chief Justice, and may it please the Court, the question in this case is whether the National Labor Relations Board is correct in its ruling that all Union rules placing restrictions on the time and circumstances under which a member may resign from the Union are invalidated by Section 8(b)(1)(A) of the National Labor Relations Act, as amended, is correct.

The facts which raise that question are these: The Pattern Makers' Union adopted a provision in its constitution and bylaws which we set out at page 3 of our brief, the blue brief, which states: "No resignation or withdrawal from an Assocication or from the League shall be accepted during a strike or lockout or at a time when a strike or lockout appears imminent."

That provision was considered at the Union's convention in 1976 and then was sent to a referendum of the Union's members, and finally approved and became

effective in 1976.

Thereafter, a strike did ensue, involving the Rockford and Beloit local Unions of the Pattern Makers' Union. some eleven members of those local Unions put in resignations during the strike and went back to work thereafter. The Union, when the strike was finally settled, sought to impose Union discipline on these individuals.

Charges were served, a trial was held, and the result was that the case went to the National Labor Relations Board on the allegation that the Union's action in seeking to discipline these individuals for violating the Union's underlying rule that engaging in strike-breaking activity is unlawul as a matter of Union law, violated Section 8(b)(1)(A).

QUESTION: What panel did the Union impose?

MR. GOLD: The Union imposed on the individuals for engaging in the strike-breaking activity.

QUESTION: The fines amounted to all of their salaries earned when they went back to --

MR. GOLD: My memory, Justice O'Connor, is that the fines were in the amount earned while engaging in strike-breaking activity.

And, of course, the question of the state of

those fines is a matter for state law to determine under this Court's decisions in the Boeing & Machinist case. The validity of the fines, whether the fine's reasonable in amount, and so on are a matter of the state law of membership associations and the state law of contracts; and the extent to which the fines are enforceable, this Court has held, is to be determined in that forum.

So all we have is in inchoate action by the Union, subject to only one means of enforcement; namely, a state court lawsuit to collect the amounts in question with the law on what is collectible, a matter of state law.

QUESTION: Do you know whether the fines, in fact, have been paid?

MR. GOLD: My understanding is they have not.

QUESTION: Well, could the Union expel these members for failure to pay the fines so that they wouldn't have to resort to state court collection proceedings under state law?

MR. GOLD: Yes. There are, as we understand the law developed by this Court from Allis Chalmers through Machininsts & Boeing, two lawful methods for enforcing a rule against strike-breaking against full Union members.

Obviously, unless the person chooses to join

the Union, to become a full Union member and be bound by the constitution, the Union can't take any disciplinary action.

But if somebody, as in this case, and it's conceded, if someone joins a Union, becomes a full member, agrees to abide by the constitution and bylaws, then the Union has two choices: one, to take action which leads to expulsion; two, to take action which leads to a fine which can be attempted to be enforced through court action.

Those are the only two options open to the Union.

QUESTION: Now, has the Union permanently given up the opportunity to expel here by imposing a fine, or could it, if the fine proved uncollectible under its own constitution, say well, you failed to pay; we're going to expel you for that.

MR. GOLD: I presume -- I've never seen a case of that kind. I presume that a Union which first seeks a fine, to collect a fine, and is told by the courts that the fine is too high an amount or procedurally imposed in an imperfect way, would still have the option of explusion.

The only argument I can see the other way is that there is some choice of remedies or waiver by the

Union. I don't think that would be the rule. Usually, Unions seek to go one way or the other initially. In many Unions, the complaint, internal complaint filed against the members, says what the penalty being sought will be.

And some Union constitutions provide that if the only penalty that can be imposed is that which the member has been given fair notice of, so that he can make his determination whether to defend or not.

Some people faced with expulsion wouldn't choose to defend, and it would be unfair to come around later and try to collect a fine from them. So different Union constitutions treat that issue in different ways.

QUESTION: I take it you will address the question of judicial deference to the Laurence view of the matter.

MR. GOLD: Oh, absolutely, Chief Justice.

The argument we make here is that the language and legislative history of the Taft-Hartley Act shows that Congress gave the most mature and complete consideration to the entire question of the extent to which the Labor Board should be empowered to regulate the Union/Member relationship, and that in particular, the House of Representatives proposed that it be an unfair labor practice for a Union to limit resignation

in any way, shape, or form; where the Senate took a quite different view. And that conference report demonstrates in this instance, as in many others, that the House receded to the Senate.

