

**International Union of Operating Engineers, AFL-CIO; International Union of Operating Engineers, Local 399, AFL-CIO and Tribune Properties, Inc.** Case 13-CB-12781

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On March 11, 1991, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondents each filed exceptions and a supporting brief, and the General Counsel and Charging Party each filed a brief in response. The Charging Party filed a cross-exception and supporting brief.

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 conclusions and to adopt the recommended Order.<sup>1</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, International Union of Operating Engineers, AFL-CIO, and International Union of Operating Engineers, Local 399, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Order.

<sup>1</sup>Contrary to our dissenting colleague, we agree with the judge's recommended remedy and Order. As discussed by the judge, the legal principle that maintaining restrictions on the right of a union member to resign from membership is unlawful has been firmly settled for several years. Nevertheless, the Respondents' constitutional and bylaws restrictions at issue have been maintained continuously throughout that period. We agree with the judge, for the reasons stated in the remedy section of his decision, that merely notifying current members of the expunction of the provisions in the "usual manner" is insufficient in the circumstances of this case. Accordingly, we affirm the judge's recommended remedy and Order in this case.

Member Cracraft would modify those provisions of the judge's recommended remedy and Order relating to publication and posting of the notice to provide a more traditional remedy for the violations found. See *Sheet Metal Workers Local 16 (Salem Heating)*, 274 NLRB 41 fn. 2 (1985). Rather than requiring that the Respondents publish notice of the expunction three times in their magazines and newsletters and that the Respondent International cause the notice to be posted in all its locals having members subject to the Board's jurisdiction, except those in Canada, Member Cracraft would order the Respondents to notify their members of the expunction in the manner they customarily use to notify members of such changes. As the judge pointed out, for example, the Respondent International customarily notifies its membership that a constitutional provision has been removed by publishing in the next edition of the International's magazine the minutes of the executive board meeting during which such action was taken. Member Cracraft fails to see why a similar one-time publication of the notice herein would not serve as an adequate remedy. In this regard, Member Cracraft notes that only one local is a Respondent in this proceeding and that extraordinary notification remedies are not warranted on the facts of this case. In all other respects, she agrees with the majority in affirming the judge's recommended remedy and Order.

*Scott A. Gore, Esq.*, for the General Counsel.

304 NLRB No. 53

*Richard Griffin, Esq.*, of Washington, D.C., for the International Union.

*William A. Widmer III, Esq. (Carmell, Charone, Widmer, Mathews & Moss)*, of Chicago, Illinois, for Local 399.

*Douglas A. Darch, Esq.*, and *Sigismund L. Sapinski Jr., Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for Tribune Properties, Inc.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This case was tried before me in Chicago, Illinois, on October 25, 1990, on the General Counsel's complaint<sup>1</sup> and the answers filed by both Local 399 and the International Union. The complaint, as amended at the hearing, alleges violation by both Local 399 and the International Union of Section 8(b)(1)(A) of the Act by their maintaining respectively, in the International's constitution and Local 399's bylaws, provisions restricting members' right to resign from the Union. The answers of both Respondents deny certain allegations of the complaint, admit others, and deny commission of unfair labor practices. Both answers affirmatively defend on the ground that the allegations of the complaint are barred by the provisions of Section 10(b) of the Act.<sup>2</sup>

At the hearing, all parties were represented by counsel who were given full opportunity to present relevant evidence, call witnesses, argue on the record, file motions, and make final argument. At the end of the proceeding, counsel for the parties waived final argument and elected to file posthearing briefs. Briefs were timely received from all parties.

On the record made in this proceeding, including the briefs, I make the following

FINDINGS OF FACT

I. TRIBUNE PROPERTIES, INC. AS A STATUTORY  
EMPLOYER

The complaint alleges and Respondents in the pleadings or at the hearing, admitted that Tribune Properties, Inc., the Employer and Charging Party is a corporation with an office and place of business in Chicago, Illinois, where it is engaged in the management of commercial properties. In the calendar year 1990, the Employer in the course and conduct of its business, derived gross revenues in excess of \$100,000 of which in excess of \$25,000 was derived from enterprises located in the State of Illinois which themselves sold and shipped products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Illinois; or which purchased and received products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Illinois. I find, under the pleading, as Respondents admit, that at all material times, the employer was engaged

<sup>1</sup>General Counsel's amended complaint, further amended at the hearing, is dated July 19, 1990. The Charging Party's underlying unfair labor practice charge was filed December 1, 1989, and served on Local 399 on December 6, 1989. A first amended charge was filed January 31, 1990, with copies served on both Local 399 and the International Union on February 7, 1990.

