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BETWEEN A ROCK AND A HARD PLACE: WRITERS AND ACTORS NAVIGATE HOLLYWOOD'S ROUGH ROADS TO EMPLOYMENT DURING LABOR STRIKES

*Adam Levin and Jenny Schneider Li**

I. INTRODUCTION

In the summer of 2001, the show may not go on. Motion picture and television producers confront the prospect of potential strikes by the Writers Guild of America ("WGA") and the Screen Actors Guild ("SAG"), whose collective bargaining agreements expire on May 1 and June 30, 2001, respectively.¹

As summer approaches, actors and writers, as well as others who support Hollywood's motion picture and television industry, likewise face uncertainty and potential financial hardship.² If new agreements are not reached, one or both of the guilds may order their respective members to cease performing services in connection with ongoing or imminent theatrical and television productions. As a result, paychecks will stop, and difficult decisions will likely follow. Non-union productions, which, during a labor dispute, continue to produce movies and television shows to satiate the public's appetite for entertainment, present tempting

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1. Patricia Ward Biederman and Kristina Saverwein, *Writers Fear for Their Finances, Careers*, L.A. TIMES, Mar. 25, 2001, at B1.

2. Darrell Saltzman, *After Record Growth, Entertainment, Industry, Local Economy Could Be Hit Hard if Actors, Writers Stage Threatened Strikes*, L.A. BUS. J., Dec. 25, 2000, at 14.

alternatives. However, work on even one non-union production has serious consequences for union members.³

This Article generally addresses a union member's relationship with, and obligations to, a union during a strike, and how a union member may choose to work for a struck or non-union employer without incurring union discipline by assuming "financial core status." Although the concept of "financial core status" discussed in Part II is not new,⁴ the upcoming potential strikes again bring the issue into focus. Thus, this Article continues by addressing financial core status as a legal concept: what unions and employers may tell employees about their right to assume financial core status, the benefits and burdens of assuming financial core status, and the importance of timing in selecting financial core status.

The Article then addresses the dilemma confronting so-called "hyphenates" during a strike. Hyphenates are a class of employees somewhat unique to the motion picture and television industry in that they are supervisors and managers who also are members of a union—the WGA.⁵ As such, they engage in supervisory work, which is not covered under the WGA Agreement, as well as "rank-and-file" work, which is covered. As union members, hyphenates may be called upon by their union to strike. However, as supervisors, hyphenates may be required by their employers to cross picket-lines to perform not only their supervisory tasks, but also the work normally done by striking writers. Thus, the pressures upon hyphenates during a strike are compounded, and may provide an even greater incentive for them to assume financial core status.

3. SCREEN ACTORS GUILD CONSTITUTION AND BY-LAWS art. XIV (Mar. 1999) [hereinafter SAG CONST.]; WRITERS GUILD OF AMERICA, WEST CONSTITUTION AND BY-LAWS art. X, pt. A, § 1 (revised Sept. 16, 1992) [hereinafter WGA CONST.].

4. See, e.g., Lionel S. Sobel, *The Origins and Evolution of "Financial Core" Union Membership and Its Significance in the Entertainment Industry*, 7 ENT. L. REP. 3, 4 (Dec. 1988); Ronald Turner, "Membership" Obligations Under NLRA Section 8(a)(3): A Proposal for Statutory Change, 17 HOFSTRA LAB. & EMP. L.J. 323, 327–30 (2000).

5. 1998 WRITERS GUILD OF AMERICA-ALLIANCE OF MOTION PICTURE & TELEVISION PRODUCERS THEATRICAL AND TELEVISION BASIC AGREEMENT art. 14 § A (AMPTP ed., 1998) [hereinafter WGA AGREEMENT].

II. BACKGROUND: UNION CONSTITUTIONS, STRIKE ORDERS AND FINANCIAL CORE STATUS

A. Union Constitutions and Strike Orders—The Ties that Bind

Like all labor unions, SAG and the WGA have promulgated union constitutions governing their relationship with their respective members.⁶ By joining the unions, actors and writers agree to be bound by the constitutions and the rules set forth therein.⁷ Those rules prohibit members from working on non-union productions, or for struck employers.⁸

Specifically, Rule 1 of SAG's Constitution states:

No member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the Guild which is in full force and effect. . . . No member shall perform any services as a performer nor make an agreement to perform services as a performer for any producer against whom the Guild is conducting a strike, nor shall any member otherwise violate any strike order of the Guild.⁹

The WGA Constitution contains similar limitations that are even broader in scope:

Any member of the Guild . . . who shall be found guilty, after a hearing in accordance with procedures in this Article X or adopted by the Board, of crossing a primary picket line of the Guild or of any act or failure to act or any conduct which is prejudicial to the welfare of the Guild or of unfair dealing with another member of the Guild, or with an employer or purchaser or licensee of his/her material, or of failing to observe the Constitution and By-Laws of this Guild, or any work rules or strike rules of the Guild, or any lawful order of the Board, or of failing to abide by the requirements of any collective bargaining agreement or code of fair practice to which the Guild is party . . .

6. See generally, SAG CONST., *supra* note 3; WGA CONST., *supra* note 3.

7. See generally, SAG CONST., *supra* note 3; WGA CONST., *supra* note 3.

8. WGA CONST., *supra* note 3, art. X, pt. A, § 1; SAG CONST., *supra* note 3, art. XIV, § 3.

9. SAG CONST. *supra* note 3, Rule 1. Some SAG members have asked SAG's national board to step-up enforcement of Rule 1 by disciplining members who work abroad, especially in Canada, on non-union productions. Dave McNary, *Harper Urges SAG Brethren To Avoid Non-Union Pacts*, DAILY VARIETY, Mar. 6, 2001, at 6. It has been reported that SAG may attempt to expand the scope of the SAG Constitution to explicitly forbid work on foreign, non-union productions.

may be suspended, declared not in good standing, expelled from membership in the Guild, be asked to resign, be censured, fined or otherwise disciplined, or any combination of the foregoing.¹⁰

In addition, the WGA Constitution provides: "Writers of scab scripts¹¹ may, if members of the Guild, be punished by expulsion, by suspension, by a fine, or by a combination of the foregoing."¹² The WGA Constitution also prohibits a writer from ever knowingly rewriting a scab script.¹³

Actors and writers cannot violate these covenants with impunity. Under the SAG and WGA Constitutions, if a union member performs struck work, or otherwise violates a rule, that member may face an internal disciplinary hearing.¹⁴ If the member is found guilty of a violation, the union may impose discipline upon the member, including fines, suspension or expulsion.¹⁵ The union may attempt to enforce any fine it imposes through a state court action.¹⁶

B. Financial Core Status: The Great Escape

A union's constitution is, in essence, a contract between the union and its members.¹⁷ Accordingly, when union membership ends, the contract ceases to have force or effect.

As discussed in depth in Section IV.A, some union members do not want to assume the obligations attendant to union membership and instead elect financial core status.¹⁸ A union member gains financial core status when that member resigns from the union, but continues to pay initiation fees and monthly dues in an amount necessary to support the union's collective bargaining, contract administration and grievance adjustment

10. WGA CONST. art. X, pt. A, § 1.

11. "Scab scripts" are defined as stories, teleplays, scripts or the like "written on order or request of or submitted to a producer . . . as to which the Guild is on strike at the time of the writing or submission." *Id.* § 3.

12. *Id.*

13. *Id.*

14. WGA CONST. art. X, pts. A, B; SAG CONST. art. XIV, §§ 3, 4.

15. WGA CONST. art. X, § 1; SAG CONST. art. XIV, §§ 1, 2.

16. *NLRB v. Boeing Co.*, 412 U.S. 67, 74 (1973), *rev'g*, 459 F.2d 1143 (D.C. Cir. 1972).

17. *See* SAG CONST. art. II. (stating SAG's objectives); WGA CONST. art. II (stating WGA's objectives).

18. Financial core status is sometimes referred to as "resigning" from the union, and workers on financial core status referred to as "non-members." However, to differentiate between true non-members and those who pay some portion of union dues and fees, such status will be referred to as "financial core status" and those individuals will be referred to as "financial core dues payors."

efforts on that member's behalf.¹⁹ Because financial core dues payors are not bound to abide by the union's constitution, they may work during a strike without the threat of union discipline.²⁰ Moreover, a financial core dues payor remains entitled to all of the benefits guaranteed by the collective bargaining agreement, and neither the union nor the employer may discriminate against an employee for electing financial core status.²¹ However, by resigning from the union, financial core dues payors lose many union membership benefits, including the right to vote on ratification of a collective bargaining agreement, hold a union office, and attend union meetings.²²

C. A Preview: The 2000 Screen Actors Guild Commercials Strike

The recent commercials strike by SAG and the American Federation of Television and Radio Artists ("AFTRA") illustrates the significant impact of labor strikes on performers.²³ Beginning in May 2000, actors represented by SAG and AFTRA engaged in a six-month strike of the advertising industry, which was one of the longest talent walkouts in history.²⁴ By the time the strike ended in October 2000, SAG members had lost more than \$100 million in income.²⁵ Furthermore, the Los Angeles economy had suffered an estimated \$125 million in lost production, and an additional \$103 million in related losses, such as camera rentals and catering.²⁶

One facet of the 2000 commercials strike garnering significant media attention was the relationship between unions and their members, and the concomitant rights and obligations of both. Many performers received an education about union rules when SAG fined golfer Tiger Woods \$100,000 for appearing during the strike in a non-union advertisement for Buick.²⁷

19. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), *rev'g* 303 F.2d 482 (6th Cir. 1962).

