

Tile Layers, Marble Masons and Terrazzo Workers of California, Local Union No. 17 of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO (R. W. Colgate Incorporated, d/b/a California Tile Company) and Murray Hamilton Deeter and Harry Dale Barber. Cases 21-CB-8665-1 and 21-CB-8665-2

11 September 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 26 April 1984 Administrative Law Judge Richard D. Taplitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed exceptions and an answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tile Layers, Marble Masons and Terrazzo Workers of California, Local Union No. 17 of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO, its officers, agents, and rep-

¹ For the reasons set forth in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), we agree with the judge's conclusion that the Respondent violated Sec. 8(b)(1)(A) by preferring charges against, trying, and fining employees Deeter and Barber for engaging in certain conduct after effectively resigning from union membership. Consistent with *Neufeld*, we also find that the Respondent's restriction on resignations as set forth in art. 6,F(1)-(3) of the International's constitution is invalid and we shall modify the judge's recommended remedy by ordering the Respondent to cease and desist from maintaining the restriction on resignations and to expunge the provision from its governing documents. *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983). In so doing, we note that we are not ordering that the parent International, which is not a party to this proceeding, expunge the offending provision from its constitution. Rather, we are only ordering the Respondent to expunge the provision from its governing documents, including such documents of the International that the Respondent may have incorporated by reference and adopted as its own. Further, as in *Neufeld* and in *Lockheed*, the lack of a separate allegation that the maintenance of the restriction is violative has no bearing on our exercise of our discretion to fashion appropriate remedies for the violations found because here the link between the restriction and the violation is evident.

As she stated in fn. 22 of *Neufeld*, Member Dennis would not order the Respondent to cease maintaining the resignation restriction or to expunge a provision appearing in the International's constitution, but instead would order the Respondent to notify its members in writing that it will not enforce the resignation restriction.

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resentatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and re-letter the subsequent paragraphs.

"(a) Maintaining in its governing documents article 6,F of the constitution of the International Union of Bricklayers and Allied Craftsmen to the extent that it provides:

"F. Members shall have the right to resign from membership subject to the following conditions:

"(1) Notice of the intent to resign must be given to the Secretary of the member's Local Union no less than thirty (30) days prior to the effective date of the resignation;

"(2) No resignation shall be accepted unless all of the member's financial obligations within this International Union are paid and all charges brought against that member have been heard and finally determined.

"(3) Locals have the right to delay the effective date of resignation of any member whose resignation is tendered within fifteen (15) days prior to the commencement of a strike by that Local or during the pendency of a strike, but in the event of such delay, the resignation shall go into effect immediately after the strike is ended."

2. Insert the following as paragraph 2(a) and re-letter the subsequent paragraphs.

"(a) Expunge from its governing documents the portion of article 6,F of the constitution of the International Union of Bricklayers and Allied Craftsmen set forth above."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents article 6,F of the constitution of the International Union of Bricklayers and Allied Craftsmen to the extent that it provides:

F. Members shall have the right to resign from membership subject to the following conditions:

(1) Notice of the intent to resign must be given to the Secretary of the member's Local Union no less than thirty (30) days prior to the effective date of the resignation;

(2) No resignation shall be accepted unless all of the member's financial obligations within this International Union are paid and all charges brought against that member have been heard and finally determined.

(3) Locals have the right to delay the effective date of resignation of any member whose resignation is tendered within fifteen (15) days prior to the commencement of a strike by that Local or during the pendency of a strike, but in the event of such delay, the resignation shall go into effect immediately after the strike is ended.

WE WILL NOT prefer charges against, try, or fine any employee for working for a struck employer after that employee has effectively resigned from our Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL expunge from our governing documents the portion of article 6,F of the constitution of the International Union of Bricklayers and Allied Craftsmen set forth above.

WE WILL rescind the fines we imposed against Murray Deeter and Harry Barber for working for a struck employer after they had effectively resigned from our Union.

WE WILL remove from our files any reference to the unlawful charges, trials, and fines of those two employees and notify them in writing that we have done so and that the charges, trials, and fines will not be used against them in any way.

