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# Union Discipline of its Membership under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?

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# UNION DISCIPLINE OF ITS MEMBERSHIP UNDER SECTION 101(a)(5) OF LANDRUM-GRIFFIN: WHAT IS "DISCIPLINE" AND HOW MUCH PROCESS IS DUE?

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*Analogies between criminal trials and union disciplinary hearings are easily drawn. Both involve charges of prohibited conduct, the presentation of evidence, and decisions by competent and impartial tribunals. Whereas one's physical freedom is at stake in a criminal proceeding, his economic freedom is often imperiled in a union disciplinary hearing. It is not surprising therefore that the requirements of due process have been extended to the labor setting. Embodied in section 101(a)(5) of the Landrum-Griffin Act, due process in the union sphere has been as elusive of definition as in judicial proceedings. Examining section 101(a)(5), Professors Beaird and Player attempt to clarify this area through a discussion of the application of the preemption doctrine to the section, the scope of statutory coverage, the definition of "discipline," and the section's procedural guarantees.*

The Labor-Management Reporting and Disclosure Act of 1959 (hereinafter Landrum-Griffin Act or LMRDA)[1] is founded upon the basic principle that each union member should have the right to participate in the internal affairs of his union, thereby assuring him a voice in fixing the terms and conditions of his employment. Section 101(a)(5),[2] by requiring that union disciplinary pro-

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[1] 29 U.S.C. § 401 *et seq.* (1970) [hereinafter cited as LMRDA].

[2] LMRDA § 101(a)(5), 29 U.S.C. § 411(a)(5) (1970) provides:

> 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.

Union members disciplined in violation of the section's requirements may enforce its provision through civil suits brought in the federal district courts pursuant to LMRDA § 102, 29 U.S.C. § 412 (1970).

ceedings meet certain minimum standards of due process, is essential to implementation of this principle, for unrestricted disciplinary action in the surest method of eliminating criticism of union policy.

Despite the seemingly clear language of section 101(a)(5), a great deal of litigation has been devoted to its interpretation. Accordingly, this Article will review the significant union disciplinary cases of the past decade in an attempt to delineate the boundaries of the section's coverage. Part I will examine the application of the preemption doctrine to section 101(a)(5). Part II will discuss the parties protected by the section. Part III will consider the crucial question of what constitutes "discipline." Finally, Part IV will analyze the particular procedural protections guaranteed by the section.

## I. The Preemption Doctrine

The first question to be considered is whether the preemption doctrine can be utilized to block suits under section 101(a)(5). In analyzing this problem, it is therefore necessary to summarize the law existing prior to Landrum-Griffin and attempt to apply the statute under discussion in that context.

The major concern of the cases prior to Landrum-Griffin was the degree to which the administrative jurisdiction of the National Labor Relations Board (NLRB) preempted judicial action in state and federal courts. For example, in *IAM v. Gonzales*[3] an expelled union member brought suit in state court against his union, seeking reinstatement and consequential damages and claiming that the expulsion was a violation of his contractual rights with the union.[4] Although it recognized that the conduct complained of might constitute an unfair labor practice,[5] the Supreme Court nevertheless

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[3] 356 U.S. 617 (1958).

[4] Traditional analysis of the relationship between a union and its members was that it was one of contract. The union constitution and bylaws, when "accepted" by individual members, became a contract binding on both union and individual. *See* Polin v. Kaplon, 257 N.Y. 277, 177 N.E. 833 (1931); Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 Ala. L. Rev. 577, 581-84 (1973).

[5] 356 U.S. at 619-20. The Court believed that the Board might construe the union's actions as violative of § 8(b)(2) of the National Labor Relations Act (Wagner Act) (hereinafter cited as NLRA), 29 U.S.C. § 158(b)(2) (1970). That section provides that it is an unfair labor practice for a union

> to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

*Id.*

held that the California court had jurisdiction to decide the dispute. The Court reasoned that restoration of union membership was a remedy not available to the NLRB,[6] and more importantly, that the purely internal affairs of the union were matters outside the Board's competence.[7]

Only a year after *Gonzales*, the Supreme Court delivered its seminal preemption opinion in *San Diego Building Trades Council v. Garmon*,[8] in which it held that when an activity is "arguably" violative of the NLRA[9] the jurisdiction of both state and federal courts is preempted by the "exclusive competence" of the NLRB.[10] It should be noted, however, that the Court did nothing to liminate the distinction made in *Gonzales* between purely internal union affairs and matters properly within the Board's jurisdiction. In fact, the Court cited *Gonzales* as authority for the principle that respect for federalism requires preservation of the states' power to regulate activities of only "peripheral concern" to the NLRA.[11]

*Gonzales* and *Garmon* demonstrate that prior to the passage of LMRDA, the distinction between cases concerning union-member relationships and those arising in a collective bargaining context was fairly well established.[12] One would have thought, moreover,

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[6] 356 U.S. at 620-21.

[7] *Id.* at 620. The Court referred to § 8(b)(1) of the NLRA, 29 U.S.C. § 158(b)(1) (1970), which provides that the section does not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." The Court believed that the controversy before it was governed by this language and that to deny state court jurisdiction "would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights." 356 U.S. at 620.

[8] 359 U.S. 236 (1959).

[9] National Labor Relations Act, 29 U.S.C. §§ 151-66 (1970).

[10] 359 U.S. at 245. This statement appears to contradict the idea expressed in *Gonzales* that even though a certain union activity might constitute an unfair labor practice state courts still have jurisdiction. *See* note 5 and accompanying text *supra*. It should be pointed out, however, that at another point in its opinion the Court stated that preemption occurred only when it was "clear" or could "fairly be assumed" that the activities violated the NLRA. 359 U.S. at 244. This shows that the *Garmon* decision requires preemption only where there is a high probability that the challenged conduct constitutes an unfair labor practice—a completely different situation from *Gonzales*, where the Court's reference to the chance of "embedded circumstances" showing a violation of the Act demonstrates that in that case the probability was very low. 356 U.S. at 619.

[11] 359 U.S. at 243-44.

[12] For a decision showing that the distinction survived passage of the LMRDA, see Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963). In that case, a union member, alleging that his union had interfered with his job opportunities, brought suit in a Texas state court. The Supreme Court concluded that the suit did not focus on purely internal union matters but rather on the union's actions with respect to the member's efforts to obtain employment. *Id.* at 697. Consequently, the matter was governed not by *Gonzales* but by

that enactment of Landrum-Griffin would have invalidated the concept of preemption in actions brought under section 101(a)(5). In the first place, the preemption doctrine is based on congressional intent, and the LMRDA's grant of jurisdiction to the federal courts clearly supercedes the idea that judicial action in this area is preempted by the NLRB.[13] Furthermore, one rationale of the preemption doctrine is the prevention of state interference with national policy. The LMRDA, instead of creating the chance of state interference, evidences a conscious choice made by Congress to entrust enforcement of the new federal rights created by the Act to a different federal forum.[14] These reasons led one commentator to conclude that "the preemption doctrine is not relevant to the problem of whether the federal courts have jurisdiction under the L.M.R.D.A. . . ."[15]

Despite the strength of the above arguments, some courts in the early 1960's ruled that they lacked jurisdiction to entertain certain section 101(a)(5) suits because the alleged conduct arguably constituted an unfair labor practice. In *Beauchamp v. Weeks*,[16] for example, the court summarily dismissed a section 101(a)(5) suit brought by a union employee to recover damages from his union for allegedly causing his employer to suspend him from employment. Construing the *Garmon* decision as requiring that the phrase "otherwise disci-

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*Garmon*, and the state court's jurisdiction must yield to the arguable jurisdiction of the NLRB. *Id.* at 696-97. For a discussion of *Borden*, see Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 754-55 (1969). Any remaining vitality of *Gonzales* was largely eviscerated by the Court in Amalgamated Ass'n v. Lockridge, 403 U.S. 274 (1971). In *Lockridge*, an employee was removed from the union allegedly for nonpayment of dues. His union caused his discharge from employment under a valid union security clause. The member recovered damages in state court on the ground that under union rules he was still a "member" and the union violated that rule by dismissing him from the union and causing his discharge. Relying largely upon the fact that the member was not seeking reinstatement in the union, but was seeking relief that the NLRB could provide under sections 8(b)(1) and 8(b)(2) of the NLRA, the Supreme Court reversed the state court judgment. The Court admitted that *Gonzales* could not survive *Garmon*, but rather than overruling *Gonzales*, the Court limited that holding to those situations where the suit "focused upon purely internal matters." Lockridge's suit focused on the employment relationship and thus did not qualify.