In other words, our position here is that Congress made a considered decision to deny the Labor Board the authority to dictate to Unions what their rules should be on who may join the Union, the conditions under which that person may join, position, the conditions under which he may be expelled, and the conditions under which he may otherwise leave the Union.

QUESTION: Mr. Gold, may I ask, is there anything in the record -- how much knowledge, if any, of this League Law 13 any of the eleven employees involved had at the time they joined?

MR. GOLD: The Board found or stated, "There is no contention that the members who tended their resignations were unaware of the restrictions on resignation imposed by the constitution."

QUESTION: But there is nothing in the record that they were affirmatively informed of this provision when they joined?

MR. GOLD: All that the record shows, Justice Brennan, is that in adopting this provision, the Union

publicized the matter to the full membership, and the membership voted on whether or not this restriction should be inserted into the Union constitution.

QUESTION: Were these eleven members of the Union at the time of the adoption of this provision?

MR. GOLD: Yes. That is my understanding. They were members at that time. And there was a hiatus from August 1976 until May 1977 between the time the provision was adopted and when the strike began. So by the clear terms or the negative implication of this restriction, each one of these members was free each one of those days to say I don't choose to be a member of this association any longer.

This is a narrow and pointed restriction on the ability to resign, one which is attendant to a particular moment of the utmost importance to the organization, the strike period with its attendant pressures, and the period during which the employer is free to employ such coercive devices, perfectly lawful under the labor laws, as hiring permanent replacements, stating an intention to do so, and so on, all of the lawful uses of economic force which tend to pull the group apart.

QUESTION: Do you read the Board's holding as an employee Union member is simply not at liberty to

waive the right under 8(b)(1)(A)?

MR. GOLD: I read the Board's holding to be firm and absolute.

QUESTION: Under no circumstances may an employee waive it?

MR. GOLD: No such rule as the Board --

QUESTION: No, that wasn't my question. A holding that the Union member, if presented with this clause before he joins, said look what happens to you if you were to strike, and he says that's perfectly all right with me, that's all right, I will go along with that and I join.

If that were a waiver, the Board says it's not to be --

MR. GOLD: Yes. The Board, in terms of its decision and also in its brief, more particularly addresses the question of waiver. Obviously, Mr. Fried is better able to say what's in the Board's mind than I am. But the Board's decision is stated in absolute terms, and certainly against the background of this case where the provision is adopted on notice by a referendum vote, not even by elected representatives, it is hard to believe when you read the Board's language, which is that any restriction placed by a Union on its members' right -- any restrictions placed by a Union on its

members' right to resign are unlawful, admits of any exception.

QUESTION: Of course, your position is that he had no right to waive.

MR. GOLD: That's right.

QUESTION: That's your primary --

MR. GOLD: Yes. Our primary position is that Congress made a basic judgment.

QUESTION: Limited these rights to the extent necessary to let the Union run its own affairs.

MR. GOLD: That's correct.

QUESTION: And I take it that you rest on the legislative history.

MR. GOLD: Yes. We rest on the --

QUESTION: If there was nothing but the language, you probably would be in more trouble.

MR. GOLD: Yes. The language -- it seems to us to proceed in the way the Court has instructed from the language to the explanation. The language is hardly helpful to the Government, but --

QUESTION: Well, unless you are inclined to say that if the Board gave it a permissible reading, you'd think it.

MR. GOLD: That is what I was about to say, Justice White. I don't think it is very helpful, but I

could not say --

QUESTION: That the language wins your case.

MR. GOLD: Forces a decision in our favor. I do think the language cuts in our favor in two different respects: one, the section 7 right is a right to refrain from concerted activities, and it seems to us the choice of the word "refrain" is a surprising one to dencte a right to join an organization which has a rule limiting resignation, and say I will join, but I am joining free and clear of that rule, and I won't respect it and I have a right that Congress gave me to join and then to leave at will any time I say.

So I don't think the language pushes in the Government's direction.

QUESTION: You're very close to a waiver argument there.

MR. GOLD: I think that the argument -- and we've gone back and forth in our minds whether or not the argument is a waiver or an argument simply that this is a narrow right, a right not to join in the first place.

Secondly, Section 8(b)(1)(A) was not in the Senate committee bill. It was added on the floor by Senators Taft and Ball, and in adding it they excepted an amendment by Senator Holland, adding the proviso to

the amendment, the proviso that says that nothing in the body of the amendment which prohibits restraint and coercion is intended to interfere with the right of Unions to prescribe their own rules with respect to the acquisition or retention of membership.