WE WILL refund to those employees the full amount of any fines that they have paid to us in connection with the above matters, with interest.

TILE LAYERS, MARBLE MASONS AND
TERRAZZO WORKERS OF CALIFOR-
NIA, LOCAL UNION NO. 17 OF THE
INTERNATIONAL UNION OF BRICK-
LAYERS AND ALLIED CRAFTSMEN,
AFL-CIO

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in San Diego, California, on March 1, 1984. The charge in Case 21-CB-8665-1 was filed on November 17, 1983, by Murray Hamilton Deeter, an individual. The charge in Case 21-CB-8665-2 was filed on the same date by Harry Dale Barber, an individual. An

order consolidating cases and complaint issued on December 22, 1983. The complaint alleges that Tile Layers, Marble Masons and Terrazzo Workers of California, Local Union No. 17 of the International Union of Bricklayers and Allied Craftsmen AFL-CIO (the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act.

Issues

The primary issues are whether Deeter's and Barber's oral resignations from the Union were effective and whether after the resignations the Union violated Section 8(b)(1)(A) of the Act by preferring charges against, trying, and fining those employees for working for a struck employer.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs which have been carefully considered, were filed on behalf of the General Counsel and the Union.

On the entire record of the case and from my observation of the witness and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company for whom the employees worked was R. W. Colgate Incorporated, d/b/a California Tile Company (California Tile or the Company). California Tile, a California corporation with a place of business in southern California, is engaged in business as a nonretail ceramic contractor. During the year preceding issuance of complaint, California Tile purchased and received goods valued in excess of \$50,000 from suppliers located within California, each of which suppliers in turn received those same goods directly from suppliers located outside California. The complaint alleges, the answer admits, and I find that California Tile is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to January 14, 1983, California Tile had authorized the Tile Contractors Association to negotiate on its behalf with the Union. Pursuant to that authorization California Tile was bound by a contract with the Union that expired by its terms on April 15, 1983. On January 14, 1983, California Tile withdrew bargaining authority from the Association and entered into individual negotiations with the Union. The first such meeting occurred on March 21, 1983, and there were seven meetings thereafter. The parties finally reached impasse and on June 13, 1983, California Tile implemented its last best offer.

On July 28, 1983, California Tile Vice President Gregory R. Colgate received a telephone call from Union Business Manager Elmer Dillon. Dillon said that he was going to pull out the men and not provide the Company

with any union help from then on. Dillon said that the Company was an unfair contractor who employed non-union help and that the Union was responding to the Company's declaration of independence.

California Tile employees Murray Deeter and Harry Barber were fined by the Union for working for California Tile after they had tendered oral resignations to the Union. The central issue in this case is whether or not those fines constituted a violation of the Act.

B. *The Fine Against Murray Deeter*

About 10 p.m. on July 25, 1983, Union Business Manager Dillon called Murray Deeter on the telephone. Dillon asked Deeter where he was working and Deeter replied that it was for California Tile. Dillon then told Deeter that he did not want Deeter to go to work the next day. Deeter asked why and Dillon replied, "Because if you do, you are going to get fined." Deeter said that they could not get blood out of a turnip and that he had to work. Dillon replied by telling him not to go to work or he would be fined. Deeter then said that as of that moment he was resigning from the Union. Dillon replied that he could not accept the resignation on the phone and that it had to be a written statement. Deeter said that he had not known that.¹

Deeter continued to work for California Tile and he took no further action with regard to his resignation from the Union until the last part of August 1983. He took a written resignation to the union office and handed it to Dillon who told him that he could not handle it at that time. Dillon hung it up on the bulletin board. That letter of resignation was dated August 22, 1983, and was by its terms effective on September 1. Deeter testified that he waited a month between his oral attempt to resign and the written resignation because he was trying to figure out whether he actually wanted to resign and retire. He also credibly averred that he paid his dues for the month of August because he understood that for that month he was still a member. The fine that is involved in this case related to work that Deeter performed for California Tile between the date of the oral attempt to resign and the written resignation.

