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Political Abuse of Hiring Halls: Comparative Treatment Under the NLRA and the LMRDA

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Union hiring halls provide the essential service of referring qualified job applicants to immediate job opportunities in many industries. Unfortunately, opportunities sometimes exist for union leaders to abuse hiring hall mechanisms by manipulating applicant referrals to favor friends and disfavor political enemies. The author discusses hiring hall mechanisms and opportunities for their abuse as well as the prevailing legal theories under which abusive practices may be combated. She first focuses on NLRA provisions which forbid union conduct causing a person to be discriminated against in employment. She then discusses LMRDA provisions protecting union members' internal union political conduct. She argues that suppression of internal union democracy is often at the basis of hiring hall abuse and concludes that the LMRDA provisions will usually be more suited to accomplishing the litigant's goal of restoring democratic procedures within the union.

INTRODUCTION ................................................ 340
I. THE OPERATION OF UNION HIRING HALLS ............. 341
II. OPPORTUNITIES FOR ABUSE .............................. 346
III. THE APPLICABILITY OF THE NLRA .................... 350
   A. Statutory Doctrines ................................... 350
   B. Enforcement Procedures Under the NLRA .......... 355
IV. AN LMRDA ALTERNATIVE .............................. 360
   A. Applicability of Title I .............................. 361
      I. Section 101(a)(2) ................................. 361

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The hiring hall in the construction and maritime industries, and to a lesser extent in the transportation industry, is an essential component of the employer-employee relationship. In those industries in which it is prevalent, the hiring hall serves as the mechanism for matching qualified workers with transient and frequently short-lived employment opportunities. As such, it is a highly desirable institution from both the workers' and the employers' viewpoints. It is also, however, a system easily subject to abuse and manipulation by those who operate the hall. "A corrupt system in which business agents who refer their cronies or other favored workers out of sequence on the out-of-work list is no different from robbery. The victimized worker is having his opportunity for income stolen by those who pretend to be protecting his needs."

This Article will focus on one aspect of hiring hall abuse—work referral practices aimed at punishing political dissidents within the union. It will review the prevailing legal theories used to combat this practice.

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under the National Labor Relations Act ("NLRA"),\(^2\) and consider an alternative legal solution based on the Labor Management Reporting and Disclosure Act ("LMRDA").\(^3\)

I

THE OPERATION OF UNION HIRING HALLS

Most workers in nonprofessional, nonmanagerial positions obtain employment by making application directly to an employer.\(^4\) Thereafter the employer, based on information contained in the application form and perhaps obtained in a personal interview, selects among the available applicants. Because of the strictures placed on employers by federal and state employment laws, this information tends to be limited to that required to determine if the applicant is qualified to perform the job in an adequate and safe manner.\(^5\) The personal background of the individual, unrelated to her employment history, is rarely the subject of inquiry.

This system tends to work satisfactorily where the employer’s place of business is stationary and the employment in question is intended to be long-term. The prospective employee is easily able to locate the employing entity and determine the existence of a job vacancy, and it is cost-effective for the employer to spend time and administrative energy sifting through the applications in order to choose a worker.

In industries characterized by work which is casual or of short-term or irregular duration, and by employers with mobile job sites, the conventional hiring methods tend to be inefficient and ineffective.\(^6\) In shipping, there is a need for qualified crews to work for the duration of the voyage, and for labor gangs to be available when a ship arrives in port for loading and unloading cargo.\(^7\) In construction, contractors require

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4. In a survey of jobseeking methods used by workers, conducted in January 1973 and covering nearly 16 million workers, the preferred jobseeking method, used by 66% of those surveyed, was direct application to an employer. This method was also the most effective—48% of all persons who used this method obtained employment. Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 1886, Jobseeking Methods Used by American Workers 9 (1975).
7. In the maritime industry, two basic categories of workers are needed: longshoremen who work the docks and seamen who work on board ship. The number of longshoremen needed to work at a port varies considerably depending on the number and type of ships in dock. As ships arrive in port, longshore workers are immediately needed to unload and load cargo. In some cases these jobs require a few hours of work, in others a few days. There is no continuity of employment or employer. See C. Larrose, Shaping Up and Hiring Hall, 2 49 (1955); Hiring Halls in the Maritime Industry, 1950: Hearings Before the Subcomm. on Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 81st Cong., 2d Sess. 109 (1950) [hereinafter Hearings on Hir-
skilled workers in various craft fields. These skilled craft workers will rarely be employed for the duration of the building project; rather, different crafts are required at various stages and in varying numbers during the construction process.\(^8\)

The hiring hall system acts to alleviate the problems encountered by both employers and employees in these types of industries.\(^9\) A union-hiring hall system acts to alleviate the problems encountered by both employers and employees in these types of industries.\(^9\)

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\(^8\) Fenton, The Taft-Hartley Act and Union Control of Hiring—A Critical Examination, 4 Vill. L. Rev. 339, 341 (1959). Among seamen, there is a regular turnover when a ship docks, due to the prolonged absence from home during a voyage. Ships, however, operate steadily and must be able to replace crews during the few days the ship is in port. Hearings on Hiring Halls in the Maritime Industry, supra, at 36, 44, 47, 60-61; Williams, Hiring Halls in the Maritime Industry under Federal Law, 8 N.Y.U. Intra. L. Rev. 178 (1953).

\(^9\) The construction industry is characterized by work performed at separate work sites at different locations. Most construction employers do not employ a steady workforce of construction labor. Rather, as each project begins, the employer hires the workers needed for that particular project. As the project progresses, there is a constant turnover of employees based on craft and job duration. A heavy equipment operator, needed to prepare a construction site, will not be required to set up floor slabs and building frames. Once her particular job is completed at that site, she is available for work elsewhere. The contractor continues to need other types of skilled workers on the project—e.g., laborers, carpenters, plumbers—who are hired as the need arises. Thus, during the course of a year, a construction worker will work for several different employers at various sites. See Fenton, Application of a Constitutionally-Based Duty of Fair Representation to Union Hiring Halls, 82 W. Va. L. Rev. 31, 47-48 (1979); Fenton, supra note 7, at 344-45; Fenton, Union Hiring Halls Under the Taft-Hartley Act, 9 Lab. L.J. 505, 507 (1958); Rains, supra note 6, at 366-68; Ross, Origin of the Hiring Hall in Construction, 11 Indus. Rel. 366 (1972); Sherman, Legal Status of the Building and Construction Trades Unions in the Hiring Process, 47 Geo. L.J. 203, 204-06 (1958).

The nature of the construction industry makes the hiring hall a virtual necessity:

A referral system is a quick and excellent source of qualified labor for a contractor who needs to employ tradesmen. An exclusive referral system provides the contractor with much greater access to a transient workforce. Since tradesmen are employees of the industry rather than of single contractors, only the records of the hiring hall can provide prospective employers with reliable work histories. By referring to the employment records maintained by the referral system, contractors are able to request applicants possessing specific or unique skills. This reduces the cost incurred by contractors having to train or requalify tradesmen.


The necessity for a hiring hall mechanism in the construction industry is such that the Associated General Contractors ("AGC"), an association whose membership includes nonunion construction companies, has published a booklet advising its nonunion members how to establish and administer a worker registry system to fulfill the recruitment and referral function performed by union hiring halls. ASSOCIATED GENERAL CONTRACTORS OF AMERICA, PUB. NO. 712, AGC MODEL CONSTRUCTION WORKER REGISTRY SYSTEM (1986).

9. Other industries rely on the hiring hall as well. Hiring halls are used in the restaurant industry for, among other things, referring workers to positions as "extras." Extras are workers called in for special events held at restaurants and clubs, such as parties, private dinners, and receptions, as distinguished from a regular waiter who is steadily employed by a particular restaurant. See Birmingham Country Club, 199 N.L.R.B. 854 (1972); Local 568, Hotel Employees Union (Warwick Hotel), 141 N.L.R.B. 310 (1963), enforced, 334 F.2d 723 (3d Cir. 1964). In the trucking industry, an employer may need a varying number of drivers depending upon the requirements of the transportation contracts to which it has agreed. The hiring hall is a source providing qualified drivers as needed. See Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); General Truck Drivers Local 980 (Nelson Freight Lines), 249 N.L.R.B. 46 (1980). Employer need for immediate access to skilled workers in the publishing business is also satisfied by the union hiring hall. See Martin v. Flannery, Civ. No. 84-7606 (S.D.N.Y. filed Oct. 10, 1985); New York Lithographers
operated hiring hall functions as a central employment clearinghouse. Employers contact the local hiring hall and request the specific number of workers required for the job; employees available for work register at the hall and are dispatched to the jobs as needed. Thus the employer, frequently based elsewhere, is assured of a readily available supply of qualified workers, without the expense involved in a continual hiring process which would otherwise be required, while individual employees are spared the time-consuming and often futile efforts at tracking down prospective employers at dispersed locations at a time when their services are required.\textsuperscript{10}

As of 1979, there were approximately 2,779 local unions throughout the United States which operated hiring halls, having a total membership of 2,227,736.\textsuperscript{11} Of these locals, 2,274 were involved in the building trades industry, covering a total of 1,465,198 members.\textsuperscript{12}

There are a variety of ways in which a union and an employer seeking to utilize a hiring hall can formalize their arrangement. The employer and union may be parties to a written agreement embodying the terms of the hiring arrangement;\textsuperscript{13} an explicit oral agreement may exist

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Union No. 1-P (Publishers Ass'n), 258 N.L.R.B. 1043, 1044-45 (1981); Delaware Valley Printing Union, Local 1776 (The Bulletin Co.), 226 N.L.R.B. 476, 481 (1976). Employment needs also fluctuate greatly in the entertainment business based on the type and duration of the performance involved. Accordingly, hiring hall arrangements are common in that industry as well. See IATSE, Local 646 (Parker Playhouse), 270 N.L.R.B. 1425 (1984); IATSE, Local 592 (Saratoga Performing Arts Center), 266 N.L.R.B. 703, 704 (1983); IATSE, Local No. 7 (Universal City Studios), 254 N.L.R.B. 1139 (1981). Indeed, employment agencies such as Kelly Services Inc. serve this same type of need by providing employers immediate access to secretarial help for temporary, short-term jobs.

10. It was to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants. Mountain Pac. Chapter of the Assoc. Gen. Contractors, Inc., 119 N.L.R.B. 883, 896 n.8 (1957), enforcement denied, 270 F.2d 425 (9th Cir. 1959).

11. These data have been aggregated from the 1979 Local Union Report EEO-3 data by the Equal Employment Opportunity Commission ("EEOC"), Survey Division, Office of Program Research. The figures given are approximations only, as unions with fewer than 100 members are not required to make a filing.

The EEO-3 form is required to be filed on an annual basis by all labor organizations with 100 or more members. Those unions which operate a hiring hall or have a referral arrangement with employers must identify themselves as referral unions on this form and are required to provide a statistical breakdown of membership in referral units, and referrals and applicants by race, ethnic background and sex. A referral unit is that portion of a labor organization's total membership that has access to, and is employed pursuant to, a referral arrangement. For example, a Teamster local might represent a bargaining unit of production workers as well as a unit of truck drivers, but only the latter unit would be subject to the referral agreement.

12. \textit{Id.}

between the parties; 14 or the parties' course of conduct may tacitly establish such an arrangement. 15 Moreover, the arrangement between a union and employer concerning use of the hiring hall may be either exclusive or nonexclusive. An exclusive hiring arrangement requires the employer to consider and hire only those applicants referred by the union hiring hall; it is forbidden to accept applicants obtained from any other source, including walk-ins. 16 In a nonexclusive arrangement, an employer merely utilizes the hiring hall as one source among many for obtaining applicants and hiring employees. 17

The methods by which a prospective employee is dispatched from a union hiring hall also vary greatly. The system is controlled by a dispatcher who is generally a union official. Many hiring halls use a "first in, first out," or rotary, system of job referrals. An employee who is out of work signs her name at the bottom of an out-of-work list. As job openings occur, the dispatcher refers the workers in the order in which they have signed the list, starting with the individual at the top. 18 Generally, the dispatcher contacts the workers on the list by phone; if unable to reach a certain individual, the dispatcher goes to the next name on the list.


16. U.S. DEP'T OF LABOR, EXCLUSIVE UNION WORK REFERRAL SYSTEMS IN THE BUILDING TRADES 6 (1970). Even in an exclusive arrangement, however, an employer can retain the right to reject applicants dispatched by the union. An employer is not obligated to hire every individual sent from the hall; it is merely obligated not to seek or hire applicants from any other source. An employer may also retain the right to seek and employ applicants from alternate sources when the union hiring hall is unable to meet the employer's labor needs within a specified time period—usually 24 or 48 hours—without affecting the exclusive nature of the arrangement. Finally, employers can retain the right to request by name certain employees from the hall without regard to their placement on the list, and to directly hire a limited number of key personnel, and still be parties to an exclusive agreement. Id.; see also Local 136, Muskingum Valley Dist. Council of the United Bhd. of Carpenters, 165 N.L.R.B. 1040, 1041 (1967), enforcement denied on other grounds, 404 F.2d 854 (6th Cir. 1968).


18. See, e.g., Painters, Local 1178 (Roland Painting, Inc.), 265 N.L.R.B. 1341, 1342 (1982); IUOE, Local 406 (Ford, Bacon & Davis Constr. Corp.), 262 N.L.R.B. 50, 50 n.2 (1982), enforced, 701 F.2d 504 (5th Cir. 1983); Sheet Metal Workers, Local 20 (The Employers Ass'n of Sheet Metal Workers), 253 N.L.R.B. 166, 167 (1980); Bastress, supra note 8, at 48-49.
Some hiring halls utilize multiple out-of-work lists, restricting access to particular lists based on such factors as experience, level of training, or other objective nondiscriminatory criteria. For example, a hall may maintain three lists—an A, B, and C list. Individuals would be eligible to sign the A list if they had attained journeyman status and had worked in the industry at least 2,500 hours in the past three years; workers would be eligible to sign the B list if they had attained apprentice status and had worked in the industry at least 1,200 hours in the past three years; all other applicants would be placed on the C list. Thereafter, as job openings occur, the dispatcher would refer all employees listed on the A list on a rotary basis before sending any employees from the B list, and then exhaust the B list before making referrals from the C list.

Some unions keep no list at all, but simply give referrals to those individuals present at the hall at the time the request for workers is received.

While the above description suggests rather well-defined referral operations, in practice the system is not so orderly. It should be noted that the phrase “hiring hall” is a term of art not necessarily implying the existence of an actual hall. While many unions do maintain a location expressly used for operating a referral system, some union hiring halls are operated from the dispatcher’s home or from an office within the union’s business office. And while the concept of signing an out-of-work list suggests that the applicant himself signs the list, many unions permit oral notification of availability by the applicant to the dispatcher, who then places the name on the list. Moreover, an out-of-work list might not even exist. Some dispatchers attempt to keep “in their heads” the information concerning who is available for work and their respective priority rankings.

So long as the bases on which referral priorities are granted are objective and nondiscriminatory within the meaning of the NLRA, see infra text accompanying notes 55-60, they are valid. See 2 C. Morris, THE DEVELOPING LABOR LAW 1398-99 (2d ed. 1983); Bailey, Construction Union Hiring Halls: Service Under a Collective Bargaining Agreement as a Prerequisite to High Priority Referral, 19 WM. & MARY L. REV. 203, 212-13 (1977).

22. See, e.g., United Ass’n of Teamsters, Local 328 (Blount Bros.), 274 N.L.R.B. 1053, 1055 (1985); Plumbers (Bechtel), 268 N.L.R.B. at 766; Polis, 262 N.L.R.B. at 1338; Local 394, Laborers, 247 N.L.R.B. at 101.
openings were available with what employers and which applicants were referred by the hall. Finally, many unions do not put in writing the criteria used for ranking applicants for referral; thus there are no guidelines readily available to applicants for determining referral rules and priorities.

In comparing the theoretical description of hiring halls with the reality of their operation, it is apparent that the system is open to abuse by dispatchers who would manipulate job opportunities for their own purposes.

II

OPPORTUNITIES FOR ABUSE

The operation of a hiring hall is very difficult to police. The day-to-day operation of the system is normally controlled solely by the dispatcher, who is generally a union official. The almost total lack of documentation in many instances renders problematic any audit of the referrals actually made. Even where records are kept, there is generally no procedure for insuring that the records are complete or accurate. Accordingly, opportunities abound for "backdooring" jobs, bypassing applicants on the list, and discriminatorily matching applicants with jobs.

Backdooring occurs when the dispatcher completely circumvents the normal referral procedure. When a request for workers is received, the dispatcher sets aside one or more of the jobs for friends who are either not on the referral list at all or are too far down the list to be eligible. If a record of referral requests is kept, the dispatcher will merely neglect to make note of the request. The dispatcher contacts her friends and refers them to the jobs.

Bypassing is the practice of skipping over the first eligible workers

24. See, e.g., cases cited supra note 23.


26. In discussing the issue of job manipulation, the author in no way intends to imply that all hiring halls are plagued by these problems. Indeed, within some local unions, strict referral record-keeping, sometimes including the use of computers, is the rule, virtually eliminating the possibility of abuse. See C. LARROWE, supra note 7, at 139-53, for a description of a referral system operated by the ILWU in Seattle. There is no evidence to suggest that unions always, or even usually, abuse referral systems, even when opportunities for abuse exist. There is sufficient indication however, based on case law alone, that some unions and their officers do abuse the system, and the problems resulting from this abuse must be recognized and confronted.

27. See, e.g., IUOE, Local 450 (Houston Chapter, Assoc. Gen. Contractors), 267 N.L.R.B. 775, 779 n.6 & 795 n.88 (1983), enforced, 600 F.2d 770 (9th Cir. 1979); International Ass'n of Bridge Workers, Local 433 (RPM Erectors, Inc.), 266 N.L.R.B. 154, 160-61 (1983), enforced, 600 F.2d 770 (9th Cir. 1979); International Ass'n of Bridge Workers, Local 433 (Assoc. Gen. Contractors), 228 N.L.R.B. 1420, 1424-36 (1977).
for the job and dispatching an individual further down the list. Where no priority ranking records are kept, bypassing is easy to accomplish and difficult to challenge. Even where lists are kept, a dispatcher can claim that he attempted to contact the first person on the list but was unsuccessful, and therefore gave the referral to the next individual. Or, in those hiring hall arrangements where "by name" requests are permitted, a dispatcher may state that the employer requested the individual further down the list by name, thereby authorizing a referral out of order.

Often, on any given day, more than one employer will contact the hiring hall requesting workers for jobs of differing duration. In distributing these jobs, a dispatcher can discriminatorily match jobs by referring his friends to the longer term jobs while sending other applicants to the shorter jobs.

30. See supra note 16.
31. See, e.g., Bridge Workers, Local 433, 228 N.L.R.B. at 1432-37.
32. See, e.g., IUOE, Local 450, 267 N.L.R.B. at 803; Local 394, Laborers, 247 N.L.R.B. at 114-16, 129.

To understand the impact of these types of abuses on the employment opportunities of individual workers, it is helpful to consider the collective bargaining structure of the construction industry. The construction industry is singled out because 81.8% of all referral unions are in the building trades. See supra text accompanying notes 11-12. Each group of contractors within an identifiable segment of the construction industry is organized into separate employer trade associations. There are 17 major national employer associations in the construction industry. Although not all contractors are members of an employer association, a great many are. See Mills, Construction, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 64-65 (G. Somers ed. 1980).

Most collective bargaining agreements in construction are negotiated on a local level between local craft unions and employer associations. Id. at 64; OFFICE OF CONSTRUCTION INDUSTRY SERVICES, LMSA, U.S. DEPT OF LABOR, ANNUAL CONSTRUCTION INDUSTRY REPORT 13 (1980). Thus, an agreement will apply to a certain type of work (e.g., electrical work) within the local union's geographical jurisdiction when performed for any employer who is a member of that particular trade association (e.g., National Electrical Contractors Association). An agreement containing an exclusive hiring hall provision would bar any workers from employment with any employer-member of the association unless referred by the union. Thus, the union effectively controls employment opportunities not just with one employer, but with the majority of employers performing that type of work.