[13] For example, enforcement of contract rights, Smith v. Evening News, 371 U.S. 195 (1962), and the duty of fair representation, Vaca v. Sipes, 386 U.S. 171 (1967), were not subject to preemption as Congress was held to have intended parallel remedies by enacting section 301 of the Taft-Hartley Act.

[14] Etelson & Smith, *supra* note 12, at 755.

[15] *Id.*

[16] 48 L.R.R.M. 3048 (S.D. Cal. 1961); *see* Rinter v. Local 24, Lithographers, 201 F. Supp. 204 (W.D. Pa. 1962).

plined" in section 101(a)(5) be strictly construed, the court concluded that the alleged conduct did not constitute disciplinary action within the meaning of the section, but rather was a matter within the exclusive competence of the Board.[17]

The weight of authority, however, soon recognized the inapplicability of preemption to Landrum-Griffin suits. In *Parks v. IBEW*,[18] the Fourth Circuit held that a district court had jurisdiction to hear actions brought under section 101(a)(5) even though the matter might also be within the competence of the NLRB. The court emphasized that Landrum-Griffin created new federal rights in favor of union members and that it would be contrary to congressional intent to require them to wait for a determination by the Board before enforcing those rights in the federal courts.[19] Similarly, in *International Brotherhood of Boilermakers v. Braswell*,[20] the Fifth Circuit emphatically rejected the applicability of the *Garmon* doctrine to section 101(a)(5) suits, emphasizing that the primary purpose of *Garmon* was "to prevent conflicts between federal and state policy," and that if there were any conflict at all here, it was "between two federal organs expressing federal policy."[21] Furthermore, even if the conduct were arguably subject to the NLRA, the court believed that the clear congressional intent that federal courts have jurisdiction to entertain section 101(a)(5) suits took precedence over application of the *Garmon* doctrine.[22]

Any division of authority as to the relevance of the preemption doctrine to section 101(a)(5) suits was resolved by the Supreme Court in *International Brotherhood of Boilermakers v. Hardeman*.[23] In that case a union member sued his union, alleging that he had been expelled without the full and fair hearing guaranteed by section 101(a)(5). The union argued that under *Garmon* the federal courts had no jurisdiction because the gravamen of the complaint was discrimination in job referrals, which was at least arguably an unfair labor practice.

The Supreme Court flatly rejected the union's argument and stated that the critical issue presented by the claim was whether

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[17] 48 L.R.R.M. at 3049.

[18] 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

[19] *Id.* at 922-23. *See* Rekant v. Local 446, Meat Cutters, 320 F.2d 271 (5th Cir. 1963); Plant v. Local 199, Laborers', 324 F. Supp. 1021 (D. Del. 1971).

[20] 388 F.2d 193 (5th Cir. 1968).

[21] *Id.* at 196. *See* text accompanying note 14 *supra*.

[22] 388 F.2d at 196. *See* text accompanying note 13 *supra*.

[23] 401 U.S. 233 (1971).

there had been a full and fair hearing within the meaning of section 101(a)(5).[24] Such a claim was not within the exclusive competence of the NLRB for several reasons. The Court noted first that the preemption doctrine was based on the theory that cases involving issues of fact not within the conventional experience of judges, and those requiring the exercise of administrative discretion, should not be kept from administrative agencies created by Congress. Neither of these factors appeared in the present case.[25] Furthermore, the Court emphasized that Congress believed section 101(a)(5) added new protections to federal labor law.[26] More importantly, Congress explicitly referred claims under the section to the federal district courts, not to the NLRB.[27] Finally, the Court was careful to point out that allowing the federal courts to exercise jurisdiction in section 101(a)(5) actions does not contravene any of the principles established by prior decisions.[28] Since *Hardeman*, therefore, it is abundantly clear that claims of preemption are improper in suits under section 101(a)(5).

## II. WHO IS PROTECTED?

The scope of section 101(a)(5) is limited by its terms to members of labor organizations.[29] A major question has been whether such language includes union officials who have been removed from office without the prescribed procedural rights. In *Grand Lodge of IAM v. King*,[30] discharged union officials claimed that their summary removal from office was in violation of section 101(a)(5). The court concluded, however, that the section does not apply to such actions since removal is not "discipline" within the meaning of this particu-

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[24] *Id.* at 237.

[25] *Id.* at 238.

[26] *Id.* at 239.

[27] *Id.*

[28] *Id.* at 240-41. In reference to the *Garmon* decision, the Court noted that the case stood for two basic principles: (1) that state law could not regulate conduct either protected or prohibited by the NLRA and (2) that where it was unclear whether conduct was left to state regulation, that determination should be made by the NLRB. *Id.* at 240. The Court concluded that the case before it did not infringe upon either of these principles. In the first place, there was no attempt "to apply state law to matters pre-empted by federal authority." *Id.* at 241. Furthermore, since the law to be applied in § 101(a)(5) actions was "federal law explicitly made applicable to such circumstances by Congress, there [was] no danger that state law [might] come in through the back door to regulate conduct that [had] been removed by Congress from state control." *Id.* at 241.

[29] *See* note 2 *supra*.

[30] 355 F.2d 340 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964).

lar subsection of the statute.[31] It emphasized that Congress had explicitly excluded such cases from the section's coverage because to include them would "permit wrongdoing union officials to remain in control while the time-consuming 'due process' requirements of the section were met."[32]

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[31] The officers in *King* also claimed violations of §§ 101(a)(1), 101(a)(2) and 609 of the LMRDA, 29 U.S.C. §§ 411(a)(1), 411(a)(2) and 529 (1970), respectively. The first two sections guarantee union members equal political rights and freedom of speech and assembly. The union argued that these guarantees do not extend to members who are also officers. 335 F.2d at 343. In rejecting this contention, the court emphasized that there was nothing in either the statutory language or legislative history of those sections to imply that officer-members were to be excluded. *Id.* Furthermore, to do so would contravene the sections' purpose of strengthening internal union democracy by denying "protection to those best equipped to keep union government vigorously and effectively democratic." *Id.* at 344.

Since the plaintiffs were protected by §§ 101(a)(1) and (a)(2), the court believed that they had stated a claim which was sufficient under either § 102, 29 U.S.C. § 412 (1970), or § 609 of the LMRDA. For present purposes, the discussion of § 609 is the more important, for through it the court restored to officers some of the protection against removal which it had denied them by its interpretation of § 101(a)(5). *See* Etelson & Smith, *supra* note 12, at 737. Section 609, 29 U.S.C. § 529 (1970), provides:

> 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 Act. The provisions in section 102 [29 U.S.C. § 412 (1970)] shall be applicable in the enforcement of this section.

The crucial inquiry was the meaning of the words "otherwise discipline." The union argued that the phrase should be read "as not including removal from union office, since the same words [had] that restricted meaning in section 101(a)(5)." 335 F.2d at 344. Although admitting that this contention is plausible, the court believed "that identical words may be used in the same statute, or even in the same section of a statute, with quite different meanings." *Id.* When this happens it is the duty of the courts to give the words a meaning consistent with legislative intent. *Id.* at 344-45. The court concluded that Congress did not intend that "otherwise discipline" in § 609 should exclude removal from union office. In the first place, the purpose of § 609 differed greatly from the purpose of § 101(a)(5). While § 101(a)(5) guarantees to union members an independent right of procedural due process, § 609 is not a source of new rights, but an enforcement provision designed "to effectuate rights conferred in other sections of the Act by making it unlawful to punish members who seek to exercise such rights." *Id.* at 345. Such punishment was prohibited "whether inflicted summarily or after a full panoply of procedural protections." *Id.* Furthermore, the purpose of the limiting gloss upon the words "otherwise discipline" in § 101(a)(5) was "to protect unions from continuing depredations while charges [against officers were] being investigated and resolved." *Id.* This purpose would not be furthered by imposing "the same restriction upon the same words in section 609, since that section has nothing to do with whether or not discipline is summary." 335 F.2d at 345.

The *King* court's interpretation of § 609 has been followed by numerous other decisions. *E.g.*, Wood v. Dennis, 84 L.R.R.M. 2662 (7th Cir. 1973); Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012 (D.D.C. 1969). *See* Etelson & Smith, *supra* note 12, at 737-38. *Contra*, Sheridan v. Carpenters Local 626, 306 F.2d 152 (2d Cir. 1962).

[32] 335 F.2d at 341-42.

The *King* court's interpretation of section 101(a)(5) has been universally followed, making the section inapplicable when an officer alleges only that he has been summarily removed from office.[33] If, however, removal is accompanied by other forms of discipline, the section may be applicable.[34] In *Lewis v. American Federation of State, County & Municipal Employees,*[35] for example, it was held that an officer who had been expelled from union membership in addition to being removed from office was entitled to the procedural guarantees of section 101(a)(5).