On August 30, 1983, Dillon filed a formal written charge against Deeter alleging that he had violated code 5, 1P and 1Q of the International code because he worked at less than the established wages and other working conditions, and he worked for an employer not signatory to the collective-bargaining agreement with the Union. The charge referred to the violation as having occurred on August 11, 1983, at or near California Tile's job. In the charge Deeter was notified that a trial would be held on September 20, 1983, at 7 p.m. A copy of the relevant sections of the code of International offenses was annexed to the charge.

Code 5 of the International Union's constitution provides:

1. It shall be an offense against the International Union:

....

P. For any member knowingly to work at the craft at less than the established wages and other working conditions in the jurisdiction for the type of work in question.

Q. For any member knowingly to work for an employer against whom a strike has been called by an affiliate.

Deeter did not appear at the trial or communicate with anyone about it. Thereafter he received a letter dated September 20, 1983, which stated:

The trial board meeting was called to order at 7:10 p.m. All members present except Bill Shiplier. Elmer Dillon presented his case about California Tile being at impasse August 31, 1983. All employees were told not to work. Letter from California Tile Company indicating employees working 8-19-83.

Murray Deeter and Harry Barber didn't comply with the rules therefore charges were brought up on 8-30-83.

The charges are: Working for a non-union employer also working for less than stated union wages.

Statement of charges vote on Code 5, 1Q:

Harry Barber has been found guilty of Code 5, 1Q: unanimous. Maximum fine \$250.00 to be paid before reentry to union if he drops.

Statement of charges vote on Code 5, 1P:

Harry Barber has been found guilty of Code 5, 1P: unanimous.

Maximum fine \$250.00 to be paid before reentry to union if he drops.

Code 5, 1Q: For knowingly working for an employer not signatory to the Collective Bargaining Agreement with Local 17.

Code 5, 1P: For knowingly working at the craft at less than the established wages and other working conditions in the jurisdiction.

Statement of charges vote on Code 5, 1Q:

Murray Deeter has been found guilty of Code 5, 1Q: unanimous.

Maximum fine \$250.00 to be paid before reentry to union if he drops.

Statement of charges vote on Code 5, 1P:

Murray Deeter has been found guilty of Code 5, 1P: unanimous.

Maximum fine \$250.00 to be paid before reentry to union if he drops.

Harry Barber and Murray Deeter have 30 days from 9-20-83 to pay fines levied upon them unless an appeal is presented to the Local Union #17.

Deeter did not pay the fine. As indicated above he resigned in writing effective September 1, 1983. By letter dated October 12, 1983, Dillon informed him:

¹ Deeter credibly testified that prior to this conversation no one from the Union ever told him how he could resign and he had never been given a copy of the Union's constitution and bylaws.

Your resignation of September 1, 1983 cannot be processed at this time, even though negotiations have been completed. The matter of the charges and subsequent fines levied against you in the amount of \$500.00 need to be paid in order to maintain resignation status with the Union.

Because the violation occurred before the placement of your resignation and completion of negotiations, these fines are due and payable to Local 17.

C. *The Fine Against Harry Barber*

In July 1983 Harry Barber decided to drop out of the Union because he thought his payments to the Union were too high and because he wanted to withdraw his retirement money from the Union fund. On August 1 he had his wife call Dillon's office to say that he wanted to withdraw from the Union and to make sure that all his debts to the Union were paid. His wife reported to him that she had done that.

On August 4 or 5, 1983, Dillon called Barber on the telephone and asked him to reconsider about dropping out of the Union. Dillon said that, if Barber stayed in the Union, it would help the Union get California Tile to sign an agreement. Barber replied that his membership would not matter. Dillon then said that, if California Tile did not sign the agreement, Dillon was going to have to call Barber off the job. Barber said that he had already withdrawn from the union and he intended to keep it that way. Dillon then told Barber that Barber had to have a written letter to resign and that it would not do Barber any good to send it in at that time because Dillon could not process it. Dillon said that he had five or six resignations sitting on the board and that he could not do any of them until all the companies had signed the contract. Barber then said that California Tile had been good to him and he was going to keep on working for California Tile.