In a study of clauses contained in construction agreements in effect as of January 1, 1973, the Department of Labor found that 53.5% of the agreements provided for exclusive hiring hall arrangements with a union. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 1864, CONTRACT CLAUSES IN CONSTRUCTION AGREEMENTS at v, 12-14 (1975). The Department of Labor chose 769 agreements for study, covering approximately 34% of all construction workers involved in standard construction crafts. Of these agreements, 64% (492) provided for union referral arrangements: 53.5% (412) were exclusive arrangements and 10.5% (80) were nonexclusive. Thus, unlike the usual job seeker who, if turned away by one employer, can apply to a second employer and be assured of a de novo consideration of her application, individuals who must utilize the hiring hall for work referrals do not get a second chance. The majority of employment opportunities in their line of work within a defined geographical area are controlled by one source—the union hiring
Even if the referral agreement between the union and employer is nonexclusive, the job seeker is at a disadvantage if she is refused referral by the hall. In the construction industry, it is extremely difficult for an applicant to locate the widespread and often remote job sites efficiently and in a timely manner (i.e., when her particular skill is needed) without the help of the centralized employment information service which a nonexclusive hiring hall provides.

Because of the unique relationship between a hiring hall dispatcher and applicants for referral, possibilities of abusing the system to the detriment of individual applicants are present. Unlike the "stranger" employer whose information on an applicant is generally limited to work related matters, a hiring hall dispatcher will usually possess more personal knowledge about an applicant. Initially, he will know if the applicant is a union member, and if she is, whether she is a member of the dispatcher's local union or a sister local. When the applicant is a member of the dispatcher's own local, he will have a general idea about the type of union political activities in which the applicant engages. The dispatcher may also be subject to pressure or influence from other union officers who request him to give preference to, or punish, certain union members. The possession of this type of information makes it possible for a dispatcher to be influenced in making referrals by factors other than relevant, work related issues.

Where a dispatcher allows his knowledge about an applicant's intra-union activities to influence his referral practices, the effect reaches beyond the individual applicant and sends a message throughout the entire local union. Like the employer who discharges the union organizer in order to quell incipient unionism among its workforce, the dispatcher-union official who manipulates the referral system to reward political al-

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33. See supra notes 6 & 8 and accompanying text.
34. Although no studies exist documenting the incidence of hiring hall abuse, the number of meritorious litigated cases on the phenomenon attests to its existence. See infra note 39.
35. See supra text accompanying note 5.
36. This information is available to the dispatcher because as a union officer he is likely to know members personally. Since unions which operate exclusive halls are allowed to charge a user's fee to nonmember applicants, the dispatcher will also know who is not a union member. Hotel Employees Union, Local 355 (DuPont Plaza Hotel), 275 N.L.R.B. No. 168, 119 L.R.R.M. (BNA) 1271 (1985); C.B. Display Serv. Inc., 260 N.L.R.B. 1102, 1107-08 (1982); Local 7, Int'l Ass'n of Bridge Workers (Waghorne-Brown Co.), 144 N.L.R.B. 925, 927-28 (1963); C. MORRIS, supra note 19, at 1402; R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 668-69 (1976). If a hiring hall is nonexclusive, a union is permitted to deny nonmembers access to the hall's services. Teamsters, Local 327 (Breeko Indus.), 167 N.L.R.B. 998 (1967). Thus, at the time an individual presents herself to register at the hall for work, the dispatcher can ask to see her union card.
37. See supra note 36. In checking the applicant's union card, the dispatcher will be able to tell of what local the individual is a member.
lies and punish political enemies can suppress internal union criticism and dissent among the membership as a whole. 38

Litigated cases are replete with examples of union officials abusing their authority over referrals from the hiring hall for the purpose of eliminating rival political factions and consolidating their own control over the union. 39 In subtle and not so subtle ways the incumbent officers who control the referral process let their influence be felt among the membership. Sometimes the political rival discovers that her referral hours have dropped significantly since she undertook to challenge the incumbent leadership. 40 Often, the dissident will be directly confronted with the fact that she will not receive any work referrals as long as she stirs up trouble. 41 Occasionally, loathe to wait for the grapevine to carry the news, the union officer-dispatcher announces to the membership that

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38. While abusing the system to the disadvantage of nonunion applicants or sister union applicants works a hardship on the individuals discriminated against, this type of abuse often does not have the same widespread chilling effect that political abuse of the system creates. Discrimination based on nonunion and sister union status is, however, illegal when the hiring hall system is exclusive. See, e.g., United Ass'n of Journeymen Plumbers, Local 198 (Jacobs/Wiese), 268 N.L.R.B. 1312 (1984), enforced, 747 F.2d 326 (5th Cir. 1984); International Ass'n of Bridge Workers, Local 480 (Bldg. Contractors Ass'n), 235 N.L.R.B. 1511 (1978), enforced, 103 L.R.R.M. (BNA) 2603 (3d Cir. 1979), rev'd on other grounds and remanded, 100 Lab. Cas. (CCH) ¶ 10,974 (U.S. 1984). The nature and effect of discrimination based on nonunion or sister union status is beyond the scope of this Article.

39. See, e.g., NLRB v. Laborers Local 300, 613 F.2d 203 (9th Cir. 1980); NLRB v. Hoisting Eng'rs Local 4, 456 F.2d 242 (1st Cir. 1972); NMU v. NLRB, 423 F.2d 625 (2d Cir. 1970); NLRB v. Local 138, IUOE, 293 F.2d 187 (2d Cir. 1961); IUOE Local 478 (Stone & Webster Eng'g Corp.), 274 N.L.R.B. 567 (1985); General Truck Drivers, Local 5 (Leonard B. Herbert, Jr. & Co.), 272 N.L.R.B. 1375 (1984); Local 553, United Ass'n of Journeymen Plumbers (Plumbing, Heating, Piping and Air Conditioning Contractors Ass'n), 271 N.L.R.B. 1361 (1984); Laborers Local 135 (Bechtel Power Corp.), 271 N.L.R.B. 777 (1984); Carpenters Union, Local 25 (Mocon Corp.), 270 N.L.R.B. 623 (1984), enforced, 769 F.2d 574 (9th Cir. 1985); Ohio Valley Carpenters' Dist. Council (Catalytic, Inc.), 267 N.L.R.B. 1223 (1983); Frank Mascal Const., 251 N.L.R.B. 219 (1980), enforced, 111 L.R.R.M. (BNA) 242 (2d Cir. 1982); Pipeline Local 38 (Hancock-Northwest), 247 N.L.R.B. 1250 (1980), enforced as modified, 748 F.2d 1001 (D.C. Cir. 1981); Local 808, United Bhd. of Carpenters (Bldg. Contractors Ass'n), 238 N.L.R.B. 735 (1978); Local 174, Int'l Bhd. of Teamsters (Totem Beverage, Inc.), 226 N.L.R.B. 690 (1976); United Ass'n n of Journeymen Plumbers, Local 137 (Hames Constr. & Equip. Co.), 207 N.L.R.B. 359 (1973); IUOE, Local 18 (C.F. Braun Co.), 205 N.L.R.B. 901 (1973), enforced, 500 F.2d 48 (6th Cir. 1974); Local 294, Int'l Bhd. of Teamsters (Rubber City Express), 204 N.L.R.B. 700 (1973), enforced, 506 F.2d 1321 (D.C. Cir. 1974); Local 1098, United Bhd. of Carpenters (Chauncey Constr. Co.), 186 N.L.R.B. 385 (1970); United Bhd. of Carpenters, Local 1281 (Raber-Kief, Inc.), 152 N.L.R.B. 629 (1965), enforced, 369 F.2d 684 (9th Cir. 1966); J.J. Hagerty, Inc., 139 N.L.R.B. 633 (1962), enforced in part, 321 F.2d 130 (2d Cir. 1963).

40. See, e.g., Local 394, Laborers, 247 N.L.R.B. at 113-16, 124-27; Oversight Hearings, supra note 1, at 356-60.

41. See, e.g., Laborers Local 300, 613 F.2d at 205 (When dissident asked business agent when he would be referred for work, the response was: "Stop fighting me and you can go to work."); J.J. Hagerty, 139 N.L.R.B. at 654 (When member of reform group asked union president about job referrals he was told, "If you all sit back and shut up, everything will go all right; you will have no trouble finding work. Otherwise, we'll keep you out of work as long as we want.").
“troublemakers” will not get jobs.\textsuperscript{42} Thus, the impact of the political abuse of the hiring hall system is felt both by the individual worker discriminated against\textsuperscript{43} and by the membership of the union as a whole. Other members of the union, having learned the lesson taught by the punishment meted out to individual dissidents, would have to be courageous indeed, and perhaps foolhardy, to risk their prospects for employment by challenging the union leadership. The effect of the membership’s abdication of its role in governing the union is to undermine the legitimacy of the union as a representative of the workers’ interests, to the detriment of both the membership and the union itself.\textsuperscript{44}

\section*{III}
\textbf{THE APPlicABILITY OF THE NLRA}

\textit{A. Statutory Doctrines}

As originally passed in 1935, the Wagner Act’s prohibitions were

\textsuperscript{42} See, e.g., \textit{Local 1098, Carpenters}, 186 N.L.R.B. at 387 (Business agent told union member, “People that vote for me and support me in this next election are the people that are going to work for the next two years.”); \textit{IUOE, Local 18}, 205 N.L.R.B. at 905 (union officer announcement at union meeting prior to election that “he was going to use the referral system to starve [the opposition] out of the organization”).

\textsuperscript{43} The discrimination has the direct effect of interfering with the individual’s employment opportunities, thereby causing loss of earnings and related fringe benefits such as medical and life insurance coverage and pension benefit accrual. \textit{See Oversight Hearings, supra} note 1, at 356-63.

\textsuperscript{44} An underlying principle of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") was the belief that guaranteeing minimum democratic safeguards within unions and requiring detailed information about the union would enable members to regulate the unions and prevent the corruption, racketeering and abuse uncovered by the McClellan Committee hearings. \textit{S. REP. No. 187, 86th Cong., 1st Sess.} 5-7 (1959). The Supreme Court has also acknowledged the importance of protecting the union members' rights to “participate fully in the operation of their union through processes of democratic self-government.” \textit{Wirtz v. Hotel Employees Union, Local 6}, 391 U.S. 492, 497 (1968). Whenever those democratic processes are impeded, the union’s ability to respond to the control of the membership is undermined.

If a reason for the existence of unions is not merely to provide a monopoly on labor’s side to match that of the employer, but also to provide an active voice for workers in the workplace, as suggested by Richard Freeman and James Medoff in their book \textit{WHAT DO UNIONS DO?} (1984), this latter function cannot be accomplished in the absence of internal union democracy. \textit{See Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 609-12 (1959).}

The effect of the suppression of democracy within a union spreads beyond the membership and the institution itself to the general public. Because of the role played by unions in the collective bargaining process, they are in a position to establish wage rates and employment standards which affect the regulation of the labor market as a whole. \textit{See Summers, Internal Relations Between Unions and Their Members: General Report, 18 Rutgers L. Rev.} 236, 237-39 (1964). Unions also exercise political power in their position as voices of organized labor, as well as economic power in their use of the strike. This impact was recognized by Congress in passing the LMRDA. It “emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.” \textit{Wirtz v. Local 153, Glass Bottle Blowers Ass’n}, 389 U.S. 463, 475 (1968).
HIRING HALL ABUSE

1987

aimed solely at management,

and the closed shop was legal. The Taft-Hartley amendments of 1947 added union unfair labor practices to the statute

and outlawed the closed shop.

For the first time the issue of the legality of union hiring halls was addressed. There was considerable debate over whether Taft-Hartley barred all union hiring hall arrangements or only those which discriminated against nonmembers.

The controversy was eventually, if not finally, settled by the National Labor Relations Board ("Board" or "NLRB"), in the Mountain Pacific case.

The Board held that while Taft-Hartley did not prohibit union hiring halls, an exclusive hiring hall arrangement vesting unfettered control over hiring with the union had the inherent effect of encouraging membership in a labor organization in violation of section 8(b)(2), even in the absence of specific evidence of discriminatory application of the system.

The Board held that this unlawful effect could be negated by explicitly providing in the hiring hall agreement that: (1) selection of applicants for referral would be nondiscriminatory and unaffected by union membership status; (2) the employer would retain the right to reject any applicant; and (3) the parties must prominently post provisions explaining the functioning of the hiring hall.

Of course, actual operation of a hiring hall referral system in a discriminatory manner (i.e., granting preference to members over nonmembers), constituted a viola-

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46. A closed shop requires that a worker be a member of a union before she can be hired by an employer. T. Haggard, Compulsory Unionism, the NLRB, and the Courts 4 (1977).

47. See C. Morris, supra note 19, at 35-48.

48. T. Haggard, supra note 46, at 34. The proviso to § 8(a)(3) did, however, allow for union security agreements in the form of a union shop. An employer and union may agree to require that all employees must become, and remain, members of the union on or after 30 days following the beginning of employment. 29 U.S.C. § 158(a)(3) (1982). The extent of required membership is limited to the payment of uniform initiation fees and dues exacted of full-fledged union members. Employees cannot be required to actually join the organization. NLRB v. General Motors Corp., 373 U.S. 734 (1963); Local 1104, CWA v. NLRB, 520 F.2d 411 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976); Union Starch & Ref. Co., 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir. 1951), cert. denied, 342 U.S. 815 (1951); T. Haggard, supra note 46, at 39-70; Cantor, Uses and Abuses of the Agency Shop, 59 Notre Dame L. Rev. 61-62 & n.2 (1983).

49. See U.S. Dep't of Labor, supra note 16, at 7-20; Fenton, supra note 7, at 346-51; Sherman, supra note 8, at 206-08; Note, Labor Law—Maritime Hiring Halls Fall Afoul of Taft-Hartley Closed Shop Ban, 24 Notre Dame Law. 82 (1948).


51. See supra notes 16-17 and accompanying text.

52. 29 U.S.C. § 158(b)(2) (1982) states, in pertinent part:

It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

tion of section 8(b)(2). 54

While the Supreme Court agreed that Congress had not outlawed the hiring hall, it held that the Board did not have the power to infer the existence of discrimination from the mere existence of an exclusive hiring hall arrangement. 55 Acknowledging that the existence of such an exclusive arrangement may indeed be said to encourage union membership, only encouragement "which is accomplished by discrimination" is prohibited by section 8(b)(2). The Court held that the Board lacked the authority to require the parties to specifically include the three Mountain Pacific standards before an exclusive hiring hall agreement would be legal. Therefore, to establish a violation of section 8(b)(2), the hiring hall agreement must be discriminatory on its face or there must be evidence of discriminatory application of a facially neutral system. 56

Section 8(b)(2) of the NLRA does not prohibit all discriminatory conduct by a labor organization, but only that which encourages or discourages union membership. In the context of the NLRA, the concept of membership does not necessarily equate with signing a membership card and joining the organization. The concept encompasses various degrees of organizational adherence, according to individual preference. As the Supreme Court stated in Radio Officers' Union v. NLRB: 57

The policy of the Act is to insulate employees' jobs from their organizational rights. Thus . . . 8(b)(2) [was] designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood. 58

Section 8(b)(1)(A) of the NLRA also prohibits unions from restraining or coercing employees in the exercise of their section 7 rights. 59

54. See, e.g., id. at 887-89 (Murdock, Mbr., dissenting in part); ILWU, Local 10 (True Knowledge), 102 N.L.R.B. 907 (1953), enforced, 214 F.2d 778 (9th Cir. 1954), cert. denied, 348 U.S. 908 (1954); International Bhd. of Boilermakers, Local 6 (Ross E. Dulinsky Consol. W. Steel Corp.), 94 N.L.R.B. 1590 (1951).


56. Id. at 675-76. For a more detailed discussion of Local 357, see Rothman, supra note 54, at 874-82; Note, Discriminatory Practices in Exclusive Hiring Halls, 16 SW. L.J. 147 (1962); Note, Hiring Hall Agreement Not Containing NLRB "Safeguards" Not Per Se Violative of NLRA, 46 MINN. L. REV. 430 (1961).


58. Id. at 40.


It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7 . . . . NLRA § 7, 29 U.S.C. § 157 (1982), states, in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage
Employee activities which involve internal union politics, for example, campaigning against incumbent leadership in intraunion elections, criticizing union officials, and protesting union decisions or activities, are clearly within the scope of section 7.60

Thus, the NLRA specifically protects union members from discrimination or coercion based on their intraunion political activities. As applied to the operation of union hiring halls, the NLRA prohibits the consideration of union political activities in determining which applicants will be referred for jobs from the hall. This prohibition affects both nonexclusive and exclusive arrangements.61

Where a hiring hall arrangement is nonexclusive, section 8(b)(2) is not implicated. As the union is merely one source among many from which an employer selects its workforce, and the employer does not afford any special consideration to those applicants referred by the union, it would be difficult to show that the employer was affected by the union's refusal to refer a specific individual. Therefore, it could not be said that the union's action in any way "caused or attempted to cause" the employer to discriminate.62

The proscription against restraint or coercion imposed by section 8(b)(1)(A) does apply to nonexclusive hiring halls. Having undertaken to provide an employment related service for a group of employees whom it represents, in this case union members, it cannot discriminate in providing this service among the represented group based on the exercise of

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

60. See, e.g., NLRB v. Local 485, IUE, 454 F.2d 17, 21 n.6 (2d Cir. 1972); ILA, Local 333 (ITO Corp.), 267 N.L.R.B. 1320 (1983); New York City Taxi Drivers Union, Local 3036 (Taxi Maintenance Corp.), 231 N.L.R.B. 965, 966-67 (1977); Hoisting Eng'rs, 189 N.L.R.B. at 374; Chauffeur's Union Local 923 (Yellow Cab Co.), 172 N.L.R.B. 2137, 2138 (1968).

61. The discriminatory operation of a union hiring hall can result in a violation of either § 8(b)(1)(A) or both § 8(b)(1)(A) and § 8(b)(2) of the NLRA. See supra notes 52 & 59. As a general rule, where the referral system is nonexclusive, only § 8(b)(1)(A) is involved; whereas an exclusive referral system implicates both sections of the Act. See Local 121, Operative Plasterers (Assoc. Bldg. Contractors), 264 N.L.R.B. 192, 195 (1982).

62. See Truck Drivers Local No. 705 (Assoc'd Transp., Inc.), 209 N.L.R.B. 292 (1974), enforced, 532 F.2d 1169 (7th Cir. 1976):

An essential element of a violation of Section 8(b)(2) is that a union must have attempted to cause what would be a violation of Section 8(a)(3) for an employer to do. . . . The necessary causal connection between a union’s attempt and an employer’s act can be found where an exclusive hiring agreement, arrangement, or practice, exists between a union and an employer pursuant to which an applicant is frozen out of the hiring process through a denial of the use of the hiring hall. Where, as here, a contract requires only that the employer give the union an equal opportunity with other sources to provide it with job applicants, an 8(b)(2) violation must be founded on something more than the contract, since such a contract, by its terms, provides for a nonexclusive hiring hall.

Id. at 307 (citations omitted). See also Local 121, Operative Plasterers, 264 N.L.R.B. at 195. But cf. Hoisting Eng'rs, 189 N.L.R.B. at 366 n.1 (Board reserves judgment on issue of whether discriminatory operation of a nonexclusive hiring hall can implicate § 8(b)(2)).
section 7 rights. By assisting those union members whose politics the union officer finds acceptable, but denying such assistance to those members perceived as dissidents, the dispatcher is sending a clear message to all union members that their chances for future employment will be impaired if they do not toe the party line. The coercive impact of this message on the members’ willingness to actively engage in union politics is not lessened by the fact that the coercive effect would be even greater were the union to exclusively control access to employment and thus have the ability to terminate, and not merely impair, employment opportunities.

Where the hiring hall arrangement is exclusive, the strictures of both section 8(b)(1)(A) and section 8(b)(2) come into play. A refusal to refer an individual because of his union political activity, when the union constitutes the sole means of obtaining employment with the employer in question, clearly coerces that individual in exercising his section 7 rights. Since the union’s refusal to refer the person is for reasons related to his union membership, the employer’s subsequent failure to consider him for employment is also essentially related to his union membership status. Thus the union’s conduct represents an attempt to cause the employer to discriminate against the individual, in violation of section 8(b)(2).

The NLRA deals with the problem of the political abuse of a union hiring hall system. It is the main avenue of attack used by litigants who have been subjected to discrimination in referrals because of their union political views. But because of the basic policy and principles underlying the NLRA, there are certain inherent limitations in using that statute to deal with manipulation of the hiring process for the purpose of suppressing union democracy.