20. See *infra* notes 103–06 and accompanying text.

21. See *infra* notes 104–08 and accompanying text.

22. *General Motors Corp.*, 373 U.S. at 737.

23. Dave McNary, *Sag Snags an Ad Deal: Tentative Pact Brings End to Hollywood's Longest Strike*, DAILY VARIETY, Oct. 23 2000, at 1.

24. *Id.*

25. *Actors Resolve Strike over Pay Issues Involve Net, Cable Ads*, SUN SENTINEL, Oct. 24 2000, at 7A; *Actors Strike Took Big Bite of Earnings*, THE TORONTO SUN, Mar. 26, 2001, at 50.

26. *Actors Resolve Strike over Pay Issues Involve Net*, *supra* note 25; see also, Greg Johnson, *Can Settlement Lure Runaway Production Home?*, L.A. TIMES, Oct. 24, 2000, at A10.

27. Dave McNary, *SAG Tees off on Woods*, DAILY VARIETY, Nov. 10, 2000, at 1 [hereinafter McNary, *SAG Tees off*]. SAG agreed to waive one-half of that fine as long as Woods did not perform struck work during a five-year probationary period. Press Release, *Tiger Woods*

Other celebrities fared better. Los Angeles Laker Center, Shaquille O'Neal, faced possible union discipline after filming an instant "I'm going to Disneyland!" spot when the Lakers won the NBA championship on June 19, 2000.²⁸ Upon release of the commercial, SAG issued a statement declaring it was "deeply disappointed" with O'Neal's decision to perform struck work, and that O'Neal's name would be added to a list of other violators.²⁹ However, after discussions with O'Neal's representatives, and after O'Neal issued a statement in support of the union,³⁰ SAG declined to formally discipline O'Neal, citing O'Neal's "hurt feelings" as discipline enough.³¹

Some actors, seeking to avoid union discipline for filming commercials during the strike, assumed financial core status.³² For example, SAG member Dave Thomas, the founder and chairman of Wendy's restaurants, initially refrained from making any Wendy's commercials during the strike.³³ However, by October 2000, Thomas

Appears Before SAG Trial Board To Answer Charges of Performing Struck Work During Recent Commercials Strike, at <http://www.sag.org/pressreleases/pr-la001207.html> (Dec. 7, 2000).

Actress-model Elizabeth Hurley was fined \$100,000 after shooting a commercial for Estee Lauder on July 11, 2000. Hurley apologized for her actions, and explained that she was unaware that she was strike-breaking. Dave McNary, *SAG Reduces Sanctions for Scabs in Ad Strike*, DAILY VARIETY, Feb. 7, 2001, at 2 [hereinafter McNary, *SAG Reduces Sanctions*]; Duncan Campbell, *Hollywood Strike: Bedazzled, Bothered and Bewildered: When Liz Hurley Turned up for the Premiere of Her Latest Film She Faced Taunts of 'Scab' from Pickets of the Screen Actors' Guild*, OBSERVER, Oct. 22, 2000, at 20. Hurley also donated \$25,000 to the strikers, but this gesture did not stop the strike supporters from protesting at the premiere of her film, *Bedazzled*, with signs reading "Elizabeth Scabily, U Make Me Hurl," and "Beauty Fades, Honor Doesn't." Duncan Campbell, *Hollywood Strike: Bedazzled, Bothered and Bewildered: When Liz Hurley Turned up for the Premiere of Her Latest Film She Faced Taunts of 'Scab' from Pickets of the Screen Actors' Guild*, OBSERVER, Oct. 22, 2000, at 20.

28. Roger Armbrust, *Tempers Flair, Resolve Affirmed as Strike Extends*, BACK STAGE, at 3.

29. See Greg Johnson, *Striking Actors Unhappy over Shaq's Disney Spot*, L.A. TIMES, June 21, 2000, at C1; Dave McNary, *Trial Boards To Start*, VARIETY, July 31-Aug. 6, 2000, at 6.

30. Armbrust, *supra* note 28 ("[A]s a SAG and AFTRA member, I fully support the strike and hope that negotiations can resume in the very near future so both sides can get back to business as quickly as possible.")

31. Todd Amorde, chairman of the unions' joint strike committee, was quoted as defending the committee's decision to recommend no disciplinary action: "Shaq's feelings were hurt by this, and that was never our intention," Amorde said. "It was, however, our intention to educate him to the issues around the strike and what a SAG member's obligations are during a strike. He understands that and is completely supportive of the strike and is not going to do any more struck commercials." David Robb, "Shaq Still A Hero To Actors Unions," HOLLYWOOD REPORTER, June 27, 2000, at 6.

32. McNary, *supra* note 23.

33. Vicki Grimshaw, *Wendy's Chief Pitchman Bags Strike*, N.Y. POST, Oct. 20, 2000, at 48; Barnet D. Wolf, *Thomas Back in New Ads for Wendy's*, COLUMBUS DISPATCH, Oct. 21, 2000, at 1F.

changed his status with SAG from member to financial core dues payor,³⁴ and citing concern for Wendy's shareholders and employees, Thomas then filmed a commercial to promote Wendy's spicy chicken sandwich.³⁵

Although only celebrities who worked during the strike attracted media attention, SAG is on the lookout for all "strikebreakers."³⁶ One survey approximated that 1,000 performers worked during the strike, twenty percent of whom were SAG members.³⁷ Although SAG initially considered a lifetime ban on membership for non-union strikebreakers, SAG is now considering a ban of three to seven years.³⁸

III. SETTING THE STAGE: THE NATIONAL LABOR RELATIONS ACT

A. Union Security Clauses May Require Employees To Join a Union

Until Congress passed the Wagner Act in 1935,³⁹ the precursor to the National Labor Relations Act ("NLRA"),⁴⁰ efforts to organize labor in the United States were largely unprotected. Management was free to frustrate employees' attempts to organize by threatening termination, an especially powerful weapon during the depression when jobs were scarce. The Wagner Act therefore focused on creating meaningful protection of employees' rights to organize and bargain collectively, and not on regulating unions' activities.⁴¹

The Wagner Act explicitly approved of the so-called "closed shop," whereby unions and employers could agree that employees must first belong to a union before obtaining a job.⁴² Specifically, section 8(a)(3) of the Wagner Act stated, "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require [union membership] as a condition of employment."⁴³

34. Wolf, *supra* note 33.

35. *Id.*; Grimshaw, *supra* note 33.

36. McNary, *SAG Reduces Sanctions*, *supra* note 27, at 2.

37. *Id.*

38. *See id.*

39. Pub. L. No. 74-198, 49 Stat. 449 (1935).

40. 29 U.S.C. §§ 151-69 (1994).

41. 1 PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 29 (3d ed. 1992) [hereinafter 1 HARDIN].

42. Wagner Act, ch. 372, § 8(a)(3), 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(3) (1994)). For the purpose of this Article, section 8 and section 158 are used interchangeably in accordance with the customary practice of the National Labor Relations Board, the courts, and practitioners.

43. *Id.*

Critics of the Wagner Act viewed the legislation as one-sided, slanted heavily in favor of organized labor. As a result, in 1947 Congress passed the Taft-Hartley amendments, which focused, in part, on employees' rights not to join a union, and outlawed the "closed shop."⁴⁴ Section 158(a)(3) was amended to make it an unfair labor practice for an employer to discriminate in hiring in such a way as to encourage or discourage union membership. An added proviso stated, "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment.*"⁴⁵ Thus, union security clauses requiring union membership as a *precondition* of hire are illegal, but arrangements requiring union membership *after* hire are not.⁴⁶ The Taft-Hartley amendments also added a proviso prohibiting employers from firing employees for not belonging to a union, unless their non-membership resulted from failing to pay certain union dues and initiation fees.⁴⁷

In *Radio Officers Union of the Commercial Telegraphers Union v. NLRB*,⁴⁸ the United States Supreme Court explained that the Taft-Hartley amendments were intended to prevent union security clauses from being used for any purpose other than to compel payment of basic union dues and fees.⁴⁹ Congress allowed union security clauses because unions had valid concerns about "free riders," i.e., employees who would benefit from union representation, but who were unwilling to financially support the union.⁵⁰ Union security clauses ensured that there would be no free riders.⁵¹ On the other hand, the Taft-Hartley amendments eliminated a union's power to

44. 1 HARDIN, *supra* note 41, 30–32, 40.