<sup>2</sup>In pertinent part, Sec. 10(b) of the Act, a statute of limitations, permits Respondent's to affirmatively defend on the ground that a complaint allegation relates to acts committed more than 6 months prior to the service of the unfair labor practice charge.

in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE UNIONS AS STATUTORY LABOR ORGANIZATION

The complaint alleges and Respondents admit that International Union of Operating Engineers, AFL-CIO, and International Union of Operating Engineers, Local 399, AFL-CIO, and each of them, has been, and is now, at all material times, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

There are 366,000 members of the International Union, 34,000 of them in Canada, and 35,000 of the U.S. members being public employees employed by Federal, state, local governments, and employed by Federal government instrumentalities such as the Tennessee Valley Authority. In addition, certain of its members in the United States are supervisors within the meaning of Section 2(11) of the Act.

At all material times, Local 399 has been and is a constituent body of the International Union. While both the International Union and Local 399 admit that its members include employees as defined in Section 2(3) of the Act, there is no dispute that the International, as above-noted, has members who are statutory supervisors and who are Canadian in approximately 29 locals throughout Canada, each with its own president. Local 399 has members who are not statutory employees within the meaning of Section 2(3) of the Act because they are supervisors, or because they are outside the Board's jurisdiction being either public employees or residing outside the United States.

The following indented provision has continually appeared in the International constitution since 1938 (now appearing as art. XXIV, subdivision 3, sec. (b)) and also appears in Local 399's bylaws and general rules, article V, subdivision 3, section (a)(2) (emphasis supplied):

The admission to membership in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his Local Union, the International Union and every other member therein, whereby, in consideration of the benefits bestowed by such membership, he agrees that he *will remain a member until expelled*; that he will not violate the Constitution, laws, Rules, Obligation and Ritual, and the decision, rulings, orders and directions of the International Union or its subordinate branches, nor the trade rules of the locality in which he works; that he will not enter into the employment of any person conditioned on severing his membership with this organization; that upon the *termination of his membership* he will acknowledge his *Obligation to be still binding* upon him and refrain from doing any act or deed in violation of the principles, Constitution, Laws, Obligation, Ritual and . . . policies of this Organization, and the decisions of any authority of the International Union empowered by this Constitution to make them.

The complaint, as amended at the hearing (Tr. 8-9), alleges that the above-indented constitutional and bylaw provisions

violate Section 8(b)(1)(A) of the Act<sup>3</sup> because (1) the requirement to remain a member until expelled; and (2) the provision that even after termination of membership, the former member remains bound to both International and local union membership obligations, both constitute invalid restrictions on employees' Section 7 rights to refrain from engaging in union activities within the meaning of Section 7 and Section 8(b)(1)(A) of the Act. The International Union concedes that its constitution has no explicit mechanism granting members a right to resign (International Br. at 21).

The General Counsel asserts that the above alleged violation consists merely in the maintenance of the above-indented provisions in the constitution and the bylaws without respect to any enforcement thereof by either Respondent entity.<sup>4</sup>

## Discussion and Conclusions

Where a labor organization maintains in force and effect restrictions on employee resignation from union membership, whether in the International Union's constitution, *Graphic Communications Local 458 (Noral Color)*, 300 NLRB 7 (1990), or in the local union's bylaws, *Birmingham Printing Pressmen's Local 55 (Birmingham News)*, 300 NLRB 1 (1990), such restrictions violate Section 8(b)(1)(A) of the Act. *Graphic Communications Local 458*, supra.

The Board held, in the underlying *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), that Section 7 of the Act expressly grants employees the "right to refrain from any or all" protected concerted activities. The Board declared that this right to "refrain" includes the right to resign union membership.