A basic purpose of the NLRA is to equalize employee bargaining power with that of the employer for the purpose of promoting collective bargaining. The vehicle for equalization is the union—the collective

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63. See, e.g., Local 121, Operative Plasterers, 264 N.L.R.B. at 195; Hoisting Eng’rs, 189 N.L.R.B. at 366-67; Chauffeur’s Union Local 923, 172 N.L.R.B. at 2138.
64. See Crouse Nuclear Energy Servs., Inc., 240 N.L.R.B. 390, 390 n.2 (1979) and cases cited therein.
65. See, e.g., IUOE, Local 18, 205 N.L.R.B. at 910; Local 1098, Carpenters, 186 N.L.R.B. at 390; Local 136, Carpenters, 165 N.L.R.B. at 1042; Carpenters, Local 1281, 152 N.L.R.B. at 634-35. See also Annotation, Union’s Discriminatory Operation of Exclusive Hiring Hall as Unfair Labor Practice Under § 8(b) of the NLRA, 73 A.L.R. Fed. 171, 192-94 (1985) and cases cited therein.
66. Besides the theories already discussed, discriminating against a union member based on his union political conduct can also violate the union’s duty of fair representation. Breach of the duty of fair representation is encompassed within the prohibitions of § 8(b)(1)(A). Vaca v. Sipes, 386 U.S. 171, 177-78 (1967); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). For a thorough discussion of the application of the duty of fair representation to the operation of union hiring halls, see generally Bastress, supra note 8.
strength of the employees banded together in a union would match the employer's strength. In order to assure the employees' ability to organize, it is necessary to safeguard them in their employment relationship from discrimination based on their organizational activities. The concept of protection based on intraunion activities evolved as a corollary of this protection. But the focal point of the statute is not the member-union relationship.\(^6\) The NLRA begins with the perspective of the employment relationship, and applies union exclusive representation in collective bargaining as the mechanism for insuring peace and stability in that relationship. The statute therefore regulates the employer-union relationship within a wider perspective of the employment relationship. Thus the methods for enforcing the protections of the NLRA and the remedies available for violations reflect that focus.

### B. Enforcement Procedures Under the NLRA

Enforcement authority is vested solely with the General Counsel of the NLRB.\(^6\) If the General Counsel determines not to issue a complaint in a particular case, that decision is unreviewable by the Board or the courts.\(^7\)

The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of the General Counsel that his claim is sufficiently meritorious to warrant Board consideration.\(^8\)

When a complaint is issued, the scope and direction of the litigation is largely controlled by the General Counsel. Although counsel for the charging party is allowed to intervene, private counsel's role is limited. Counsel has the right to present evidence, examine witnesses and make arguments,\(^9\) but the General Counsel retains the authority to frame the allegations of the complaint,\(^10\) which determines the issues to be decided.

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68. Indeed, during the debates over the Taft-Hartley amendment which, inter alia, added union unfair labor practices to the NLRA, representatives considered including a section dealing with internal union affairs. Section 8(c) of H.R. 3020 was aimed at ensuring that unions operate democratically. National Labor Relations Board, Legislative History of the Labor-Management Relations Act 52-56, 322 (1948) [hereinafter Legislative History of the LMRA]. The final statute, however, included only a few provisions purporting to regulate union government and otherwise abandoned any attempt to systematically regulate internal union affairs at that time. Id. at 550; Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960).


71. Sears, 421 U.S. at 139.


by the administrative law judge at the hearing.\textsuperscript{74}

The availability of pretrial discovery in proceedings under the NLRA is severely limited. The normal discovery procedures provided for in the Federal Rules of Civil Procedure are not applicable to unfair labor practice hearings.\textsuperscript{75} Provision for prehearing discovery is solely within the NLRB's discretion,\textsuperscript{76} and is limited in nature.

The Board's rules and regulations provide for the taking of depositions, but they must be authorized by either the regional director, prior to the opening of an unfair labor practice hearing, or the administrative law judge thereafter.\textsuperscript{77} Granting an application for depositions is committed to the discretion of the regional director or administrative law judge\textsuperscript{78} for good cause shown, which is generally limited to situations involving unavailability of the witness for the hearing.\textsuperscript{79} While subpoenas, both ad testificandum and duces tecum, are available as a matter of course in connection with unfair labor practice hearings,\textsuperscript{80} they are returnable on the date the hearing begins, and are not a mechanism for pretrial discovery as they are under the Federal Rules of Civil Procedure.\textsuperscript{81} Moreover, trial subpoenas are not self-enforcing, but must be enforced by a federal district court.\textsuperscript{82} The authority to petition the court for enforcement resides exclusively with the NLRB.\textsuperscript{83} The court is with-

\textsuperscript{74} See IUE v. NLRB, 289 F.2d 757 (D.C. Cir. 1960); Sunbeam Plastics, 144 N.L.R.B. at 1011 n.1.


\textsuperscript{76} See supra cases cited in note 75. The problems caused by a lack of discovery, particularly in a hiring hall case, are evident in this excerpt from the administrative law judge's decision in Laborers' Local 282 (Millstone Constr.), 236 N.L.R.B. 621, 630 (1978):

Prior to the hearing, only the Union was in a position to know who was referred, who was not, and why. Prior to the hearing, the Union refused to furnish General Counsel with a copy of its alleged out-of-work list (although permitting a Field Examiner to look at the list), and, as matters turned out, that list was a false or falsified one. Moreover, two major employers declined to cooperate with the Regional Office's investigation.

\textsuperscript{77} 29 C.F.R. § 102.30(a) (1986).

\textsuperscript{78} Id.; Electromec Design and Dev. Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969); Trojan Freight Lines, Inc. v. NLRB, 356 F.2d 947 (6th Cir. 1966).


\textsuperscript{81} There is provision for the issuance, during the investigative stages of administrative proceedings, of subpoenas which are returnable prior to any hearing, but their availability is limited to the General Counsel; they are not issued at the behest of private parties. NATIONAL LABOR RELATIONS BOARD, NLRB CASEHANDLING MANUAL ¶ 11770 (1983). But cf. FED. R. CIV. P. 30 (provides for the use of subpoenas to require attendance of witnesses and production of documents at pre-trial depositions).

\textsuperscript{82} 29 U.S.C. § 161(2) (1982).

\textsuperscript{83} Id.
out jurisdiction to enforce a subpoena upon motion of a private party.\textsuperscript{84} Nor is the Board required to seek enforcement upon the request of a private party, but only if enforcement would be consistent with the law and policies of the Act.\textsuperscript{85}

The remedial authority of the Board is circumscribed by the dual requirements that its orders must be designed to effectuate the policies of the NLRA, but that they may not be punitive in nature.\textsuperscript{86} As applied to hiring hall cases, the policy to be effectuated is "to insulate employees' jobs from their organizational rights,"\textsuperscript{87} not to preserve democracy within the union institution. For this reason, available remedies, while dealing with the denial of job opportunities, do not attempt to cure the underlying cause of the problem: the suppression of the democratic rights of union members.\textsuperscript{88}

In cases where the political manipulation of the hiring system manifests itself in backdooring or bypassing—\textit{i.e.}, where lawful, objective criteria exist for determining referral priority but the dispatcher disregards the established procedure in dealing with dissidents—the Board will order the union to cease and desist from discriminating in job referrals, to follow established referral criteria, to keep records of referral operations adequate to disclose the basis on which every referral is made, and to make said records available for inspection by an agent of the Board's regional office.\textsuperscript{89} Where the discrimination is accomplished by virtue of the lack of any objective referral criteria, priority being determined solely by the dispatcher, the Board will order the union to cease and desist from operating the hiring hall without any objective criteria and require the union to develop such criteria for future operation.\textsuperscript{90}

The authority of the Board to compensate those individuals who have been subjected to illegal political discrimination is limited by the mandate that orders be remedial and not punitive in nature.\textsuperscript{91}

\begin{footnotes}
\item[84] NLRB v. Dutch Boy, Inc., 606 F.2d 929 (10th Cir. 1979); Wilmot v. Doyle, 403 F.2d 811 (9th Cir. 1968).
\item[85] 29 C.F.R. \textsection 102.31(d) (1986); NATIONAL LABOR RELATIONS BOARD, NLRB CASEHANDLING MANUAL ¶ 11790.1 (1983).
\item[87] Radio Officers', 347 U.S. at 40.
\item[88] Of course, to the extent that union members are made whole for discrimination suffered by reason of their union political activities, they will be encouraged to continue their political activism in the belief that any future attempts to retaliate will likewise be remedied.
\item[89] See, e.g., Bridge Workers, Local 350, 164 N.L.R.B. at 651-52; Skouras Theaters Corp., 155 N.L.R.B. 157, 158 n.2 (1965), enforced, 361 F.2d 826 (3d Cir. 1966), cert. denied, 385 U.S. 972 (1966); J.J. Hagery, 139 N.L.R.B. at 633; C. MORRIS, supra note 19, at 1686.
\item[90] See, e.g., International Bhd. of Teamsters, 274 N.L.R.B. 1053, 1061 (1985); IATSE, Local 646, 270 N.L.R.B. at 1425; Polis, 262 N.L.R.B. at 1344; Local 394, Laborers, 247 N.L.R.B. at 131.
\item[91] See supra note 86 and accompanying text.
\end{footnotes}
pose of Board monetary awards, therefore, is to restore the discriminatee to the economic position she would have held in the absence of discrimination.\textsuperscript{92} This make-whole remedy requires that the individual be awarded an amount equal to the pay she would have earned from the employment she would have held but for the discrimination. This amount includes all forms of payment received as reimbursement for employment, such as bonuses, overtime and all fringe benefits such as health and life insurance and pension accrual.\textsuperscript{93} The concept of make-whole is, however, a narrow one, limited to those monetary losses directly attributable to the discrimination in question. It does not include collateral losses or punitive damages, neither of which are recoverable under the NLRA.\textsuperscript{94}

Moreover, the one individual most directly responsible for the discrimination suffered by the political dissident, the union officer-dispatcher who is using his power over the hiring hall to consolidate and strengthen his position within the union, is not personally liable for the monetary losses of the dissident.\textsuperscript{95} The money comes solely from the union treasury, which itself is a victim of the dispatcher's political manipulations to the extent that suppression of democracy within the union works to the detriment of the union as a whole.

Neither does the Board's policy normally provide for payment of the

\textsuperscript{92} Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
\textsuperscript{94} See NLRB v. Gullett Gin Co., 340 U.S. 361, 364 (1951); Consolidated Edison, 305 U.S. at 235-36.
\textsuperscript{95} The Board's policy does not require the payment of backpay by an individual union agent. Its usual practice is not to impose personal liability. See, e.g., Local 1098, Carpenters, 186 N.L.R.B. at 390 n.11; International Union of United Brewery Workers (Considine Distrib. Co.), 166 N.L.R.B. 915, 915 n.1 (1967); Local 136, Carpenters, 165 N.L.R.B. at 1042 n.5; Local 121, Marble Polishers, 132 N.L.R.B. 844, 845 n.2 (1961); Local 490, Int'l Hod Carriers, 130 N.L.R.B. 380, 381 n.2 (1961), enforced, 300 F.2d 328 (8th Cir. 1962). The Board has not articulated a specific rationale for this policy, although several have been proffered. Motion Picture Operators Union, Local 244, 126 N.L.R.B. 376, 377 n.3 (1960) (business agent not personally liable because he acted as agent of union and not in individual capacity); Local 420, United Ass'n of Journeymen Plumbers, 111 N.L.R.B. 1126, 1127-28 (1955), enforced, 239 F.2d 327 (3d Cir. 1956) (personal liability not deemed necessary to effectuate purposes of the NLRA); International Bhd. of Teamsters, Local 179, 110 N.L.R.B. 287, 288, 305-06 (1954) (The trial examiner interpreted the NLRA as prohibiting finding a union agent personally liable because the business agent is a creature of the union and not a separate entity, and because § 10(c) limits the imposition of backpay to either employers or labor organizations but does not include agents. The trial examiner's recommendation on this issue was specifically adopted by the Board even though no exceptions had been filed.).
In the one instance where a Board order imposed personal liability on a union business agent, IUOE, Local 925, 180 N.L.R.B. 759 (1970), the court of appeals refused to enforce that aspect of the order since the Board had departed from its normal policy of refusing to impose personal liability without offering any reason for the change in policy. NLRB v. IUOE, Local 925, 460 F.2d 589, 603-04 (5th Cir. 1972). The court noted the argument that the imposition of personal liability is contrary to § 10(c) without deciding the issue. Id. at 604 n.9.
charging party’s attorney fees by the respondent. The political dissident who successfully vindicates her right to nondiscriminatory referral treatment must shoulder the expense of obtaining independent counsel. Only in extraordinary cases, where the respondent’s defenses are frivolous, has the Board ordered the respondent to reimburse the charging party for expenses incurred in the investigation, preparation, and litigation of the case, including, inter alia, counsel fees.

Finally, any order eventually obtained from the Board is not self-enforcing. If a respondent refuses to comply voluntarily, the Board must seek enforcement of its order in a federal circuit court of appeals. It is only after obtaining enforcement that a subsequent refusal to comply is punishable by contempt. Even where a respondent indicates a desire to comply, lengthy backpay compliance proceedings are often necessary to determine the amount of backpay due the discriminatee. Thus, the perceived advantages of utilizing the relatively expeditious procedures of the NLRB are often illusory in practice.

It can hardly be claimed that the NLRA has neither been enforced in this area nor been effective in remedying the discrimination suffered by political activists. Nonetheless, the Act’s inherent limitations in dealing with the underlying cause of the political abuse of hiring halls—the suppression of union democracy and corresponding abuse of the union leader’s power—suggest a need to consider an alternative approach.


Of course, an advantage of utilizing the procedures of the NLRB is that independent counsel for the charging party is not required. The General Counsel, in the public interest, prosecutes the case on behalf of the charging party. Accord Heck’s, 191 N.L.R.B. at 889.


99. See supra note 98. See also NLRB v. Local 80, Sheet Metal Workers, 491 F.2d 1017 (6th Cir. 1974).

100. See, e.g., NLRB v. Plumbers Local 403, 710 F.2d 1418 (9th Cir. 1983); NLRB v. International Ass’n of Bridge Workers, Local 433, 600 F.2d 770 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980); Laborers Local 135, 271 N.L.R.B. at 781.

101. The median time elapsed from the filing of an unfair labor practice charge to the issuance of a Board decision was 484 days in 1980 and 490 days in 1981, the most recent data published. 45 NLRB ANN. REP. 294 (1980); 46 NLRB ANN. REP. 228 (1981). The national median time from filing the complete record in the federal courts of appeals to disposition was 8.9 months in 1980 and 9.3 months in 1981. These data refer to all cases filed in the courts of appeals; it is not limited to NLRB filings. ADMINISTRATIVE OFFICE OF U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 15 (1983). The total elapsed time, therefore, from the filing of a charge to a court-enforced order is approximately two years.
IV
AN LMRDA ALTERNATIVE

The Labor Management Reporting and Disclosure Act specifically addresses the issues of the union-member relationship and internal union democracy. Its passage was aimed at preserving democratic standards within unions to enable the members to maintain control over the purposes and policies of their organization. Thus, an objective of this statute is to restrict union and union officer conduct intended to suppress union democracy. Substantive as well as procedural aspects of the LMRDA lend themselves to achieving that objective.

Title I grants union members the substantive right to express any views, arguments or opinions both during union meetings and at other times, free from infringement or discipline by the union or its officers.


103. See Griffin, A New Era in Labor-Management Relations, in Symposium on the Labor-Management Reporting and Disclosure Act of 1959, at 25 (R. Slovenko ed. 1961) ("The third fundamental principle which should (and, as evidenced by the [LMRDA], now does) underlie our national labor policy is that labor unions should exist for the benefit of, and be subject always to the control of, the membership . . ."). See also supra note 44. See generally Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 829-31 (1960); Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 199 (1960).

104. The scope of protection afforded by the LMRDA is therefore limited to members of the specific union alleged to have violated the statute. Hughes v. Local 11, Int'l Ass'n of Bridge Workers, 287 F.2d 810 (3d Cir.), cert. denied, 368 U.S. 829 (1961); MacKenzie v. Local 624, IUOE, 472 F. Supp. 1025, 1031 (N.D. Miss. 1979). Thus, where hiring hall discrimination impacts upon nonunion workers or workers who belong to a different union than the one operating the hall, it is not cognizable under the LMRDA. Such discrimination may, however, be illegal under the NLRA. See supra note 38.


Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

106. LMRDA § 102, 29 U.S.C. § 412 (1982), states, in pertinent part:

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

107. LMRDA § 609, 29 U.S.C. § 529 (1982), states:

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 shall be applicable in the enforcement of this section.
representatives. It also confers protection from union discipline in the absence of certain procedural safeguards. Title V imposes a fiduciary responsibility upon union officers and representatives, requiring them to exercise their authority for the benefit of the organization and its members. That responsibility is enforceable at the behest of a union member. The applicability of these provisions of the LMRDA to the political abuse of hiring halls will be discussed seriatim, followed by a consideration of litigation issues involved in enforcing these provisions.

A. Applicability of Title I

1. Section 101(a)(2)

   a. Substantive Rights

   The guarantee of free speech to union members contained in section 101(a)(2) specifically embraces the members’ right to criticize, as well as support, union policies and officials, and to actively campaign for, and against, candidates for union office:


   No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

109. LMRDA § 501(a), 29 U.S.C. § 501(a) (1982), states:

   The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

110. LMRDA § 501(b), 29 U.S.C. § 501(b) (1982), states:

   When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

111. See supra note 105.
Congress adopted the freedom of speech and assembly provision in order to promote union democracy. It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership.\footnote{112} This free speech right is not absolute, however. The proviso to section 101(a)(2) allows certain "reasonable" restrictions to be placed on that right. In the context of union meetings, member speech may be limited to "business properly before the meeting" and subject to "reasonable rules relating to the conduct of meetings." This limitation is primarily procedural in nature and only indirectly allows the union to regulate the content of a member's speech. The union has the authority to maintain order and establish procedures to be followed during meetings.\footnote{113} A union may properly discipline a member who insists upon criticizing the union's decision to expend dues money to build a new union hall when the subject currently before the union meeting is the negotiation of a new collective bargaining agreement. Likewise, a member who consistently disrupts a meeting by shouting out criticism of the union's business manager is not insulated from union discipline. Regulation is permitted in those instances in order to facilitate the orderly conduct of union meetings, not to permit union officers to control or censor the content of member speech.\footnote{114} As to all union member speech, regardless of context, the union retains the ability to enforce "reasonable rules as to the responsibility of every member toward the organization as an institution" and to regulate conduct interfering with the performance of the union's legal or contractual obligations.\footnote{115} It is this proviso which raises the issue of the union's legitimate right to control the content of member speech.

If broadly interpreted, particularly from a united front,\footnote{116} business

114. But see Atleson, supra note 113 (procedural rules can be manipulated by those controlling the meeting so as to effectively censor the content of the member's speech at the meeting); Scoville, 338 F.2d at 682 (Schnackenberg, J., dissenting).  
115. See supra note 105.  
unionism perspective, the proviso would appear to permit the union great leeway in controlling member political criticism. Under this view, a united, militant organization is required for the successful realization of bargaining objectives when dealing with the employer. Thus, the necessity for obedience to union leadership and the importance of internal harmony is emphasized. Political dissidents destroy that harmony and create divisiveness, thereby undermining the effectiveness of the union. Such an interpretation would allow the exception to swallow the rule.

The courts, however, in interpreting section 101(a)(2) have broadly read the grant of rights and narrowly confined the effect of the proviso on those rights. The leading case under section 101(a)(2) is *Salzhandler v. Caputo*. Salzhandler, the financial secretary of a Carpenters' local, distributed leaflets to the membership accusing the union's president, Webman, of mishandling union funds. Webman filed internal union charges against Salzhandler, alleging that the accusations against him were false and as such constituted acts detrimental to the interests of the union and inconsistent with a member's obligations to the union. After a hearing before a union trial board, Salzhandler was found guilty and was barred from attending, voting at, or participating in union meetings for a period of five years. Subsequently, Salzhandler filed suit in federal district court pursuant to section 102 of the LMRDA, alleging that the union's discipline infringed his free speech rights under section 101(a)(2). The district court dismissed the complaint, finding that Title I of the LMRDA does "not include the right of a union member to libel or slander officers of the union."