Another form of discipline which has been held to entitle a discharged officer to the protections of section 101(a)(5) is the imposition by the union of restrictions on the officer's right to seek union office. *Martire v. Laborers Local 1058*[36] involved a union business agent who had been discharged, fined, and barred from union office for five years. Although the court recognized that section 101(a)(5) does not protect the officer from summary removal, it concluded that the part of the penalty which barred the officer from office affected "his status *qua* union member," and thus afforded him a remedy under the section.[37] A similar result was reached in *Schonfeld v. Penza,*[38] an action brought by a union secretary-treasurer who had been removed from office and declared ineligible to run for re-election. The *Schonfeld* court also recognized that mere removal from office gave the plaintiff no right of action under sec-

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[33] *E.g.,* Nelms v. United Ass'n of Journeymen, 405 F.2d 715 (5th Cir. 1968); Air Line Stewards Local 550 v. Transport Workers Union, 334 F.2d 805 (7th Cir. 1964), *cert. denied,* 379 U.S. 972 (1965); McKee v. Sales Drivers Local 166, 82 L.R.R.M. 3126 (C.D. Cal. 1973); Hartner v. Baltimore Regional Joint Bd. of Amalgamated Clothing Workers, 339 F. Supp. 1257 (D. Md. 1972); Brogg v. International Union of Operating Eng'rs, 313 F. Supp. 6 (S.D. Ala. 1970); Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968); Mamula v. Local 1211, Steelworkers, 202 F. Supp. 348 (W.D. Pa. 1962).

[34] The *King* court expressly stated that its holding did not encompass the question of whether § 101(a)(5) would be applicable when a union official is "fined, suspended, expelled, or otherwise disciplined," other than by suspension or removal from office. 335 F.2d at 342 n.8.

[35] 407 F.2d 1185 (3d Cir. 1969). *See* note 37 *infra.*

[36] 419 F.2d 32 (3d Cir. 1969).

[37] *Id.* at 35. *See* Hartner v. Baltimore Regional Joint Bd. of Amalgamated Clothing Workers, 339 F. Supp. 1257 (D. Md. 1972); Mamula v. Local 1211, Steelworkers, 202 F. Supp. 348 (W.D. Pa. 1962); notes 79-87 and accompanying text *infra. Contra,* Verbiscus v. Industrial Union of Marine Workers, 238 F. Supp. 848 (E.D. Mich. 1964). With reference to the fine, the *Martire* court, citing the *Lewis* decision, stated that if the plaintiff were subject to expulsion for failure to pay he must be afforded the protection of § 101(a)(5). 410 F.2d at 35; *see* text accompanying note 35 *supra.*

[38] 477 F.2d 899 (2d Cir. 1973).

tion 101(a)(5),[39] but the court concluded that "rendering a man ineligible from seeking union office . . . affects him *as a member* and permits him under the Act to challenge the fairness of the procedures resulting in such political exile."[40] Thus, the general rule remains that summary removal from office does not constitute "discipline" within section 101(a)(5), but, when combined with additional sanctions, the due process requirements of the statute are applicable.

## III. What is Discipline?

Section 101(a)(5) provides procedural guarantees only when a union member has been "fined, suspended, expelled, or otherwise disciplined."[41] Thus, it has become important to determine the meaning of "otherwise disciplined." The two major questions considered are whether "discipline" includes (A) union action which interferes with a member's employment relationship and (B) union action which deprives a member of the right to run for union office. As will become apparent in this discussion, examination of this issue necessarily overlaps the question of who is protected—the topic analyzed in the previous section.

### A. *Interference with the Employment Relationship*

A number of decisions have held as a matter of law that union action which affects only a member's employment relationship does not constitute discipline within the meaning of section 101(a)(5). In *Allen v. Armored Car Chauffeurs & Guards Local 820,*[42] a union member sued his union under section 101(a)(5) for failing to prosecute a grievance against his employer relating to his discharge from employment. In discussing the complaint, the court emphasized that the section does not grant jurisdiction for discipline in the form of discharge from employment, but only for union discipline of a member as to his membership.[43] Similar reasoning was used by the court in *Lucas v. Kenny,*[44] where a union member had charged his

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[39] *Id.* at 904.

[40] *Id.*

[41] *See* note 2 *supra.*

[42] 185 F. Supp. 492 (D.N.J. 1960).

[43] *Id.* at 494-95. *See* Stout v. Construction & Gen. Laborers Dist. Council, 226 F. Supp. 673 (N.D. Ill. 1963); Green v. Local 705, Hotel and Restaurant Employees, 220 F. Supp. 505 (E.D. Mich. 1963); Rinker v. Local 24, Lithographers, 201 F. Supp. 204 (W.D. Pa. 1962). *See also* Etelson & Smith, *supra* note 12, at 731-33.

[44] 220 F. Supp. 188 (N.D. Ill. 1963).

union with violating its obligation to secure and assign him work. The court dismissed the complaint, holding that the charge was unrelated to section 101(a)(5) because the union action in question did not concern the "union-member relationship."[45] Finally, in *Seeley v. Brotherhood of Painters,*[46] the court refused to apply section 101(a)(5) to an action brought by a supervisor who was an inactive union member, charging that the union had conspired with his employer to have him dismissed from his job. The court's conclusion was premised on the idea that "discipline" under section 101(a)(5) only includes union actions affecting membership in the union.[47] As a supervisor, the only membership interests the plaintiff could have were seniority and fringe benefits.[48] Since it did not appear that either of these interests had been infringed, the complaint failed to state a claim upon which relief could be granted.

The idea that "discipline" includes only union action which affects membership status is unnecessarily narrow. An enormous loophole is created in the protections of section 101(a)(5), through which unions could often punish members at the workbench rather than in the union hall. It has been argued that such a restrictive doctrine fails "to recognize that the right not to be disciplined except in conformity with section 101(a)(5) is itself a positive right of every union member . . . ."[49] Furthermore, decisions such as *Allen*, *Lucas*, and *Seeley* give no justification "for passing over the ordinary meaning of the word 'discipline' in favor of a specialized, limited one."[50] Finally, the concept is deficient "because it arbitrarily excludes from the protection of the Act (L.M.R.D.A.) a large sector of the traditional penal systems of unions, which have never confined their sanctions to limitations on 'membership' rights."[51]

Fortunately, the weight of authority is to the effect that union interference with the employment relationship *can* constitute "discipline." In the leading case of *Detroy v. American Guild of Variety Artists,*[52] a union member was blacklisted by his union after he refused to comply with an arbitrator's award which was based on a finding that he had violated his employment contract. The union argued that blacklisting does not constitute discipline within the

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[45] *Id.* at 190.
[46] 308 F.2d 52 (5th Cir. 1962).
[47] *Id.* at 59.
[48] *Id.*
[49] Etelson & Smith, *supra* note 12, at 731.
[50] *Id.*
[51] *Id.*
[52] 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

meaning of section 101(a)(5). In rejecting the argument, the court emphasized that unions enforce the contracts made by their members with employers because such enforcement benefits all union members by promoting stability within the industry.[53] Consequently, blacklisting of members who violated their contracts was an "act of self-protection."[54] The court believed that a union which furthers its own ends in this manner must abide by the rules prescribed by section 101(a)(5) and that any member punished by the union in the interest of promoting the welfare of the group is entitled to the section's guarantees.[55]

Other courts have agreed with the *Detroy* court's holding that interference with the employment relationship does not as a matter of law exclude judicial consideration of the union's action under section 101(a)(5).[56] It is unclear whether these decisions totally reject the "affect membership=affect employment" distinction, thereby including all union interference with the employment relationship within the meaning of "discipline" or whether they hold that such interference *can* constitute "discipline," but only when interference with employment results in a detrimental effect on union membership status.

Several decisions tend to support the conclusion that some effect on membership status is necessary to trigger the due process protections of section 101(a)(5). In *Rekant v. Local 446, Amalgamated Meat Cutters,*[57] the union rescinded a resolution, which had granted a jobless union member temporary replacement work, because he had failed to appear at work punctually and had unsatisfactorily performed his duties. The member claimed that this action had been taken without affording him the rights guaranteed by section 101(a)(5). Although the court ultimately rejected the member's claim,[58] it did agree that the union action came within the definitional ambit of section 101(a)(5). It is crucial to note, however, that the court reached this conclusion only because the evidence demonstrated that the sanction against the member "went to the heart" of the union-member relationship.[59]

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[53] *Id.* at 81.

[54] *Id.*

[55] *Id.* For another decision holding that blacklisting constitutes discipline, see Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963).

[56] *See, e.g.,* Smith v. American Fed'n of Musicians, 80 L.R.R.M. 3063 (S.D.N.Y. 1972); Gross v. Kennedy, 183 F. Supp. 750 (S.D.N.Y. 1960).