QUESTION: Isn't this the kind of question that traditionally, courts have traditionally given the Labor Board a great deal of elbow room?

MR. GOLD: I think that this is, Chief Justice, the kind of question where the Board has the least possible elbow room. I would concede that if all that I had to present to you was the bare language of the statute, unexplained by its evolution and by what its sponsor said, that this might be an area in which the Board's expertise weighs heavily.

But that is simply not the situation here. Congress was considerate enough, good enough to debate these matters at great length. And what we see is (a), as I was saying in the Senate, expressed statement by the sponsors of Section 8(b)(1)(A) that they had no intent to intervene in internal Union affairs and to regulate the Union/Member relationship.

And then when we move to the House, we find a very different situation. In the House, there was a Section 7(a) in the House bill, very much like Section 7

now, including these words "granting individual employees the right to refrain from concerted activities," and a Section 7(b) which regulated, which gave Union members rights, vis a vis the labor organization.

And in the House bill, there was a Section 8(B) which is very much like Section 8(b)(1)(A) now, dealing with this general question of restraint and coercion, basically physical coercion and interference with job rights.

QUESTION: Mr. Gold, was there any discussion before or after or during the conference report with respect to this specific problem?

MR. GOLD: Yes.

QUESTION: Whether a Union could fine a member for strike-breaking?

MR. GOLD: No, Justice White. I cannot say that the discussion was in that specificity, but the discussion was as follows. We reproduced the portions of the statement of the House managers who would certainly take the kindest view as to what --

QUESTION: Which is the language of their statements do you most strongly relate?

MR. GOLD: Page 31 to 32. And I'd like to read it at the bottom of the page, simply to give the

background to this statement.

The House passed a bill that had a Section 7(b) which gave rights to individuals as Union members and a Section 8(c)(4) which specifically stated that Union members would have a right to resign at will, and that it was an unfair labor practice to limit that right.

The bill went to conference. Section 7(b) and 8(c) were dropped. The House conferees said Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members.

One of the more important provisions of this section, that limiting the initiation fees which a labor organization may impose, where a permitted Union shop or maintenance of membership agreement is in effect, is included in the conference agreement. See Section 8(b)(5) and, has already been discussed, the other parts of this subsection are omitted from the conference agreement as unfair labor practices.

The House managers had the political job of going back to the House and saying we salvaged as much as was possible. The House managers did not admit to failure in that regard lightly.

There is just no doubt, we submit, that this

language says we tried to regulate internal Union affairs; we succeeded in -- we tried to regulate internal Union affairs in Section 7(b) of our bill and 8(c) of our bill; we saved Section 8(b)(5) on initiation fees; we lost on everything else.

Senator Taft told the Senate that with regard to the scope of 8(b)(1) which he and Senator Ball had said was not intended to get into internal Union affairs, the conference bill was the same as the Senate bill.

Now, the Board which admits that all of these materials are embodiments of Congress' will and have to be explained, says that while no one -- no one -- so stated at the time, the real agenda of the conference was by adding the words the "right to refrain" in Section 7, which had not been in the Senate bill, it was the intent to create a right to resign at will, quite aside from the fact that that doesn't face up to what happened to Section 7(b) and 8(c)(4).

QUESTION: But that's an argument that the failure to include the unfair labor practice, which was what -- 8(c)?

MR. GOLD: Yes, Your Honor.

QUESTION: Failure to include that, that supposedly limits the meaning of 7(a) is your argument?

MR. GOLD: Yes. It limits it in this respect. Neither the House nor the Senate ever claimed that Section 7 or 7(a) of the House bill or Section 8(b)(1) regulated internal Union affairs or this particular aspect of internal Union affairs.

And indeed, unless the Board is correct that Section 7(b) and 8(c)(4) of the House bill were completely redundant, the fair inference is that both the House and the Senate saw the issue of regulating Union activity that affects job rights or Union activity that involves restraint and coercion in the colloquial sense, harming somebody physically, engaging in mass picketing, and the rest, were different from the question of whether Congress ought to regulate the Union/Member relationship.

And everything in the Senate, the explanations of the addition of the proviso to Section 8(b)(1)(A), the failure in the Senate bill to include any right to refrain, the statements of Senator Ball --

QUESTION: And I suppose if you were a member of the House or the Senate voting on this conference report on the final -- and you just sat and read it -- you may not know, wouldn't have had the faintest notion of all this background that you have just recounted.