On appeal, the Second Circuit reversed and directed entry of judgment for Salzhandler. The court considered the policy underlying the Act as one of "protect[ing] the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers." Accordingly, the statute specifically evinces a congressional intent to "prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain."

The union expressly raised the united front contention as justification for its regulation of Salzhandler's speech. The court rejected this defense, noting that in enacting Title I, Congress had decided that pro-

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118. *Id.*; James, *supra* note 116.
120. *Salzhandler* was also removed from his position as financial secretary. *Id.* at 448.
121. *Id.*
122. *Id.* at 448-49.
123. *Id.* at 449.
124. *Id.* at 451.
tecting internal democratic processes outweighed any possible damage which free expression might inflict on unions in their dealings with employers.\textsuperscript{125} "The Congress has decided that it is in the public interest that unions be democratically governed and toward that end that discussion should be free and untrammeled and that reprisals within the union for the expression of views should be prohibited."\textsuperscript{126}

In effect, the court found the free speech guarantee of section 101(a)(2) to be nearly absolute and the union’s ability to regulate such speech pursuant to the proviso to be severely limited. Subsequent case law reaffirmed this absolutist approach and courts rarely have found union institutional, contractual or legal interests sufficient to outweigh the member’s speech rights.\textsuperscript{127} Although the Supreme Court in \textit{United Steelworkers v. Sadlowski}\textsuperscript{128} has slightly retrenched on this absolutist view and read content back into the proviso,\textsuperscript{129} the decision left unaf-

\begin{thebibliography}{99}
\bibitem{125} Id.
\bibitem{126} Id.
\bibitem{127} See, e.g., Kuebler v. Cleveland Lithographers Union, Local 24-P, 473 F.2d 359 (6th Cir. 1973) (member criticism of union negotiation stance protected); Semancik v. United Mine Workers Dist. No. 5, 466 F.2d 144, 153 (3d Cir. 1972) ("whenever a union member is to be disciplined for discussing the fitness of union leaders, their policies or their administration, he may claim the protection of the LMRDA’s Bill of Rights"); Airline Maintenance Lodge 702 v. Loudermilk, 444 F.2d 719 (5th Cir. 1971) (member advocacy in support of rival union protected); Farowitz v. Associated Musicians Local 802, 330 F.2d 999 (2d Cir. 1964) (member who urged fellow union members not to pay dues protected). For a good discussion of the application of the proviso to free speech cases after \textit{Salzhandler} see Beaird & Player, supra note 113, at 593-606; J. Bellace & A. Berkowitz, supra note 102, at 39-45.


\bibitem{129} In \textit{Sadlowski}, the plaintiff challenged a union rule prohibiting a candidate for union office from accepting financial support from a nonmember. 457 U.S. at 105. Sadlowski contended that the rule prevented candidates from amassing the resources necessary for effectively exercising their free speech rights during an election campaign. After considering the legislative history of Title I, the Court rejected the argument that Congress intended to grant union members free speech rights coextensive with citizen rights under the first amendment. "Rather, Congress’ decision to include a proviso covering ‘reasonable’ rules refutes that proposition." \textit{Id.} at 111. Whereas government infringement on first amendment rights must be justified by a compelling state interest and narrowly drawn, union rules are valid under the proviso so long as they are reasonable. "The critical question is whether a rule that partially interferes with a protected interest is nevertheless reasonably related to the protection of the organization as an institution." \textit{Id.} at 111-12.

In upholding the outsider rule under the proviso, the Court specifically noted that as a practical matter the impact of the rule on free speech rights "may not be substantial" as 1) candidates remain free to seek support from union members, and 2) the rule does not prohibit union members who are not running for office from using outside money to address particular issues. \textit{Id.} at 113-15. Moreover, the interest advanced by the regulation was viewed by the Court as consistent with an underlying policy of the LMRDA—to ensure that the union remains responsive to its members and to minimize the influence of outsiders on union affairs. \textit{Id.} at 115-16.

These same extenuating considerations are not present where union restrictions infringe individual member speech based on the critical content of the speech. The \textit{Sadlowski} rule only indirectly
fected prior authority prohibiting union retaliation against a member for criticism of, or opposition to, the union leadership and its policies.\textsuperscript{130}

The continuing vitality of \textit{Salzhandler}, as it affects the ability of a union to regulate the content of members' speech, has been reaffirmed by the Second Circuit in \textit{Petramale v. Local 17, Laborers}.\textsuperscript{131} A post-Sadlowski decision, \textit{Petramale} held that a union may not discipline a member for accusations made against union officers. Thus, a union's attempt to justify censorship of the content of a member's speech based on the proviso would fare no better after Sadlowski than before.\textsuperscript{132}

\textbf{b. Enforcement}

\textit{(1) Section 102}

The primary mechanism for enforcing rights granted under Title I is section 102.\textsuperscript{133} The scope of section 102 is relatively broad, providing a

\begin{footnotesize}
\begin{enumerate}
\item See Chayes, \textit{supra} note 128, concluding:
  \begin{quote}
  The \textit{Sadlowski} decision does, however, contain language that may leave some speech rights of union members intact. Although it held that Congress did not intend the protective scope of section 101(a)(2) to be identical to that of the first amendment, \textit{Sadlowski} did recognize that "Congress modeled Title I [of the LMRDA] after the Bill of Rights, and that the legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal." Even after \textit{Sadlowski}, one can argue that union actions affecting certain core rights of expression must "pass the stringent tests applied in the First Amendment context" rather than the mere reasonableness test applied to the outsider rule adopted by the Steelworkers.
  
  Further, \textit{Sadlowski} may even help to define these core rights. For example, although the right to solicit outside financial support during a campaign for high union office is not within this core, "the right to speak one's mind without fear of reprisal" is. It thus appears, for example, that a union could neither discipline a member for exercising his right to criticize the union leadership nor decide, on the basis of content, which messages members may post on union bulletin boards. This core right may deserve exactly the protection it would receive under the first amendment, and implicit recognition of this core may limit the scope of the Court's holding.
\end{quote}
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\textit{Id.} at 297-98 (footnotes omitted).

\begin{footnotesize}
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\item 736 F.2d 13 (2d Cir. 1984). The court specifically relied on \textit{Salzhandler} as support for its decision. \textit{Id.} at 17-18.
\item See, e.g. Davis v. UAW, 765 F.2d 1510, 1511 n.1 (11th Cir. 1985), \textit{cert. denied}, 106 S. Ct. 1284 (1986) (the court noted the protection given to views, arguments and opinions under § 101(a)(2) while dismissing the case based on the running of the statute of limitations); Rivera v. Feinstein, 636 F. Supp. 159, 162 (S.D.N.Y. 1986) ("It is well settled law in this circuit that the statements contained in the newsletter which concern internal union affairs and which criticize union officers are protected by section 101(a)(2), even if these statements are defamatory or malicious."); Loekle v. Hansen, 551 F. Supp. 74, 80-81 (S.D.N.Y. 1982) (relying on \textit{Salzhandler}'s broad protection of union member speech but finding the conduct of the union members in this case to be outside the purview of \textit{Salzhandler} since the members knowingly lied concerning missing union election ballots, thereby attacking the validity of the election).

The extent to which \textit{Sadlowski} affects the protection afforded member speech unrelated to criticism of and opposition to union officials is beyond the scope of this Article.
\item See \textit{supra} note 106.
\end{enumerate}
\end{footnotesize}
cause of action for any infringement of a right secured by Title I. To paraphrase the Supreme Court in *Finnegan v. Leu*, the question remains whether a union member's right to free speech, secured by Title I, is infringed by union manipulation of the hiring hall which redounds to the detriment of the individual member.

In *Murphy v. IUOE, Local 18*, the court found such infringement of free speech rights resulting from a union's discriminatory operation of the referral system. The union had argued that its conduct did not constitute infringement of Murphy's free speech rights since he still retained his ability to speak out as a union member. The economic discrimination which he suffered only indirectly interfered with the exercise of that right. Such indirect interference, the union contended, is not actionable under section 101(a)(2). The court rejected the union's contention and found that the economic discrimination suffered by Murphy as a result of the manipulation of hiring hall referrals constituted an infringement of his right to speak and therefore was actionable under section 102.

The union's argument was based on its reading of the Supreme Court's decision in *Finnegan v. Leu*. In *Finnegan*, a union business agent who had supported the incumbent union president during a hotly contested election campaign was fired from his position by the challenger who won the election. The business agent filed suit under the LMRDA alleging, inter alia, that his right to free speech had been infringed when he was discharged. The court initially noted that Title I protects the rights of union members, not union officers or employees. This focus on membership rights was central to the Court's determination that the discharge from union office did not give rise to a cause of action under section 102.

The distinction between directly protecting an officer from retaliatory discharge (which is not intended by the LMRDA) and affording indirect protection to that officer where the discharge is aimed at suppressing member rights (which may be within the scope of the LMRDA) is similar to the treatment given to supervisors under the NLRA. The NLRA specifically excludes supervisors from coverage. NLRA § 2(3), 29 U.S.C. § 152(3) (1982). Thus a supervisor who is discharged for engaging in union organizing activity is not protected and is not entitled to reinstatement. See *Beasley v. Food Fair*, 416 U.S. 653 (1974). However, where the discharge of a supervisor implicates employee rights under the NLRA, for example where a supervisor is discharged for refusing to

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136. *Id.* at 122-23.
139. *Id.* at 433-34. Plaintiff also alleged that the discharge constituted discipline for exercising his Title I rights in violation of § 101(a)(5) and § 609. This portion of the decision is discussed *infra* in the text accompanying notes 164-71.
140. 456 U.S. at 435-37, 440-41. The Court did indicate that where dismissal from union office is "part of a purposeful and deliberate attempt . . . to suppress dissent within the union," thereby implicating the free speech rights of members, such union conduct may be subject to attack under § 102. *Id.* at 441. See also *Cotter v. Owens*, 753 F.2d 223, 228-30 (2d Cir. 1985).
In focusing on member rights, the Court looked to the policy behind the LMRDA—to insure that unions would be democratically governed and responsive to the will of the membership. The ability of a union president to select his own administrative and policymaking employees was seen as not only consistent with the purposes of the Act but as an “integral part of ensuring a union administration's responsiveness to the mandate of the union election.”

This policy distinction between the member's right to criticize and the union officer-employee's criticism was effectively expressed by the court in Cehaich v. UAW.

Any union member is certainly entitled to disagree with the union's policy. However, when persons chosen by the union leadership are appointed to effectuate that policy, elected union officers are investing the appointee with the trust of the membership. When that trust is lost, not only will the appointee be subject to removal; but the elected official has placed his office in jeopardy also.

Moreover, the discharged union officer maintains her right to speak out as a member—her status as a union member remains unaffected. The Finnegan Court viewed the officer's choice between his job and his right to speak out as presenting only an indirect interference with his membership rights. This statement, however, should be viewed in light of the policy perspective articulated by the Court for allowing such interference on the union's part: the necessity for the union leader to be able to trust and rely on his staff to implement the policies for which he was elected. The Court noted there was nothing in the statute or its legislative history suggesting a congressional intent to prohibit union patronage, and while this may “pose a dilemma” for some union employees, it was not a di-

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141. 456 U.S. at 441. The Court noted that the result might be different in a case involving nonpolicymaking and nonconfidential employees. Id. at 441 n.11. In his concurrence, Justice Blackmun emphasized the distinction between employees who are instrumental in developing and carrying out the union's policies, and rank-and-file employees, which latter group he believed presented an entirely different issue. Id. at 442-43. The extent of protection afforded union officers and employees, while an important issue, is beyond the scope of this Article. For some views on this issue, see Pope, supra note 117, at 551-84; Note, Finnegan v. Leu: Promoting Union Democracy, 32 Cath. U.L. Rev. 287, 310-14 (1982); Note, Finnegan v. Leu: A Withdrawal of the Free Speech and Association Rights of Appointed Union Officers, 36 Rutgers L. Rev. 644, 662-63 (1983).

142. 710 F.2d at 234 (6th Cir. 1983). Cehaich was a union-appointed benefit representative who was removed from office for criticizing the collective bargaining agreement negotiated by the union. He challenged his removal based on LMRDA §§ 101(a)(2), 102, 609, 29 U.S.C. §§ 411(a)(2), 412, 529 (1982). The court affirmed the dismissal of his case based on Finnegan's holding that Title I does not restrict the freedom of union officials to appoint and remove staff members responsible for implementing union policy. Cehaich, 710 F.2d at 238-39.

143. Cehaich, 710 F.2d at 239 (emphasis in original).

144. 456 U.S. at 440.
lemma with which Congress was concerned.\textsuperscript{145}

Where a union dispatcher manipulates hiring hall referral practices to disadvantage a member because of that member’s criticism of union policies and leadership, the analysis underlying the \textit{Finnegan} decision is inapposite. As recognized by the \textit{Murphy} court, the \textit{Finnegan} decision was based on the Court’s concern that a union leader be able to choose her own people to help her run the union. “Plainly, the Supreme Court in \textit{Finnegan} did not intend to rule out Section 411 as a protection against manipulative discrimination on behalf of an ordinary union member seeking to exercise his right of expression at union meetings.”\textsuperscript{146}

The speech rights implicated in a hiring hall case are those of the member, whose rights are specifically protected by Title I, not those of the officer-employee, who receives no independent protection under the Act. Unlike union employment, which involves effectuating internal union policies, employment with outside employers does not implicate those policies. Denying the member access to jobs does not serve the policy of making the union responsive to the will of the members but rather acts to suppress the voicing of the members’ will, thereby running counter to the Act’s policy. As noted previously,\textsuperscript{147} political discrimination in job referrals operates not only to suppress critical speech and dissent by the discriminatee, who suffers an economic loss as a result of his temerity in speaking out, but also has a chilling effect on other union members who learn the cost of dissent.

Additionally, requiring a member to choose between nondiscriminatory referral services and free speech directly interferes with a membership right and does not comport with any explicit or implicit statutory policies. Where the union operates a nonexclusive hiring hall, an individual’s right to utilize the service is based on her membership status in the union.\textsuperscript{148} This membership right of access to the hall is directly interfered with when the dispatcher discriminatorily refers members to jobs based on their union political views. The member’s status is affected because treatment of a member differs based on his speech—nondissenters are given preferential access to jobs and dissenters are denied referrals.

Where the union operates an exclusive hall, access cannot be limited solely to members.\textsuperscript{149} The union may, however, charge nonmembers a fee for the use of the service.\textsuperscript{150} Membership status, therefore, carries

\begin{itemize}
\item[\textsuperscript{145}] Id. at 441-42.
\item[\textsuperscript{146}] \textit{Murphy}, 774 F.2d at 123.
\item[\textsuperscript{147}] See supra text accompanying notes 38-44.
\item[\textsuperscript{148}] A union may deny nonmembers the use of a nonexclusive hiring hall. Teamsters Local 327, 167 N.L.R.B. 998 (1967).
\item[\textsuperscript{149}] Restricting access to exclusive referral systems to union members violates § 8(b)(2) of the NLRA. R. GORMAN, supra note 36, at 664-65.
\item[\textsuperscript{150}] See supra note 36.
\end{itemize}
with it the right of free access to the union hiring hall. This status is
affected where the service rendered by the dispatcher varies based on the
political content of the member's speech.

Thus, unlike employment by the union itself, external employment
opportunities secured through the use of the union hiring hall are a func-
tion of the member's internal union status. When those employment op-
portunities are affected, the member's status in the union is affected.

Legislative history supports this interpretation. In the debate pre-
ceding enactment of Title I, Congress expressed concern about protecting
members from job loss in reprisal for exercising their free speech rights.
While offering the initial version of Title I, Senator McClellan dis-
cussed the need for enacting a law defining union member rights, and
protecting members in the exercise of these rights. He noted that there
currently existed no protection for a member from "job-loss as reprisals
for assembling, for speaking up in meetings, for making inquiry about the
financial affairs or other actions of his union." In discussing his pro-
posed "freedom of speech" provision, Senator McClellan referred to two
waitresses who had testified that it took them six months to find jobs
because union officials interfered with their employment opportunities
and warned employers not to hire them. Thus, unlike the union em-
ployment patronage problem which received no discussion during the
consideration of the LMRDA, there was a voiced concern about the
effect of union interference with members' job opportunities in reprisal
for exercising their free speech rights, a concern which led to the event-
tual passage of Title I.

A member's right to speak out in criticism of union officers and poli-
cies is protected by section 101(a)(2). While the proviso to that section
allows for some union restrictions on this right, the proviso is narrowly
construed. Union manipulation of a hiring hall referral system to punish
members for exercising their speech rights does not fall within the pro-
viso, and it infringes upon rights protected by Title I in violation of sec-
tion 102 of the LMRDA.

151. Sen. McClellan's proffered Title I was not the version which was eventually enacted into
law. Shortly after its adoption by the Senate, Sen. Kuchel offered a substitute amendment which was
approved. The major difference between the two bills affecting the free speech clause, § 101(a)(2),
was that the Kuchel amendment included the "reasonable rules" proviso. See supra text accompa-
nying notes 113-18. The House bill, which contained a Bill of Rights provision identical to the
Senate-adopted Title I, was subsequently approved. Sadiowski, 457 U.S. at 109-10; Rothman, supra
note 103, at 206-09. Nevertheless, Sen. McClellan's comments are clearly relevant to an understand-
ing of congressional intent behind § 101(a)(2).

152. NATIONAL LABOR RELATIONS BOARD, II LEGISLATIVE HISTORY OF THE LABOR-MAN-
AGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1098 (1959) [hereinafter LEGISLATIVE
HISTORY OF THE LMRDA].

153. Id. at 1103.

154. Finnegan, 456 U.S. at 441 & n.12.
(2) Section 609

An alternative mechanism for enforcement of Title I rights is found at section 609 of the LMRDA. This provision is at once broader and more narrow than section 102. Section 609 protects the rights of union members granted under any provision of the LMRDA, whereas section 102 protections are limited to Title I rights. Thus a right secured by Title I, such as the member’s free speech right, falls within the ambit of both section 102 and section 609. However, section 609 prohibits only that union action which constitutes a fine, suspension, expulsion or other discipline, whereas section 102 prohibits any infringement.

The distinction between union activity which infringes Title I rights and that which constitutes discipline for the exercise of those rights is a substantive one. A plaintiff may be able to state a cause of action under section 102 without necessarily stating a cause of action under section 609. As discussed previously, union interference with outside employment opportunities by virtue of discriminatory manipulation of the hiring hall system constitutes infringement. Whether such conduct also constitutes discipline will be discussed below in connection with consideration of the applicability of section 101(a)(5) to the political abuse of hiring halls.

2. Section 101(a)(5) and Section 609

Section 101(a)(5) prohibits a union from fining, suspending, expelling or otherwise disciplining any member without first observing certain procedural safeguards. The purpose behind this provision is not to review the reason for the discipline or to determine whether it is warranted. Rather it is to ensure that the member has an opportunity to protect her interests and present her defense before any discipline is im-

155. See supra note 107.

156. The Finnegan Court explained that the somewhat duplicative nature of these two sections, § 102 and § 609, is the result in large part of the peculiar legislative history of the LMRDA. Section 102 was originally part of the Kuchel amendment and provided for individual civil enforcement of Title I rights. Section 609 was originally included for the purpose of creating criminal penalties for retaliatory discipline primarily related to the election provisions (Title IV) of the LMRDA. Subsequent amendments to § 609 provided for civil enforcement by the Secretary of Labor instead of criminal sanctions in order to temper the penalty. Eventually individual enforcement mechanisms were substituted to remove unnecessary injection of the executive branch in law enforcement matters. 456 U.S. at 439 n.10. See Rothman, supra note 103, at 218-19; see also Aaron, supra note 103, at 877.

157. Finnegan, 456 U.S. at 439 (having initially determined that the discharge of the business agent did not constitute discipline under § 609, the Court was required to separately consider whether such action constituted infringement under § 102); Murphy, 774 F.2d at 122 ("[A] suit may be brought to redress an infringement of section 411 rights even if no improper 'discipline' is shown."). See also Cehaich v. UAW, 710 F.2d 234, 238 (6th Cir. 1983).

158. See supra note 108.
posed. The failure of the union to provide these procedural protections renders the subsequent discipline voidable. The union may, however, remedy this defect by providing the member with her due process rights, and thereafter reimpose the discipline.