As the General Counsel notes, the right to refrain from union membership, particularly by resignation, has the corollary effect of preventing the union from imposing its authority on employees who, having resigned, are thereby refraining from union activity. In short, to restrict the right of resignation is tantamount to extending the Union's right to regulate employee conduct otherwise free of union regulation. In particular, in *Neufeld Porsche-Audi*, supra at 1335, the Board held that the union possesses no statutory authority to impose its will on employees who have resigned from the union, i.e., who have exercised their Section 7 right to refrain from engaging in concerted activity. There is no question that the Board has adopted an analysis which permits the union to enact membership rules that are internal in scope but prohibits the right of a labor organization to impose its will on employees who exercise their Section 7 right to resign and refrain from concerted activity. *Neufeld Porsche-Audi*, supra, cited in *NLRB v. Sheet Metal Workers Local 73*, 840 F.2d 501 (7th Cir. 1988).

Not only was the *Neufeld Porsche-Audi* rule essentially adopted by the Supreme Court in *Pattern Makers League v.*

<sup>3</sup> Sec. 8(b)(1)(A) of the Act provides:

It shall be an unfair labor practice for a labor organization or its agents—  
(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

<sup>4</sup> Consistent with this General Counsel assertion, as well as the theory of the case as announced in complaint paragraph (IV)(a) ("has maintained in full force and effect" the above-indented material in the text), I rejected attempts by other parties to change and expand this case into one involving the enforcement of these clauses.

*NLRB*, 473 U.S. 95 (1985) (in which the Supreme Court held that any restriction on the member's right to resign was invalid, see *NLRB v. Sheet Metal Workers Local 73*, supra, but *Pattern Makers* also established that an otherwise lawful contract prohibiting resignation from membership under certain conditions constitutes unlawful restraint and coercion because compliance with those conditions interferes with the employee-members exercise of his Section 7 right to resign "at any time." See *NLRB v. Sheet Metal Workers Local 73*, supra. It is also beyond question that while the NLRB has upheld union efforts to discipline former members for preresignation misconduct, the Supreme Court held, in *NLRB v. Granite State Joint Board*, 409 U.S. 213, 217 (1972), that when a member resigns, his former union can no longer compel him to follow its rules and policies. *NLRB v. Sheet Metal Workers Local 73*, supra, citing *Granite State*, supra.

Finally, the Supreme Court, in *Pattern Makers League*, rejected the contention that restrictions on resignation are protected by the proviso to Section 8(b)(1)(A) of the Act. The court held, that the proviso phrase "Rules with respect to the . . . retention of membership" refer to rules that provide for the expulsion of employees from the union, not to those that restrain the right of members to resign. *NLRB v. Sheet Metal Workers Local 73*, supra, citing *NLRB v. Pattern Makers League*, supra at 108-109. The Supreme Court thereby explicitly adopted the Board's *Neufeld Porsche-Audi* rule, supra at 1335, establishing the union's lack of justification in restricting resignation on the basis of the proviso. The proviso relates to "internal actions" of the union which regulate conduct of which they have lawful control, leading ultimately to expulsion from membership of persons found to be undesirable. *NLRB v. Sheet Metal Workers Local 73*, supra.

In the instant case, both the International constitution and Local 399's bylaws have the same language. In the above-indented constitutional and bylaw language, admission to membership into the Union "constitutes a contract between the member, his Local Union, the International Union and every other member," whereunder the newly admitted member "agrees that he will remain a member until *expelled*" and is obliged to consent to the union's constitution, laws, rules, obligations, ritual, and the decisions, rulings, orders, and directions of the International Union or its subordinate branches. Especially in the absence of any device in the constitution or bylaws which permits *resignation*, it appears that the only reasonable reading of this language is that once admitted to membership, the member remains a member at the Union's pleasure at least until expulsion. Expulsion is a mechanism which lies in the control of Respondents. There being no mechanism for resignation, the member remains a member, under full union obligation until Respondents decide on expulsion. If the only method of termination of membership is expulsion, and Respondents having conceded that there is no mechanism for resignation in the constitution or bylaws ("members have a right to resign which is not explicitly stated in the constitution" R. International Br. at 21), there can be no question that these provisions which require continued obligation to the union, after admission. at the Union's pleasure restrict the members' right to resign. The requirement of continued obligation by a member until expulsion constitutes and invalid restriction on the employee's Section 7 right to refrain from engaging in union activities. *Machinists (Neufeld Porsche-Audi)*, supra; *Pattern Makers*

*League v. NLRB*, 473 U.S. 95 (1985); *NLRB v. Sheet Metal Workers Local 73*, 840 F.2d 501 (7th Cir. 1988). Such a restriction necessarily violates Section 8(b)(1)(A) of the Act because, failing the Union's desire to expel the member, there is no right in the member to resign *at anytime*, thus constituting unlawful restraint and coercion within the meaning of Section 8(b)(1)(A) of the Act, as alleged.