45. 29 U.S.C. § 158(a)(3) (emphasis added).

46. *See id.* Such arrangements create an employment situation known as a "union shop." 2 PATRICK HARDIN, *THE DEVELOPING LABOR LAW 1495–96* (3d ed. 1992).

47. Currently, the second proviso of section 8(a)(3) of the NLRA provides:

[N]o Employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3).

48. 347 U.S. 17 (1954), *aff'g*, 196 F.2d 960 (2d. Cir. 1952).

49. *Id.* at 41.

50. *Id.*

51. *Id.*

require employers to fire non-union employees, as long as those employees paid certain dues and fees.⁵²

Both the current Producer-Screen Actors Guild Codified Basic Agreement (“SAG Agreement”) and the Writers Guild of America Theatrical and Television Basic Agreement (“WGA Agreement”) contain union security clauses requiring employees to become union members after obtaining employment.⁵³ Both agreements provide that employers do not violate the union security provisions if they employ a non-member, provided the reason for non-membership is not the employee’s failure to pay dues and fees.⁵⁴ Although a general perception exists that producers will not hire non-union writers or actors,⁵⁵ nothing in the WGA or SAG agreements prohibits them from doing so. Indeed, it would be unlawful for

52. See *id.* at 40–41.

53. See PRODUCER-SCREEN ACTORS GUILD CODIFIED BASIC AGREEMENT OF 1995 § 2.A (1995) [hereinafter SAG AGREEMENT]; WGA AGREEMENT, *supra* note 5, art. 6.A.

54. See SAG AGREEMENT, *supra* note 53, § 2.C. Section 2 further provides “[i]t is the intention of the parties to prevent the Union from closing its books so as to prevent any person who wishes to act in motion pictures from joining the Union.” *Id.* § 2.G. Article 6, section H of the WGA Agreement similarly states:

It is understood that the provisions of this Article 6 shall never under any circumstances be so construed during the term of this Basic Agreement as to constitute or permit what is known as a “closed shop” or construed in any manner that will at any time deprive the Company of its right to employ or continue the employment of a writer who is not a member of the Guild in good standing, or who does not become a member of the Guild in good standing within the period prescribed in Paragraph A. of this Article 6 if the Company has reasonable grounds for believing that such a membership was not available to such writer on the same terms and conditions generally applicable to other like members of the Guild, or if the Company has reasonable grounds for believing that membership in the Guild was denied, deferred, suspended or terminated for reasons other than the failure of such person to tender the applicable periodic dues uniformly required as a condition for acquiring or retaining membership in the Guild.

55. See, e.g., Emily C. Chi, *Star Quality and Job Security: The Role of the Performers’ Unions in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 10–11 (2000) (positing that the Actors’ Equity Association and Screen Actors Guild membership requirements, producers’ preference for hiring qualified performers, and union security clauses contained in collective bargaining agreements, produce a de facto closed shop in the acting profession); see also John Horn, *Writers Sleuth To Uncover Strike Breakers*, SAN DIEGO UNION-TRIBUNE, July 6, 1988, at C9 (reporting the WGA planned to expel members who worked during the 1988 strike, “effectively ending a screenwriter’s career”).

In fact, the SAG Agreement states only that preference will be given to “qualified professional performers,” who are defined as individuals who have been employed as motion picture performers at least once in the previous three years. SAG AGREEMENT, *supra* note 53, § 14.A. These individuals may be, but are not necessarily, SAG members. In addition, the SAG Agreement provides various exceptions under which performers who have not yet been employed on a motion picture may be hired for the first time. *Id.* § 14.D. There is no similar provision in the WGA Agreement requiring producers to give preference to “professional,” or previously employed writers.

an employer to refuse to hire a writer or performer because that person was not yet a union member.

B. Unlike Regular Employees, Supervisors Are Not Subject to NLRA Protections

Another significant change made by the 1947 Taft-Hartley amendments was the exclusion of supervisors from the protections of the NLRA,⁵⁶ as a result of which the National Labor Relations Board ("NLRB") does not regulate employer actions with respect to supervisors. Therefore, an employer may prohibit its supervisors from joining a union.⁵⁷ However, an employer may consent to include supervisors within the coverage of a collective bargaining agreement, and may permit supervisors to join a union. In such cases, a supervisor may have obligations to both his employer and his union, especially during a strike.⁵⁸

In the motion picture and television industry, the WGA Agreement has historically covered some categories of supervisors and, consequently, supervisors have joined the WGA.⁵⁹ These supervisor-members, such as executive producer-writers, story editor-writers and director-writers, are known as hyphenates, because they perform both writing and supervisory functions, including hiring writers and directing their work.⁶⁰

56. The NLRA defines supervisors as those

having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1994).

57. See, e.g., *Fla. Power & Light Co. v. Int'l Bhd. of Elec. Workers, Local 641*, 417 U.S. 790, 812 (1974) (stating an employer "is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union").

58. "[I]nherent in the option afforded the employer by Congress [permitting supervisors to become union members], must be the recognition that supervisors permitted by their employers to maintain union membership will necessarily incur obligations to [both]." *Id.* at 812 n.22.

59. See WGA AGREEMENT, *supra* note 5, art. 14, § A ("The parties acknowledge that it is customary in the television industry to employ persons to render services as writers under the terms of this Basic Agreement, and the same persons to render services in other capacities which are not subject to this Basic Agreement.").

60. See *id.*

IV. UNION MEMBERSHIP: THE UNION MEMBER'S RIGHTS AND OBLIGATIONS

A. *Financial Core: The Paying Non-Member*

Pursuant to Taft-Hartley, as interpreted by the United States Supreme Court in *Communication Workers of America v. Beck*,⁶¹ a union member may assume financial core status by resigning from union membership, but continuing to pay a portion of the union's initiation fees and dues.⁶² The fees and dues paid must be sufficient to compensate the union for its collective bargaining, contract administration, and grievance adjustment efforts on that worker's behalf.⁶³

Historically, union members have assumed financial core status for a variety of reasons. For example, some members objected to paying dues used for a union's political or other activities,⁶⁴ while others contended membership violated their religious beliefs.⁶⁵ Political commentators have also objected to union membership based on First Amendment considerations.⁶⁶ Most significant to this Article, the financial core issue has also arisen during strikes, when members have disagreed with their

61. 487 U.S. 735 (1988).

62. *See id.* at 745 (citing *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), *rev'g*, 303 F.2d 482 (6th Cir. 1962)).

63. *Id.*

64. For example, one article discussing the concept of financial core status reports that a former SAG board member, Mark McIntire, became a financial core dues payor in the 1980s, apparently as a result of a long-standing disagreement over the direction of SAG activities. Sobel, *supra* note 4, at 3; *see also* *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768–69 (1961) (under the Railway Labor Act, unions are not permitted to spend on political causes the compulsory dues and fees of non-members who object), *rev'g*, 108 S.E.2d 796 (Ga. 1959); *Beck*, 487 U.S. at 745 (expanding the holding of *Street* to the National Labor Relations Act and holding that unions may use mandatory dues and fees of financial core members only to perform the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues).

65. *E.g.*, *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978) (holding union security provisions do not relieve employer of duty under the Civil Rights Act of 1964 to reasonably accommodate religious beliefs of employees), *rev'g*, 14 Fair Empl. Prac. Cas. (BNA) 807 (W.D. Mich. Jan. 13, 1976).

66. *See* *Buckley v. Am. Fed'n of Television and Radio Artists*, 496 F.2d 305, 308–09, 311 (2d Cir. 1974) (rejecting the argument that political commentators, including William F. Buckley, Jr., have a First Amendment right not to belong to a union or to pay even financial core dues and fees: "The dues here are not flat fees imposed directly on the exercise of a federal right. . . . To the contrary, assuming, arguendo, that government action is involved here, the dues more logically would constitute the employee's share of the expenses of operating a valid labor regulatory system which serves a substantial public purpose.").

union's stance during negotiations,⁶⁷ when members wanted to return to work,⁶⁸ or when they simply wanted to make a point.⁶⁹

1. "Membership": A Misleading Term of Art

Section 8(a)(3) of the NLRA allows employers to make agreements with unions requiring employees to become union members, yet simultaneously prohibits employers from encouraging union membership.⁷⁰ The United States Supreme Court reconciled this seeming contradiction by interpreting the term "membership" to mean solely the obligation to pay those initiation fees and dues necessary for the union to perform its duties as the employee's exclusive representative in dealing with the employer.⁷¹ However, even after the Supreme Court in *General Motors* and *Beck* assigned a legal meaning to the term "membership," union members continued to challenge union security clauses that did not define the parameters of the term within the union security clause itself.⁷²

The Court put the issue to rest in *Marquez v. Screen Actors Guild, Inc.*⁷³ In *Marquez*, the Court unanimously decided that a union may enforce a collective bargaining agreement requiring union "membership"

67. See James Bates, *Writers Strike Has L.A.'s Hyphenates' Getting Very Itchy*, S.F. CHRON., July 20, 1988, at E6 (discussing dissatisfaction of some writers during 1988 writers' strike over WGA's position in negotiations and those writers' threats to assume financial core status).