[57] 320 F.2d 271 (3d Cir. 1963).

[58] *See* note 65 and accompanying text *infra.*

[59] 320 F.2d at 276.

A similar analysis was applied in *Scovile v. Watson.*[60] There a union member who had been discharged from her job argued that the union's adoption of a resolution denying arbitration rights to any employee with a record of excessive absenteeism constituted disciplinary action. The union contended that under the collective bargaining agreement, "the union, rather than the aggrieved employee, had the right to proceed or not to proceed to arbitration."[61] Moreover, any rights of the member "to require the union to demand arbitration . . . were not secured by her union membership but were derived from the collective bargaining agreement."[62] In rejecting this argument, the court held that even though the right asserted might be derivative, refusal by a union to prosecute an arbitrable grievance *under some circumstances* "might be considered as a disciplinary measure *relating to the employee's membership in the union.*"[63] Thus, although recognizing the abstract proposition that interference with employment rights can constitute "discipline" under section 101(a)(5), *Rekant* and *Scovile* do not greatly expand the previously criticized[64] interpretation that requires impact on the individual's rights *qua* the union. Both decisions appear to preclude a finding of discipline based on interference with the employment relationship alone. The plaintiff must establish a nexus between the injured employment right and the rights of the plaintiff as a union member.

Even when the union action has an adverse impact on membership status, *Rekant* and *Scovile* indicate circumstances wherein the court might not consider the action "discipline." In *Rekant*, the court held that the union's rescinding resolution was not discipline under section 101(a)(5) because it did not deprive the member of employment; he had already done that himself by his incompetence and unsatisfactory behavior.[65] Undoubtedly, the court was also impressed by the fact that this initial grant of work to the unemployed worker was in the nature of a "privilege" or gratuity by the members

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[60] 338 F.2d 678 (7th Cir. 1964), *cert. denied*, 380 U.S. 963 (1965).

[61] *Id.* at 680.

[62] *Id.* The union cited Allen v. Armored Car Chauffeurs Local 820, 185 F. Supp. 492 (D.N.J. 1960), in support of its argument that its actions did not constitute discipline. *See* text accompanying notes 42-43 *supra.*

[63] 338 F.2d at 680 (emphasis added). For the court's reasoning that under the circumstances the union's action was not "discipline" see text accompanying notes 67-68 *infra.*

[64] *See* text accompanying notes 49-51 *supra.*

[65] 320 F.2d at 276-77. The court noted that no employer would have hired him even if the resolution had not been rescinded.

that could be withheld at will, rather than a "right" held by virtue of his membership in the organization.[66] In *Scovile,* the court stressed that the union's resolution "was prospective and applied to the entire membership, and not to plaintiff alone."[67] As it was a matter of union policy, it could "hardly be said" to be discipline[68] within the meaning of the statute.[69]

Recently, the case of *Hayes v. Local 481, IBEW*[70] followed the *Scovile* doctrine. A member's classification as journeyman wireman was terminated when he failed to complete four successful semesters of training. The requirement that retention of journeyman status depends upon completion of the training program "applied to all persons in the program and not just the plaintiff," and the requirement was a "policy matter of internal union concern."[71] On this basis, the court ruled that termination of the classification was not "discipline."

Other courts have emphasized the "uniform rule" concept in holding that union interference with employment is not "discipline" within section 101(a)(5). In *Figueroa v. National Maritime Union,*[72] the union, without a hearing, refused to register three members in its hiring hall or refer them for employment because of their past narcotics convictions. The members claimed that they had been

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[66] Public administrative law at one time made distinctions between "rights" and "privileges," the former being surrounded by protections and procedural due process, and the latter being subject to summary revocation. *See* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Smith v. Iowa Liquor Control Comm'n, 169 N.W.2d 803 (Iowa 1969); House of Tobacco, Inc. v. Calvert, 394 S.W.2d 654 (Tex. 1965). *See also* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 600-07 (6th ed. 1974). In recent years this doctrine has been substantially eroded if not eliminated. *See* Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Dixon v. Alabama St. Bd. of Educ., 294 F.2d 150 (5th Cir. 1961). However, as no state action is involved in union discipline cases, there is no particular reason why this distinction could not be maintained under the LMRDA.

[67] 338 F.2d at 680.

[68] *Id.*

[69] This distinction between "rule making" and "adjudication" has a sound basis in general administrative law. A rule of prospective uniform application need not be preceded by the procedural protections accorded by adjudications concerning the application of a rule to a particular set of facts. *See* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973); SEC v. Chenery Corp., 332 U.S. 194 (1947); American Airlines v. CAB, 359 F.2d 624 (D.C. Cir. 1966). *See also* Bell, *Administrative Law: Rule Making and a "Hearing." A Tale of Two Cases (Three Rules) or What the Dickens!*, 8 GA. L. REV. 19 (1973); Crampton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting,* 58 VA. L. REV. 585 (1972).

[70] 83 L.R.R.M. 2647 (D. Ind. 1973).

[71] *Id.* at 2648.

[72] 342 F.2d 400 (2d Cir. 1965).

denied the procedural guarantees of section 101(a)(5). In dismissing the complaint, the court noted that the union's "refusal to register and refer was pursuant to the terms of a collective bargaining agreement and in compliance with the declared policy of the shipowners that they [would] hire no seaman known to have a narcotics conviction."[73] Since the members had "admitted their convictions and the applicability to them of the terms of the collective bargaining agreement," the union's action "was no more 'discipline' . . . than it would have been to turn down an applicant who admitted that he lacked a physical requirement for the job . . . ."[74]

Another decision which utilizes this "self-admission" factor is *Williams v. International Typographical Union.*[75] There a printer was reclassified from "working at the trade" to "not working at the trade" when the union became aware of his full-time job with the United States. In holding that this action did not constitute discipline, the court emphasized that the member "readily admitted his government employment prior to his reclassification and [had] done so ever since."[76]

It is hard to criticize the result reached in the *Scovile, Hays, Figueroa* and *Williams* line of cases. Nonetheless, the process by which the courts reached their result leaves much to be desired. The courts appear to have looked to the result they desired—dismissal of the complaint—and to have feared that if they called the union action "discipline" they could not reach that result. Thus, their definition of the term "discipline" was contorted beyond recognition.

The courts were correct in their tacit recognition that imposition

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[73] *Id.* at 406.

[74] *Id.* It is important to note, however, that the court pointed out that had the members disputed the fact of their convictions, the union's determination that they had been convicted would have constituted discipline. *Id. See* Tirino v. Local 164, Bartenders, 282 F. Supp. 809 (E.D.N.Y. 1968), wherein union members charged by their union with engaging in a wildcat strike sought to enjoin the union from conducting an intraunion trial against them. The union moved for summary judgment on a number of grounds, one of which was that there had been no discipline within the meaning of § 101(a)(5). In rejecting the union's argument, the court cited *Figueroa* as authority for its conclusion that since the members here vigorously denied that they had engaged in a wildcat strike, the union's actions against them might be found to constitute "discipline" if they could establish their claim that the actions were based on the union's predetermination that they had participated in such a strike. *Id.* at 817.

[75] 423 F.2d 1295 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). *See* Hayes v. Local 481, IBEW, 83 L.R.R.M. 2647 (D. Ind. 1973).

[76] 423 F.2d at 1297. The court also stressed the reasonableness of the classification scheme and its fair application to the plaintiff. *Id.*

of a prospective rule of uniform application is in the nature of a legislative act wherein individual procedural due process has little or no application. The enactment of such a rule, in itself, is not discipline.[77] However, when the rule is applied to individual members to deny employment opportunities, the union at that point is utilizing its position to injure the member, and this result must be considered "discipline."

Accepting that application of a union rule to deny employment as "discipline" does not necessarily mean that a "due process" hearing is always required. Failure to recognize this principle is the point at which the courts went astray. When an incontestably valid rule is in existence and when the rule, without dispute, applies to a particular union member, there is simply no denial of "due process" for the union to take summary action. Union tribunals, like courts of law, need not give full evidentiary hearings if no facts are in dispute. Thus, when a union rule requires certain prerequisites for a classification and the member is denied employment because he does not have the classification, this must be considered "discipline." If, however, the rule is valid and the facts admitted make the rule applicable, section 101(a)(5) does not require a full evidentiary hearing, and the court, as a matter of law, need not order one. Likewise, if the union has a collective agreement not to supply workers with certain backgrounds, the refusal to refer an individual member will be "discipline." If there is a factual dispute as to whether the rule applies to the particular member, section 101(a)(5) is fully applicable because a full hearing is necessary to determine the propriety of the union's disciplinary action. On the other hand, even though the union action in refusing referral is "discipline" within the meaning of the statute and a hearing is not accorded,

[77] There may well be a problem in determining whether action is "rule making" or "adjudicatory," a problem frequently encountered in administrative law. *See* note 69 *supra*. Although the extremes are easy to distinguish, when action has retrospective impact and affects a relatively few individuals, the distinction between the two types of action is quite difficult. For instance, in *Scovie* it might be argued that the action denying arbitration to the plaintiff because of her absenteeism was retrospective in nature (punishment for past acts) and applicable solely to her particular circumstances. It thus took on the hue of an individual adjudication as to whether arbitration should be pursued in her case. If this were, in fact, an individual adjudication not to pursue arbitration, as opposed to a prospective rule relating to when arbitration would be pursued, § 101(a)(5) would seem to require a hearing.

section 101(a)(5) is not violated if the employee admits that the rule is factually applicable to him. In such a case, the due process hearing is unnecessary to determine the propriety of the action and is thus an exercise in futility which the courts need not require.