You may have had some feeling about it, but

you voted on the language of the bill.

MR. GOLD: That's true, but you voted after knowing that you voted for a very different House bill, and that your appointed representatives came back and in black and white said --

QUESTION: Said we lost a lot of stuff.

MR. GOLD: We lost a lot of stuff. And one of the things they lost was this.

QUESTION: I know that's what you say, but nobody mentioned it. They lost that unfair labor practice.

MR. GOLD: But that's the argument here. The argument here is precisely that while they lost that unfair labor practice, that the Labor Board has the power under 8(b)(1)(A) which was never claimed to give the Board the power, the authority to recreate that unfair labor practice, and to do so out of whole cloth.

QUESTION: If you're right about that, Mr. Gold, doesn't that cast some doubt on the correctness of the Court's decision in the Textile Workers case?

MR. GOLD: No. I don't believe that that's so at all. The Textile Workers case and all of the decisions through the Court's decision in Machinists & Boeing say that the Union/Member relationship is no greater than the contract created by the Union's

constitution, and that union's have no right to take diciplinary action against non-members without engaging in a wrong.

The question here is whether the Board has the power to truncate the Union member contract by substituting its view that there is something somewhere in some brooding omnipresence in the sky that says that every Union rule limiting the right to resign is an unfair labor practice.

And our point is that nothing in Section 7(a), nothing in Section 7 as enacted, nothing in Section 8(b)(1), authorizes the Board to create that unfair labor practice; that the provisio to 8(b)(1)(A) in terms denies the Board that authority, and that the legislative history shows that Section 7 was not intended to give the Board that authority, and that the fate of Sections 7(b) and 8(c)(4) demonstrates that this was not an issue of which Congress was unaware, but rather an issue where there were two different views.

The House's view was the Union/Member relationship should be regulated, regulated in detail, and in particular regulated on when people should resign The view of the Senate was that Congress should not move to that point, should not say who could be a Union member, how long he would be a Union member if he chose

to be a Union member, and when he would get out.

But they were not going to tell the Unions what to do on those kinds of rules. And it was the Senate view that prevailed, and the Board here, as in Insurance Agents, where the Court said that the first issue is did Congress ask the Board to answer a particular question and said that it had not, is the same here.

The Board just has not been given the authority to determine what Union resignation rules are good anymore than what the Union finds are reasonable. These matters Congress left where it found them until -- for the state courts, for the law of contracts, for the law of membership associations, and eventually for the Landram-Griffin Act where this matter was not regulated either.

CHIEF JUSTICE BURGER: Mr. Fried.

ORAL ARGUMENT OF CHARLES FRIED, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. FRIED: Mr. Chief Justice, and may it please the Court, having decided that a Union commits an unfair labor practice by seeking court-enforceable fines against members who have resigned to go back to work during a strike, the Court considers today the Board ruling that a Union may not accomplish precisely the

same result by recasting its rule so as to forbid strike resignations by those who would go back to work.

Now, in considering that Board ruling, I respectfully remind the Court that the Court has frequently said that the interpretation of the Act is in the first instance for the Board, and that that interpretation by the Board of its Act is due great deference, so long as its interpretation is -- and I quote Mr. Justice Stewart in the American Shipbuilding case -- "not inconsistent with the fundamental structure of the Act."

Therefore, I think it is helpful to consider at the outset what the fundamental structure of the Act is. And surely there is nothing more fundamental to the structure of the Act than Section 7.

Section 7 of the Wagner Act, an Act of 1935, was the centerpiece of that piece of legislation. It was the great charter of liberties of the Union movement. Employees shall have the right to self-organization and to engage in considered activities.

In 1947, the Congress sought to enlarge that charter of liberties and to add -- and I quote here from the preamble of the Taft-Hartley Act -- "further rights" -- and I quote here -- "to protect the rights of

individual employees in their relations with labor organizations."

So that when the first part of Section 7 was enacted, it protected the rights of employees, vis a vis employers; the second part, which added the words "and shall also have the right to refrain from any and all such activities" created an enlargement and a symmetry in speaking of the individual's rights vis a vis labor organizations.