Section 609, which also regulates union discipline, prohibits a union from disciplining any member for exercising his rights under the LMRDA. Under this provision, the reason for the imposition of discipline is subject to review. If the justification is retaliation for exercising LMRDA rights, the discipline is illegal. Even if the union grants the disciplined member all his procedural rights under section 101(a)(5), the union’s conduct still violates section 609—it is unlawful to impose discipline for that reason.

Regardless of whether the member is challenging the union’s action as procedurally or substantively defective, the crucial question is the same: does the union’s action constitute discipline? The meaning of the term discipline as used in section 101(a)(5) and section 609 is the same. The question, then, is whether the loss of employment opportunities that occurs by virtue of the union’s discriminatory operation of the hiring hall constitutes discipline?

The starting point for considering this question is once again Finneghan v. Leu. There the Court held that the term discipline “refers only to retaliatory actions that affect a union member's rights or status as a member of the union.” The specific sanctions mentioned in the statute—fine, suspension, and expulsion—all refer to actions taken against members as members. Discipline, therefore, refers only to punitive action diminishing membership rights, and not to discharge from union employment, as such discharge does not impinge upon the incidents of union membership.

The Court in Finneghan focused on the distinction between union

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160. See Perry v. Milk Drivers' Union, Local 302, 656 F.2d 536 (9th Cir. 1981); Feltington v. Moving Picture Mach. Operators Local 306, 605 F.2d 1251, 1257 (2d Cir. 1979), cert. denied, 446 U.S. 943 (1980); see, e.g., Tincher v. Piasecki, 520 F.2d 851 (7th Cir. 1975); Anderson v. United Bhd. of Carpenters, 59 L.R.R.M. (BNA) 2684 (D. Minn. 1965).

161. See supra note 107.


163. Finneghan, 456 U.S. at 437-39. The scope of union conduct regulated by both provisions is identical: "fine, suspend, expel or otherwise discipline." Thus, while the purposes of the two sections are different, the conduct being regulated is the same. "Certainly, one would expect that if Congress had intended identical language to have substantially different meanings in different sections of the same enactment it would have manifested its intention in some concrete fashion." Id. at 438-39 n.9.


165. Id. at 437 (emphasis in original).

166. Id. at 438.
employment and union membership in finding that the termination of the union business agent was not discipline. This distinction should be remembered when considering the applicability of Finnegan to union interference with outside employment. If Finnegan were broadly read, one might conclude that interference with any employment is not discipline. As discussed previously, however, access to employment may in some circumstances be a function of an individual's membership status, so that interference with that access does affect a member's status.167

It is essential to keep in mind the context of Finnegan—the Court's concern with the interest of union leaders in appointing employees they can trust, and its belief that Congress did not intend to abolish patronage. Indeed, the Finnegan Court cited Sheridan v. Carpenters Local 626168 in connection with its holding that discharge from union office does not affect union membership.169 In Sheridan the court gave due consideration to the political ramifications of an officer's actions in finding that his removal did not constitute discipline. An "officer's conduct, whether in his individual or official capacity, affects the confidence reposed in him by the union membership, and his effectiveness as an officer."170

The other ground for the Finnegan decision that discharge from union office did not constitute discipline was the legislative history behind section 101(a)(5) which showed a specific congressional intent "not to protect a member's status as a union employee or officer."171 There is no similar legislative indication that Congress did not mean to protect a member's outside employment opportunities from disciplinary effects.

Whether union interference with outside employment opportunities constitutes discipline has been the subject of considerable debate since the passage of the LMRDA.172 After Finnegan, the real question is not

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167. See supra notes 148-50 and accompanying text.
169. Finnegan, 456 U.S. at 438.
170. Sheridan, 306 F.2d at 157. The recognition of this distinction between union employment and outside employment was highlighted in Murphy, in which the court found denial of outside work opportunities distinguishable from Finnegan, where the work involved was as an appointed employee of the union itself. Murphy, 774 F.2d at 122 n.5.
171. "The Conference Report... explains that this 'prohibition on suspension without observing certain safeguards applies only to suspension of membership in the union; it does not refer to suspension of a member's status as an officer of the union.'" Finnegan, 456 U.S. at 438 (emphasis in original).

Disagreement over this issue is also reflected in court opinions, although the majority view clearly held that union interference with the outside employment relation can constitute discipline. See, e.g., Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), cert. denied, 366 U.S.
whether union interference with employment does or does not constitute per se discipline. Rather the issue is whether, under the factual circumstances presented, union conduct which affects employment causes a change in the individual's status, or diminution of her rights as a member.

The Fifth Circuit has long employed a *Finnegan*-type criterion for determining whether union conduct is discipline. Asking whether the union conduct affected the individual's membership within the union, the Fifth Circuit has held union interference with outside employment to constitute discipline in some situations but not in others. A look at how the Fifth Circuit has applied this test should provide some guidance as to how the courts will handle a case alleging political manipulation of a hiring hall in a post-*Finnegan* context.

In *Seeley v. Brotherhood of Painters*, the plaintiff, upon being promoted to a supervisory position, withdrew from active membership in the union. He maintained an "inactive" status in order to retain accumulated seniority and fringe benefit rights. When a labor dispute arose between the union and the plaintiff's employer, plaintiff was blamed for instigating the trouble. The union threatened the employer with coercive measures if plaintiff was not discharged, and the employer complied. When plaintiff obtained a supervisory position with another employer, a labor dispute once more occurred for which plaintiff was again blamed. The union threatened to strike unless plaintiff was discharged.


173. See *Seeley v. Brotherhood of Painters*, 308 F.2d 52, 59 (5th Cir. 1962) ("Certainly the alleged 'discipline' must have some relation to the plaintiff's membership in the labor organization... [I]t does not appear that the plaintiff's discharge... ha[s] any relationship to his membership in the Brotherhood.").

174. *Keene v. IUOE*, Local 624, 569 F.2d 1375 (5th Cir. 1978).
175. *Miller v. Holden*, 535 F.2d 912 (5th Cir. 1976); *Seeley*, 308 F.2d at 59.
176. 308 F.2d 52 (5th Cir. 1962).
177. *Id.* at 54.
178. *Id.*
179. *Id.* at 55.
and this employer also complied. The court held that the union's actions did not constitute discipline as it had no effect on the plaintiff's limited status within the union as an "inactive" member. His accumulated seniority and fringe benefits were not affected. Plaintiff's employment in a supervisory capacity with the two employers was not a function of, nor related to, his union membership.

In Miller v. Holden, the plaintiff lost his job as the training coordinator of an apprenticeship program allegedly because he had actively supported unsuccessful challengers to the incumbent officers in an internal union campaign. In analyzing the factual situation, the court found that the union's conduct did not relate to the plaintiff's membership in the union and was therefore not discipline. The court did specifically note, however, that discharge from employment would constitute discipline "when the member's employment status is a function of some internal union status, such as a hiring hall or, conversely, a union blacklist."

This relationship between membership and employment was present in Keene v. IUOE, Local 624. The court, accordingly, found that union interference with employment opportunities affected membership status and constituted discipline. The IUOE operated a union hiring hall through which it referred union members to work, based on their place on the out-of-work list. Keene was a member of the IUOE who unsuccessfully ran for union office. Subsequently, his political rivals, who controlled the operation of the hiring hall, manipulated the referral process so as to deny Keene the opportunity to work. Citing Miller, the Fifth Circuit found that the concept of discipline included the refusal to refer the plaintiff from the referral list.

The key issue in both the Fifth Circuit line of cases and Finnegan is whether the union, by virtue of its authority over the member, is able to influence or affect employment status. In both Seeley and Finnegan, the union's ability to affect the individual's employment status was based on its influence over the employer—in Seeley the economic influence of the strike on the employer and in Finnegan the fact that the union itself was the employer. Where a hiring hall is involved, as in Keene, the union's ability to affect the individual's work referrals is a direct result of its authority over and relation to him as a union member. As noted previ-

180. Id.
181. Id. at 58-59.
182. Id.
183. 535 F.2d 912 (5th Cir. 1976).
184. Id. at 915.
185. Id. (emphasis added).
186. 569 F.2d 1375 (5th Cir. 1978).
187. Id. at 1379.
ously, an individual’s access to a nonexclusive hall, or free access to an exclusive hall, is based solely on his membership status in the union.\textsuperscript{188} It is by virtue of that membership status that the union gains control over his employment status.\textsuperscript{189}

This link between discipline of a union member and its resultant effect on employment was recognized by Congress during its discussion of Title I. In discussing his proposed section 101(a)(6), which, with some changes not relevant to the meaning of “discipline,” became section 101(a)(5), Senator McClellan noted that “union officials can expel a member from the lodge and keep him from working. . . . What we are trying to do is to protect a man from being arbitrarily disciplined without a fair hearing and without the right to protect his livelihood.”\textsuperscript{190} Representative Rhodes, commenting on section 101(a)(5), also remarked that it allows a union member to “protect the job he has, protect his craft or his skill in the craft which he has acquired through the years. He cannot be suspended or expelled, and deprived of his right to make a living, without first being given a hearing.”\textsuperscript{191}

A post-Finnegan case which found the link between member status and employment opportunities in a hiring hall context is \textit{Murphy v. IUOE, Local 18}.\textsuperscript{192} The union removed Murphy’s name from the hiring hall referral list because he had stolen a union master election list. Murphy alleged that the union violated section 101(a)(5) since he had received no procedural due process prior to the removal of his name. The union, relying on Finnegan, argued that the removal of the name was employment related and did not affect Murphy’s rights as a union member, and therefore did not constitute discipline.\textsuperscript{193} The court disagreed:

The Union’s action in foreclosing Murphy’s participation in the work referral program was a sanction which set him apart from other members in good standing. It unquestionably affected his membership rights. . . . [T]he removal of the card [with Murphy’s name] was discipline impermissibly imposed without a full and fair hearing.\textsuperscript{194}

Murphy also alleged that, prior to the removal of his name from the referral list, the union had manipulated the referral system to his detri-

\textsuperscript{188} \textit{See supra} text accompanying notes 148-50.
\textsuperscript{190} \textit{II LEGISLATIVE HISTORY OF THE LMRDA, supra} note 152, at 1103.
\textsuperscript{191} \textit{Id.} at 1666.
\textsuperscript{192} 774 F.2d 114 (6th Cir. 1985), \textit{cert. denied}, 106 S. Ct. 1201 (1986).
\textsuperscript{193} \textit{Id.} at 123.
\textsuperscript{194} \textit{Id.} at 123-24.
ment in retaliation for his dissident union political activity. He claimed that this manipulation also constituted discipline without the safeguards required by section 101(a)(5). The district court had found that the manipulation of the referrals merely lessened Murphy's chances for employment rather than totally denying him employment and therefore did not constitute discipline. On appeal, the Sixth Circuit noted that the district court's "conclusion that mere unsystematic manipulation, as opposed to a total foreclosure of such job referrals, may not constitute 'discipline' . . . represents a cautious [sic] approach to section 411." The appellate court did not, however, specifically affirm or reverse the district court on this issue, because it affirmed the district court's finding that the same conduct constituted an infringement of Murphy's free speech rights under section 101(a)(2), and recovery under section 101(a)(5) would be duplicative.

There is no basis in reason or precedent to distinguish between degrees of harm suffered for purposes of determining whether the conduct causing the harm constitutes discipline. The punitive effect of the union's conduct is present whether the member suffers a partial loss of income or a total loss.

In the district court opinion, the court also referred to the "surreptitious" nature of the manipulation of referrals as militating against finding the conduct to be discipline. It held that in order to be discipline, conduct must be not only punitive but also "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership." The court found no evidence that any union tribunal was involved in the manipulation; neither did it serve the union's interests but rather it served the selfish political and economic interests of certain members. The district court's reliance on these factors in deciding that this aspect of the union's conduct did not constitute discipline was misplaced.

Although a union action must be judicial in order to be considered discipline, the nature of the procedure utilized in imposing the discipline is not determinative as to whether or not the action is judicial. If the

195. Id. at 121.
196. Id.
197. Id. at 122.
198. Id. at 122-23. For a discussion of this aspect of Murphy see supra text accompanying notes 135-46.
199. There is a requirement that a member establish that she has suffered or will suffer some detriment in order for union conduct to be considered discipline. Bougie v. Lake County Dist. Council of the United Bhd. of Carpenters, 67 L.R.R.M. (BNA) 2402 (N.D. Ind. 1968).
201. Id. at 2115 (quoting Miller v. Holden, 535 F.2d 912, 915-16 (5th Cir. 1976)).
202. Id. The court of appeals did not review this aspect of the district court's rationale for finding that "mere manipulation" did not constitute discipline. 774 F.2d at 122.
nature of proceedings controlled the characterization of the conduct, a union could easily evade the requirements of section 101(a)(5) by avoiding the use of judicial proceedings or tribunals prior to imposing punitive measures.\textsuperscript{203} Rather, denoting the union's conduct as judicial serves the purpose of distinguishing it from legislative or ministerial acts of the union.\textsuperscript{204}

This distinction between judicial and ministerial acts was emphasized by the court of appeals in \textit{Murphy}. The court distinguished the results reached in two post-\textit{Finnegan} cases as involving union ministerial acts.\textsuperscript{205} Both \textit{Turner v. Local Lodge 455, International Brotherhood of Boilermakers}\textsuperscript{206} and \textit{Hackenburg v. International Brotherhood of Boilermakers}\textsuperscript{207} involved union members claiming that the union's refusal to refer them from the hiring hall constituted discipline. The union's refusal was based on a clause in the collective bargaining agreement requiring that any employee who engaged in an illegal or unauthorized strike could not be referred from the hiring hall for ninety days. The union's conduct in refusing to refer the members was, therefore, purely "ministerial," based on the union's obligation to comply with its contractual commitments.\textsuperscript{208} This is to be contrasted with union discretionary conduct in manipulating the hiring hall process. Complying with agreed-upon obligations is certainly different than singling out a union member for the purpose of imposing punitive measures such as the denial of employment opportunities, unrelated to any established rules or contractual obligations. The latter conduct constitutes a discretionary, judgmental act appropriately characterized as judicial.\textsuperscript{209}

To be actionable, discipline must be union-imposed. Action is

\begin{itemize}
\item \textsuperscript{203} J. \textsc{Bellace} & A. \textsc{Berkowitz}, supra note 102, at 68.
\item \textsuperscript{204} See, e.g., \textit{Morrissey v. National Maritime Union}, 544 F.2d 19 (2d Cir. 1976); \textit{Scoville}, 338 F.2d at 680; \textit{Figueroa v. National Maritime Union}, 342 F.2d 400 (2d Cir. 1965); \textit{Hayes v. IBEW, Local 481, 83 L.R.R.M. (BNA) 2647} (S.D. Ind. 1973); \textit{Beaird & Player, supra note 172, at 395-97; Etelson & Smith, supra note 172, at 731-32.}
\item This distinction between judicial and ministerial was explained by the court in \textit{Macaulay v. Boston Typographical Union} 13, 692 F.2d 201 (1st Cir. 1982). "The even-handed application of a reasonable union rule is not arbitrary action by a union or its officers. It would be arbitrary, however, to use a union rule in bad faith in order to punish a member; this would constitute 'discipline'..." \textit{Id.} at 204.
\item \textit{Scoville v. Watson}, 338 F.2d 678 (7th Cir. 1964), \textit{cert. denied}, 380 U.S. 963 (1965), involved union legislative conduct. The union, during a membership meeting, passed a motion to refuse to arbitrate cases where a member was guilty of excessive absenteeism. As a result of this motion, plaintiff was denied arbitration. Plaintiff claimed she had been disciplined without notice or hearing. The court held that the adoption and prospective uniform application of a union rule is not discipline.
\item \textsuperscript{205} \textit{Murphy}, 774 F.2d at 122 n.5.
\item \textsuperscript{206} 755 F.2d 866 (11th Cir. 1985).
\item \textsuperscript{207} 694 F.2d 1237 (10th Cir. 1982).
\item \textsuperscript{208} \textit{Id.} at 1239; \textit{Turner}, 755 F.2d at 868.
\item \textsuperscript{209} See \textsc{Black's Law Dictionary} 984 (5th ed. 1979).
\end{itemize}
deemed to be union-imposed, however, when a union officer acts "under color of and in abuse of authority."210 Manipulation of hiring hall referrals would not be within the job description of a union officer. A union officer who uses his admitted authority to supervise, or actually operate, the hiring hall in a discriminatory manner has abused his authority. This abuse of admitted authority constitutes more than mere private misconduct, however. The officer is in a position to inflict the injury on the union member solely by virtue of the authority he possesses as an officer. Thus discipline imposed by an officer constituting an abuse of authority is attributable to the union.211 Indeed the statute itself speaks of discipline being imposed by "such organization or by any officer thereof."212 Finally, the motive behind the union’s action is irrelevant for the purpose of determining whether it constitutes discipline.213

Thus, political abuse of the hiring hall system, whether it results in total or partial denial of referrals, constitutes discipline within the meaning of section 101(a)(5) and section 609. It is union-imposed, discretionary rather than ministerial, and affects membership rights by virtue of the union’s authority over the dissident member’s access to employment.

B. Applicability of Title V

In enacting section 501, Congress statutorily imposed fiduciary responsibilities on the officers, agents and representatives of labor organizations.214 This did not represent the imposition of any new obligation upon union leaders; the recognition of the fiduciary nature of the relationship existing between a union’s officers and its members had its roots in the common law.215 Indeed, the Supreme Court in Steele v. Louisville & Nashville R.R.,216 its landmark case establishing the union’s duty of fair representation, based that duty on the fiduciary nature of the relationship between the union and the employees it represents. "It is a principle of general application that the exercise of a granted power to act in

211. See Aguirre v. Automotive Teamsters, 633 F.2d 168, 172-73 (9th Cir. 1980); Restatement (Second) of Agency §§ 216, 228-229, 236 & comment a, illustration 3 (1958).
213. Pittman v. United Bhd. of Carpenters, 251 F. Supp. 323, 324 (M.D. Fla. 1966); J. Bellace & A. Berkwitz, supra note 102, at 68.
214. See supra note 109.
behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. . . ."217

While the specific duties and obligations of a fiduciary are determined by the context of the relationship,218 as a general proposition a fiduciary is one who "undertakes to act in the interest of another person"219 and therefore owes a duty of loyalty to that person.220 As noted by Professor Cox, the general fiduciary guidelines contained in section 501 were adopted from the Restatement of Agency with the purpose of incorporating common law fiduciary principles while keeping in mind the special problems and functions of a union.221

An issue posed by the language of section 501 concerns the scope of the fiduciary obligation imposed on union officials. Whereas the first sentence seemingly imposes a broad obligation, the second sentence apparently limits that obligation to three specific areas: the management and expenditure of union funds, the avoidance of conflict of interest or dealing with the union as an adverse party, and accountability to the union for profits received by officials.222 This textual ambiguity raised the question whether the fiduciary obligation of union officers, agents and representatives extends to all activities undertaken by these individuals (as suggested by the first sentence) or whether it is limited to financial dealings only (as suggested by the second sentence).

Extensive analysis of the legislative history of section 501 by commentators supports a broad reading of the fiduciary obligation imposed.223 This broad reading has also been adopted by the majority of courts which have considered the issue.224 Only the Second Circuit has limited the application of section 501's fiduciary requirement solely to

217. Id. at 202.
219. Scott, supra note 218, at 540.
220. J. SHEPHERD, supra note 218, at 47-48; Scott, supra note 218, at 540-41; RESTATEMENT (SECOND) OF AGENCY § 387 (1958); RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).
221. Cox, supra note 215, at 828.
222. See supra note 109.
fiscal matters.225

Applying the majority analysis of the scope of section 501, union officers and representatives are required to exercise their authority in all activities undertaken, both financial and operational, in the best interests of the union as an institution and the members as a group. Courts have recognized that one of the interests of both the union and its members is the preservation of internal union democracy; section 501 imposes a duty on union officers to exercise their authority so as to protect the political rights necessary to preserve democracy.226 Thus, an officer who abuses her authority to the detriment of the political rights of union members has breached her fiduciary obligation.227

In Pignotti v. Local 3, Sheet Metal Workers,228 the union was embroiled in a controversy over whether to participate in a particular pension fund. The union president and certain other officers of the local personally favored adoption of the fund. When submitted for approval to the membership, participation in the plan was defeated. Thereafter, the union president used his authority to call union meetings repeatedly until he was finally able to railroad acceptance through the membership. He subsequently ignored a valid petition to call another membership meeting to reconsider the pension plan; when that meeting was finally held, he failed to implement the vote not to retain the pension plan. The district court found that the union president had breached his fiduciary duty by allowing his personal feelings to interfere with his official duties.229 The Eighth Circuit affirmed stating that the "restoration of or-

225. Gurton v. Arons, 339 F.2d 371 (2d Cir. 1964). The Second Circuit's narrow reading has been criticized as based on the legislative history of a version of § 501 which was not the provision ultimately enacted. Stelling, 587 F.2d at 1386-87; Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n, 477 F.2d 825, 834 (8th Cir.), cert. denied, 414 U.S. 1067 (1973); J. BELLACE & A. BERKOWITZ, supra note 102, at 285-86; Clark, supra note 215, at 444; Comment, Fiduciary Duties of Union Officers, supra note 223, at 879-80.