The courts have recognized as much by saying that the denial of a classification is "discipline" when there is a factual dispute, but that the same denial of a classification is not "discipline" when no factual dispute exists.[78] Such a double meaning of "discipline" distorts analysis and invites serious error in result. It is "discipline" to deny an employee employment opportunities by virtue of the union's exercise of its power and position. The only question remaining is whether the basis of the dispute is factual in nature. If it is, a full evidentiary hearing with the protections granted in section 101(a)(5) is required. If no facts are in dispute, section 101(a)(5) is not violated by a failure to have a full hearing.

### B. *Deprivation of the Right of Candidacy*

As previously demonstrated, section 101(a)(5) does not grant union officers procedural protection against summary removal.[79] Moreover, Title I of the LMRDA does not guarantee union members the right to run for union office. The right of candidacy, however, is specifically protected by Title IV of the Act.[80] Thus, several courts have held that deprivation of the right of candidacy is not actionable under section 101(a)(5), but only through a suit brought by the Secretary of Labor as prescribed by Title IV. In *Boiling v. International Brotherhood of Teamsters*,[81] for example, a union member claimed that he had been "disciplined" by his union when it denied him the right to run for president and business manager. The court rejected this argument, holding that the member's right to be a candidate was governed exclusively by Title IV and that to permit him to enforce this right under section 101(a)(5) "would in effect circumvent and render largely meaningless the enforcement procedures provided" in that Title.[82] A similar result was reached in

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[78] *See* note 74 *supra*.

[79] *See* text accompanying notes 30-33 *supra*.

[80] LMRDA § 401(e), 29 U.S.C. § 481(e) provides: "In any election . . . every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . ."

[81] 224 F. Supp. 18 (E.D. Tenn. 1963).

[82] *Id.* at 20-21. *See* Mamula v. United Steelworkers, 304 F.2d 108 (3d Cir. 1962); Etelson & Smith, *supra* note 12, at 739.

*Verbisus v. Industrial Union of Marine Workers,*[83] where the court held that a union officer who had been removed from office, fined and disqualified from holding any office for ten years must seek relief pursuant to Title IV rather than under Title I.

Despite these holdings, several recent decisions demonstrate that deprivation of the right of candidacy does constitute "discipline" within the meaning of section 101(a)(5). As previously noted, both the *Martire* and *Schonfeld* decisions hold that union action prohibiting a discharged union officer from running for office affects his membership rights and is therefore actionable under section 101(a)(5).[84] What is most interesting about the decisions, however, is that neither court mentions the conflict with the cases construing Title IV as the exclusive remedy for deprivation of the right to run for office.[85]

Notwithstanding this failure, it is submitted that the result reached by *Martire* and *Schonfeld* is beneficial, for Title IV inadequately protects the right of candidacy. It has been noted that, "[n]ot only must the Secretary's suit await the holding of the election, but [he] has virtually complete discretion as to whether or not to prosecute a complaint filed with him by the union member."[86]

Including deprivation of the right of candidacy within the definition of "discipline" affords better protection for the right than does Title IV, and arguably does not in any way conflict with that title. Under Title IV, the Secretary is bound to act in the public interest and is not required "to protect the interests of the complaining member if, in [his] judgment, to do so would not further the administration" of the title.[87] The rights guaranteed by section 101(a)(5), however, are vested by the statute in the individual union member. Consequently, if those rights are violated, it should be

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[83] 238 F. Supp. 848 (E.D. Mich. 1964).

[84] *See* notes 35-40 and accompanying text *supra*.

[85] It should be pointed out that the *Schonfeld* court did rely on Title IV in disagreeing with the district court's holding that the officer's dismissal and disqualification supported a Title I action by union members for violation of their § 101(a)(1) right to nominate candidates for union office. *See* Schonfeld v. Penza, 360 F. Supp. 1228 (S.D.N.Y. 1972), *aff'd*, 477 F.2d 899 (2d Cir. 1973). *But cf.* Schonfeld v. Raftery, 335 F. Supp. 846 (S.D.N.Y. 1971). The court's use of the Title IV argument in this context makes its failure to mention it in connection with the officer's claim even more noticeable.

[86] Etelson & Smith, *supra* note 12, at 740.

[87] *Id.*

irrelevant that in the act of violating them the union may also have violated a provision of Title IV.[88]

## IV. Procedural Guarantees

In order to insure the accomplishment of its "due process" goals, section 101(a)(5) contains a number of procedural guarantees.

### A. *Written Notice of Specific Charges*

The first specific procedural right guaranteed by section 101(a)(5)(A) is the provision that no member can be disciplined until he has been "served with written specific charges."[89] The major questions of interpretation with respect to this right have been (1) whether a member may be disciplined for an offense not specified in the union constitution and (2) what information the charge must contain to meet the requirement of specificity.

1. Non-Specified Offenses.—Until recently, it was well established that a union could discipline its members only for offenses stated in its constitution. In *Simmons v. Local 713, Textile Workers*[90] for example, a member was disciplined for "non-cooperation," an offense not mentioned in the union constitution. The court, in affirming a jury verdict for the member, held that a union could not discipline its members "except for offenses stated in its constitution and by-laws, and that the courts [lacked] the power to recognize 'implied offenses' . . . ."[91] In the landmark decision of *International Brotherhood of Boilermakers v. Hardeman*,[92] however, the Supreme Court radically changed the law.

*Hardeman* involved a union member who had been disciplined for violation of two provisions of the union constitution—article twelve, which forbade any threat of force against a union officer to prevent him from discharging his duties, and article thirteen, which prohibited attempts to create dissension within the union. The district court, after examining the transcript of the union disciplinary proceeding, concluded that there was no evidence to support the mem-

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[88] *Id.*

[89] *See* note 2 *supra*.

[90] 350 F.2d 1012 (4th Cir. 1965); *cf.* Local 455, Boilermakers v. Terry, 398 F.2d 491 (5th Cir. 1968); International Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968); Allen v. International Alliance of Theatrical Employees, 338 F.2d 309 (5th Cir. 1964).

[91] 350 F.2d at 1017.

[92] 401 U.S. 233 (1971).

ber's conviction for violation of the article thirteen prohibition and, consequently, that the general guilty verdict returned by the union tribunal could not stand.[93] This holding was based on an earlier appellate decision which had construed article thirteen as applying not to merely personal altercations, but only to "threats to the union as an organization and to the effective carrying out of the union's aims."[94] On appeal, the decision was affirmed by the Fifth Circuit.[95]

In reversing, the Supreme Court examined the legislative history of section 101(a)(5), and concluded that it demonstrated nothing which justified "such a substitution of judicial for union authority to interpret the union's regulations . . . ."[96] The Court emphasized that the language in the section's original version which would have forbidden discipline "except for breach of a published written rule" was subsequently eliminated.[97] Furthermore, the Court noted a remark by Senator Goldwater in which he explicitly stated that the section did not require that the charges served upon a member "be based on activity that the union had proscribed prior to the union member having engaged in such activity."[98] Since this history showed that a union could discipline "its members for offenses not proscribed by written rules at all," the Court held that it is "a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope."[99]

It is interesting to note that the Court did not even mention cases such as *Simmons* which had restricted union disciplinary power to offenses specified in the union constitution. Nevertheless, in view of the Court's unequivocal language, the conclusion is inescapable that those cases have been overruled and that presently discipline may be imposed for an offense regardless of whether it is enumerated in the union constitution.[100]

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[93] *Id.* at 242.

[94] *Id., quoting* International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 199 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968).

[95] Hardeman v. International Bhd. of Boilermakers, 420 F.2d 485 (5th Cir. 1969).