68. See *id.*

69. See Judith Michaelson, *Herschensohn Walkout Angers Unions*, L.A. TIMES, July 11, 1988, at 1. KABC-TV commentator Bruce Herschensohn resigned from AFTRA in 1988 to show striking WGA members "how to do it and that you can do it." *Id.* (quoting Bruce Herschensohn).

70. See discussion *supra* Part III.A.

71. See *General Motors Corp.*, 373 U.S. at 742 ("Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."); *Beck*, 487 U.S. at 762-63 (stating section 8(a)(3) "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues'").

72. See, e.g., *Int'l Union of Elec., Elec., Salaried, Mach. and Furniture Workers v. NLRB*, 41 F.3d 1532, 1537-38 (D.C. Cir. 1994) (refusing to enforce NLRB's ruling that the union acted in bad faith by maintaining union security clause without informing members of their rights to become financial core dues payors); *Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers*, 94 F.3d 1107, 1115-16 (7th Cir. 1996) (holding agency shop clause not facially invalid for failing to include notice of right to challenge fees charged for exclusive representation, at least where union newsletter contained such notice), *aff'g*, 895 F. Supp. 1093 (N.D. Ind. 1995).

73. 525 U.S. 33 (1998), *aff'g*, 124 F.3d 1034 (9th Cir. 1997).

as a condition of employment, and that use of the language of the NLRA, without including a definition of the term “membership” in the collective bargaining agreement, did not violate the union’s duty of fair representation to members of the bargaining unit.⁷⁴

In *Marquez*, the plaintiff was a part-time actress selected for a role in an episode of a television series.⁷⁵ The production company was a party to the SAG agreement, which included a union security clause requiring performers who worked more than thirty days in the motion picture industry to become “a member of the Union in good standing.”⁷⁶ Because Marquez had worked more than thirty days in the industry, she was required to pay union dues and fees of approximately \$500 before she could perform in the episode.⁷⁷ Marquez attempted to make arrangements with SAG allowing her to pay the fees after she was paid for her work.⁷⁸ However, she was unsuccessful, and another actress was ultimately hired for the part.⁷⁹

In *Marquez*, the Court addressed the narrow question of whether a union breaches its duty of fair representation by negotiating a union-security clause that tracks the precise language of section 8(a)(3), without explaining in the agreement the meaning of that language as set forth in *General Motors* and *Beck*.⁸⁰ The Court concluded:

[B]y tracking the statutory language, the clause incorporates all of the refinements that have become associated with that language To the extent that these interpretations are not obvious, the relevant provisions of §8(a)(3) have become terms of art; the words and phrasing of the subsection now encompass the rights that we announced in *General Motors* and *Beck*.⁸¹

74. *Id.* at 46–47. The Supreme Court did not decide whether SAG illegally enforced the union security clause by allegedly requiring Marquez to become a member or to require her to pay dues for non-collective bargaining activities. *Id.* at 42. Another issue not before the Court was whether SAG breached its duty of fair representation by failing to adequately notify Marquez of her rights under *Beck* and *General Motors* by means other than the collective bargaining agreement itself. *Id.* at 43. The Board has held, and SAG conceded, that unions have an obligation to so notify employees. *Id.*; see also discussion *infra* Part IV.A.2.

75. *Marquez*, 525 U.S. at 39.

76. *Id.* at 38 (citing the collective bargaining agreement).

77. *Id.* at 39.

78. *Id.*

79. *Id.* After a new actress was hired, SAG faxed a letter to the production company stating it had no objection to Marquez working in the production, but the letter was too late, and the production company proceeded on schedule with the replacement actress. *Id.*

80. *Id.* at 42, 45.

81. *Marquez*, 525 U.S. at 46.

The *Marquez* decision validates using the term “membership” as a term of art in a collective bargaining agreement, even though such language admittedly does not mean what it says.⁸² Were union members required to rely solely on the collective bargaining agreement for an explanation of their membership obligations, uninformed members could be misled. However, even before *Marquez*, the Board had held that unions must notify all unit employees in a reasonable manner of their rights under *General Motors* to become financial core dues payors, and of their rights under *Beck* to pay only for union activities germane to collective bargaining and administration of the contract.⁸³ Unions failing to provide members with adequate notice of their *General Motors* and *Beck* rights through periodic newsletters or other publications may be in violation of section 8(b)(1)(A) of the NLRA, which prohibits union restraint or coercion of employee rights.⁸⁴

2. The Well Kept Secret: What Employers Cannot Say About Financial Core

Although unions have an affirmative duty to inform members of their right to assume financial core status, the NLRA imposes restraints on an employer’s ability to do the same. Indeed, it is an unfair labor practice for an employer to pressure or coerce any employee in the exercise of the employee’s rights under § 7 of the NLRA,⁸⁵ which includes pressure or coercion regarding the right to elect financial core status. As such, the NLRB would likely find that an employer has applied unlawful pressure if the employer were to spontaneously raise the subject of financial core.

For example, in *Naperville Ready Mix, Inc. and General Teamsters, Chauffeurs, Salesdrivers and Helpers Local Union No. 673*,⁸⁶ one of the

82. *Id.* After *Marquez*, the Board has continued to allow union security clauses to require “membership in good standing” language. *E.g., Polymark Corp. and Int’l Union of Elec., Elec., Salaried, Mach. and Furniture*, 329 N.L.R.B. No. 7, 1999–2000 NLRB Dec. (CCH) ¶ 15,257. (Sept. 1, 1999), *aff’g*, 1995 N.L.R.B. LEXIS 996 (N.L.R.B. Sept. 30, 1992); *Teamsters Local 75*, 329 N.L.R.B. No. 12, 1999–2000 NLRB Dec. (CCH) ¶ 15,259. (Sept. 1, 1999), *aff’g*, 1992 N.L.R.B. LEXIS 1051 (N.L.R.B. Sept. 4, 1992).

83. *See Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995), *aff’g*, 1992 N.L.R.B. LEXIS 669 (N.L.R.B. May 29, 1992), *enforced*, 133 F.3d 1012 (7th Cir. 1998).

84. *See, e.g., Teamsters Local 75*, 329 N.L.R.B. No. 12, 1999–2000 NLRB Dec. (CCH) ¶ 15,259 (holding the union violated section 8(b)(1)(A) of the NLRA by failing to provide notice to new employees of *Beck* and *General Motors* Rights, prior to obligating them to pay dues under the union security clause).

85. 29 U.S.C. § 157 (1994) In general, an employee’s section 7 rights include the right to join, or refrain from joining, a labor organization. *Id.*

86. 329 N.L.R.B. No 19, [1999–2000] NLRB Dec. (CCH) ¶ 15,277 (Sept. 21, 1999), *aff’g*, 1995 N.L.R.B. LEXIS 996 (N.L.R.B. Oct. 13, 1995).

company's owners approached striking employees on the picket line, and advised them to sign "financial core" statements, assume financial core status, and then cross the picket line.⁸⁷ Otherwise, they were told, there would be no work for them.⁸⁸ The employer also distributed forms outlining procedures for assuming financial core status just prior to commencement of the strike. The NLRB held that this conduct violated section 8(a)(1)⁸⁹ of the NLRA:

[The employer] had distributed forms outlining procedures for becoming "financial core" members to the employees with the paychecks that covered their work for the period ending with the commencement of the strike. In the context in which this occurred—the Respondent's imminent shift to an operation in which it would be engaging employees' services only outside the collective-bargaining relationship—Wehrli's conduct was not a mere lawful response to employee questions about resignation but amounted to unlawful solicitation of union resignations, in violation of Section 8(a)(1) of the Act.⁹⁰

An employer may, however, give purely factual information regarding an employee's right to assume financial core status in direct response to employee inquiries. For example, in *Lear Siegler, Inc.*,⁹¹ the employer responded to employees' inquiries regarding resignation by

87. *Id.* at 28,279.

88. *See id.*

89. 29 U.S.C. § 158(a)(1) (1994) (stating it is an unfair labor practice for an employer to "interfere with, restrain or coerce [an] employee[] in the exercise the rights guaranteed in Section 157 of this title").