The General Counsel's complaint, as amended at the hearing, separately attacks the International Union's constitution and the local Union's bylaws:

[T]hat upon the termination of his membership he will acknowledge his Obligation to be still binding upon him and refrain from doing any Act or deed in violation of the principals, Constitution, laws, obligation . . . and . . . policies of this Organization, and the decisions of any authority of the International Union empowered by this Constitution to make them."

It is clear from the above clause that even expulsion from membership does not terminate the member's obligation to the Union. The clause does not speak of "expulsion" or even "resignation." Its limitation is only "termination of his membership." Such broad phrasing necessarily includes any method of separation or termination of the member's status as a union member. As such, "termination" of membership, so broadly phrased, necessarily is broad enough to include both resignation and expulsion. Thus, after resignation or expulsion from the Union, the former member continues to be obligated to acknowledge his obligation to the Union as continuously binding on him and he must refrain from doing any act or deed inconsistent with the constitution or bylaws of the Union from which he was either expelled or otherwise terminated. The requirement of continued obligation after resignation or termination of membership necessarily regulates posttermination conduct which is unlawful. *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972).

Having concluded that "termination of his membership" is broad enough to apply to both "resignation" and "expulsion" from membership, it would appear that even if the offending language, appearing in the full paragraph above, implicitly permitted resignation from the Union, the restrictions imposed in that paragraph would nevertheless be unlawful. The unlawfulness stems from the futility of resigning even under an implied right to do so: The futility being based on the fact that the former member necessarily remains under obligation to the Union after "termination" of his membership. As above noted in *Granite State Joint Board*, supra, the imposition of postseparation union obligations is unlawful. Thus, even if there was a right to resign, the clause, as alleged, violates Section 8(b)(1)(A) of the Act.

#### Respondent's Defenses

##### 1. The restrictions are allegedly lawful

As a first defense, Respondent relies on the assertion that both Respondents had members who are employed by governments and governmental subdivisions, who are employed as statutory supervisors, and members who reside outside the United States. Respondent asserts that since the Board has no jurisdiction over them under the Act, the restriction on the right to resign, even as interpreted by the General Counsel,

is lawful. Since it is lawful certainly as to members outside the reach of the Act, any restriction on the right to resign is irrelevant.

It seems to me that merely because substantial numbers of Respondent's 366,000 members, as foreigners, public employees, and supervisors may not be subject to the restraints of the Act or the Board's jurisdiction (Tr. 34-35), that in no way bears on the question of the unlawfulness of the restraints on resignation as they pertain to persons actually subject to the Board's jurisdiction as employee members within the United States. For instance, in *Auto Workers Local 148 (McDonnell-Douglas)*, 296 NLRB 970 (1989), the Board was presented with a union constitutional clause which, in part, was an unlawful restraint on the right to resign and, in part valid. The Board, nevertheless, found no merit in the assertion that elimination of the entire provision was inappropriate because portions of that provision might be lawful, *Auto Workers Local 148 (McDonnell-Douglas)*, supra. In the instant case, it cannot be said, as will be noted hereafter, that any part of the clause constitutes anything other than an unlawful restraint on the right to resign, unlike *Auto Workers Local 148 (McDonnell-Douglas)*, where parts of the alleged offending clause might be held to be lawful. In the instant case, the entire clause being unlawful (but may have lawful application to persons over whom the Board has no jurisdiction) that condition hardly militates in favor of the conclusion that the Board's jurisdiction should be surrendered because of the clause's nonapplication to foreigners, supervisors, and public employees. The offending language constitutes an unlawful restraint on the right to resign of member employees in the United States and, as noted by the board in *Auto Workers Local 148 (McDonnell-Douglas)*, supra, it is "not for the Board to rewrite constitutional language to bring it into conformity with the law."