Dillon did not call Barber back and Barber continued working for California Tile. Prior to his conversation with Dillon, Barber did not know that a written resignation was necessary. Barber had never been given a copy of the constitution and bylaws. He never did submit a written resignation. He sent \$52 to the Union for what he considered to be the International's part of the dues for July through October 1983. He testified in a rather confused manner that his lawyer told him that, if he paid the International dues, he could work for both union and nonunion shops without getting into trouble. The Union sent the \$52 back to him.

On August 30, 1983, Dillon filed internal union charges against Barber which were substantially the same as those that had been filed against Deeter. Barber was also alleged to have violated Code 5, 1P and 1Q on August 11, 1983, at California Tile. His trial was scheduled for September 20, 1983. He did not attend that trial and he later received a copy of the same letter that had been sent to Deeter. That letter is quoted in full above.

Barber, like Deeter, did not pay the fine. There is no evidence in the record to indicate that the Union took any further action against either of them.

D. *Limitations in the Union Constitution Concerning Resignations*

Article 6 of the Union's International constitution provides in part:

F. Members shall have the right to resign from membership subject to the following conditions:

(1) Notice of the intent to resign must be given to the Secretary of the member's Local Union no less than thirty (30) days prior to the effective date of the resignation;

(2) No resignation shall be accepted unless all of the member's financial obligations within this International Union are paid and all charges brought against that member have been heard and finally determined.

(3) Locals have the right to delay the effective date of resignation of any member whose resignation is tendered within fifteen (15) days prior to the commencement of a strike by that Local or during the pendency of a strike, but in the event of such delay, the resignation shall go into effect immediately after the strike is ended.

E. *Analysis and Conclusions*

1. The legal framework

Under Section 7 of the Act employees have the right to refrain from union activity. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7 rights. However Section 8(b)(1)(A) also contains a proviso that states: ". . . this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." As is indicated in the cases discussed below, there is often a tension between the right of employees who are union members to refrain from engaging in union activity, which is protected by Section 7 of the Act, and the right of a union to maintain internal discipline among its members, which is inherent in the proviso to Section 8(b)(1)(A). The United States Supreme Court, in a series of cases, has set out some broad guidelines in this area. However, the high court has specifically left open the question of whether or not a union can lawfully discipline an employee for working for a non-union employer in a situation where the employee has tendered a resignation from the union and there is a provision in the union constitution which limits the right of members to resign.

In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181-182 (1968), the Supreme Court established the principle that a union could lawfully fine a member who crossed the union picket line. The history of the proviso to Section 8(b)(1)(A) was discussed in detail and the court held:

Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regula-

tions governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent" Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.

In addition, the judicial view current at the time Section 8(b)(1)(A) was passed was that provisions defining punishable conduct and the procedures for trial and appeal constituted part of the contract between member and union and that "The courts' role is but to enforce the contract." In *Machinists v. Gonzales*, 356 U.S. 617, 618, we recognized that "[t]his contractual conception of the relation between a member and his union widely prevails in this country" [Footnotes omitted.]

The *Allis-Chalmers* case was followed by *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). In that case the union had initiated a ceiling on the production for which its members could accept immediate piecework pay. In effect the union was controlling the amount of piecework its members would turn out by fining employees who accepted immediate payment for piecework in excess of the quota. The court held:²

Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. This view of the statute must be applied here.