90. *Naperville Ready Mix*, 329 N.L.R.B. No. 19, 1999–2000 NLRB Dec. (CCH) ¶ 15,276, at 28,279; *see also Gondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997) (upholding the Board's decision that the employer violated section 8(a)(1) by helping striking workers resign from the union where supervisor prepared and distributed the resignation form, waited for and obtained the signatures of several employees, completed and dated the form and forwarded it to the union), *aff'g*, 318 N.L.R.B. 996 (1995); *Schenk Packing Co.*, 301 N.L.R.B. 487, 489 (1991) (stating employees could reasonably perceive a substantial employment risk should they fail to resign from the union where the employer stated that it would only consider unit employees as replacements during a lockout once they resigned from the union); *Chicago Beef Co.*, 298 N.L.R.B. 1039, 1039 (1990) (stating it was not the dissemination of resignation forms which violated the Act, but rather, the further act of conditioning reinstatement on resignation from the union which constituted an unfair labor practice); *Manhattan Eye, Ear and Throat Hosp.*, 280 N.L.R.B. 113, 114 (1986) ("[A]n employer does not violate the Act merely by providing employees with information on how to resign from the union 'as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation," but repeatedly informing striking employees that they can return to work once they resign from the union constitutes unlawful solicitation of union resignation.).

91. 283 N.L.R.B. 929 (1987).

providing verbal information and distributing and posting a notice explaining employees' rights.⁹² The communications included a statement that employees had a right under the NLRA to strike or refrain from doing so, and that an employee could resign from the union to avoid possible union fines for crossing a picket line.⁹³ The information provided by the employer emphasized that the decision to resign rested solely with the employee.⁹⁴ The Administrative Law Judge ("ALJ") found these communications were not calculated to interfere with the employees' section 7 rights and did not violate the NLRA.⁹⁵

In *Laundry, Dry Cleaning, Government and Industrial Service, Local 3*,⁹⁶ in the context of evaluating an unfair labor practice charge against a union for refusing to accept employees' resignations, the Board found that there was no coercion in either the employer's memoranda to employees regarding strike rights, or in the employer's provision of resignation exemplars.⁹⁷ One memorandum advised employees that if they decided to work during the threatened strike, they would be vulnerable to disciplinary fines by the union as long as they retained union membership.⁹⁸ Another memorandum stated:

This letter is intended to make you aware of your rights. We recognize that it is your individual right to make your own decision without your employer or your Union attempting to tell you what to do. We are not urging you either to remain a member of the Union or to resign from the Union.⁹⁹

In addition to this memorandum, the employer provided employees with samples of resignation letters they could send to the union to terminate union membership, thus immunizing employees from union discipline.¹⁰⁰ Although the ALJ specifically noted that he was not reviewing the validity of the employer's communications, he found that the memoranda had not coerced employees into resigning.¹⁰¹ Therefore, by implication, it is unlikely that such communications would violate section 8(a)(1).

92. *Id.* at 943-44.

93. *Id.* at 944.

94. *Id.*

95. *Id.* at 946.

96. 275 N.L.R.B. 697 (1985).

97. *Id.* at 704.

98. *Id.* at 699.

99. *Id.*

100. *Id.*

101. *Id.* at 704.

Notwithstanding the foregoing decisions, there is a risk that even factual information provided in response to an employee's specific request might be perceived by the NLRB as unlawful pressure or coercion. Because of this risk, many employers prefer to give employees only general information, and direct employee inquiries to an independent attorney or to the local office of the NLRB. As a result, union members must generally rely on their unions to inform them of their rights regarding financial core status.

3. Why Financial Core?

The primary benefit of assuming financial core status is not financial, in that financial core dues payors must continue to pay most of the union's customary dues and fees.¹⁰² Instead, the significance is that, unlike union members, financial core dues payors are not subject to union discipline, even if they work during a strike.¹⁰³ Although financial core dues payors are not bound by the union's rules, they are covered by the terms and conditions of the collective bargaining agreement, cannot be discriminatorily denied benefits guaranteed under the collective bargaining agreement, such as pension and health benefits,¹⁰⁴ and are owed by the union the same duty of fair representation as full members.¹⁰⁵ In short, financial core dues payors reap the benefits of what they pay for: the union's efforts in collective bargaining, contract administration, and grievance adjustment.

102. See *Beck*, 487 U.S. at 745. The authors do not know what percentage of the full dues is required by SAG or the WGA. But see *Screen Actors Guild*, No. 31-CB-8059, 1990 WL 597041, *1-2 (N.L.R.B. Op. Off. Gen. Counsel, Aug. 20, 1990) (SAG violated section 8(b)(1)(A) of NLRA by requiring financial core member to pay 95.68 percent of normal union dues, because inclusion in dues of cost of lobbying for collective bargaining legislation and "operating and administrative costs" such as rent, utilities, salaries and travel, were not properly chargeable to financial core member.).

103. See *supra* note 20. Union members, on the other hand, are subject to the union's constitution and rules. SAG CONST., *supra* note 3, art. XIV, § 3 (c); WGA CONST., *supra* note 3, art. X, pt. A § 1.

104. See, e.g., *Teamsters Cannery Local 670 v. NLRB*, 856 F.2d 1250, 1256 (9th Cir. 1988) (ruling in the context of interpreting a strike settlement agreement, financial core members cannot be denied access to pharmacy and clinics in retaliation for electing financial core status during a strike); *Graphic Communications Int'l Union, Photoengravers Pension Welfare Fund*, Nos. 30-CA-9669, 30-CB-2612, 1988 WL 236535, *2 (N.L.R.B. Op. Off. Gen. Counsel, Sept. 30, 1988) (stating that an employer cannot discriminate against financial core members by denying health and pension benefits).

105. See, e.g., *Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283, 297 (4th Cir. 1991) ("The employee, regardless of union membership, has the right [under the NLRA and RLA] to be represented fairly and heard by the collective bargaining representative.").

However, financial core dues payors lose many of the privileges of union membership. The union may prohibit financial core dues payors from voting to ratify a collective bargaining agreement, voting in union elections, running for union offices or attending union meetings.¹⁰⁶ To some, these benefits are important because they are essentially the only means by which an individual bargaining unit employee can voice an opinion on specific issues of collective bargaining, or on the political direction of the union. In addition, in the motion picture and television industry, a union member who assumes financial core status during a strike may face ostracism by union members,¹⁰⁷ despite purported protection against discrimination.¹⁰⁸

4. When To Go Financial Core? Timing Is Everything

In *NLRB v. Textile Workers Union*,¹⁰⁹ the Supreme Court held that a union violated the NLRA when it sued to collect strike-related fines imposed on former members who assumed financial core status *before* crossing a picket line. The Court reached this result even though the union members voted in favor of the strike, and then resigned after the strike was declared.¹¹⁰ The Court determined that once a member resigns or elects

106. See *General Motors Corp.*, 373 U.S. at 737.

107. See, e.g., Michael Cieply, *Emotions Run High over Writers' Split: Dissidents' Back-to-Work Threat Provokes Bitter Response*, L.A. TIMES, July 16, 1988, at 1. During the 1988 WGA strike, some members threatened to become financial core dues payors in protest of the WGA's failure to agree to a contract that many members supported. *Id.* The union did not appreciate the threat, and some questioned the members' motives for wanting to obtain financial core status. *Id.* See also *Letter to the Editor from Edmund H. North*, L.A. TIMES, July 30, 1988, at Calendar, at 2 (reminding potential union deserters of the 1936 effort of some dissidents to resign and form their own union: "The ensuring [sic] years [when the dissidents returned to the WGA] were traumatic for these people [because] [f]riendships had dissolved [and] [s]ocial contacts had dried up. There were no welcoming smiles at the writers' table in the studio commissary. Desertion in the face of the enemy has always carried a heavy penalty."); Michael Cieply, *Emotions Run High over Writers' Split: Dissidents' Back-to-Work Threat Provokes Bitter Response*, L.A. TIMES, July 16, 1988, at 1 (quoting striking guild members regarding threat of some members to resign and return to work; "For all that the guild has done for them, they just turned [without recognizing any] sense of history.").

Also, at a meeting to ratify the 1988 WGA Agreement, some union members distributed lists of the names of dissenting members, and a WGA board member attempted to list their names from the podium, with encouragement from the majority of the membership. *Letter to the Editor from Eugenie Ross-Leming*, L.A. TIMES, Aug. 14, 1988, at Calendar, at 103; *Letter to the Editor from Mark Evanier*, L.A. TIMES, Aug. 21, 1988, at Calendar, at 99.

108. See, e.g., *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083, 1087 (9th Cir. 1975) (stating that an employee may not be discharged, nor may a union demand the employer discharge the employee, because the employee has assumed financial core status).

109. 409 U.S. 213 (1972), *rev'g*, 446 F.2d 369 (1st Cir. 1971).