Now, in the early days of Section 7 of the Wagner Act, employers regularly came to the Board and came to the Court to argue that they had made bargains with employees in which employees had bargained away those great rights, and they had made fair bargains, reasonable bargains, bargains for a limited time only, and that the employees had struck those bargains with their eyes open.

And the Board and the Court regularly turned those arguments down, saying that Section 7 rights cannot be bargained away. The great case in this Court is National Licorice. What the Board does here in its understanding of the fundamental structure of the Act is that the right in the second part of Section 7 also cannot be bargained away, no matter how fair the Union provision is, no matter how limited in scope, and no

matter that the member entered into this bargain, bargaining away his rights with his eyes open.

So there is a symmetry here and the structure which the Board discerns seems to us to be a structure which makes sense, which is a coherent structure.

Indeed, the only exception which Section 7 admits this right to refrain relates to Union security clauses, and this Court was most emphatic over a generation ago in the General Motors case, that Union may not, by Union security clauses, demand any more than financial core membership. That is to say, such an allegiance which does not submit an individual worker to Union discipline.

QUESTION: Mr. Fried, has the Board's interpretation, present interpretation of these provisions been a consistent one throughout the years?

MR. FRIED: Over the last dozen years, Justice O'Connor, the Board in every major case has held that a Union attempt to impose court-enforceable fines on workers who would go back to work during a strike, when those workers have indicated their desire no longer to be affiliated with the Union, constitutes an unfair labor practice.

So we don't have here some dramatic U-turn in the position of the Board, but a consistent picture

which the Board has been elaborating since this issue first surfaced, and a picture which this Court has twice added its hand to the elaboration of.

Now, the Petitioners rely very heavily on the provisio of Section 8(b)(A). They rely on the proviso which reserves to the Union the right to make rules regarding the acquisition and retention of membership. The Board's reading of that proviso, we submit, is a perfectly natural reading, but also a reading which carries forward a consistent, a coherent picture of the structure of the Act.

For what it says on one hand under Section 7, is the employee's relation to the Union is wholly voluntary. He may join if he wishes and he may leave when he wishes. And under the proviso as the Board reads it, what Congress is saying, it is voluntary on the other side of the relationship also. The Union may accept a member if it wishes and may terminate, that is to say, expel the member when it wishes.

Thus, the Board's reading is a reasonable one and makes sense out of the structure of the Act. The Petitioners' reading of the proviso would have the word "retention" take on the meaning that the Union has some kind of a power to hold onto a member who no longer wishes to maintain his membership.

Now, had the same really rather powerful argument which Petitioners and Unions urge and have urged consistently before this Court, arguments in terms of free riding, arguments in terms of solidarity, had those arguments been deployed to require an interpretation of the parallel word "acquisition" of membership, such that the Union may reach out and impose membership on an unwilling worker, this Court would reject that reading out of hand.

What the Board does here is to read the word "retention" in a similar way and to recognize that these very strong arguments of solidarity and free riding nevertheless cannot overcome the fundamental principles set forth in Section 7.

QUESTION: Well, Mr. Fried, I take it that your colleague on the other side seems to agree that if we were just looking at the words of the Act and structure, that maybe the Board has got a pretty good case.

But he rests on the legislative history which he claims requires that these words be given a different meaning than you are urging.

MR. FRIED: Justice White, if the legislative history plainly indicated an intention of the Congress to allow this kind of strike resignation fining, we

would not be here, we would not have this case for the third time before the Court.

Of course, the legislative history in our view is really quite indeterminate on this point, which is what presents the problem. The closest, I think, in the legislative history that we can come to an elucidation of the meaning of the proviso are the words of Senator Holland himself who was the proponent of the proviso in its present terms to the Senate.

QUESTION: I wouldn't think you would have to find anything in the legislative history that would support your view. All you have to do is negative -- the suggestion that the legislative history requires an interpretation contrary to yours.

It would be helpful, I suppose, if you had some support.

(Laughter.)

MR. FRIED: The greatest help, Your Honor, which I find in the legislative history is Senator Holland's own explanation of the function of the proviso, for he says -- and I quote from a passage on page 20 of the Petitioners' brief -- that "the function of the proviso has to do with admission and explusion of members."

And that, of course, is precisely how the

Board reads it; is that the proviso deals with the admission and expulsion of members. That makes quite plain that what Senator Holland was seeking to accomplish was to reserve to the Union that same freedom of action which Section 7 reserved to the individual worker.

The relationship is voluntary symmetrically on both sides.