[96] 401 U.S. at 242-43. *Accord*, Smith v. American Fed'n of Musicians, 80 L.R.R.M. 3063, 3067 (S.D.N.Y. 1972); *see* Kiepura v. Local 1091, Steelworkers, 358 F. Supp. 987 (N.D. Ill. 1973), wherein the court stated that it lacked the authority "to inquire into the merits of the charges brought against" a union member. *Id.* at 990.

[97] 401 U.S. at 243.

[98] *Id.* at 244.

[99] *Id.* at 244-45.

[100] *But see* Boggs v. IBEW, 326 F. Supp. 1 (D. Mont. 1971), wherein the court, in holding that certain union disciplinary action was improper, emphasized that the sections of the

2. Specificity.—Unlike the law pertaining to offenses not specified in the union constitution, the rules regulating the specificity required of the notice of charges were not significantly changed by the *Hardeman* decision. Prior to that case, it was firmly established that although union officials are not required "to frame their charges and specifications technically as formal legal pleadings,"[101] they must draft them so "as to inform a member with reasonable particularity of the details of the charges."[102] At minimum, "reasonable particularity" requires a showing of the circumstances surrounding the alleged disciplinary infraction and the time and place of the infraction, as nearly as can be ascertained.[103]

*Hardeman* in effect affirmed these basic concepts. The Court noted that the charges must be "specific enough to inform the accused member of the offense that he has allegedly committed."[104] In addition, when the charges refer to specific written provisions, the federal courts have authority to examine them to "determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense."[105] Here, however, examination of the union transcript revealed that the notice complied with section 101(a)(5), for it "did not confine itself to a mere statement or citation of the written regulations . . . [but] contained a detailed statement of the facts . . . that formed the basis for the disciplinary action."[106]

Since *Hardeman,* many decisions have followed the principles it

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union constitution which the member was charged with violating were too ambiguous to define an offense. This ambiguity meant that § 101(a)(5) had been violated, for a charge could not be specific when it specified "the violation of a rule which itself [was] not sufficiently specific." *Id.* at 3. The court's examination of the union constitution seems to be precisely that "futile exercise" which *Hardeman* proscribes. *See* text accompanying note 99 *supra.*

[101] Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857, 859 (E.D. La. 1965); *accord,* Gleason v. Chain Serv. Restaurant, 300 F. Supp. 1241, 1251 (S.D.N.Y. 1969); *see* Null v. Carpenters Dist. Council, 239 F. Supp. 809 (S.D. Tex. 1965). *See also* Etelson & Smith, *supra* note 12, at 742.

[102] Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857, 859-60 (E.D. La. 1965); *accord,* Gleason v. Chain Serv. Restaurant, 300 F. Supp. 1241, 1251 (S.D.N.Y. 1969); Etelson & Smith, *supra* note 12, at 742.

[103] Gleason v. Chain Serv. Restaurant, 300 F. Supp. 1241, 1251 (S.D.N.Y. 1969); *see* Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857 (E.D. La. 1965); Etelson & Smith, *supra* note 12, at 742.

[104] 401 U.S. at 245, *quoting Hearings on Labor-Management Reform Legislation Before the Joint Subcomm. of the House Comm. on Education and Labor,* 86th Cong., 1st Sess., pt. 5, at 2285 (1959) (remarks of Senator McClellan).

[105] 401 U.S. at 245.

[106] *Id.*

reaffirmed. In *Smith v. American Federation of Musicians,*[107] the court noted that *Hardeman* had not changed the requirement that the notice of charges be specific.[108] In that case, the union's notice was deficient because "no 'circumstances' or 'time' or 'place' [were] specified in the charges on which [the member] was found guilty."[109] A similar result was reached in *Cefalo v. Moffett,*[110] where the union's notice was held not to have satisfied the specificity requirement because it contained "no specification of time, place or circumstances surrounding the alleged infraction."[111]

One decision since *Hardeman* has held that the notice provided lacked the requisite specificity because the member was disciplined for conduct other than that contained in the charge. *Eisman v. Baltimore Regional Joint Board of Amalgamated Clothing Workers*[112] involved a member who was charged with conduct unbecoming a union member at a union meeting and was subsequently expelled. In examining the sufficiency of the notice, the court noted that it was undisputed that the member was expelled for additional reasons not set forth.[113] Since there was no way to determine whether the union would have expelled the member had it considered only the events of the meeting, the court had "no choice but to conclude that the [member] was prejudiced by the determination of the [union] to expel him based in whole or in part upon facts and allegations not within the scope of the written charges . . . ."[114]

An issue not considered by the Supreme Court in *Hardeman* is whether the fact that an accused member has independent knowledge of the details of his alleged offense softens the requirement of notice of specific charges. Several early cases had held that such knowledge made it unnecessary for a union to give a member a complete factual statement of the charges.[115] These decisions have

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[107] 80 L.R.R.M. 3063 (S.D.N.Y. 1972).

[108] *Id.* at 3067.

[109] *Id.*

[110] 78 L.R.R.M. 2112 (D.D.C. 1971).

[111] *Id.* at 2114. *See* Charron v. American Fed'n of State, County and Municipal Employees, 79 L.R.R.M. 2635 (E.D. Mich. 1971), *aff'd* 470 F.2d 156 (6th Cir. 1972), where the court held that the specificity requirement was met because the notice of charges contained the specific dates and the specific amounts that the member was accused of using improperly. *Id.* at 2636.

[112] 352 F. Supp. 429 (D. Md. 1972).

[113] *Id.* at 435.

[114] *Id.* at 436.

[115] Null v. Carpenters Dist. Council, 239 F. Supp. 809, 815 (S.D. Tex. 1965); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963); *see* Etelson & Smith, *supra* note 12, at 743.

been criticized as disregarding "the plain mandate of the statute that 'written specific charges' shall be served."[116] Furthermore, since most union constitutions provide for specific written notice, there is little excuse for failure to comply with the statute.[117] Finally, such a rule is unsatisfactory because it fosters "litigation on the extent of the member's actual knowledge pertaining to the charges."[118] These criticisms are cogent and, fortunately, several more recent decisions have held that an "*ex post facto* showing that the accused had knowledge of the events surrounding the alleged offenses cannot cure the lack of adequate written notice made mandatory by the statute."[119]

### B. *Reasonable Time To Prepare a Defense*

The second procedural guarantee of section 101(a)(5)(B) is the right of an accused member to "a reasonable time to prepare his defense."[120] The applicable law with respect to what constitutes a reasonable time has been concisely reviewed elsewhere,[121] and recent developments have produced no significant changes. As noted, there are apparently no cases in which courts have held less than a week's notice to be a reasonable time,[122] and none where a three-

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[116] Etelson & Smith, *supra* note 12, at 743.

[117] *Id.*

[118] *Id.*

[119] Gleason v. Chain Serv. Restaurant, 300 F. Supp. 1241, 1253 (S.D.N.Y. 1969); *accord*, Smith v. American Fed'n of Musicians, 80 L.R.R.M. 3063, 3067 (S.D.N.Y. 1972); Magelssen v. Local 518, Plasterers, 233 F. Supp. 459, 461 (W.D. Mo. 1964). Whereas *Gleason, Smith* and *Magelssen* seem to eliminate the "exception" to the specificity requirement based on the accused member's independent knowledge of the charge, there is another exception which, according to some commentators, apparently is still viable — "a defective notice is 'cured' if the member thereafter secures a bill of particulars clarifying or enlarging upon the charges that have been brought." Etelson & Smith, *supra* note 12, at 742. *See* Magelssen v. Local 518, Plasterers, 233 F. Supp. 459, 461 (W.D. Mo. 1964) (dictum); Rosen v. Painters Dist. Council 9, 198 F. Supp. 46 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964). As the commentators note, this exception is not only "eminently reasonable," but also is consistent with § 101(a)(5)'s purpose of requiring "full notice without excessive attention to detail." Etelson & Smith, *supra* note 12, at 743. As they also point out, it "seems irrelevant whether the initiative for the bill of particulars comes from the member or from the union, so long as the member has a reasonable time to prepare his defense after receiving satisfactory notice." *Id.* at 742 n.77, 742-43.

[120] *See* note 2 *supra*.

[121] Etelson & Smith, *supra* note 12.

[122] *Id.* at 743. *Cf.* Simmons v. Local 713, Textile Workers, 350 F.2d 1012, 1017 n.9 (4th Cir. 1965) (district court held union violated reasonable time requirement by failing to give full week's notice; the court of appeals found a more significant violation and did not review this ruling); Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857 (E.D. La. 1965) (seven days' notice unreasonable); Deluhery v. Marine Cooks Union, 211 F. Supp. 529 (S.D. Cal. 1962)

week period or longer has been held unreasonably short.[123]

In determining what constitutes a reasonable time, the courts have considered various factors affecting a member's ability to prepare his defense, including the adequacy of the notice,[124] the availability of help from union members or counsel,[125] whether the member obtained a postponement of the trial,[126] and whether the member was prejudiced by the length of time allowed.[127] Significantly, the courts have also been influenced by time limitations prescribed by the union, especially when embodied in its constitution or bylaws.[128]

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(three and one-half hours unreasonable); Nelson v. Painters Local 386, 47 L.R.R.M. 2441, 41 CCH Lab. Cas. ¶ 16,755 (D. Minn. 1961) (one day's notice of changes in trial procedures held unreasonable).