110. *Id.* at 214.

financial core status, “the union has no more control over the former member than it has over the man in the street.”¹¹¹

Unions cannot circumvent the rule promulgated in *Textile Workers Union* by attempting to control the timing of a member’s resignation. In *Pattern Makers’ League v. NLRB*,¹¹² the Supreme Court considered a provision of a union’s constitution prohibiting members from resigning during a strike.¹¹³ A divided Court held that the union violated the NLRA by fining former members who resigned before returning to work, despite the union’s rules prohibiting resignations during a strike.¹¹⁴ In holding that a union may not prohibit resignation during a strike, the Court explained that the NLRA “protects the employment rights of the dissatisfied member, as well as those of the worker who never assumed full union membership.”¹¹⁵ The Court reasoned, “[b]y allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union.”¹¹⁶

Despite the Supreme Court’s 1985 decision in *Pattern Makers*, the WGA Constitution in effect during the 1988 WGA strike contained a provision prohibiting resignation during a strike.¹¹⁷ This provision was the

111. *Id.* at 217.

112. 473 U.S. 95 (1985), *aff’g*, 724 F.2d 57 (7th Cir. 1983).

113. *Id.* at 97.

114. *Id.* at 115–16.

115. *Id.* at 106.

116. *Id.* However, a union is well within its rights to discipline a member who *first* crosses a picket line or works in a non-union production and *then* chooses financial core status. For a recent example *see*, Mike Salinas, *Williams Tries Equity Dodge*, BACK STAGE, Oct. 6, 2000, at 1 (discussing the attempt of actor Barry Williams, Greg Brady from “The Brady Bunch,” to escape union discipline by Actors’ Equity for performing in non-union production of “The Sound of Music” by choosing financial core status *after* he agreed to play the part of Captain Von Trapp).

117. Section 8 (Resignation) of the WGA Constitution in effect in 1988 provided:

By accepting membership in the Guild members agree that the continuation of membership status and the applicability of discipline to all members, especially during times of negotiation with employers or during strikes by the Guild, is essential to their welfare and necessary for solidarity and to achieve the objectives of the Guild, and that resignation during or shortly preceding a strike by the Guild shall not relieve a member of his obligations during the duration of such and related strikes to observe the Guild’s strike rules

(c) If a member tenders his resignation after commencement of collective bargaining between the Guild and one or more employers, and within twenty-one (21) days prior to the expiration date of the then current and applicable collective bargaining agreement, and if a strike occurs within twenty-one (21) days of the expiration of said collective bargaining agreements, or if a member tenders his resignation during a strike . . . his resignation shall not relieve the member of his obligation to observe the Guild strike rules and a primary picket line of the Guild for the duration of such and related strikes, and such member shall remain subject to Article X (Discipline) for the duration of such and related strikes.

subject of an unfair labor practice charge filed by twenty-one members of the WGA and the Alliance of Motion Picture and Television Producers ("AMPTP").¹¹⁸ In *Writers Guild of America, West, Inc.*, the NLRB ordered the WGA to expunge the unlawful provisions from its Constitution.¹¹⁹ Currently, neither the WGA nor the SAG Constitutions prohibit resignation during a strike.¹²⁰

B. Wearing Two Hats: The Hyphenate As Supervisor and Union Member

*"A supervisor-member cannot serve both masters without incurring some obligations to both; it is simply unfair to require unions to accept members who receive all of the benefits of the association and bear none of the obligations."*¹²¹

Employers may demand absolute loyalty from their supervisors, and may prohibit them from belonging to a union.¹²² This right is critical to employers who, during a labor strike, rely upon their supervisors to perform not only their regular supervisory duties, but sometimes the rank-

118. *Writers Guild of America, West, Inc.*, 297 N.L.R.B. 92 (1989). The AMPTP is a multi-employer bargaining association which represents various employers engaged in the business of producing theatrical and television motion pictures in connection with their collective bargaining negotiations with various unions and guilds. *Id.*

119. *Id.* at 94.

120. WGA CONST., *supra* note 3, art. IV, pt. F; SAG CONST., *supra* note 3, art. IV, § 4. Each of the guilds has its own procedures regarding how to "resign" (or elect financial core status). The WGA requires a resignation in writing, signed by the member, and personally delivered to and "receipted by" an officer or employee of the Guild, or mailed by certified or registered mail to the Board of Directors. WGA CONST., *supra* note 3, art. IV, pt. F.

The SAG Constitution requires a General Member to give written notice by mail or delivery to the Hollywood office, and a Branch Member to mail or deliver notice to the member's Branch office. SAG CONST., *supra* note 3, art. IV, § 4.

Notwithstanding the WGA's and SAG's instructions on how to resign, a union member's resignation or election of financial core status becomes effective when the member clearly manifests his or her intent to resign or elect financial core status. *See, e.g.*, *Peabody Coal Co.*, 291 N.L.R.B. 361, 363 (1988) ("An employee's resignation from membership in a labor organization may be communicated orally or in writing and need only convey a clear intention to resign.").

121. *NLRB v. Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 593 (1987), *aff'g*, 780 F.2d 1489 (9th Cir. 1986).

122. *See* 29 U.S.C. § 164(a) (1994) ("Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law . . . relating to collective bargaining."); *Fla. Power & Light Co. v. Int'l Bhd. of Elec. Workers*, 417 U.S. 790, 812 (1974) (stating that an employer "is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union").

and-file work normally performed by striking workers.¹²³ Supervisors, in large part, enable employers to continue operating during a strike.

However, employers and unions occasionally agree that supervisors will be represented by, and allowed to join, a union.¹²⁴ In any industry, when supervisors are also union members, tensions often arise during a strike because the supervisor-member may have divided loyalties between his employer and his union. While employers may order supervisors to cross picket lines during a strike, a union may lawfully discipline supervisor-members for performing the rank-and-file work of striking employees,¹²⁵ as well as certain kinds of supervisory work.¹²⁶

However, section 8(b)(1)(B) of the NLRA imposes some limits upon a union's ability to discipline a supervisor-member for crossing a picket line. Section 8(b)(1)(B) provides that "[i]t shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."¹²⁷ Therefore, if a supervisor-member's regular job duties include tasks related to collective bargaining or grievance adjustment, a union may not prevent the supervisor-member from performing those duties during a strike by threatening or imposing discipline.¹²⁸

In the motion picture and television industry, there is a unique group of supervisor-members called hyphenates.¹²⁹ These individuals are writer members of the WGA and perform supervisory tasks for their producer-employers. Hyphenates include executive producer-writers, producer-writers, associate producer-writers and story editor-writers.¹³⁰ As is discussed in Section IV.B.1, the Supreme Court, in *American Broadcasting Cos. v. Writers Guild of America, West, Inc.*,¹³¹ recognized that these categories of hyphenates performed section 8(B)(1)(b) duties, at least under the facts of that case.¹³² However, the determination of whether a particular hyphenate performs job duties related to collective bargaining or

123. See *Fla. Power & Light Co.*, 417 U.S. at 796.

124. See, e.g., *id.* at 793-94.

125. *Id.* at 813.

126. See *Int'l Bhd. of Elec. Workers*, 481 U.S. 573.

127. 29 U.S.C. § 158(b)(1)(B) (1994).

128. *Am. Broad. Cos. v. Writers Guild of Am., West, Inc.*, 437 U.S. 411, 424 (1978), *rev'g* 547 F.2d 159 (2d Cir. 1976)..

129. *Id.* at 411.

130. See WGA AGREEMENT, *supra* note 5, art. 14, § A.

131. 437 U.S. 411.

132. *Id.* at 412.

grievance adjustment must be made on a case-by-case basis, depending on the hyphenate's actual job duties.¹³³

1. The Unique Dilemma of Hyphenates During a Strike: *American Broadcasting Cos. v. Writers Guild of America, West, Inc.*

American Broadcasting Cos. illustrates the hyphenate's dilemma during a strike. In March 1973, the WGA engaged in a strike against the network and producer members of the AMPTP.¹³⁴ Before the strike, the WGA distributed strike rules to all of its members, including hyphenates.¹³⁵

Among other mandates, the strike rules prohibited members from working for a struck producer, required each member to accept picket duty when assigned, prohibited members from resigning from the union during the strike,¹³⁶ and prohibited members from ever working with any individual who violated any of the union's strike rules.¹³⁷ Certain of the hyphenates who received the WGA's strike rules customarily performed supervisory functions including hiring and directing the work of writers. In addition, the hyphenates performed certain limited writing duties not covered by the collective bargaining agreement, as well as covered work.¹³⁸

In connection with their primary supervisory duties, many hyphenates were represented by labor organizations other than the WGA, such as the Directors Guild of America.¹³⁹ Some of the organizations' contracts contained no-strike clauses, and therefore, those organizations instructed hyphenates to disregard the strike and report to work.¹⁴⁰ In addition, some of the hyphenates had personal services contracts with their producer-employers, and were instructed by their employers that they were expected to fulfill their obligations under those contracts during the strike.¹⁴¹ The hyphenates were assured, however, that they would not be asked to perform any writing duties covered by the collective bargaining agreement.¹⁴²

133. *See, e.g., id.*

134. *Id.* at 414.