QUESTION: Mr. Fried, may I inquire at this point, because it seems to me their stronger argument does not necessarily rely on the proviso, but rather relies on the fact that the House originated both the words the "right to refrain" and the provision that was deleted that said that this doesn't affect the right to resign.

And if you have those in the same bill that originated in the House, does not that imply that the right to refrain without the other would not encompass the right to resign?

MR. FRIED: Justice Stevens, I think that the implication is wholly indeterminate in that respect. The sponsor of the House provisions, Congressman Hartley, described the Senate -- the final Senate version as being broader in scope in general. That was his general word.

Now, whether that is intended to indicate --

QUESTION: Well, let's take it one step at a time. Would it not be true that within the House original submission, that at least your first reading of it should be that the right to refrain was not enough to accomplish what 8(c)(4), I guess it was, was intended to accomplish?

Why would they have had both provisions if the right to refrain did the whole job? Just looking at the House itself for the moment.

MR. FRIED: Legislation is frequently full of redundant terms, of terms that go over the same grounds in specific ways as well as in general ways. And, therefore, I think what one must ask is whether there is anything in the legislative history which, with sufficient specificity, indicates that by dropping that language the House members were attending to the point which my brother Gold insists they were attending to, or whether they viewed themselves really as acceding to more general and admittedly more debatable language.

QUESTION: I understand the force of your argument on the compromise on the conference -- I'm still trying to think through the initial drafting of the language, at least creates an inference that at that point they thought something more than the right to

refrain was probably needed.

That's the first -- it seems to me the first question we ought to ask ourselves. But I see what you say; well, maybe they later on decided it might have been redundant. It hardly would seem redundant in the very first bill. That's the thing that --

MR. FRIED: Of course, it's a fact that is well known, that when there's a fight -- and my brother Gold is quite right -- there were a lot of fights concerned with this legislation -- it is often the part of prudence to recede in favor of vaguer, more general language, and hope that you will prevail later.

That is a very understandable tactic of compromise.

QUESTION: It apparently worked, too.

(Laughter.)

MR. FRIED: We shall see, sir.

QUESTION: You mean prevail with the Board later?

QUESTION: With the Board at least.

QUESTION: You mean prevail with the Board later?

MR. FRIED: Prevail with the Board, prevail in the courts, prevail with those who are considering the structure of the Act as a whole. Having created

perhaps some kind of an ambiguity, having created a question, the question then becomes, given the whole texture, given what Justice White referred to as the web and structure of the Act, did not the proponents of the House language in fact have their way, though they lost the specific wording?

That is the question which we put before you.

QUESTION: Well, you're a little cynical.

QUESTION: 8(c) simply -- that proposed 8(c) that was eliminated was simply made a -- just added a specific unfair labor practice with respect to -- or did it?

MR. FRIED: It added a specific unfair labor practice and --

QUESTION: To protect the rights under Section 7?

MR. FRIED: Whether that was how the Congress was thinking, and whether the House had the matter that firmly in mind is something that I cannot give you assurance of. It is a striking fact that what the House was concerned about in that right to resign provision was specifically to protect the rights of workers.

And this, I think, might help in answering Justice Stevens' question. What the House was concerned with was, as they were throughout, in protecting the

rights of workers who resigned and whom the Union then seeks to terminate as employees under a Union security clause. And that matter surely was covered, and adequately covered by the more general language and by this Court's decision in the General Motors case.

QUESTION: Does this phenomenon of calculated ambiguity in the legislative process help explain why courts, including this Court, have said we leave that to the Agency to wrestle with it and work it out?

MR. FRIED: It does help, Mr. Chief Justice, but the Court limits the Board to asking whether its reading is not inconsistent with the fundamental structure of the Act, and that is why we come back again and again to that fundamental structure.

It is our contention that the structure which the Petitioners urge is not a coherent structure, whereas the structure which the Board's decisions consistently, over a period of a dozen years has been moving towards, is one which is balanced and fair on both sides.

QUESTION: Mr. Fried, in the Curtis Brothers case, this Court did something along the lines that Mr. Gold has urged today; to wit, infer from Congress's failure to enact more specific provisions, that we should look to that failure to enact specific in

interpreting the end result.

Do you think that that case poses some support for your opponent?