[123] Etelson & Smith, *supra* note 12, at 743-44. *See* McAfee v. UAW, 71 L.R.R.M. 2515 (E.D. Mich. 1969) (over a month held a reasonable time); *cf.* Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857 (E.D. La. 1965) (dictum) (union obligated to give 20 days' notice, as specified in constitution); Carroll v. Musicians Local 802, 235 F. Supp. 161 (S.D.N.Y. 1963) (reasonable time found where,as a result of continuances, hearing was not held until 29 days after notice); Rosen v. Painters Dist. Council 9, 198 F. Supp. 46 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964) (three and one-half months held to be a reasonable time). *But see* Smith v. American Fed'n of Musicians, 80 L.R.R.M. 3063, 3067 (S.D.N.Y. 1972) (despite three weeks' notice, court found evidence to support a charge of lack of reasonable time).

[124] Etelson & Smith, *supra* note 12, at 744. *See* Rosen v. Painters Dist. Council 9, 198 F. Supp. 46 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964); *cf.* Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 948 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963) (member's knowledge of facts and circumstances held relevant).

[125] Etelson & Smith, *supra* note 12, at 744. *See* Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 948 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963); Rosen v. Painters Dist. Council 9, 198 F. Supp. 46 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964).

[126] Etelson & Smith, *supra* note 12, at 744. *See* Caraballo v. Union de Operadores y Canteros de la Industria del Cemento de Ponce, 55 L.R.R.M. 2787, 2788, 49 CCH Lab. Cas. ¶ 13,784 at 30, 805 (D.P.R. 1964); Rosen v. Painters Dist. Council 9, 193 F. Supp. 46 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964).

[127] Etelson & Smith, *supra* note 12, at 744. *See* Burke v. International Bhd. of Boilermakers, 57 CCH Lab. Cas. ¶ 12,496 (N.D. Cal. 1967) (whether evidence sought would have been admissible); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 948 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963). The authors also note that other important factors might be "the gravity of the offense charged, the amount of free time the member had available to prepare a defense, the formality of the proceedings, and any special circumstances known to the union." Etelson & Smith, *supra* note 12, at 744.

[128] Etelson & Smith, *supra* note 12, at 744. *See* Simmons v. Local 713, Textile Workers, 350 F.2d 1012, 1017 n.9 (4th Cir. 1965); Falcone v. Dantinne, 288 F. Supp. 719 (E.D. Pa. 1968) (dictum); Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857 (E.D. La. 1965); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 948 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963). When the constitution and the bylaws are silent, the court may give some weight to the union's interpretation of its statutory notice obligation. *See* Null v. Carpenters Dist. Council, 239 F. Supp. 809 (S.D. Tex. 1965). Presumably, requirements in either form are chosen with some view to the needs of members of the particular organization.

C. *Full and Fair Hearing*

The general requirement in section 101(a)(5)(C) of a "full and fair hearing"[129] is not amenable to precise definition. It is clear that the process that is "due" a member is not the strict requirements of a criminal prosecution,[130] but strong parallels can and will be drawn between union proceedings and administrative law due process. At present, however, administrative due process has not been fully transplanted into the union hall.

1. Right to an Open Hearing.—The right to a "full and fair hearing" does not necessarily contemplate an open hearing. As stated in *McCraw v. United Association of Journeymen & Apprentices*:[131]

> The closing of the door to the hearing room does not appear to have deprived the plaintiff of the right to be heard nor of the right to present his witnesses, nor does it necessarily reflect upon the impartial nature of the hearing, but it rather appears to be a reasonable rule to secure an orderly hearing.[132]

As the court indicates by implication, the closed hearing is suspicious and might indicate other areas of unfairness, but standing alone does not constitute unfairness *per se*.

2. Right to Be Present, Speak, Call Witnesses, and Confront Accusers.—Even prior to the LMRDA, some courts required as a prerequisite to union discipline that the member be present and that he be allowed to speak and confront his accusers.[133] The post-LMRDA cases have uniformly imposed this requirement. In *Yochim v. Caputo*,[134] plaintiffs were not allowed to testify in their own behalf or to present favorable witnesses. Naturally, it was held that a "fair hearing" cannot be conducted under such circumstances. In *Anderson v. Brotherhood of Carpenters*,[135] plaintiff was not present

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[129] *See* note 2 *supra*.

[130] Null v. Carpenters Dist. Council, 239 F. Supp. 809 (S.D. Tex. 1965); Smith v. Local 467, Truck Drivers, 181 F. Supp. 14 (S.D. Cal. 1960).

[131] 216 F. Supp. 655 (E.D. Tenn. 1963), *aff'd*, 341 F.2d 705 (6th Cir. 1965). *See* Nelms v. United Ass'n of Plumbers, 405 F.2d 715 (5th Cir. 1968).

[132] 216 F. Supp. at 661.

[133] Cloan v. Braun, 191 N.Y.S.2d 213 (Sup. Ct. 1959). *See also* Shernoff v. Schimel, 28 L.R.R.M. 2377 (N.Y. Sup. Ct. 1951); Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 YALE L.J. 175, 203 (1960).

[134] 53 L.R.R.M. 793 (D. Minn. 1963). *See also* Parks v. IBEW, 314 F.2d 886 (4th Cir. 1963).

[135] 51 L.R.R.M. 2516 (S.D.N.Y. 1962). *See* Parks v. IBEW, 314 F.2d 886, 912 (4th Cir. 1963); Detroy v. American Guild of Variety Artists, 286 F.2d 75, 79 (2d Cir. 1961); Hart v. Local

when his accusers appeared before the trial committee. Plaintiff was later admitted to the hearing, testified, and presented witnesses in his own behalf. The court found that the denial of the right to confront and cross-examine his accusers denied the plaintiff a "fair hearing." The Fifth Circuit, however, has upheld cross-examination by the hearing officer rather than the member himself.[136] Moreover, although there is a right to be present at the hearing, to speak, to call witnesses, and to confront and cross-examine adverse witnesses, each of these rights can be waived by a member who fails to take advantage of them during the hearing.[137]

3. Stenographic Record.—An accused union member has the right to compel the taking of a stenographic record of the disciplinary proceeding.[138] It has been asserted that this is "one of the more essential procedural protections recognized under the [LMRDA]."[139] Such a record is important because it enables the reviewing bodies to examine the evidence actuallyconsidered at the hearing, to determine whether the member was afforded adequate safeguards, and to detect bias or improper conduct among members of the hearing board.

It goes without saying that the transcript should be complete. However, omissions not directly related to the charges or issues considered at the hearing will not in fact prejudice the member.[140] Thus, such omissions do not constitute violations of section 101(a)(5). In addition, as with other rights under section 101(a)(5), this one too may be waived.[141] This principle is especially significant

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1292, Carpenters, 341 F. Supp. 1266, 1269 (S.D.N.Y. 1972); Allen v. Iron Workers Local 92, 47 L.R.R.M. 2214, 2223 (N.D. Ala. 1960). *See also* Etelson & Smith, *supra* note 12, at 745-46.

[136] Nelms v. United Ass'n of Plumbers, 405 F.2d 715 (5th Cir. 1968).

[137] Degan v. Tugmen's & Pilots' Ass'n, 84 L.R.R.M. 2569 (D. Ohio 1973); Kuykendall v. Local 1763, Carpenters, 56 L.R.R.M. 2455 (D. Wyo. 1964); McCraw v. United Ass'n of Journeymen, 216 F. Supp. 655 (E.D. Tenn. 1963). *See* Etelson & Smith, *supra* note 12, at 746.

[138] *E.g.*, Hart v. Local 1292, Carpenters, 341 F. Supp. 1266, 1269 (E.D.N.Y. 1972); Deacon v. Operating Eng'rs Local 12, 59 L.R.R.M. 2706, 2709 (S.D. Cal. 1965); Jacques v. Local 1418, Longshoremen, 246 F. Supp. 857 (E.D. La. 1965); *cf.* Kiepura v. Local 1091, Steelworkers, 358 F. Supp. 987 (N.D. Ill. 1973), where the court, although refusing to hold "that the use of a court reporter [was] a necessary element of a full and fair hearing," did hold that under the circumstances before it "the refusal to allow the plaintiff to supply a court reporter at his own expense was an abuse of discretion which did tend to deprive him of such a hearing." *Id.* at 992.