## 2. The statute of limitations; Section 10(b) of the Act

Respondent asserts that the International constitution was amended and repromulgated in April 1988 (R. Local 399 Br. at 4). It urges that the 10(b) 6-month period of limitations began to run no later than May 1, 1988; and since the first charge in this matter was not served until December 5, 1989 (G.C. Exh. 1(b)), the 6-month period expired before the December 5, 1989 service of the charge. Moreover, Respondents asserts without contradiction, that the allegedly offending language has been in effect for more than 40 years prior to the repromulgation.

I have concluded, however, above, that the language alleged to be unlawful in the International constitution and the Local Union's bylaws by limiting termination of membership to expulsion, necessarily, on its face, represents an unlawful restraint on the right to resign at any time because there is a complete absence, in the constitution and bylaws, of any right to resign whatsoever. I have concluded that such a situation necessarily constitutes an unlawful restraint on the right to resign at any time and thus violates Section 8(b)(1)(A) of the Act under Board law. I have further found, above, that even if there were an implicit right to resign under the constitution and bylaws, the further language in the allegedly unlawful paragraph makes such implicit right to resign irrelevant. The irrelevancy stems from the fact that even after "termination" of the union membership, his obligations to the Union nevertheless remained in full force and effect. I

have concluded that this separately violates Section 8(b)(1)(A) of the Act because it would render totally futile any resignation from the Union, even if such right existed, because obligation to the union remains "post termination."

Having found that these unlawful restraints on resignation exist on the face of the offending paragraph, it follows that Respondent's reliance on *Lorraine v. AT & T Technologies*, 490 U.S. 900 (1989), is of no avail. A facially unlawful clause can be challenged at any time, *Lorraine v. AT & T Technologies*, supra. Continued maintenance of restrictions on resignations constitute unfair labor practices up to, and even after, the filing of the charge and complaint. *Auto Workers Local 848 (LTV Aerospace)*, 282 NLRB 946, 948 (1987); *Sheet Metal Workers Local 73*, 274 NLRB 374 (1985).

I conclude that the continued maintenance, as here, of a facially unlawful clause restricting resignation from the Union may be attacked at any time; and that the limitations imposed by Section 10(b) of the Act, whether because there are classifications of employees against whom the statute may not be applied or because the offending language, enforced for 40 or more years, has been repromulgated outside the 10(b) limitation period, offer no defense.<sup>5</sup>

## 3. The Board allegedly has already ruled on the language at issue

Both Respondents prominently rely on certain language in *Operating Engineers Local 12 (Associated Engineers)*, 282 NLRB 1337 (1987). In that case, the Board resolved the question whether the International Union herein, in its April 1980 International convention, amended its constitution to add a particular provision relating to resignation from membership which was unlawful. The Board, affirming the administrative law judge, found that, indeed, the new amendment was an unlawful restriction on the right to resign under *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984). In the statement of facts approaching the history of the creation of that unlawful clause directly restraining resignation from membership, the Board stated:

Before April 1980, the Operating Engineers constitution to which the Respondent is bound, contained no limitation on its members' right to resign.<sup>6</sup>

It seems to me, that this language taken from *Operating Engineers Local 12 (Associated Engineers)*, supra, constitutes no defense to the Respondents.

<sup>5</sup>To the extent Local 399 relies on *Sheet Metal Workers Local 68 (DeMoss)*, 298 NLRB 1000 (1990), to argue that the alleged offending language is lawful on its face, such reliance is misplaced. That case supports the proposition that Sec. 8(b)(1)(A) does not protect a supervisor's right to resign. Local 399 appears to argue that since the language deals with supervisors and is not unlawful as to them, it is lawful to all and therefore not facially invalid and must be judged, for 10(b) purposes, under *Lorraine v. AT & T Technologies*, supra. I have already rejected this argument, having found the language facially unlawful. Thus, *Lorraine v. AT & T*, does not apply.

<sup>6</sup>At the hearing, I refused to permit Respondent to prove or argue the effect of Respondent's having eliminated from its constitution the offending clause relating to resignation from membership. I also refused to permit Respondents to prove or argue the effect of statements by the International's officer (General Vice President Herman Jones), regarding the purpose and effect of the unlawful language introduced in the April 1980 convention. Rather, I restricted the parties to the allegations of the complaint, i.e., whether the above-indented clause relating to the obligations of membership, upon admission, nevertheless itself constituted a facially unlawful restraint on resignation from the union.