MR. FRIED: It is evidently some support. I believe it is not sufficient support in the overall context of what is being done. I recall Senator Taft's words as he accepted Senator Holland's proviso. He accepted the proviso without objection. He found it perfectly understandable for, as he said -- and I quote -- his only purpose was, to quote, "outlaw restraint and coercion as would prevent people from going to work if they wanted to go to work."

That is how Senator Taft understood the general structure of what he was doing, ane he thought that Senator Holland's proviso fit into that structure perfectly comfortably.

Now, therefore, I don't think we need to work the elaborate inferences from enactment and failure to enact which this Court was forced to resort to in the Curtis Brothers case, which I think are not necessary to a decision in favor of the Board's ruling in this case.

I would suggest that the picture which the Petitioners give of the word "retention" in that proviso is a picture which is similar to the word "detention," that it means that a Union is empowered to hold on to a

member who no longer wishes to be a member.

And the Petitioners understandably insist upon the fact that after all here, so far as we know, the Union member was well aware of this provision either at the time he joined the Union or after the League Law 13 was passed and when he had a chance to get out.

But these Section 7 rights, the Court has said again and again, cannot be bargained away. So the picture that is being offered by the Petitioners is a picture which the Petitioners, the Union in the Granite State case also offered to this Court, and in their brief they offered a picture of the worker as -- and I quote here from their brief -- "a volunteer for military service, under strict discipline for the duration."

Now, the picture which the Board offers of the Union/Member relationship was well stated by Mr. Justice Douglas in that same Granite State case, where he said it was a picture "normally reflected in our free institutions," the right of the individual to join or to resign from associations as he sees fit."

The question for the Court is whether the Board correctly understood the fundamental structure of the Act as enacting the military picture of the member as a volunteer for military service or Mr. Justice Douglas's picture.

Now, the Petitioners go back to the law of voluntary associations, and properly so, because the great case in this Court on the whole issue of fining Union members is the Allis-Chalmers case. Since the statute says not a word about fining Union members, it's in that case that that right was established.

But the Allis-Chalmers case emphasized that the power to impose court-enforceable fines was predicated on the fact that the fined person "enjoyed full Union membership," and that what was at stake was purely internal -- internal regulation.

Now, the state law on voluntary associations is said to clearly require, to clearly recognize the right of a voluntary association to restrict the right of members to resign. And in this regard, the Petitioners rely on the weighty authority of corpus juris secundum.

I would engage in a battle of the giants here and bring in the weighty authority of Am. Jur. Second, which says that a member may lawfully resign at any time from an association or club, and a bylaw which restricts this right or makes the withdrawal subject to the organization's approval is invalid.

Well, the fact of the matter is, I would give no great weight to either of these weighty authorities

because the fact of the matter is that the common law of voluntary associations is underdeveloped and in conflict on the subject of whether an association may or may not restrict an individual in his attempt to resign.

One thing, however, is quite clear; that those cases -- and there are cases, common law cases, which recognize an association's right to restrict a member's resignation -- all make it quite clear that those restrictions will be placed under the strictest court scrutiny to see whether they comport with state public policy of fairness.

The question which this Court must consider is whether the issue, not of the reasonableness of a Union fine, which this Court clearly remits to state law, but the question of the outer perimeters of the Union/Member relationship should also be remitted to 50 varying state court policies, so that in one state such a restriction is unreasonable; in another state such a restriction does comport with public policy.

QUESTION: Might you have a little difficulty here? This local operates in both Illinois and Wisconsin, does it not?

MR. FRIED: Yes, that would be a very great difficuty, Mr. Justice Blackmun. It would seem that this matter -- and here is a fundamental difference

which the Board has with the Petitioners -- this matter of the outer limits of a Union's reach over those who would not be members is no longer merely an internal matter, but becomes a matter for federal labor policy, a matter indeed entrusted in the first instance to the Board as it interprets -- as it interprets the fundamental structure of the Act.

Now, I would like, if I may, to speculate for a moment with the Court about the effects of this Board's ruling, the Board's ruling on the situation of Unions, because the suggestion is that this ruling is a disaster.

It would seem, first of all, that we must recall that this ruling is no great innovation. After all, this Court has said in Granite State and in Booster Lodge that a Union may not offer the following bargain to a potential member: You may join with us, but only on condition that you agree, having resigned, not to go back to work during a strike.

What has the Union done here? Through a merely technical reformulation, they offer a member the following bargain: You may join with us, but only on condition that you agree not to resign in order to go back to work during the strike.

QUESTION: Well, you could as well argue that

you are relying on a technicality to distinguish the case from Allis-Chalmers.