Applying those principles to the facts of that case, the Court held that the union had not violated the Act. That case did not involve an attempt of a member to resign from the union but the Court's language concerning the freedom of members to leave the union indicated that that was a matter to be considered in future cases. Such a situation arose in *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972). There the Court found that a union violated Section 8(b)(1)(A) of the Act by fining employees who resigned their membership and returned to work during the course of a strike under circumstances where there was no constitutional or other limitation on the members' right to resign. The Court limited its holding by stating: "We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign." Thus the Court narrowed its holding to apply only to situations where there were

² At another point in that decision, the Court held at 429: . . . it has become clear that if the [union] rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1).

no restraints set forth in the union constitution on the right of members to resign.³

In *Machinists Local 405 v. NLRB*, 412 U.S. 84 (1973), the Court found that a union violated section 8(b)(1)(A) of the Act by seeking court enforcement of fines that had been imposed on resigned members for strikebreaking activity. There the union constitution prohibited members from engaging in such activity. The union's constitution and bylaws were, however, silent on the subject of voluntary resignation from the union. Once again the Court held that, in the absence of a provision in the union's constitution or bylaws limiting the circumstances under which a member could resign, the member was free to resign at will. As in *Granite State* the Court specifically left open the question of the extent to which contractual restrictions on a member's right to resign could be limited by the Act.

In a long series of cases the Board and the circuit courts have tried to fill in the open areas left by the Supreme Court.

2. The controlling Board law

The current position of the Board is set forth in *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), enf. denied 725 F.2d 1212 (9th Cir. 1984).⁴ In that case the union constitution prohibited resignations during a strike or within 14 days preceding the commencement of a strike. That provision was substantially the same as the limitation on resignation set forth in article 6, F(3) of the Union's constitution in the instant case. Also as in the instant case, the union fined employees who tendered their resignations and returned to work during the course of a strike in circumstances where the union constitution limited the right to resign. A four-member majority of the Board, though for different reasons, agreed that the fine constituted a violation of Section 8(b)(1)(A) of the Act.⁵ Board Members Fanning and Zimmerman found at 986 that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction of a member's Section 7 right to resign." Those Members stated that there was a need to balance two fundamental principles which were critical to the law but were inherently in conflict. The first was the right of an employee to refrain from collective activity

³ In dissent, Justice Blackmun stated (at 221):

I cannot join the Court's opinion, which seems to me to exalt the formality of resignation over the substance of the various interests and national labor policies that are at stake here. Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in "pact." Similar mutual commitments arising from perhaps less compelling circumstances have been held to be legally enforceable. See 1A A. Corbin, *Contracts* Sec. 198, pp. 210-212 (1963).

⁴ That case involved the reconsideration of 231 NLRB 719 (1977), after a remand from the Ninth Circuit, 608 F.2d 1219 (9th Cir. 1979). For other cases applying the new *Dalmo Victor* decision, see *Machinists District 160 (Gray Motors)*, 265 NLRB 1049 (1982); *Teamsters Local 36 (E. R. Stong Building)*, 266 NLRB 1057 (1983); *Machinists Local 758 (Menasco, Inc.)*, 267 NLRB 1147 (1983).

⁵ See *Machinists District 160 (Gray Motors)*, supra.

under Section 7 and the second was the legitimate interest of the union in protecting employees it represented who were joined together for collective economic activity. In balancing those two conflicting principles, those two Board Members concluded that limitations keyed to a strike or the anticipation of a strike were unlawful, but that restrictions on resignations that were not geared to a strike and simply protected the institutional interests of the union were proper. Those Members then state:

Having carefully considered the competing interests involved, we find that a rule which restricts a union member's right to resign for a period not to exceed 30 days after the tender of such a resignation reflects a reasonable accommodation between the right of union members to resign from the union and return to work, and the union's responsibility to protect the interests of employees who maintain their membership, as well as its need to dispose of administrative matters arising from such resignations.²⁰ Such a rule gives clear guidance to employees and unions alike concerning their respective responsibilities and further adds stability to the field of labor relations.²¹

The 30-day rule, which those two Board Members indicate would be lawful, is substantially the same one that is contained in article 1, F(1) of the union constitution in the instant case.

Board Chairman Van de Water and Member Hunter entered a concurring opinion. They disagreed however with the approach of their colleagues. They were of the opinion that any restriction imposed upon a union member's right to resign was unreasonable and that the imposition of any fine or other discipline premised upon such restriction was a violation of Section 8(b)(1)(A). In their view there was no need to balance conflicting interests. They stated that the other Members had balanced the statutory rights of employees against nonstatutory interests of the union and in such cases there could be no proper balancing. The net effect was that Chairman Van de Water and Member Hunter agreed that the restrictions on resignations which were geared to a strike situation were invalid but disagreed with their colleagues with regard to the legitimacy of a general 30-day restriction on resignations. They would have held that all restrictions on resignations were invalid.