In that case, the Board ruled on a clearly unlawful clause addressed precisely to the issue of resignation for membership. The quoted language merely states that the Respondent's constitution contained no limitation on the members' right to resign. In context, that means merely that there was no provision in the constitution explicitly devoted to the right to resign, the subject of the litigation actually there before the Board. Therefore, both in a technical sense and in a material sense, the issue of whether other portions of the constitution constituted facial, unlawful restrictions on the right to resign was not before the Board. Therefore the indented quoted statement above, becomes the clearest *obiter dictum* in determining whether other parts of the constitution contained facially unlawful restrictions on the right to resign. The Board was not concerned with other language in the constitution; it was concerned only with the language actually before it, the Union's newly drafted direct restraint on resignation from membership. In the absence of a defense based on collateral estoppel I need not address the issue.

4. The offending language is protected by the provision to Section 8(b) (1)(A)

Respondent International defends on the ground that the challenged language is protected by the *proviso* to Section 8(b)(1)(A).<sup>7</sup> I have already held that the challenged language is an unlawful restraint on the right to resign because in substance, it requires that employees admitted to membership *must* remain members until expelled; and are further, separately coerced by having union obligations after expulsion (or, arguably, resignation). Since expulsion is the product solely of the Union's discretionary power and has nothing to do with the employees' own right to resign, I concluded, above, that the challenged clause, in substance offers no ability to terminate membership obligations whether by expulsion or otherwise. The right to resign at any time does not exist.

In *Pattern Makers League v. NLRB*, supra, the Court did not accept the Union's contention that its actions, restraining resignation, were necessarily protected by the proviso to Section 8(b)(1)(A). The Court held that the proviso phrase "rules with respect to the . . . retention of membership" traditionally had been understood to refer to rules for the Union's discretionary *expulsion* of employees from union membership, not to those that restrained the right of members to resign. *NLRB v. Sheet Metal Workers Local 73*, 127 NLRB 801, 804 (1961). This was the Board's construction of the proviso in *Neufeld Porche-Audi*, supra, and the Court found the NLRB's construction of the proviso reasonable. *NLRB v. Sheet Metal Workers Local 73*, supra.

Since I have found that the alleged offending clause relates to an unlawful restraint on the right to resign it is not a clause designed to define the Union's right of expulsion of its members and therefore is not within the proviso to Sec-

tion 8(b)(1)(A), the defense on which Respondent relies. I therefore conclude that the proviso to Section 8(b)(1)(A) does not provide a defense to Respondent.

Citing, in particular, *Communications Workers Local 9201 (Pacific Northwest Bell)*, 275 NLRB 1529 (1985), Respondent International argues that there is a requisite that employees reading the challenged language must be subject to the impression that any attempt to resign would be futile:

In *Machinists Local 1374 (Columbia Machine)*, 274 NLRB 123 (1984), the Board held that it would apply an objective standard to determine whether the Union's conduct reasonably created in the members' minds the impression that any attempt to resign would be futile. A member is not required to attempt to resign when the Union has made it clear to the member that the Union would reject the resignation in any event. However, the mere existence of the restriction on resignations is insufficient to support a finding that it is futile to resign, even where the members has knowledge of the restriction.

In that case, the Board held that there was no showing that any of three individuals failed to submit a timely resignation because the employee had an objective basis to believe the attempt to resign would be futile. It is obvious that that case has limited application to the case at bar. The case at bar deals only with whether the language of the challenged constitutional and bylaw clauses constitute an unlawful restraint on the right to resign.

The authority cited by Respondent, *Communications Workers Local 9201 (Pacific Northwest Bell)*, supra, dealt with the question of whether members had resigned prior to their return to work. But assuming, arguendo, that in order for the clause itself to be held invalid, there must be an "objective standard" to determine whether the clause creates the impression of the futility of an attempt to resign, the instant clause show that unmistakably. The challenged constitutional language here does not permit an employee to resign under any circumstances. The only way to "terminate" membership is to be expelled. And, even when expelled, his obligations of union membership continue under the above-quoted language: His obligation is "still binding upon him" and he must "refrain from doing any act or deed in violation of the . . . constitution, laws, obligations . . . and policies of this [International] Organization, and the decisions of any authority of the International Union." Such continuing restrictions and obligations to the Union, even after expulsion (without a right to resign in the union constitution), clearly provide "an objective standard" to create in the members' minds the impression that any resignation would be futile.