Several circuits, while acknowledging the opposing views on this issue, have not indicated which view they espouse. Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984); Carr v. Learner, 547 F.2d 135 (1st Cir. 1976); Lux v. Blackman, 546 F.2d 713 (7th Cir. 1976). But see Roland v. Airline Employees Ass'n, Civ. No. 84-1618 (N.D. Ill. filed May 2, 1985); Hill v. Marine Ass'n, Civ. No. 85-8436 (N.D. Ill. filed Nov. 27, 1985), in which these district courts interpreted Lux as endorsing the Second Circuit's narrow view.

226. Semancik, 466 F.2d at 155 ("Union officers . . . have a fiduciary duty under Section 501 . . . to insure the political rights of all members of their organization."); Retail Clerks Local 648 v. Retail Clerks Int'l Union, 299 F. Supp. 1012, 1021 (D.D.C. 1969) ("Title V's obligations encompass not only the proper handling of money but the protection of political rights as well.").


228. 477 F.2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973).

derly democratic processes to the local union is clearly a benefit to the labor organization, and a proper subject of concern to the entire membership."  

In \textit{Blanchard v. Johnson}, an unaffiliated local union was being courted by several international unions proposing affiliation. The union president negotiated an affiliation arrangement with the International Longshoremen's Association ("ILA") and submitted the question of affiliation to a membership vote. The union president did not, however, inform the members of affiliation proposals received from other unions, nor did he fully disclose all the details of the affiliation arrangement negotiated with the ILA. The court found that the union officers had breached their fiduciary obligation by using their right as union officials "to discuss union matters as an excuse to withhold pertinent, relevant information."  

This same analysis applies to the union officer who uses her position in administering the hiring hall system to manipulate referrals to the disadvantage of political opponents or to the advantage of political allies. She occupies a position of trust which she is to use solely for the benefit and interests of the union and its members. Instead, she has used that position to further her own interests in solidifying her political position, to the detriment of the union's interest in internal democracy. As noted by Professor Leslie, the fiduciary concept is based on the notion of fidelity—the fiduciary gives his undivided loyalty to his principal (here, the union) and may not permit his actions to be affected by a desire for personal gain, including a desire to consolidate political position, punish enemies, or reward friends. Thus, political abuse of the hiring hall constitutes a breach of the fiduciary responsibility imposed on union officers by section 501.  

\textbf{C. Litigation Issues}  

Union members can enforce the rights granted under Titles I and V by filing a civil suit in federal court. The litigation of such suits is  

\begin{itemize}
  \item 230. 477 F.2d at 835.
  \item 232. \textit{Id.} at 212-13.
  \item 233. \textit{Id.} at 214.
  \item 234. As noted previously, political abuse of the hiring hall system not only impacts on the particular individual who loses the job referral, but also serves as an example to deter other union members from exercising their political rights. See \textit{supra} text accompanying notes 38-44.
  \item 235. Leslie, \textit{supra} note 227, at 1325 & n.61.
\end{itemize}
governed by the Federal Rules of Civil Procedure and in general conforms to the legal rules applicable to most federal litigation. There are, however, certain procedural and substantive peculiarities connected with LMRDA lawsuits.

1. Preemption

The concept of preemption is based on the supremacy clause of the United States Constitution, which mandates that federal law supersedes conflicting state law and that federal regulation of a specific field may totally occupy that field to the exclusion of parallel state regulation. In the field of labor law, the general principle of preemption was established by the Supreme Court in San Diego Building Trades Council v. Garmon. The preemption principle is based on two theories, the substantive rights theory and the primary jurisdiction theory. The premise of the substantive rights theory is that allowing the states to regulate or control conduct which is within the scope of the NLRA would create a conflict between state and federal regulation and could frustrate national labor policy. The premise of the primary jurisdiction theory is that Congress did more than merely create substantive regulation in passing the NLRA: it also established a comprehensive regulatory mechanism for enforcing the rights and duties created. According to this the-

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§ 609, 29 U.S.C. § 529 (1982), prohibiting discipline of union members for exercising their rights under the LMRDA.

237. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land. . . ."


239. 359 U.S. 236, 244-45 (1959):

When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . .

. . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Recently, the Court has identified a second preemption principle, enunciated in IAM v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), which prohibits state regulation of conduct which Congress intended to remain unregulated. See Golden State Transit Corp. v. City of Los Angeles, 106 S. Ct. 1395, 1398 (1986); Belknap, Inc. v. Hale, 463 U.S. 491, 499 (1983). This preemption principle is not implicated in the current discussion.


ory, exclusive jurisdiction was vested in the NLRB in order to ensure uniform application and interpretation of the national labor policy.\textsuperscript{242}

The preemption issue arises in the current context because the political abuse of hiring halls, which is the subject of the LMRDA lawsuit, also constitutes an unfair labor practice under section 8(b)(1)(A) and section 8(b)(2) of the NLRA. Since the preemption doctrine applies to federal as well as state courts,\textsuperscript{243} the question arises whether preemption by the NLRA applies to claims raised under the LMRDA.

Initial guidance in answering this question was provided by the Supreme Court in \textit{International Brotherhood of Boilermakers v. Hardeman}.\textsuperscript{244} Hardeman, a member of the union, became involved in an altercation with the union business manager over what Hardeman perceived to be unfair treatment in referrals from the hiring hall. Hardeman was brought up on union charges of creating dissension within the union and threatening a union officer. He was found guilty of the charges and expelled from the union. As a result of the expulsion he lost job opportunities and suffered a loss of income. Hardeman subsequently filed suit under section 102 of the LMRDA alleging he had been disciplined without a fair hearing in violation of section 101(a)(5).\textsuperscript{245}

The union claimed that Hardeman’s complaint was preempted by the NLRA, as he was seeking damages for discrimination in job referrals which was arguably prohibited by section 8(b)(1)(A) and section 8(b)(2) of the NLRA. The Court rejected the union’s argument.\textsuperscript{246}

The Court held that the primary jurisdiction theory is based on the premise that in “cases raising issues of fact not within the conventional experience of judges or . . . requiring the exercise of administrative dis-

\begin{itemize}
\item Since the Supreme Court announced the \textit{Garmon} rule, subsequent cases have been replete with exceptions. Activity otherwise falling within the \textit{Garmon} rule has been excepted from its application because the activity in question was a matter of merely peripheral concern to the NLRA, IAM v. Gonzales, 356 U.S. 617 (1958) (expulsion from union membership); because it concerned issues deeply rooted in local interests, see, e.g., Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (libel); UAW v. Russell, 356 U.S. 634 (1958) (picket line violence); or because the injured party was unable to bring the dispute before the NLRB, ILA v. Davis, 106 S. Ct. 1904, 1913 n. 10 (1986); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).
\item \textsuperscript{243} \textit{Garmon}, 359 U.S. at 245; see also Ettelson & Smith, \textit{supra} note 172, at 754. \textit{Cf.} Smith v. Evening News Ass’n, 371 U.S. 195 (1962).
\item \textsuperscript{244} 401 U.S. 233 (1971).
\item \textsuperscript{245} \textit{Id.} at 235-37.
\item \textsuperscript{246} \textit{Id.}
cretion, agencies created by Congress for regulating the subject matter should not be passed over.”

However, the fairness of union disciplinary procedures is not beyond the competence of federal judges nor is it within the special expertise of the NLRB. Moreover, Congress in enacting the LMRDA was aware that it was adding new rights and duties to federal labor law and specifically entrusted enforcement of those rights to federal district courts, not to the NLRB.

As to the substantive rights theory of preemption, the Court found it inapplicable also. This case did not involve an attempt to apply state law, nor federal law of general application, but rather a federal law explicitly made applicable to the factual circumstances involved.

In reaching its conclusion that the preemption doctrine did not apply to Hardeman’s suit under the LMRDA, the Court cited with approval several circuit court decisions which had held that Congress by enacting section 102 expressly provided for federal court enforcement of the rights created by the LMRDA, and that section 103 clearly indicated Congress’ intent that these rights be superimposed on already existing rights available in other fora.

Although the specific facts of Hardeman involved a claim under section 101(a)(5), the rationale used by the Court to find preemption inapplicable is equally persuasive as to the entire LMRDA. Therefore, not only claims raised under section 101(a)(5), but those raised under any provision of the LMRDA should withstand the preemptive force of the NLRA.

As often noted by the Court in dealing with preemption issues, the

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247. Id. at 238 (quoting Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965)).
248. Id. at 238-39.
249. Id. at 240-41. See Beaird & Player, supra note 172, at 384-88.
250. Hardeman, 401 U.S. at 241 n.6 (citing International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 195-97 (5th Cir.), cert. denied, 391 U.S. 935 (1968) ("Even if the conduct is arguably subject to the NLRA... it is also a violation of the LMRDA... A clear Congressional directive that federal courts have jurisdiction to entertain suits for damages has precedence over application of the primary jurisdiction rule."); Rekant v. Shoctay-Gasos Union Local 446, 320 F.2d 271 (3d Cir. 1963) (§ 102 providing for federal enforcement of a union member's rights); Parks v. IBEW, 314 F.2d 886 (4th Cir.), cert. denied, 372 U.S. 976 (1963) (§ 103 preserving all remedies under any law or before any tribunal; district court not to abstain from exercising jurisdiction when issue arguably subject to the NLRA); Addison v. Grand Lodge of the IAM, 300 F.2d 863, 868 (9th Cir. 1962) ("The [LMRDA] embodies a Bill of Rights of members of labor organizations, and for infringement of its rights, the Act provides a federal forum."); Grand Lodge of the IAM v. King, 335 F.2d 340, 347 (9th Cir.), cert. denied, 349 U.S. 920 (1964) ("Congress was aware that the rights conferred by the [LMRDA] overlapped those available under state law and other federal legislation, and expressly provided that these rights were to be cumulative.").
touchstone is congressional intent. Congress, in various provisions throughout the LMRDA, indicated its intent that causes of action under the statute not be preempted. Congress expressly provided for individual enforcement of Title I rights in federal court by enacting section 102. It also specifically provided for the enforcement of Title V rights in section 501(b), and for the enforcement of section 609 rights by making the provisions of section 102 applicable to their enforcement. Similarly, as section 103 evinces congressional intent that LMRDA remedies with respect to Title I be cumulative of all other available state or federal remedies, section 603 evinces that same intent with respect to all six titles of the LMRDA.

The rights being vindicated in an LMRDA action arise out of the union member-union relationship. Violation of those rights might have a corollary effect on the employer-employee relationship, but the focus of the LMRDA, and the court’s analysis of a claim, remains the member-union relation. The court will consider whether the union member’s status as a member was affected, and whether the conduct is forbidden under the LMRDA. This is a different focus and concern than that im-

supra note 172, at 754-55. For present purposes, consideration of preemption will be limited to claims raised under Title I, Title V and § 609.

Suits under the LMRDA which involve claims arising from the same core of facts as an unfair labor practice under the NLRA are analogous to actions under § 301 and § 303 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. §§ 185, 187 (1982). Under § 301, an individual may sue to redress a violation of the collective bargaining agreement even though the violation itself may constitute an unfair labor practice. Like the LMRDA, § 301 has been held to confer substantive rights upon employees covered by the collective bargaining agreement, and Congress directed the courts to formulate and apply federal law to these suits. Therefore, Garmon does not preempt individual suits in federal court under § 301. Smith v. Evening News Ass’n, 371 U.S. 195 (1962). Similarly, the same conduct which constitutes an unfair labor practice under § 8(b)(4) of the NLRA, and for which that Act provides an administrative remedy, also gives rise to a claim for damages cognizable in either state or federal court under § 303. Local 20, Teamsters v. Morton, 377 U.S. 252, 258 n.13 (1964).


253. The court in Vandeventer v. IUOE Local 513, 579 F.2d 1373, 1377-78 (8th Cir.), cert. denied, 439 U.S. 984 (1978), examined the legislative history of both § 101 and § 609 and found that it indicated congressional intent that union members have remedies before both the federal courts and the NLRB.


255. 29 U.S.C. § 523 (1982) states, in pertinent part:

(a) . . . except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal Law or law of any State.

(b) . . . nor shall anything contained in said titles [I through VI] of this Act be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended.

256. This corollary effect can occur when discipline of a member or infringement of a member’s rights takes the form of discrimination in job referrals resulting in loss of employment opportunities. See supra text accompanying notes 133-213.
plicated by the NLRA. The latter statute is concerned with regulating the employer-employee relation by means of the employer-union relation. The court in an LMRDA case is not being asked to adjudicate the legality of conduct as it applies to the employer-union relation governed by the NLRA; rather it is determining the legality of a union's conduct as it affects the members and the institution as a whole. If a union member's Title I rights are infringed, or the member is disciplined for exercising those rights, the federal court can determine these questions under the LMRDA without considering the legality of such conduct under the NLRA. The same is true when the court is asked to determine whether a union officer has breached his fiduciary obligations to the union—there is no need to consider the NLRA. No danger of inconsistent or conflicting interpretations of the NLRA is present.

Therefore, neither of the rationales behind preemption theory is applicable to the LMRDA. As to the substantive right argument, the LMRDA is a federal statute, enacted by a Congress fully cognizant of the existence of the NLRA, which created new rights and regulated conduct not within the scope of the NLRA. Congress in section 103 and section 603 plainly expressed its intent that any rights under the LMRDA exist alongside all existing rights, including those under the NLRA. As to the primary jurisdiction branch of the preemption doctrine, Congress in section 102 and section 501(b) clearly granted jurisdiction to the federal district courts to enforce the LMRDA. This enforcement does not require any consideration of the terms of the NLRA.

Courts presented with the preemption defense in LMRDA cases since Hardeman have rejected it. Many of these cases involve section 101(a)(5), and are therefore directly governed by Hardeman. Various cases, however, have dealt with other sections of the LMRDA.

In Benda v. Grand Lodge of IAM, the preemption argument was raised in the context of a Title III suit challenging the imposition of a union trusteeship. The court held that clear expressions of congres-
sional intent that federal courts exercise jurisdiction to enforce the LMRDA take precedence over any claim of NLRB primary jurisdiction. In *Quinn v. DiGiulian*, the union allegedly disciplined, fined and suspended from membership a union member because of his political activity within the union, eventually leading to his discharge from his job, in violation of sections 101(a)(1), (2) and (5) and section 609. The court, relying on *Hardeman* and *Benda*, rejected the union’s preemption argument: a claim of illegal union disciplinary action is not preempted merely because a consequence of the discipline is loss of employment.

Although dealing specifically with a claim arising under section 101(a)(1), the court in *Woods v. Local 613, IBEW*, unequivocally held that rights guaranteed under the LMRDA are not preempted by the NLRA. This conclusion was based on two considerations. First, the role of *Garmon* was to prevent conflict between state and federal policy. The LMRDA is itself an expression of federal policy and Congress has entrusted the courts, not the NLRB, with primary responsibility in enforcing that policy. Second, section 103 provides that the LMRDA is cumulative of other rights, including those provided by the NLRA. A similar analysis led the court in *Martin v. Flannery* to find that plaintiff’s section 101(a)(4) claim was not preempted. The court held that the statutory scheme of the LMRDA precludes preemption as evidenced by section 102, which explicitly vests jurisdiction in the federal courts. The rationale for preemption is not applicable since the federal court bases its decision on an independent federal law and is not required to interpret the NLRA.

Likewise claims of political abuse of hiring hall referrals based on sections 101(a)(2) and (5), section 609 and section 501 of the LMRDA are not preempted by the NLRA. Such claims find their basis apart from...
NLRA considerations, and on the independent federal policy to promote union internal democracy.

2. Statute of Limitations

Neither section 102\(^{268}\) nor section 501(b)\(^{269}\) contains an express limitations provision for the filing of enforcement actions. As different principles govern the determination of the appropriate limitations period for these two provisions, they will be discussed separately.

a. Section 102

Where Congress creates a cause of action but does not provide a limitations period, courts will often apply the most closely analogous state statute of limitations of the forum state.\(^{270}\) These state limitations periods will not be borrowed, however, if their application would be inconsistent with the underlying policies of the federal statute.\(^{271}\) Initially, the federal courts followed this general rule and applied the most closely analogous state limitations period to LMRDA suits.\(^{272}\) The Supreme Court decision in \textit{DelCostello},\(^{273}\) however, caused many courts to reconsider the appropriateness of this course of action.

\textit{DelCostello} involved a hybrid duty of fair representation/section 301\(^{274}\) lawsuit. The employee alleged that the employer had violated the collective bargaining agreement, and that the union's handling of his grievance protesting the contract violation constituted a breach of its duty to fairly represent him. The Court was asked to decide the appropriate statute of limitations applicable to such hybrid suits.\(^{275}\)

The Court began its analysis by reiterating the general rule of borrowing analogous state statutes. It then noted that in some instances the state statutory periods may act to frustrate or interfere with the implementation of national policies, in which case the Court will look to federal law for an appropriate limitations period. Having stated the rule

\(^{268}\) Section 102 governs enforcement of suits alleging violations of Title I and § 609.

\(^{269}\) Section 501(b) is the enforcement provision for actions alleging breach of fiduciary duties under § 501(a).


\(^{272}\) See, e.g., Copitas v. Retail Clerks Int'l Ass'n, 618 F.2d 1370 (9th Cir. 1980) (applying California three-year limitation period for causes of action upon liability created by statute); Howard v. Aluminum Workers Int'l Union, 589 F.2d 771 (4th Cir. 1978) (applying Virginia two-year limitation period for tort); Sewell v. Grand Lodge of IAM, 445 F.2d 545 (5th Cir. 1971), \textit{cert. denied}, 404 U.S. 1024 (1972) (applying Alabama one-year limitation period for injury to personal rights).

\(^{273}\) \textit{DelCostello}, 462 U.S. at 151.


\(^{275}\) \textit{DelCostello}, 462 U.S. at 154-58.
and its exception, the Court proceeded to discuss its decision in *UAW v. Hoosier Cardinal*,\(^{276}\) which had followed the general rule, and distinguished it from the facts presented by *DelCostello*\(^{277}\).

The Court noted that *Hoosier Cardinal* "was a straightforward suit under section 301" for breach of a collective bargaining agreement, filed by the union against the employer. While recognizing that the field of labor law ordinarily calls for national uniformity, the Court reasoned that uniformity was less important in cases not involving the formation of collective bargaining agreements or the private settlement of disputes under such agreements. The Court also observed the close analogy between section 301 suits and breach of contract cases. It was, therefore, appropriate to apply the state limitations period for actions on unwritten contracts.\(^{278}\)

The *DelCostello* case, on the other hand, involved a suit filed by an employee challenging the private settlement of a dispute under a collective bargaining agreement. Such a suit, involving as it does a hybrid of claims—one against the employer and one against the union—has no close analogy in ordinary state law. Rather, it bears a resemblance to unfair labor practice charges alleging breach of the duty of fair representation under section 8(b)(1)(A) of the NLRA, and breach of the duty to bargain under section 8(a)(5).\(^{279}\) Moreover, the policy considerations underlying the six-month limitation period for unfair labor practices in section 10(b) of the NLRA are similar to those involved in a hybrid case: "the proper balance between the natural interests in stable bargaining relationships and the finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining agreement."\(^{280}\) Thus, the six-month section 10(b) period was held to govern such claims.