135. *Id.* at 415. The specific hyphenates involved were executive producers, producers, associate producers, directors, story editors, story consultants, script consultants, executive story editors, and executive story consultants. *Writers Guild of America, West, Inc.*, 217 N.L.R.B. 957, 961 (1975).

136. *Am. Broad. Cos.*, 437 U.S. at 415.

137. *Id.* at 416.

138. *Id.* at 417.

139. *See id.* at 415.

140. *Id.*

141. *Writers Guild of Am., West*, 217 N.L.R.B. at 968.

142. *Am. Broad. Cos.*, 437 U.S. at 417. The reported Board and court decisions do not discuss why the producer-employers expressly exempted rank-and-file writing duties from those

The WGA charged those who returned to work with violating strike rules, and disciplinary hearings ensued. At the hearings, the hyphenates were found guilty of violating strike rules.¹⁴³ The WGA imposed discipline, including expulsion, suspension and fines up to \$50,000.¹⁴⁴

The AMPTP and the networks then filed unfair labor practice charges, asserting that the WGA violated section 8(b)(1)(B) of the NLRA.¹⁴⁵ The ALJ ultimately recommended the charges be sustained.¹⁴⁶ The ALJ found that the various categories of producers, directors and story editors were supervisors within the meaning of the NLRA, and that these hyphenates had the authority and the obligation to adjust grievances.¹⁴⁷

Specifically, the ALJ found that the producers adjusted grievances between directors and craft employees, directors and actors, between two or more actors, and in matters involving writers, as in the case of disputes between writers and story editors.¹⁴⁸ The ALJ found that directors adjusted grievances among the crew and actors.¹⁴⁹ Finally, the ALJ found that on a television series, the story editor may participate with the producer in the initial determination of a dispute over screen credits. The story editor also may serve as a buffer between management and the writer, as in ameliorating a writer's distress over rewritten material.¹⁵⁰

tasks that they asked hyphenates to perform. It is possible, however, that the employers were attempting to protect hyphenates from union discipline by bolstering the argument that the work performed during the strike was simply normal supervisory work that fell within the parameters of section 8(b)(1)(B). During the board hearings in *American Broadcasting Cos.*, the Supreme Court issued its opinion in *Florida Power & Light Co.*, holding that a union may lawfully discipline a supervisor-member for crossing a picket line to perform rank and file struck work. 417 U.S. at 790.

143. *Id.* at 417–18.

144. *Id.* at 418. The penalties received wide publicity and were drastically reduced after appeals. *Id.* at 418 & n.7.

145. *Am. Broad. Cos.*, 437 U.S. at 418.

146. *Id.* at 419–22.

147. *Id.* at 426–27 n.25; see also *Writers Guild of Am., West*, 217 N.L.R.B. at 960–62.

148. *Am. Broad. Cos.*, 437 U.S. at 419–22. For example, in one instance in which a dispute arose as to whether a commitment was made to a freelance writer, the producer involved decided that no commitment was made. *Writers Guild of Am., West, Inc.* 217 N.L.R.B. at 970. The testimony showed that if the producer had decided a commitment had been made, that would have been binding and resolved the dispute. *Id.* In situations in which the film is being shot on a distant location, the producer may be involved in negotiating or agreeing to short-term agreements with local unions where the services of local craft members are required, and possibly adjusting, or attempting to adjust, local jurisdictional conflicts. *Id.*

149. *Am. Broad. Cos.*, 437 U.S. at 419–20 & n.8.

150. *Id.* at 419–20 n.8. One executive story editor testified that because he was the first person in the studio the writer met, and due to the story editor's close association with the writer, "if [the writer] has a problem, more likely than not, he will come to me because it is usually a problem with a producer, or things aren't working out." *Id.*

The ALJ concluded that by issuing strike rules and engaging in other conduct designed to compel the hyphenates to refrain from working, such as threatening permanent blacklisting by other writers, the WGA restrained and coerced the hyphenates from engaging in supervisory services for their employer during the strike.¹⁵¹ Such restraints and coercion restricted employers in the selection of their section 8(b)(1)(B) representatives.¹⁵² On appeal, the NLRB adopted the conclusions of the ALJ.¹⁵³ The Court of Appeals for the Second Circuit, however, denied enforcement of the NLRB's order.¹⁵⁴

In a five to four decision, the United States Supreme Court reversed the Court of Appeals.¹⁵⁵ The Court rejected the Second Circuit's ruling that it is *never* an unfair labor practice for a union to discipline a supervisor-member for working during a strike, regardless of the type of work performed.¹⁵⁶ The Supreme Court reviewed its prior opinion in *Florida Power & Light*, in which it found that a "carry-over" effect could occur if a union were allowed to discipline a supervisor-member without consideration of the kind of work the supervisor performed.¹⁵⁷ The Court ruled that a union's discipline of a supervisor-member would violate section 8(b)(1)(B) whenever such discipline could adversely affect the supervisor's future conduct in his capacity as a grievance adjuster.¹⁵⁸ Therefore, the Court concluded that "[i]n ruling upon a Section 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects

151. *Id.* at 421.

152. *Id.*

153. *Id.* at 421–22.

154. *Id.* at 422. In a brief per curiam opinion, the Court of Appeals denied enforcement and agreed with dissenting Board member, Fanning, that *Florida Power & Light* barred the results reached by the Board. *Writers Guild of Am., West*, 217 N.L.R.B. at 966–71. Member Fanning explained that the Supreme Court, in *Florida Power & Light*, "indicated that section 8(b)(1)(B) was designed for the sole and limited purposes of preventing labor organizations from forcing employers into multi-employer bargaining negotiations and from dictating to employers whom they should select to represent them during grievance adjustment and/or collective-bargaining sessions." *Id.* at 958. Member Fanning found, and the Court of Appeals agreed, that the union's actions did not violate these narrow purposes of section 8(b)(1)(B). *Id.*

155. *Am. Broad. Cos.*, 437 U.S. at 438.

156. *Id.* at 429. The Court rejected the union's arguments that: 1) there was insufficient evidence that any hyphenates were restrained from reporting to work; 2) discipline imposed on the hyphenates who did report to work would not adversely affect the performance of their grievance-adjustment duties; and 3) union discipline could not adversely affect a supervisor's later performance of his section 8(b)(1)(B) duties, because the employer could require him to leave the union and thereby free himself from further threats of union discipline. *Id.* at 431–32, 436. The Court found the third argument to be particularly weak, because at the time, the union had a rule prohibiting members from resigning during a strike. *Id.* at 436–37.

157. *Id.* at 437.

158. *Id.* at 429–30.

to work during a strike, [the NLRB] may—indeed it must—inquire whether the sanction may ‘adversely affect the supervisor’s performance of his collective bargaining or grievance adjustment tasks.’”¹⁵⁹

The Court in *American Broadcasting Cos.* focused on the effect of union discipline on a supervisor-member’s *future* performance of his collective bargaining or grievance adjustment duties, rather than on the duties the supervisor actually performed for his employer.¹⁶⁰ As set forth in Section IV.B.2, the Supreme Court later narrowed the 8(b)(1)(B) inquiry, setting forth a test that required analysis of whether the supervisor-member was *currently* involved in any collective bargaining or grievance adjustment duties.¹⁶¹

2. *NLRB v. International Brotherhood of Electrical Workers, Local 340*: The Court Narrows the Parameters of Section 8(b)(1)(B)

In *NLRB v. International Brotherhood of Electrical Workers Local 340*,¹⁶² the Supreme Court narrowed its prior decisions, concluding that the protections of section 8(b)(1)(B) are limited to certain types of supervisors.¹⁶³ In *International Brotherhood of Electrical Workers Local 340*, the union fined two supervisor-members for working for employers who did not yet have collective bargaining agreements with the union.¹⁶⁴ The ALJ and the NLRB concluded that the union violated section 8(b)(1)(B) because the supervisors were part of the “reservoir” of employees from which employers could select future representatives for collective bargaining or grievance adjustment, regardless of whether these supervisors currently performed such duties.¹⁶⁵ In the alternative, the ALJ concluded that aside from the “reservoir doctrine,” one of the supervisors actually was an 8(b)(1)(B) supervisor, because, at that time, he granted employees time off and resolved personal complaints or problems regarding job assignments.¹⁶⁶

159. *Id.* at 430.

160. *Id.*

161. See *Int’l Bhd. of Elec. Workers*, 481 U.S. 573 (1987); see also discussion *infra* Part IV.B.2.

162. 481 U.S. 573 (1987).

163. See *id.* at 595.

164. *Id.* at 573.

165. *Id.* at 577–78.