MR. FRIED: It is a technicality, Justice --

QUESTION: Resignation.

MR. FRIED: It is a technicality, Justice White, on which this Court has laid great emphasis, particularly in the words which said that a Union member is, in general, free to leave the Union and escape the rule.

I think this Court has viewed resignation --

QUESTION: I was just repeating that it was -- if you call it a technicality, it's a technicality -- resignation.

MR. FRIED: But it's a technicality which --

QUESTION: I didn't say it was unimportant.

(Laughter.)

MR. FRIED: The other matter which --

QUESTION: Let me ask you one question on deference, if I may, Mr. Fried.

Do you think the issue is one on which, if the Board had gone the other way, it would have been clearly wrong? Or could it have gone either way on this issue?

MR. FRIED: Had the Board -- had the Board said that a Union may restrict in this unlimited way the right of strike resignation, it is our contention that

this would be at war with the fundamental structure of the Act. Yes, sir.

QUESTION: Would you say the same thing about the 30-day provision that two members speculated on?

MR. FRIED: Had the Board decided that a Union is entitled to insist on certain formalities in processing strike resignations, and maybe even including a brief delay during which the Union absorbs the fact that these men are, in fact, resigning, that might well be within the discretion of the Board.

But a restriction as extensive as 30 days raises the very gravest doubts in our mind about it's consistent with those Section 7 rights and the notion that those rights may not be bargained away.

QUESTION: I suppose one could say that that kind of 30-day provision makes it a harder case for your opposition.

MR. FRIED: It would be a harder case for our opposition, but I don't believe, Mr. Justice Blackmun, that it would be a decision which we would care to defend.

I would like to simply underline one matter in terms of the effect of this decision. For, though the Board adheres fast to the right of a member to leave the Union and escape the rule, the Court must remember that

this is not a costless option. The Union continues to be the mandatory bargaining representative of that worker, and in choosing to resign, he loses his voice and he loses his voice most particularly in regard to the question of whether he may participate in a vote to take that unit out on strike, and he loses his voice in deciding whether to accept a new contract -- a new contract to end the strike.

So there is a penalty, there is a price that the man pays when he exists, when he exercises his right under free institutions to exit.

Finally, I might say that over the years, employers have found no more effective tactic in arguing against Union representation than to urge that Union membership is like joining the Army.

Now, it seems to me that the Board's ruling here would establish once and for all the notion that Union membership is a free relationship, voluntary on both sides, and this may very well open the way to a more solid form of solidarity, based indeed on the fact of an intrinsic loyalty.

I thank the Court for it attention.

CHIEF JUSTICE BURGER: You have one minute remaining, Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. GOLD: I would like to warmly impress on the Court Judge Lernard Hand's injunction that the task of both agencies and courts is to recreate the gamut of values extant at the time from the legislative materials.

My brother Fried did everything, other than talk about what Congress said and did. And the overall picture he drew, I would suggest, is it has nothing to do with the Act.

What is self-organization? What is freedom of association? It is not, and was not in Congress's eyes, the right of every individual to join the organization if he wishes and to leave if he wishes. Of course, the very point of the proviso was to recognize that freedom of association is a group freedom, and the group creates its rules on who may join and who may not join.

An individual who walks up to a Union and says I want to join, but I won't abide by these rules, can be rejected because Congress's view of the freedom of association was the contractual view, the view stated by this Court in Democratic Party of the United States, and not the view that Mr. Fried creates out of whole cloth, and that's the Board, without paying the least bit of attention to what Congress was willing to do and not

willing to do, enacted.

This bill was a compromise. The issue of whether there would be a perfect freedom to join and leave was joined. The determination was that there would be a different contractual relationship of the kind always recognized in common law. There is no case saying that this kind of restriction is no good, and indeed there would be a zero issue here if, under the normal law of membership associations, these kinds of restrictions had not always been recognized.

CHIEF JUSTICE BURGER: Your time has expired, Mr. Gold.

MR. GOLD: Thank you, Chief Justice.

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

We will hear arguments next in Oregon v. the Klamath Indian Tribe.

(Whereupon, at 11:06 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1894 - PATTERN MAKERS' LEAGUE OF NORTH AMERIC, AFL-CIO, ET AL.,

Petitioners V. NATIONAL LABOR RELATIONS BOARD, ET AL.

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BY Paul A. Richardson

(REPORTER)