Board Member Jenkins filed a dissent in which he stated that he would find that the union's constitutional

provision which prohibited members from resigning during the course of a strike was a reasonable and valid restriction on resignation which was lawful under the proviso to Section 8(b)(1)(A) of the Act. In effect he agreed with Members Fanning and Zimmerman that a 30-day restriction would be lawful and went much further by asserting that even restrictions geared to the strike would be lawful. It thus appears that there is a three-member majority agreeing that a 30-day restriction is lawful and a four-member majority holding that restrictions geared to a strike or anticipated strike are unlawful.

The Ninth Circuit Court of Appeals refused to enforce the Board's Order. The court held that no balancing test was needed as the controlling criteria was set forth by the Supreme Court in the *Scofield* case. The court found that the union's rule prohibiting strike-related resignations reflected a legitimate union interest, impaired no policy that Congress had imbedded in the labor laws, and was reasonably enforced against union members. In addition the court found that the rule did not invade or frustrate an overriding policy of the labor law. In effect the court held that postresignation strikebreaking was a serious threat to a union's viability and that the union had the right under the law to take the action it did in *Dalmo Victor*. With regard to the employees who worked for the struck employer, the court held (725 F.2d at 1218):

But they may not betray their colleagues and expect to get away without paying a price for weakening the collective bargaining environment.

Though the Ninth Circuit Court of Appeals in refusing to enforce the Board's Order in *Dalmo Victor* had adopted a position that is completely inconsistent with that of the Board, I am constrained to follow Board rather than circuit court law. Controlling Board policy requires administrative law judges to follow Board rather than circuit court law where there is a conflict between the two, until such time as the Supreme Court has ruled. *Regency at the Rodeway Inn*, 255 NLRB 961, fn. 2 (1981); *Iowa Beef Packers*, 144 NLRB 615 (1963), enf. denied in part 331 F.2d 176 (8th Cir. 1964).⁶

In the instant case Deeter and Barber were fined by the Union, after they had tendered their resignations from the union, because they worked for the Company

²⁰ Obviously, where the member has not been apprised of the existence of such a rule prior to tendering his resignation, then the member's resignation becomes effective immediately rather than upon the expiration of the 30-day period following such tender of resignation. See *Teamsters Local 439 (Loomis Courier Service, Inc.)*, 237 NLRB 220, 223 (1978); *Ex-Cell-O Corporation*, 227 NLRB at 1048. Further, where the members have been apprised of the existence of such a rule, the running of the 30-day period before the resignation becomes effective must be triggered solely by the member's notice to the union, and not contingent on any other obligations.

²¹ We realize, however, that under extraordinary circumstances, a union may need more than the 30 days found reasonable herein to dispose of the administrative matters arising from the resignations. In those cases, the Board will determine whether or not circumstances exist warranting a longer period of time.

⁶ In the *Iowa Beef Packers* case the Board reiterated what it had stated in prior cases (144 NLRB at 616):

It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner [now administrative law judge] to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

when the Union was on strike against the Company.⁷ The Union's letter to Deeter and Barber stated that they were fined for working for an employer who was not signatory to a collective-bargaining agreement and for working at less than the established wages. However, that clearly referred to the employees' work for the struck employer.

The critical question is whether Deeter and Barber were members of the Union at the time that they worked for the struck employer. If their resignations were effective when orally tendered then they were not members. If the Union's constitution lawfully restricted their right to resign so that the resignations were not effective, then the fines were lawful. As I read *Dalmo Victor*, article 6, F(1) of the Union's constitution which states that notice of the intent to resign must be given no less than 30 days prior to the effective date of the resignation, if it were standing alone, would be lawful. However, article 6, F(3), which states that locals have the right to delay the effective date of resignation of any member whose resignation was tendered within 15 days prior to the commencement of a strike or during the pendency of a strike, is clearly unlawful. Two questions remain to be considered. The first is whether article 6,F(1) has independent vitality when it is considered with article 6,F(3). Both Deeter and Barber did return to work for the Company less than 30 days after they tendered their resignations. The second question is whether the resignations were ineffectual because they were oral rather than in writing.