The Court concluded its decision by cautioning that it was not departing from the general rule of borrowing state statutes and counseled courts to continue to use a flexible approach in determining a limitations period.\(^{281}\)

Subsequently, several circuit and district courts have applied the holding of *DelCostello* to LMRDA cases.\(^{282}\) The most extensive rationale given for applying *DelCostello* is found in the Third Circuit's decision...


\(^{277}\) *DelCostello*, 462 U.S. at 158-62.

\(^{278}\) *Id.* at 162-63.

\(^{279}\) *Id.* at 163-70.

\(^{280}\) *Id.* at 171.

\(^{281}\) *Id.* at 171-72.

\(^{282}\) Davis v. UAW, 765 F.2d 1510 (11th Cir. 1985), cert. denied, 106 S. Ct. 1284 (1986); Val- lone v. Local 705, Int'l Bhd. of Teamsters, 755 F.2d 520 (7th Cir. 1985) (per curiam); Adkins v. IUE, 769 F.2d 330 (6th Cir. 1984); Local 1397, USWA v. United Steelworkers of Am., 748 F.2d 180 (3d Cir. 1984); McConnell v. Chauffeurs Local 445, 606 F. Supp. 460 (S.D.N.Y. 1985); Legutko v.
in *Local 1397, USWA v. United Steelworkers of America.* This case involved a section 102 suit alleging violations of sections 101(a)(2) and (5) and section 609 of the LMRDA. The court found a resemblance between unfair labor practice charges and section 102 suits—both section 8(b)(1) and section 102 address the same basic concern of protecting workers from arbitrary union actions. The court argued that any attempted distinction between the internal concerns of the LMRDA and the external concerns of the NLRA is flawed; the union has one function, which is to represent workers in bargaining with employers. Secondly, the court found the policy considerations favoring rapid resolution of bargaining disputes in order to maintain stability in bargaining relationships to apply as well to LMRDA suits, noting that dissension within the union impacts on the union's effectiveness in collective bargaining with employers. Therefore the court applied the six-month limitation period provided in section 10(b) of the NLRA.

The Eleventh Circuit in *Davis v. UAW* agreed that there was a resemblance between alleged violation of Title I rights and unfair labor practice charges as noted by the Third Circuit. It disagreed, however, with the Third Circuit's analysis of the policy considerations. The court found an important distinction between Title I actions, which implicate national interests in union democracy and involve only the union and its members, and *DelCostello* hybrid claims, which involve the employer and the bargaining relationship and implicate only individual employee interests. Moreover, it thought the link between internal union dissension and the union's effectiveness in bargaining, noted by the Third Circuit, to be rather tenuous. Nevertheless, the court felt "constrained by the rationale of *DelCostello* and the holding of our sister circuits to reach the same conclusion," and applied the section 10(b) statute of limitations.

Recently courts have shown a reluctance to automatically apply the holding of *DelCostello* and have found the policy considerations underlying that case to be inapplicable to LMRDA suits. These cases represent a better balancing of interests and more appropriate analysis of the
issues than the earlier court decisions. In thorough and well reasoned opinions these courts have thoughtfully criticized prior cases applying *DelCostello* and explained the distinctions between LMRDA and hybrid suits.

Although there may be a surface similarity between claims under the NLRA and the LMRDA, the focus of these statutes differs. The NLRA secures worker economic rights gained through collective bargaining whereas the LMRDA regulates internal union affairs and secures worker civil rights from union abuses.\(^\text{291}\) The Third Circuit's view of a union's function is too narrow: unions not only engage in collective bargaining, but offer employees the opportunity to participate in decisions that affect their working lives. "Participation has an independent value of its own; the LMRDA protects rights of participation."\(^\text{292}\)

LMRDA claims do not implicate the employer nor do they have any immediate or direct impact on the bargaining relationship or agreement. Any effect on the contractual concerns involved in *DelCostello* is tangential at best.\(^\text{293}\) Even where LMRDA claims implicate employment issues, these issues are not the focus of the claims. Rather, employment issues are implicated as a consequence of the union's illegal actions toward its members.\(^\text{294}\)

Finally, unlike hybrid claims which find no easy analog in state law, LMRDA claims are similar to state claims. Title I establishes a "bill of rights" similar to that found in the Constitution,\(^\text{295}\) and section 102 seeks to protect those civil and political rights from infringement by union government. As such, a claim under Title I closely resembles a civil rights claim.\(^\text{296}\) The Supreme Court in *Wilson v. Garcia* characterized a federal civil rights claim as a personal injury action for purposes of determining

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291. *Doty*, 784 F.2d at 3-4.
294. *Accord McQueen v. Maguire*, 122 L.R.R.M. (BNA) 2449 (S.D.N.Y. 1986), which alleged a violation of § 101 as a result of the union's refusal to refer certain members from the hiring hall because they had participated in a Title VII lawsuit against the union. "Although I recognize that this action presents a challenge to the union's management of a collectively bargained hiring hall referral system, resolution of plaintiff's claims will have insufficient impact on the collective bargaining process to justify application of § 10(b)." *Id.* at 2453.

As the First Circuit specifically pointed out in *Doty*, those LMRDA cases which are appended to hybrid § 301/fair representation claims and basically involve challenges to the terms of a collective bargaining agreement or settlement thereunder may appropriately be governed by *DelCostello*. *Doty*, 784 F.2d at 4. *See also* Linder *v. Berge*, 739 F.2d 686 (1st Cir. 1984); Adkins *v. IUE*, 769 F.2d 330 (6th Cir. 1984).
the appropriate state statute of limitations. It is appropriate, therefore, to apply the personal injury statute of limitations of the forum state to claims arising under Title I of the LMRDA.

b. Section 501(b)

As discussed earlier, the fiduciary principles contained in section 501 are based on the common law. Traditionally, the liability of a trustee who breached her fiduciary obligations sounded in equity. Accordingly, actions brought under section 501 have been considered equitable rather than legal in nature.

In the absence of an express statute of limitations, the court of equity fashions its own time limitation under the principle of laches. Therefore, suits filed under section 501 are governed by the doctrine of laches. Whether a court, in its discretion, will invoke the doctrine of laches does not depend on the length of time since the cause of action arose, but whether, under the circumstances presented, the plaintiff's delay and lack of diligence in prosecuting his claim has caused prejudice to the defendant.

In sum, for purposes of the statute of limitations on LMRDA claims, courts should borrow the forum state limitations period for personal injury actions in suits brought under section 102, and should apply the doctrine of laches to suits brought under section 501(b).

3. Exhaustion of Internal Union Remedies

The doctrine withholding judicial relief for an alleged injury until the prescribed internal remedies have been exhausted has been applied not only in the field of administrative law but also to the activities of private associations. As private associations, unions have received the

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298. See cases cited supra note 296.
299. See supra text accompanying notes 214-21.
300. Restatement (Second) of Trusts § 197 (1959).
benefit of this doctrine. The purposes served by the exhaustion requirement are conservation of judicial resources and preservation of institutional autonomy.

a. Section 101(a)(4)

Section 101(a)(4) of the LMRDA provides that a member may be required to exhaust intraunion procedures (not to exceed four months) before instituting legal action against the union. This provision has been interpreted as incorporating the exhaustion principle into the LMRDA. This principle, however, is not mandatory—it does not act as a jurisdictional bar to judicial relief. Rather it commits to the discretion of the court the decision whether a union member will be required to exhaust the available union remedies prior to resorting to the court under section 102.

Although a court’s decision on whether to require exhaustion depends upon the facts and circumstances of each case, there are several well established exceptions to the general principle of exhaustion. Exhaustion will not be required if there is no likelihood that the union will render a decision within four months, if the remedies available

land and Virginia Milk Producers Ass’n, 250 Md. 24, 242 A.2d 512 (1968) (corporation); Annotation, Suspension or Expulsion from Social Club or Similar Society and the Remedies Therefor, 20 A.L.R.2d 344, 385-87 (1951); Annotation, Suspension or Expulsion from Professional Association and the Remedies Therefor, 20 A.L.R.2d 421, 486-87 (1951); Annotation, Suspension or Expulsion from Church or Religious Society and the Remedies Therefor, 20 A.L.R.2d 531, 564-65 (1951). See Note, Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1069-80 (1963) [hereinafter Developments in the Law]; Comment, Exhaustion of Remedies in Private, Voluntary Associations, 65 Yale L.J. 369 (1956) [hereinafter Comment, Exhaustion of Remedies].


No labor organization shall limit the right of any member thereof to institute an action in any court . . . Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization. . .


313. See J. BELLACE & A. BERKOWITZ, supra note 102, at 58-63; Beaird & Player, supra note 311, at 530-39.

through the union are inadequate, if no appeal procedures are available, if appeal would be futile, or if the union's action is void ab initio.

In any event, even when a court requires an individual to resort to internal union procedures, "exhaustion" in the sense of pursuing those procedures to their final conclusion will never be required. As mandated by section 101(a)(4), pursuit of union remedies past a four month period will not be required. Thus, prior to filing a suit under section 102, a union member may be required to some extent to utilize the union's internal grievance procedure to seek redress for his injury.

b. Section 501(b)

Section 501(b) contains its own specific prerequisites to filing suit: failure of the union to institute its own suit upon demand by the member, and leave of court to file complaint by filing verified application upon good cause shown. Before discussing these prerequisites, an initial question presents itself—must the union member exhaust her internal procedures pursuant to section 101(a)(4) as well as meeting the specific prerequisites of section 501(b), or were the latter procedures enacted to replace the exhaustion principle contained in section 101(a)(4)? Case law is split on this question. The more recent and persuasive authority, however, views the requirements of section 501(b) as a substitute for those found in section 101(a)(4).

The most extensive analysis finding both exhaustion and compliance with section 501(b) as prerequisites to filing suit is contained in Penelas v. Moreno. There the court initially noted that since federal courts are courts of limited jurisdiction, statutes conferring such jurisdiction should be strictly construed. In line with this concept of strict construction, the court found no indication that exhaustion under section 101(a)(4) is not applicable to section 501. Moreover, according to the court, Congress clearly expressed its intent not to abrogate the exhaustion doctrine, and the policies which underlie that doctrine apply with equal force to section 501. Lastly, the court held that the "good cause" requirement of section 501(b) invites reference to the exhaustion doctrine, reasoning that a plaintiff who has not exhausted internal union remedies lacks good cause to file suit in court.

Rosario v. Amalgamated Ladies' Garment Cutters' Union, 605 F.2d 1228 (2d Cir. 1979), cert. denied, 446 U.S. 919 (1980).

316. Vandevener, 579 F.2d at 1379.
317. Keene v. IUOE, Local 624, 569 F.2d 1375, 1379 (5th Cir. 1978).
319. See Beaird & Player, supra note 311, at 530-31 and cases cited therein.
The *Penuelas* decision has been criticized by courts and commentators alike.\(^{322}\) The fact that Congress specifically referred to exhausting union procedures in section 101(a)(4) while in the same enactment providing different prerequisites for suit in section 501(b) indicates an intent to omit the exhaustion principle in section 501 suits.\(^{323}\) It should also be noted that Congress explicitly referred to intraunion exhaustion requirements not only in section 101(a)(4) but also in Title IV,\(^{324}\) which governs election procedures.\(^{325}\) Before a union member may file a complaint with the Secretary of Labor challenging a union election, she must first exhaust her available union remedies.\(^{326}\) This indicates that when Congress wanted to require exhaustion it knew how to say so.

In section 501(b) Congress imposed a requirement of demand and refusal as the means to alert the union to the problem and allow it the opportunity to correct the situation, thus serving the policy of institutional autonomy. The good cause requirement acts to advance the interest in preservation of judicial resources. Thus the policy considerations underlying the exhaustion principle are fulfilled by the preconditions contained in section 501(b), so that superimposing the exhaustion doctrine contained in section 101(a)(4) would be redundant.

In any event, as it would be highly unlikely that a suit alleging political abuse of the hiring hall would be brought solely under section 501(a) without a companion allegation under Title I, the union member should have already complied, as necessary, with the exhaustion requirement of section 101(a)(4).

An issue separate and distinct from exhaustion is compliance with the stated prerequisites to a section 501 suit: demand and refusal, verified application and good cause. Initially the union member must make a demand to the union that it sue to secure appropriate relief for the breach of fiduciary duty, and allow the union a reasonable time to comply with the request.\(^{327}\) Some courts have strictly construed this requirement,
finding failure to make the demand cause for dismissing the complaint.\textsuperscript{328} Other courts have been more liberal and have excused failure to make a demand where it would be futile.\textsuperscript{329} In view of the purpose served by requiring the demand—preservation of institutional autonomy by allowing the union an initial opportunity to deal with all problems—it makes little sense to require such an act where it is clear that the union does not intend to handle the problem. As with the exhaustion principle embodied in section 101(a)(4), it should be within the court’s discretion to excuse compliance when the purpose behind the requirement would not be served.

After demand and refusal, the union member must file a verified application seeking leave of the court to file a complaint upon good cause shown. The purpose served by this requirement is to protect union officials from vexatious and harassing lawsuits.\textsuperscript{330} The courts have not been rigidly formalistic with regard to the procedure used to obtain the court’s permission to file a complaint. Permission has been granted after the complaint was filed, where the complaint itself was verified and the complaint contained a request to file suit or counsel moved for leave to proceed.\textsuperscript{331}

The meaning of “good cause” in this context was definitively established by the court in \textit{Dinko v. Wall}, where the court construed good cause “to mean that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence.”\textsuperscript{332} In determining whether such good cause exists, the court is not limited to the face of the complaint, but may take into account all the facts and circumstances, including exhibits and affidavits.\textsuperscript{333} This determination may be made ex parte,
or on the basis of a hearing.334

4. Remedies
   a. Section 102

Section 102 provides for the granting of "appropriate" relief, including injunctions. In a case alleging political abuse of the hiring hall such appropriate relief may include compensatory and punitive damages as well as injunctive relief.

(1) Compensatory Damages

The standard generally used by the courts in determining the appropriateness of awarding compensatory damages allows recovery for those injuries suffered as a proximate result of the wrongful union conduct.335 The union member subjected to discriminatory referral practices will suffer a decrease in, or total loss of, employment income and related fringe benefits, such as contributions to health, welfare and pension funds. Such losses, which are the direct result of the union's unlawful conduct, are clearly recoverable.336 Other nonmonetary injuries caused by the union's conduct are also compensable, such as injury to reputation, loss of sleep, and physical illness (headaches, palpitations, weight gain or loss).337 The courts are not in agreement as to whether mental suffering or emotional distress alone is compensable.338

(2) Punitive Damages

There is also some question as to the award of punitive damages under the LMRDA. Those circuit courts which have considered the issue have unanimously held that punitive damages may be awarded where

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334. Horner, 362 F.2d at 228-29: "Thus section 501(b) provides that such an application may be made ex parte. But the court may, on its own motion, call for a hearing, or may grant the defendant's motion for a hearing."

335. See, e.g., Bise v. IBEW, 618 F.2d 1299, 1305 (9th Cir. 1979), cert. denied, 449 U.S. 904 (1980); Braswell, 388 F.2d at 199; Simmons v. Avisco, Local 713, 350 F.2d 1012, 1019 (4th Cir. 1965); Murphy, 99 L.R.R.M. (BNA) at 2131. See Etelson & Smith, supra note 172, at 769.

336. See, e.g., Rosario v. Garment Cutters, 605 F.2d at 1245; Bise, 618 F.2d at 1305; Keene, 569 F.2d at 1382; Kuebler v. Cleveland Lithographers, 473 F.2d at 364; Braswell, 388 F.2d at 199; Murphy, 99 L.R.R.M. (BNA) at 2133; Sweeney v. Retail Clerks Int'l Ass'n, 78 Lab. Cas. (CCH) ¶ 11,348 (S.D. Cal. 1975); Sands v. Abelli, 290 F. Supp. 677, 681-83 (S.D.N.Y. 1968).

337. See, e.g., Rosario v. Garment Cutters, 605 F.2d at 1245; Bise, 618 F.2d at 1305; Simmons, 350 F.2d at 1019.

338. Compare International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307, 315 (9th Cir. 1965) (apparently construing the term "appropriate relief" in § 102 as referring to equitable rather than legal remedies, although refusing to fashion any general rule with regard to recovery while merely disallowing claims for emotional distress alone) with Bradford v. Textile Workers, Local 1093, 563 F.2d 1138, 1144 (4th Cir. 1977) (allowing damages for mental suffering and humiliation) and Rosario v. Garment Cutters, 605 F.2d at 1245 ("Although a question may exist as to whether damages are recoverable for mental or emotional distress . . . in the absence of some other form of harm . . . we need not . . . decide that issue in this case.").
the union acts with actual malice or reckless and wanton indifference to the rights of the injured member. The rationale behind these decisions was best expressed by the court in *International Brotherhood of Boilermakers v. Braswell*. The court initially considered the purposes behind the LMRDA, one of which is to prevent improper practices on the part of labor unions. The court found that this deterrent purpose is served by the award of punitive damages. Next, the court looked at how the state courts had handled the issue prior to the passage of the LMRDA. The court found persuasive the logic of the New York state court upholding punitive damages on policy grounds:

The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the organization, it cannot be condoned.

The general consensus on this issue has been called into doubt by the Supreme Court's opinion in *IBEW v. Foust*. The case involved a union member's claim that the union breached its duty of fair representation by the way it handled his grievance. The sole issue before the Court was whether an award of punitive damages is proper in such a case. In determining that punitive damages are improper, the Court based its decision on four factors. First, the purpose behind fair representation suits is to make the injured party whole, while punitive damages go beyond compensating for the injury suffered. Second, limiting union liability "reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interest of union members in protecting limited funds." Awards of punitive damages could deplete union treasuries, weakening the effectiveness of the union. This concern is particularly appropriate in light of jury discretion in determining the award amount, which can be employed to punish unpopular defendants such as unions. Third, the possibility of punitive damages could act to curtail the broad discretion given to un-


341. *Id.* at 200.


344. *Id.* at 45-46.

345. *Id.* at 45-50.

346. *Id.* at 50.

347. *Id.* at 50-51 & n.14.
ions in the handling of grievances. This could result in disrupting the stability of collective bargaining agreements as unions might feel compelled to process every grievance, however frivolous.\textsuperscript{348} Fourth, "general labor policy disfavors punishment,"\textsuperscript{349} and is essentially remedial in nature.

The Court emphasized that it was expressing no views as to the propriety of punitive awards under the LMRDA.\textsuperscript{350} As recognized by Justice Blackmun in his opinion concurring in the result, some of the factors relied on by the Court apply with equal force to suits under the LMRDA.\textsuperscript{351}

The inherent tension between individual and collective interests in fair representation suits, usually involving individual grievances arising under the contract, will normally not be present in a suit under the LMRDA. In the latter case the individual interest in protecting her political rights coincides with the group interest in a democratically run organization. However, there is a collective interest in maintaining the effectiveness of the union, which means having the financial resources to support a strike fund, pay for arbitration and attorneys, and maintain support staff and personnel necessary to negotiate and administer contracts. A large punitive damage award could cripple, if not bankrupt, a local union's treasury.

This problem may be alleviated by several measures short of a complete prohibition on punitive damages. First, liability for punitive damages could be limited to union officers personally.\textsuperscript{352} Deprivations of member rights normally occur for the purpose of advancing individual officers' personal or political interests and not for the good of the organization. It does not seem just to punish the institution for the misdeeds of the officers in such a case.\textsuperscript{353} Second, courts have the discretion to adjust an award of punitive damages that is excessive under the circumstances, which include the losing party's financial situation.\textsuperscript{354} Third, the imposition of punitive damages should be reserved for only the most egregious cases, where the conduct of the union or its officers is the result of actual malice.\textsuperscript{355}

The other factor mentioned by the \textit{Foust} Court that is applicable to

\textsuperscript{348} \textit{Id.} at 51.
\textsuperscript{349} \textit{Id.} at 52.
\textsuperscript{350} \textit{Id.} at 47 n.9.
\textsuperscript{351} \textit{Id.} at 59.
\textsuperscript{352} As will be discussed \textit{infra} text accompanying notes 369-73, individuals who abuse their authority as union officials are personally liable for damages resulting from violation of member rights.
\textsuperscript{353} See Etelson & Smith, \textit{supra} note 172, at 770.
\textsuperscript{354} Accord Hall v. Cole, 412 U.S. at 9 n.13; DiGiulian, 739 F.2d at 651 & n.22; Murphy, 774 F.2d at 134-35.
\textsuperscript{355} Accord DiGiulian, 739 F.2d at 651. This standard is somewhat stricter than that previously
INDUSTRIAL RELATIONS LAW JOURNAL

LMRDA suits is the essentially remedial character of the national labor laws. Almost all federal labor laws are limited to compensatory remedies.\textsuperscript{356} There are a few instances, however, where Congress has provided for damages over and above those necessary to compensate the plaintiff. The Fair Labor Standards Act provides for an award of liquidated damages in an amount up to the amount of wages recovered.\textsuperscript{357} The Age Discrimination in Employment Act provides for liquidated damages where violations are willful.\textsuperscript{358} The issue, then, is the intent of Congress with respect to punitive damages under the LMRDA.