I therefore conclude that Respondents' defense, insofar as it relies on the necessity of proof of an objective standard of futility inherent in the offending clause, is without merit since that standard is clearly met here. I do not mean by this conclusion to suggest that such proof is necessary, where, as here, the allegation of unlawfulness is directed solely to the maintenance of such offending language in the Union International's constitution and where enforcement elements are not part of the alleged violation. All that is alleged here is the facial invalidity of constitutional and bylaw restraints on the right to resign, including obligations to the Union and

<sup>7</sup> Respondent International's argument appears to be at least partially inconsistent with Respondent Local 399's position. Respondent International asserts that the proviso to 8(b)(1)(A) offers it a defense. Respondent Local 399, however, defends on the theory that since the offending language covers its supervisors and since a union's relation to supervisors is governed by Section 8(b)(1)(B), the alleged offending language, dealing with supervisors is facially valid and governed by Sec. 8(b)(1)(B) not Sec. 8(b)(1)(A). Sec. 8(b)(1)(A), with its proviso, of course, relates to employees and does not protect a supervisor's right of resignation, as Respondent Local 399 has argued (Br. at 4-5); *Sheet Metal Workers Local 68 (DeMoss)*, 298 NLRB 1000 (1990).

union discipline even after involuntary expulsion from the Union.<sup>8</sup>

#### CONCLUSIONS OF LAW

1. By maintaining in effect the restrictions on resignation from membership contained in (a) article XXIV, subdivision 3, section B of the International Union's constitution and (b) article V, subdivision 3, section (a)(2) of the bylaws and general rules of Local 399, the Respondents, and each of them, have violated Section 8(b)(1)(A) of the Act.

2. The Respondent's have not violated the Act in any other way.

#### THE REMEDY

Under *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), where the offending clause constitutes an unlawful restriction on the right of members to resign from the union, or its local, the Board requires, as part of the remedy, that the Respondents expunge the unlawful provisions from the governing documents. *Auto Workers Local 73 (McDonnell-Douglas)*, 282 NLRB 466-467 (1986). Other than the expunction remedy, General Counsel would require the posting of notices at the local union and the international union (Tr. 19-20). The Charging Party would have me recommend to the Board a further remedy regarding dissemination of the expunction. Thus, the Charging Party, in addition to expunction, would have me recommend to the Board that Respondents notify each member of the illegal activities to correct the violation. It would have the Board adopt former Member Dennis' argument in *Machinists Local 1414 (Neufeld Porsche-Audi)*, supra at 1336 fn. 22, that each member should be notified, in writing, that Respondent would not enforce the restrictions on resignation set forth in the International constitution and Local 399's bylaws. The Charging Party, indeed, would go further: it suggests that the Board adopt the reasoning of the administrative law judge in *Sheet Metal Workers (Losli International)*, 299 NLRB 972 (1989), whereby the unions would be required to announce the striking of the clauses at its membership meetings and in its newsletter or newspaper (Br. at 20-21). Finally, the Charging Party urges that the Respondents be directed to republish the constitution and bylaws omitting the offending provisions.

With regard to the posting of notices, I will recommend to the Board that they be posted other than in the Canadian locals, but in all locals in which there are members who are employees subject to the Board's jurisdiction, whether or not those locals also admit to membership employees who are not subject to the Board jurisdiction, including employees of state and local governments or subdivisions thereof. The problem in this case is that we are not dealing merely with a local union but with an international union. I am persuaded that merely posting notices will not adequately inform the

<sup>8</sup>In this regard, it is unknown whether Respondent International is attempting to pull the leg of the Board or its indulging in legal silliness in describing the alleged offending language as merely "precatory language" (R. International Br. at 2). It appears inherently inconsistent: to describe "certain precatory language describing the obligations to which IUOE members agree when they are admitted to membership" (R. International Br. at 2). Either it is "precatory" or it is an "obligation." The alleged offending language is replete with all the trappings and paraphernalia of legal obligation, speaking in terms of "contract," third party obligations under the contract, etc.

membership because there may be members admitted after the period when the notices need be posted, i.e., after the 60-day posting period. Having considered the matter, I conclude that posting is an insufficient remedy at least to such persons and I shall recommend to the Board that Respondents be directed to publish and disseminate in their magazines and newsletters, on three successive occasions commencing with the publishing and dissemination of such magazines and newsletters first following the issuance of the Board Order, the substance of the Order as follows.