3. The union constitution, the oral resignations, and conclusions

As found above the 30-day limitation on resignation contained in the Union's constitution was lawful and enforceable while the limitation geared to a strike situation was not. When read together the restrictions were clearly overly broad. The Board has held that, where restrictions on resignations contained in union constitutions are overly broad, none of the narrower parts of those restrictions retain any independent vitality. *Sheet Metal Workers Local 170 (Able Sheet Metal Products)*, 225 NLRB 1178, fn. 1 (1976). In *Broadcast Employees & Technicians Local 531 (Skateboard Productions)*, 265 NLRB 1676 (1982), the Board analogized such overly broad provisions to improper no-solicitation rules and adopted the language it has used in *Times Publishing Co.*, 240 NLRB 1158, 1160 (1979), which held:

... once a rule is found to be generally invalid, it is invalid for all purposes and cannot be applied as valid in part to a specific area.

In any event, Deeter and Barber were never told of the existence of the 30-day limitation. They were simply told that the resignation had to be in writing. In the absence of such notice, that constitutional provision could not lawfully be used against them. *Machinists Local 758*

⁷ As noted above on July 28, 1983, Union Business Manager Dillon told Company Vice President Colgate that the Union was pulling out the men and not providing the Company with any help from then on. Dillon then told the Company's employees not to report for work. That constituted a strike.

(*Menasco, Inc.*), supra; *Teamsters Local 36 (E. R. Stong Building)*, supra.

It follows that there were no provisions in the union constitution that could lawfully apply to Deeter and Barber to limit their right to resign at will.

At the time that Deeter and Barber tendered their oral resignations to Union Business Manager Dillon, Dillon told them that the resignations had to be in writing. There is no evidence in the record that the union constitution or bylaws contained such a requirement. However, a requirement that resignations be in writing is certainly a reasonable one. It promotes administrative efficiency and avoids the possibility of misunderstandings. If proper notice were given, I believe that an official of the Union such as Dillon could make such a requirement. In the instant case Dillon told Deeter and Barber about the need for a writing during the same conversation in which they orally resigned. Deeter and Barber could have submitted written resignations the same day, but they chose not to do so. They had time to meet the written requirement before they engaged in the struck work.

Prior to the *Dalmo Victor* case, it appeared clear that a union could not lawfully require a resignation to be in writing, at least where there was no established method for resignation. The only requirement was that the desire to resign had to be clearly communicated. Thus in *Machinists Local 2045 (Eagle Signal Controls)*, 268 NLRB 635, 637 (1984), the Board held:

... where there is no established method for resignation, a member may communicate to the union his intent to resign in any reasonable way so long as the intent is clearly conveyed.

The *Eagle* case cited with approval *Potters Local 340 (Macomb Pottery)*, 175 NLRB 756, 760 fn. 14 (1969), in which case the Board held that an employee effectively resigned from the union by orally telling the union to tear up his card. See also *Carpenters Local 1233 (Polk Construction)*, 231 NLRB 756, 761 (1977). As the Board held in *Electrical Workers IBEW Local 66 (Houston Lighting)*, 262 NLRB 483, 486 (1982), a case in which the union's constitution and bylaws provided no specific restraint on resignation, an employee could resign at will "so long as the desire to resign is clearly communicated. Further, such communication may be made in any feasible way and no particular form or method is required." (Footnote omitted.)

Some doubt as to the controlling law was raised by the language of the concurring decision in *Dalmo Victor*. Chairman Van de Water and Member Hunter stated (263 NLRB at 992-993):

In addition, for a resignation to be valid, it must in writing and is effective upon receipt by the union.⁵²

⁵² We do not view such requirements as "restrictions" on resignation. Rather, they are simply the ministerial acts necessary to ensure that a member's resignation is voluntary and has, in fact, occurred.