166. *Id.* at 577. The ALJ also concluded it was irrelevant that the union did not have a collective bargaining agreement with the complaining employer, because discipline could still have the effect of forcing the representatives to quit, thereby depriving the employer of his services. Moreover and in any event, the ALJ found the union was seeking to represent the employees. *Id.* at 577.

Ultimately, the Supreme Court rejected the “reservoir doctrine,” holding that union discipline of a supervisor member only violates section 8(b)(1)(B) if the member is *actually* engaged in collective bargaining, grievance adjustment, or a closely related activity, such as contract interpretation.¹⁶⁷ The Court did not address the Court of Appeals’ alternate holding that one of the supervisors was, in fact, a grievance adjuster. However, the Court observed that the adjustment of personal, as opposed to contractual grievances, may not qualify a supervisor as a section 8(b)(1)(B) representative, because the language of the NLRA suggests that “grievance adjustment” and “collective bargaining” have narrow meanings within the context of section 8(b)(1)(B).¹⁶⁸

In reaching this result, the Court found its holding consistent with *American Broadcasting Cos.*, because there, the Court had found that the supervisor-members were actually engaged in section 8(b)(1)(B) duties.¹⁶⁹ However, the Court disavowed dictum from *American Broadcasting Cos.*, in which the Court suggested that a union could not lawfully discipline a supervisor when the supervisor engaged in supervisory tasks *other than* those enumerated in section 8(b)(1)(B).¹⁷⁰

Courts continue to narrowly interpret section 8(b)(1)(B). For instance, in *NLRB v. Sheet Metal Workers Ass’n Local 104*,¹⁷¹ the Ninth Circuit denied enforcement of a Board order that found a violation of section 8(b)(1)(B) when a union disciplined a supervisor-member for assigning employees to work sites, and taking other supervisory actions that allegedly conflicted with the collective bargaining agreement.¹⁷² The NLRB characterized the supervisor-members’ actions as “contract interpretation,” which was so closely related to collective bargaining that the supervisor-members were immune from union discipline.¹⁷³ The Ninth Circuit disagreed, holding:

We cannot read [*International Brotherhood of Electrical Workers*] as endorsing in any manner the Board’s view that [the supervisor-member’s] daily supervisory activities, carried out in conformity with and by reference to the collective bargaining

167. *Id.* at 585–86.

168. *Int’l Bhd. of Elec. Workers*, 481 U.S. at 588–89 n.12.

169. *Id.* at 585.

170. *Id.* at 585–86 n.8.

171. 64 F.3d 465 (9th Cir. 1995), *denying enforcement of* 311 N.L.R.B. 758 (1993), *aff’d*, *Sheet Metal Workers Int’l Ass’n, Local 104 v. Henry*, 1992 N.L.R.B. LEXIS 856 (N.L.R.B. July 15, 1992).

172. *Id.* at 467.

173. *Id.* at 468.

agreement, constituted “interpretation” that would somehow bring [the supervisor-member] within the protection of Section 8(b)(1)(B). Under such reasoning, every supervisor would fall within the protection of Section 8(b)(1)(B) by reason of his or her routine acts.¹⁷⁴

The Ninth Circuit also rejected the NLRB’s determination that the supervisor-member’s correction of mistakes in the payment of travel pay was “grievance adjustment”:

Were we to classify the travel pay problem as a grievance and [the supervisor-member’s] correction of that problem as grievance adjustment, once again every line supervisor would be converted by his or her routine activities into a Section 8(b)(1)(B) representative for purposes of protection from union discipline. As we have said, Congress did not intend to cast its net that widely in enacting the section.¹⁷⁵

Under these controlling authorities, and because section 8(b)(1)(B) duties are very narrowly defined, hyphenates in the motion picture and television industry walk a fine line during a strike. As long as hyphenates remain members of the WGA, those who cross a picket line to perform regular supervisory duties will remain protected from discipline only if those duties relate to adjustment of disputes over application of a collective bargaining agreement, or if the hyphenates are actually involved in collective bargaining or a closely related activity. The Court’s decision in *American Broadcasting Cos.* provides support for the position that certain hyphenates actually do perform contract interpretation or grievance adjustment duties. However, other hyphenates with those same job titles may not necessarily perform the same kinds of functions. Job duties vary depending on the production. Accordingly, the determination of whether a hyphenate is a grievance adjuster or contract interpreter must be made on a case by case basis, depending on the individual’s actual job duties on a given production.¹⁷⁶

Regardless of whether supervisor-members may be protected under section 8(b)(1)(B) from union discipline for crossing a picket line, employers are likely to order these hyphenates to return to work. If they refuse to report to work, hyphenates risk violating the terms of their personal services contracts.¹⁷⁷ If hyphenates obey their employer’s

174. *Id.*

175. *Id.* at 470.

176. *See, e.g., Am. Broad. Cos.*, 437 U.S. at 412.

177. One consequence of breaching an employment contract is, of course, termination of the employment relationship. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 8.2 (2d ed. 1999).

direction to return to work, but are later found not to be section 8(b)(1)(B) supervisors, then they may be subject to discipline by the WGA.¹⁷⁸ Of course, as discussed in Section IV.A, hyphenates, like any other union member, can opt for financial core status and avoid the dilemma altogether.¹⁷⁹ Moreover, because hyphenates are supervisors, employers are not prohibited from informing them, or even from requesting that they become financial core dues payors.¹⁸⁰

Arguably, an employer may be constrained from insisting that a supervisor elect financial core status, where the supervisor's personal services contract requires the hyphenate to become a WGA "member." However, such a provision likely has the same meaning in the context of a personal services contract as it does in a collective bargaining agreement—that membership requires only the payment of financial core dues and fees.¹⁸¹ Accordingly, a personal services contract should not prevent an employer from requesting that a hyphenate assume financial core status.

Moreover, during a strike, a producer may require that the hyphenate resign from the union altogether.¹⁸² This is so because upon expiration of the WGA Agreement, the union security clause expires as well.¹⁸³ Under these circumstances, the collective bargaining agreement would not require even the payment of financial core dues and fees. In any event, whether the hyphenate is a financial core dues payor, or has completely resigned

However, questions related to the suspension and/or termination of personal services contracts of both writers and hyphenates during a strike require analysis of complex legal issues arising under the NLRA and the WGA Agreement and are, therefore, beyond the scope of this Article.

178. See *supra* note 125 and accompanying text.

179. See discussion *supra* Part IV.A. However, electing financial core status does not necessarily eliminate the dilemma a hyphenate may experience when in the uncomfortable position of having to take actions that directly undermine the WGA's strike objectives. See *Writers Guild of Am., West*, 217 N.L.R.B. at 968. For example, one of a producer's main job duties is helping to find and hire writers. During a strike, a producer could be required to actively recruit replacement writers. Because hiring writers is a supervisory duty assigned to producers, it would be proper for an employer to insist that a producer continue to hire writers during a strike. *Id.*

180. See discussion *supra* Part III.B.

181. See *supra* notes 19–21 and accompanying text.

182. See *Fla. Power & Light*, 417 U.S. at 812 n.22.

183. *Syscon Int'l*, 322 N.L.R.B. 539, 544 n.5 (1996) (citing *Indus. Union of Marine Workers of Am. v. NLRB*, 320 F.2d 615, 619 (3d Cir. 1963)); *Bethlehem Steel Company*, 136 N.L.R.B. 1500 (1962) (holding it was lawful for an employer to unilaterally discontinue union-security clause upon expiration of the collective bargaining agreement, because section 8(a)(3) prohibits a union security provision without mutual agreement of the parties), *enforcement denied on other grounds*, 320 F.2d 615 (3d Cir. 1963).

from the union, the hyphenate may work during a strike without the risk of union discipline.¹⁸⁴

V. CONCLUSION

Becoming a financial core dues payor is not a panacea for all of the hardships that writers and performers endure during a labor strike. However, for some writers and performers who are not concerned about losing some of the benefits of union membership, or enduring possible criticism from their peers, it offers a reasonable alternative to long-term unemployment. For hyphenates, who must perform a delicate balancing act when determining whether to work during a strike, financial core status may have even more appeal. At any rate, union members should not be misled by misinformation about the purported repercussions of electing financial core status. Instead, union members should make informed decisions about union membership, based on an accurate understanding of their legal rights and obligations.

184. See *Writers Guild of Am., West*, 217 N.L.R.B. at 967 (noting that “[t]he supervisor-member is, of course, not bound to retain his union membership absent a union security clause, and if, for whatever reason, he chooses to resign from the union, thereby relinquishing his union benefits, he could no longer be disciplined by the union for working during a strike. . . .” (quoting *Fla. Power & Light*, 417 U.S. at 812 n.22)). In *American Broadcasting Cos.*, hyphenates did not have the option of resigning from the WGA during a strike, because, at that time, the WGA Constitution prohibited resignations during a strike. *Am. Broadcasting Cos.*, 437 U.S. at 436.