The Respondent International, in substance, states that when it has removed constitutional provisions in the past, its executive board minutes noting that action is published in the International's magazine which is sent to each member of the International. Under such circumstances, the action of publishing the removal on three successive occasions in the International's magazine (and any newsletter issued by the Local), together with notice posting and the striking of these provisions from both the International's constitution and the local union's bylaws, seems to me to be a remedy consistent with and appropriate to the violations found. In addition, I shall recommend to the Board that it order Respondents, upon the republication, if any, of the International Union's constitution, or the local union's bylaws, that such republication, of course, be consistent with the expungement order. My refusal to order individual direct mail to all the International and Local members and the immediate republication of the constitution and bylaws is based on the expense involved in such actions together with the adequacy of the remedy with regard to dissemination and notification. Lastly, I shall recommend to the Board that Respondent International notify each of its constituent locals in the United States, which locals admit member employees subject to the Board's jurisdiction that, consistent with the present decision, it has removed from the International constitution the offending language.

Otherwise, for remedial purposes, I shall follow generally Board precedent as announced in *Graphic Communications Local 458 (Noral Color)*, 300 NLRB 7 (1990).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondents, International Union of Operating Engineers, AFL-CIO, and International Union of Operating Engineers, Local 399, Chicago, Illinois, AFL-CIO, and each of them, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in effect article XXIV, subdivision 3, section (b) of the International Union's constitution and article V, subdivision 3, section (a)(2) of the bylaws and general rules of Local 399 to the extent that such documents provide as follows:

The admission to membership in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his local Union, the International Union and every other member therein, where-

<sup>9</sup>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.

by, in consideration of the benefits bestowed by such membership, he agrees that he will remain a member until expelled; that he will not violate the Constitution, laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of the International Union or its subordinate branches, nor the trade rules of the locality in which he works; that he will not enter into the employment of any person conditioned on severing his membership with this organization; that upon the termination of his membership he will acknowledge his Obligation to be still binding upon him and refrain from doing any act or deed in violation of the principles, Constitution, Laws, Obligation, Ritual and policies of this Organization, and the decisions of any authority of the International Union empowered by this Constitution to make them.

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

(a) Remove from and, on republication, physically remove from the International Union's constitution and Local 399's bylaws and general rules and from all other of their governing documents, all of the matter appearing above in the indented paragraph in l(a).

(b) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."<sup>10</sup> Copies of said notices on forms provided by the Regional Director for Region 13, after being signed by authorized representatives of each of the Respondents herein, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notices for posting by Tribune Properties, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Publish in Respondent International's magazine and Local 399's newsletters to members, if any, on three successive occasions, following adoption by the National Labor Relations Board of this Recommended Order, notification to members that the language appearing in paragraph l(a), above, has been expunged, respectively, from both the International Union's constitution and Local 399 bylaws and General Rules. In addition, at the time of the initial publication in its magazine notifying members of the expunction of the above language in paragraph l(a) Respondent International shall also notify each of its constituent locals in the United

States that it has expunged from its constitution the said language.

(e) Notify the Regional Director in writing within 20 days from the date of the Order what steps each of the Respondents have taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
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 effect article XXIV, subdivision 3, section (b) of the International Union's constitution and article V, subdivision 3 section (a)(2) of the bylaws and general rules of Local 399, International Union of Operating Engineers, AFL-CIO, to the extent that such documents provide as follows:

The admission to membership in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his Local Union, the International Union and every other member therein, whereby, in consideration of the benefits bestowed by such membership, he agrees that he will remain a member until expelled; that he will not violate the Constitution, laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of the International Union or its subordinate branches, nor the trade rules of the locality in which he works; that he will not enter into the employment of any person conditioned on severing his membership with this organization; that upon the termination of his membership he will acknowledge his Obligation to be still binding upon him and refrain from doing any act or deed in violation of the principles, Constitution, Laws, Obligation, Ritual and policies of this Organization, and the decisions of any authority of the International Union empowered by this Constitution to make them.

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

WE WILL remove and, on republication, *We will* physically remove from the International Union's constitution and Local 399's bylaws and general rules, and from all other of our governing documents all of the matter appearing indented, above.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 399

<sup>10</sup>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."