It could be argued from that language in the concurring opinion that two members of the Board were of the opinion that an oral resignation is not effective whether or not there is a requirement in the union constitution that it be in writing. As Member Fanning in his dissent took the position that all resignations (whether written or oral) in the context of that case were invalid, it could be further argued that a three-member majority of the Board agreed that oral resignations were invalid. However, even if that were so, it would not change the result in this case. Dillon did tell both Deeter and Barber that their resignations had to be in writing. However, he specifically told Barber that it wouldn't do Barber any good to send in a written resignation because he (Dillon) could not process it. Dillon also told Barber that he had five or six resignations sitting on the board and that he could not do any of them until all the companies had signed the contract. When Deeter did proffer a written resignation to Dillon, Dillon said that he could not handle it at that time. By a letter dated September 1, 1983 Dillon informed Deeter that even his written resignation would not be accepted because of the unpaid fine. That letter stated that the violation occurred before the placement of his resignation "and completion of negotiations." The evidence leads to the inescapable conclusion that Deeter and Barber would simply have been engaging in a futile act if they submitted written resignations instead of their oral resignations because no resignations were going to be accepted during the strike. The law does not require futile gestures. Thus, in *Carpenters Local 1233 (Polk Construction)*, supra, the Board held that oral resignations were sufficient even in the face of a union rule requiring written resignations where because of unlawful limitations on the right to resign, the employees would have been engaging in a futile act by submitting a written resignation. See also *Potters Local 340 (Macomb Pottery)*, supra.⁸

In sum, I find that the limitations on the right to resign contained in the union constitution and bylaws were inapplicable to Deeter and Barber; that Deeter's and Barber's oral resignations were effective when tendered; that at the time that Deeter and Barber returned to work for the struck employer, they were no longer members of the Union; that they were engaging in activity protected by Section 7 of the Act when they performed the struck work; and that the Union violated Section 8(b)(1)(A) of the Act by restraining and coercing them in the exercise of the Section 7 right when it preferred charges against, tried, and fined them for working for the struck employer.

CONCLUSIONS OF LAW

By preferring charges against, trying, and fining employees Deeter and Barber, who had effectively resigned from union membership, for their postresignation conduct in working for a struck employer, the Union re-

⁸ Deeter testified that he delayed his written resignation because he was not sure he wanted to resign. However, his oral resignation was effective when given. Deeter's uncertainty thereafter was caused by the Union's improper conduct, and therefore cannot be effectively raised by the Union as a defense. That also applies to the payment of dues after the oral resignations were rejected.

strained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby violated Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that the Union engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Union fined Deeter and Barber in violation of Section 8(b)(1)(A) of the Act, I shall recommend that the Union be ordered to rescind the fines. As of the date of the trial, neither Deeter nor Barber had paid any part of the fine. If since that time all or part of the fine has been paid, the Union is to refund that money with interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

It is further recommended that the Union be ordered to remove from its files any reference to the unlawful charges, trials, and fines of those two employees and notify them in writing that it has done so and that the charges, trials, and fines will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Tile Layers, Marble Masons and Terrazzo Workers of California, Local Union No. 17 of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Preferring charges against, trying, or fining any employee for working for a struck employer after that employee has effectively resigned from the Union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fines it imposed against Murray Deeter and Harry Barber for working for a struck employer after they had effectively resigned from the Union.

(b) Remove from its files any reference to the unlawful charges, trials, and fines of those two employees and notify them in writing that it has done so and that the charges, trials, and fines will not be used against them in any way.

(c) Refund to those two employees the full amount of any fines that they have paid to the Union in connection with the above matters, with interest, as is set forth in the section of this decision entitled "The Remedy."

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its offices and meeting halls copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 con-

¹⁰ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

secutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Furnish said Regional Director with signed copies of the aforesaid notice to be posted by R. W. Colgate Incorporated, d/b/a California Tile Company, if that company is willing to post it.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.