Nothing in the legislative history expressly authorizes or precludes punitive damages,\textsuperscript{359} although several statements indicate that Congress did not intend the LMRDA to be punitive in nature. The Senate Report on S.B. 1555, which at this time did not contain a "Bill of Rights" Title I, noted that "[t]he committee rejects the notion of applying destructive sanctions to a union. . . ."\textsuperscript{360} In support of the substitute bill which he cosponsored, Representative Griffin made the following remarks: "The substitute introduced today is a moderate but effective reform bill. It is not punitive or extreme."\textsuperscript{361} But neither of these comments was directed specifically at the enforcement provisions of Title I, and they are much too general in nature to be conclusive of the issue.

On the other hand, Congress did clearly express its intent that union members retain all rights and remedies which they enjoyed under state law.\textsuperscript{362} One of those state remedies, as noted by the Braswell court,\textsuperscript{363}

approved in LMRDA cases. The prior standard allows punitive damages where defendant acts with reckless or wanton indifference as well as maliciously. See supra text accompanying note 339.

This limitation on punitive damages is appropriate not only where liability is imposed on the union itself but also where it is imposed solely on the offending officer. The rationale for limiting it where unions are liable—the necessity for preserving the fiscal integrity of the union treasury—has been discussed in the text. The limitation on officer liability is based on the reality of union compensation. Particularly on the local level, union officers are paid little or, in some circumstances, not at all. If these individuals were held personally liable for punitive damages, other than for actual malice, it could reduce the pool of people willing to hold union office. This too would weaken a union's effectiveness.

356. See, e.g., \textit{Foust}, 442 U.S. at 42 (union not liable for punitive damages for breach of duty of fair representation); \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405 (1975) (Title VII); \textit{Teamsters v. Morton}, 377 U.S. 252 (1964) (employer's damages under § 303 limited to actual losses); \textit{Republic Steel Corp. v. NLRB, 311 U.S. 7} (1940) (NLRB cannot impose punitive sanctions for unfair labor practices).


359. \textit{DiGiulian}, 739 F.2d at 648-49; \textit{Bise}, 618 F.2d at 1305 n.6.

360. \textit{I LEGISLATIVE HISTORY OF THE LMRDA, supra note 152, at 403.}

361. \textit{II LEGISLATIVE HISTORY OF THE LMRDA, supra note 152, at 1519.}


363. 388 F.2d at 200. See supra text accompanying note 342.
was the award of punitive damages to plaintiffs where union officials malic-iously deprive them of their rights. The possibility of punitive damages in these situations did not seem to overly concern Congress. The Supreme Court, in considering the legislative history of section 102 in 
Hall v. Cole, found congressional intent “to afford the courts ‘a wide latitude to grant relief according to the necessities of the case.’” Finally, punitive damages would clearly serve the congressional purpose to “prevent improper practices on the part of labor organizations.”

The balance between maintaining the effectiveness of the union as an institution and protecting the rights of union members could perhaps best be struck by allowing punitive damages to be awarded only against individual union officers, and only when their conduct rises to the level of actual malice.

With respect to the individual liability of union officers for damages, section 102 does not create a cause of action against individual officers who commit tortious acts in their private capacities. The courts are unanimous, however, in holding union officers personally liable for acts performed under color of, and in abuse of, their authority as union officials. Such individual liability is necessary to achieve one of the purposes behind the LMRDA—“to curb the power of overweening union officials.” Liability is present not only where the individual officer abuses his official authority to deny a member her rights under the LMRDA, but also where he uses his authority to direct or induce others to do so. Of course, officials who act in a good faith effort to discharge their official duties have a defense to the imposition of personal liability.

367. Those courts which have considered the award of punitive damages since Foust have continued to find them appropriate in LMRDA suits. They have not, however, limited damages in the manner here suggested. DiGiulian, 739 F.2d at 648-52; Parker v. Local 1466, USWA, 642 F.2d 104, 107 (5th Cir. 1981); Bise, 618 F.2d at 1305-06.
370. Rosario v. Garment Cutters, 605 F.2d at 1246; Morrissey, 544 F.2d at 24.
372. Keene, 569 F.2d at 1381 n.7; Morrissey, 544 F.2d at 24; White v. King, 319 F. Supp. 122, 126 (E.D. La. 1970).
Union officers with authority to operate the hiring hall system, who use that authority to discriminate against members who assert their political rights under the LMRDA, are abusing their positions and are personally liable for the damages caused. Even if the officer herself is not responsible for making referrals, but only uses her authority as a union official to persuade the person who does make the referrals to discriminate, she can still be held personally liable.373

(3) Injunctive Relief

Section 102 specifically provides for the grant of injunctive relief. In a case involving political abuse of the hiring hall, an injunction would require restoring the plaintiff's name to its proper place on the referral list, enjoining the union and its officers from discriminating against the plaintiff in future referrals, and imposing a method of validating the referral practices to ensure against future discrimination.374 In addition to the grant of permanent injunctive relief after the trial, section 102 also allows for the grant of preliminary injunctive relief where appropriate.375

The grant of a preliminary injunction depends on the plaintiff's ability to show reasonable likelihood of success on the merits and irreparable injury in the absence of an injunction.376 In a political abuse of hiring hall case, the major issue will be the plaintiff's ability to prove irreparable injury. If the sole injury suffered by a union member in such a case were loss of income due to denial of employment opportunities, one might argue that this loss could be adequately compensated by money damages. This, however, is only one of the harms suffered by the plaintiff, since the union officials use this deprivation to keep the plaintiff and other union members from exercising their political and civil rights to speak out on union political issues. It is the loss of these rights which is irreparable.

In another context, the Supreme Court has acknowledged that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."377 The Court has

373. Murphy, 774 F.2d at 119 (union business agent who told hiring hall dispatcher to remove plaintiff's name from referral list held personally liable for damages); Keene, 569 F.2d at 1380-81 (union business agent who influenced the operation of the hiring hall held personally liable for damages).

374. See Murphy, 774 F.2d at 119.


also acknowledged that the LMRDA rights implicated in a political abuse case are similar to those enjoyed under the first amendment. "Congress modeled Title I after the Bill of Rights, and the legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal." The right to speak one's mind is certainly lost where a member suffers the reprisal of loss of income. This loss also serves to chill the free speech rights of other union members who want to avoid similar economic punishment. Such a showing surely meets the requirement of irreparable harm. The deprivation of the right to participate in union affairs is a loss which cannot adequately be compensated. A preliminary injunction in such a case would require the union to refrain from discriminating against the plaintiff in job referrals and to restore her name to its proper place on the referral list.

b. Section 501

A section 501 claim can be filed only against individual union officers, agents or representatives; the section does not provide for suit to be filed against a labor organization. The statute also states the remedy available—recovery of damages, securing an accounting, or other appropriate relief for the benefit of the labor organization. Thus, while this section of the LMRDA can not be used to assert a purely personal wrong and request relief for purely personal benefit, the correction of wrongful acts directed against a specific member may redound to the benefit of the entire membership and the organization as a whole.

Those union officers who abuse their positions of authority to advance their personal political goals injure not only those members who are the targets of the abuse but also the organization as a whole, as their actions subvert the normal democratic processes of the union. "The restoration of orderly democratic processes to the local union is clearly a benefit to the labor organization, and a proper subject of concern to the entire membership." Vindication of personal rights in such a case also benefits the union.

Appropriate relief in that situation would include an injunction requiring the union officers to refrain from violating or chilling union

378. Sadlowski, 457 U.S. at 111.
381. Stelling, 587 F.2d at 1385-86; Pignotti, 477 F.2d at 832.
383. Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968).
384. Accord Pignotti, 477 F.2d at 835-36; Nelson v. Johnson, 212 F. Supp. 233, 298 (D. Minn. 1963), aff'd, 325 F.2d 646 (8th Cir. 1963); see Comment, Fiduciary Duty, supra note 224, at 1194.
385. Pignotti, 477 F.2d at 835.
members' rights under the LMRDA, and to perform their duties and use their offices for the benefit of the union and its members rather than for the advancement of their personal ambitions.  

386

Some commentators have suggested that appropriate relief under section 501 could include removal of the offending individual from union office. 387 This suggestion is based on remedies granted by courts in common law trust cases. 388 But just as the fiduciary duty imposed by section 501 should be interpreted in light of the "special problems and functions of a labor organization," so should the appropriateness of the remedy. Indiscriminate application of conventional trust law in this context overlooks the central role played by the democratic process in labor organizations. Union officers are elected; trustees are appointed. Moreover, the LMRDA contains a specific provision dealing with the removal of elected officials guilty of serious misconduct. 389 Thus, while it would be inappropriate for a court to remove an elected official under section 501, such a remedy could be appropriate where the guilty official or representative was not elected. 390

5. Attorney Fees

The "American rule" governing the apportionment of attorney fees and expenses in civil litigation provides for each party to bear its own costs. 391 Exceptions to this general rule are found in statutory or contractual authorizations or in the equitable power of the courts. 392 Although section 102 contains no statutory authority for the award of attorney fees, the Supreme Court in Hall v. Cole held that a court could exercise its equitable power under the "common benefit" rationale to award reasonable attorney fees to successful plaintiffs in Title I lawsuits. 393

The common benefit theory is applied where a plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." 394 This rationale does not require a finding of bad faith on the defendant's part. Rather it is based on the premise that where a plaintiff's action redounds to the benefit of a group, it would

386. Accord DiGiulian, 739 F.2d at 653. See also Nelson, 212 F. Supp. at 288.
392. Id. at 4 & nn.5-6.
393. Id.
394. Id. at 5 (quoting Mills v. Electric Auto-Lite, 396 U.S. 375, 393-94 (1970)).
be unfair to have her shoulder the entire burden of litigation costs while allowing the group to enjoy the benefits.\textsuperscript{395}

A plaintiff’s Title I suit attacking political abuse of a hiring hall clearly reaps a benefit for all union members. When an individual member is denied job opportunities in retaliation for exercising political rights under Title I, the rights of all members are threatened. The example set is an effective one, chilling the exercise of Title I rights by other members and suppressing democracy within the union. Thus, in vindicating his own rights the union member dispels the chill and revitalizes all members’ rights.\textsuperscript{396} District courts accordingly have the discretion to award the successful Title I plaintiff in a political abuse of the hiring hall case reasonable attorney fees from the union treasury.\textsuperscript{397}

Section 501(b) contains an express provision allowing the court to “allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting this suit . . . and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.”\textsuperscript{398} A literal interpretation of this clause would limit an award of litigation fees and expenses to those cases where a monetary recovery was achieved, and limit the amount of the award to a “reasonable part” of that recovery. The courts, however, have uniformly rejected such a restrictive reading of the statute.\textsuperscript{399}

The courts have found a liberal construction necessary to effectuate the purposes of the LMRDA.\textsuperscript{400} The concept of “recovery” is not limited to monetary benefits but is broad enough to include any type of benefit bestowed on the union as a result of the lawsuit.\textsuperscript{401} Moreover, Congress has entrusted to individual union members responsibility for enforcing the fiduciary obligations for the benefit of the organization as a whole, and members and their counsel should be protected through the award of fees and expenses whenever such benefit is realized.\textsuperscript{402} Of course, where there is a monetary recovery for the benefit of the organi-

\textsuperscript{395} Hall v. Cole, 412 U.S. at 5-7, 15.
\textsuperscript{396} Accord id. at 8.
\textsuperscript{397} Murphy, 774 F.2d at 127 (upholding district court’s fees award); Vandeventer, 579 F.2d at 1380 (ordering district court to consider fees motion).
\textsuperscript{398} See supra note 110 (text of statute).
\textsuperscript{399} See, e.g., Kerr, 466 F.2d at 1278; Norris, 383 F.2d at 742-43; Bakery Workers Int’l Union v. Ratner, 335 F.2d 691, 696 (D.C. Cir. 1964); Highway Truck Drivers Local 107 v. Cohen, 220 F. Supp. 735, 737 (E.D. Pa. 1963); see J. Bellace & A. Berkowitz, supra note 102, at 303-04; Comment, Facilitating the Union Member’s Right to Sue Under Sections 412 and 501(b) of Landrum-Griffin, 58 Geo. L.J. 221, 237-38 (1969) [hereinafter Comment, Right to Sue].
\textsuperscript{400} It has been suggested, however, that a liberal reading is contrary to the congressional intent found in the legislative history of § 501(b). Clark, supra note 215, at 471-75; accord Bartosic & Minda, Union Fiduciaries, Attorneys and Conflicts of Interest, 15 U.C.D. L. Rev. 227, 339-40 (1981).
\textsuperscript{401} Cohen, 220 F. Supp. at 737.
\textsuperscript{402} Norris, 383 F.2d at 742-43; Ratner, 335 F.2d at 696; Comment, Right to Sue, supra note 399, at 237-38.
zation, the resulting fund may prove a source for the payment of fees.\textsuperscript{403}

A benefit to the union and its members is surely realized when an individual successfully stops a union officer or representative from abusing her position of authority in making referrals from a hiring hall for the purpose of punishing political enemies and rewarding political allies. When the members know that their opportunities for employment will no longer be jeopardized if they engage in union political activity, they will be more inclined to exercise their civil and political rights within the organization. Increased membership participation within the union can only serve to strengthen it as a democratic institution responsive to, and reflective of, the will of its members.

V

A COMMENTARY ON THE COMPARISON

From a policy perspective, the LMRDA is the more appropriate vehicle for challenging political abuse of hiring halls. One of its purposes is specifically to protect union members from union officers who misuse their positions of authority and suppress democratic rights within the union. This is exactly the situation presented by a political abuse of hiring hall case. Both the manner in which the rights are enforced and the liability imposed on offending parties are directed toward effectuating that purpose.

LMRDA litigation is controlled by the plaintiff and his attorney, while in suits under the NLRA the decision to litigate is vested exclusively in the General Counsel.\textsuperscript{404} Also, the availability of discovery procedures in federal court under LMRDA aids the private litigant in obtaining a complete picture of the misuse of the hiring hall and the injury suffered. In many cases, this picture can only be pieced together through deposition of union officers and employees, employers who obtain their workers through the hiring hall, and other union members, as well as documents such as hiring hall lists, referral requests and referral slips. Where referral records are not kept, documents such as health, welfare and pension fund contribution lists can indicate who worked for which employers during what period of time. Where records are kept, the ability to check their accuracy and completeness through pretrial discovery is a necessity.\textsuperscript{405}

The availability of preliminary injunctive relief in LMRDA suits provides another major advantage over NLRA proceedings, in which the individual being denied job referrals can effectively be starved out of the

\textsuperscript{403} Ratner, 335 F.2d at 697. A thorough and excellent analysis of the issues involved in the computation of attorney fees can be found in Bartosic & Minda, supra note 400, at 346-59.

\textsuperscript{404} See supra text accompanying notes 69-74.

\textsuperscript{405} See supra note 76.
union while awaiting disposition of his complaint. The ability to obtain a preliminary injunction in such a situation is of primary interest to a plaintiff.

The shorter time period for obtaining a court-enforceable order for a successful litigant in an LMRDA suit is a further advantage. On a national level, the median time from the filing of a responsive pleading in federal district court to trial was fifteen months in 1980 and fourteen months in 1981. During this same time period, it took approximately two years to obtain a court-enforceable order under the NLRA.

Further, the remedies available under the LMRDA more readily serve the need presented in a political abuse of hiring hall case. First, those individuals responsible for abusing their authority and retaliating against political enemies can be held personally liable. Second, in those situations where malice is present, punitive damages may be awarded. Last, the victim is eligible for compensatory damages which reimburse her not only for work-related losses, but for all damages proximately caused by the unlawful conduct. These types of remedies serve as a powerful deterrent to those union officers who would seek to consolidate their institutional positions at the expense of members' rights. Moreover, the complete remedy afforded the victim serves to encourage other union members to exercise their political rights without fear of severe, uncompensated loss due to officer reprisal.

While the administrative nature of the proceedings makes it rela-

406. See supra note 42.
407. Preliminary relief is available under the NLRA pursuant to § 10(j), 29 U.S.C. § 160(j) (1982). After an unfair labor practice complaint has been issued, the NLRB may petition the district court for a restraining order pending the issuance of a Board decision in the case. The Board's decision to seek § 10(j) relief pursuant to a charging party's request lies solely with the Board and is discretionary, not mandatory. When a request for a § 10(j) injunction is received by the Regional Director, she notifies the Division of Advice, Office of the General Counsel, in Washington, D.C. The General Counsel must then ask for, and receive, authorization from the Board prior to filing a request for § 10(j) injunction. See generally NATIONAL LABOR RELATIONS BOARD, NLRB CASE-HANDLING MANUAL ¶¶ 10310-10312 (1983); Helm, The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions, 7 INDUS. REL. L.J. 599 (1985); Note, Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy, 18 SANTA CLARA L. REV. 1021 (1978). In 1980 the Board filed a total of 50 § 10(j) petitions, only 5 of which sought relief against a union. 45 NLRB ANN. REP. 205 (1980). In 1981 it filed 45 petitions, and only 4 against a union. 46 NLRB ANN. REP. 139 (1981). There is only one reported case of a § 10(j) injunction specifically involving a discriminatory union hiring hall. Brown v. National Union of Marine Cooks, 104 F. Supp. 685 (N.D. Cal. 1951). Thus, while it is possible to obtain a preliminary injunction in a political abuse of hiring hall case under the NLRA, the likelihood of persuading the Board to seek such relief runs counter to established pattern.
409. See supra note 101.
410. Personal liability is not imposed under the NLRA. See supra text accompanying note 95.
411. The NLRA limits monetary relief to work-related losses. See supra text accompanying notes 91-94.
tively inexpensive for an individual to pursue his case through the NLRA, the availability of attorney fees to the successful litigant under section 102 and section 501(b) of the LMRDA should help to equalize the cost of pursuing a case under the two statutes.

CONCLUSION

Hiring halls perform a valuable role in bringing together qualified, available workers and employers in certain industries. In the operation of hiring halls, however, opportunities are present for union leaders to manipulate the referral of applicants to the advantage of their friends and the disadvantage of their enemies. Where the manipulation is motivated by internal union political considerations, rights and liabilities under both the NLRA and the LMRDA are implicated.

In protecting an employee's right to engage in union activities, the NLRA broadly defines the meaning of union activity, encompassing not only external union proselytizing and union activity at the workplace but also internal union political activity. The focus of this statute, however, is on the relationship between the employer and its employees and their union representative. Accordingly, a central concern is ensuring the employees' ability to organize so as to equalize their bargaining power with the employer.

The LMRDA expressly protects a union member's right to engage in internal union political conduct. This protection is not a corollary of the statute's main focus; rather, the central theme behind this legislation is the regulation of the relationship between a union and its members. As such, its goal is to establish and preserve union democracy.

Thus, while both the NLRA and the LMRDA provide mechanisms for attacking political abuse of hiring halls and compensating the victims of that abuse, the enforcement and remedial provisions contained in the LMRDA are more suited to accomplishing the larger objective at stake. The fundamental goal is the protection of the union-member relationship envisioned by Congress, a relationship the hallmark of which is union democracy. The interest in preserving union democracy extends beyond the individual union members and concerns society as a whole, because the functions performed by unions influence not only workers and employers but also the general public. Toward that end, the litigant's subsidiary goals—restoration of democratic procedures within the union, punishment of union officials who constructively steal income from the members by manipulating job referrals, and vindication of the members' political and civil rights within the union—are best achieved through the

412. The investigation and litigation of NLRA cases is handled by tax-paid employees.
LMRDA. Achievement of these goals in turn supports attainment of the larger objective.