[139] Etelson & Smith, *supra* note 12, at 751.

[140] Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943 (D. Conn. 1963), *aff'd*, 320 F.2d 567 (2d Cir. 1967).

[141] Falcone v. Dantinne, 288 F. Supp. 719 (E.D. Pa. 1968), *rev'd on other grounds*, 420 F.2d 1157 (3d Cir. 1969).

since, although the primary responsibility for furnishing a report is with the union, if the member assumes this responsibility and then fails to secure the services of a stenographer, courts may assume that the right to a record was waived.[142]

4. Evidentiary Support of Findings.—Another right possessed by union members under the "full and fair hearing" standard is the rule that any finding against them must be supported by the evidence, although it is well established that the quantum of evidence needed is not as great as the "preponderance" required in a civil action. In *Vars v. International Brotherhood of Boilermakers,*[143] the court held that there need be only "some evidence to support the charges made"[144] and that the courts have the authority to review the record to this extent in order to protect union members from "obvious abuses."[145] A more strict standard would have contravened the principle that the "courts are not free to substitute their judgment for that of the trial court or to re-examine the evidence to determine whether it would have arrived at the same conclusion that was reached by the trial body."[146]

The "some evidence" requirement established by the *Vars* court has been universally followed[147] and recently was expressly adopted by the Supreme Court in the *Hardeman*[148] decision. The Court emphasized that any lesser standard would render the requirement of specific written charges meaningless.[149] A more stringent standard, on the other hand, "would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record."[150]

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[142] *Id.* at 727.

[143] 320 F.2d 576 (2d Cir. 1963).

[144] *Id.* at 578.

[145] *Id.*

[146] *Id.*

[147] *Accord,* Lewis v. American Fed'n of State, County and Municipal Employees, 407 F.2d 1185, 1195 (3d Cir. 1969); International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 199 (5th Cir. 1968); *see* Charron v. American Fed'n of State, County & Municipal Employees, 79 L.R.R.M. 2635, 2636-37 (E.D. Mich. 1971), *aff'd,* 470 F.2d 156 (6th Cir. 1972); Burke v. International Bhd. of Boilermakers, 302 F. Supp. 1345, 1350 (N.D. Cal. 1967), *aff'd,* 417 F.2d 1063 (9th Cir. 1969). *But see* McKee v. Sales Drivers, Local 166, 82 L.R.R.M. 3128 (C.D. Cal. 1973), wherein the court emphasized that it found "substantial evidence" to support the decision of the union tribunal.

[148] International Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, 246 (1971).

[149] *Id.*

[150] *Id. Accord,* Charron v. American Fed'n of State, County & Municipal Employees, 79

5. Right to Counsel.—Union constitutions and bylaws often expressly permit union members to be represented by fellow members in disciplinary hearings, but deny the right to have outside legal counsel. The courts have sustained such provisions. In *Smith v. General Truck Drivers, Local 467,*[151] for example, the court flatly stated that "the right to be represented by counsel, guaranteed by the Sixth Amendment . . . does not apply to hearings before labor unions."[152] In *Cornelio v. United Brotherhood of Carpenters,*[153] the court explained its rationale:

> The legislative scheme for the protection of rights of individual members of labor unions clearly contemplates, at least in the first instance, a "within the family" procedure for resolving intra-union conflicts. So long as both the accuser and the accused are placed on a "roughly equal footing" and are bound by the same restriction, the accused has no cause for complaint in the fact that he is limited to being represented at the trial by a member of the United Brotherhood family. Denial of assistance of counsel is of even less significance as it bears upon the requirement of a (fair hearing) where, as here, the trial body is made up of union members who, in all likelihood, will not be "learned in the law."[154]

Implicit in this discussion are two important points. First, if the union is represented by counsel, maintenance of a "roughly equal footing" and a "fair hearing" will demand representation for the accused.[155] Second, the accused has an absolute right to lay counsel.[156] The courts, however, are yet to reach the issue as to whether and to what degree the lay counsel must be "competent counsel."[157]

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L.R.R.M. 2635, 2636-37 (E.D. Mich. 1971), *aff'd*, 470 F.2d 156 (6th Cir. 1972).

[151] 181 F. Supp. 14 (S.D. Cal. 1960).

[152] *Id.* at 17. *Accord*, Buresch v. IBEW Local 24, 343 F. Supp. 183, 191 (D. Md. 1971); Sawyers v. Grand Lodge, Machinists, 279 F. Supp. 747, 756 (E.D. Mo. 1967); Cornelio v. Metropolitan Dist. Council, 243 F. Supp. 126, 129 (E.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 728 (3d Cir. 1966).

[153] 243 F. Supp. 126 (E.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 728 (3d Cir. 1966).

[154] 243 F. Supp. at 129.

[155] *See* Air Line Stewards Local 550 v. Transport Workers Union, 55 L.R.R.M. 2711 (N.D. Ill. 1963), *rev'd on other grounds*, 334 F.2d 805 (7th Cir. 1964); In re Hunt, 45 L.R.R.M. 2993 (N.Y. Sup. Ct. 1960); Etelson & Smith, *supra* note 12, at 746. Summers, *supra* note 133, at 203.

[156] Sawyers v. Grand Lodge, Machinists, 279 F. Supp. 747 (E.D. Mo. 1967); Etelson & Smith, *supra* note 12, at 746-47.

[157] Etelson & Smith, *supra* note 12, at 747-48.

*Cornelio* must be compared with the Supreme Court decision in *Goldberg v. Kelly*,[158] in which the Court dealt with the due process requirements of state administrative proceedings. Citing *Powell v. Alabama*,[159] a criminal case, the Court said:

> [T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally safeguard the interests of the recipient.[160]

This argument has similar application to union disciplinary hearings. At present, however, no trend has developed in the direction of applying the *Goldberg* rationale to the union disciplinary hearing situation.[161] Regardless of whether the distinctions between "in house" union proceedings and state action depriving individuals of governmental largess justify different roles for legal counsel, at the very least lay counsel is virtually indispensible for transmitting essential communications between the accused and the prosecuting officials, for reducing the risks that personal animosity might cloud the issues and influence the outcome, and for providing actual and psychological support in both the investigation and presentation of the member's case.[162]

6. Impartial Tribunal.—The due process clause of the fourteenth amendment forbids a criminal trial before a judge who has a direct, personal or pecuniary interest in the outcome.[163] Administrative due process likewise requires hearings before tribunals that are not improperly biased or prejudiced.[164] So also, a "full and fair hearing" under section 101(a)(5)(C) demands an impartial union tribunal.[165] Statement of the rule is simple; but its application is

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[158] 397 U.S. 254 (1970).

[159] 287 U.S. 45 (1932).

[160] 397 U.S. at 270.

[161] *See* Buresch v. IBEW, Local 24, 343 F. Supp. 183 (D. Md. 1971), which was decided subsequent to *Goldberg v. Kelly* and reaffirmed the *Smith* and *Cornelio* doctrine that a "full and fair" hearing under § 101(a)(5)(C) does not require legal counsel.

[162] Etelson & Smith, *supra* note 12, at 747.

[163] Tumey v. Ohio, 273 U.S. 510 (1927).

[164] American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Note, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216 (1964).

[165] Etelson & Smith, *supra* note 12, at 748.

quite difficult. Few men burdened with judging fellow men do so without a background of experiences, biases and prejudgments. Indeed, "[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[166] The law has attempted, however, to distinguish between a "generalized attitude" of prejudice that is unavoidable and thus permissible, and a "particularized hostility" that is prohibited.[167] Perhaps this distinction is even more necessary in the relatively closed world of the union. Often disciplinary action is the outgrowth of an intra-union dispute, and those who sit in judgment of the member, or choose the ones who do, are the persons most at odds with the accused. The accused member is often known, if not notorious, to all of the union leadership and most of the membership. On one hand, the statute will not tolerate "kangaroo courts" based solely on the prejudgments of the tribunal; on the other hand, unions must be permitted disciplinary powers, and common sense dictates that if absolute neutrality is demanded, the ability to try improper conduct will be emasculated.

Disqualifying hostility or partiality has been classified into two basic categories. First are tribunals whose very structure permits a "built-in bias" the finding of which requires reversal regardless of any inquiry into the actual personal prejudice of the members. Second is subjective bias of a member of an otherwise properly structured tribunal.[168]

The most common area for litigation involves structural defects, which themselves can be divided into categories. The first class of cases deals with defects in the organization of the trial system that will *always* produce improper conflicts, regardless of the surrounding facts and circumstances. One example of this *per se* structural defect is where the prosecuting official is on the hearing tribunal.[169] A variation on this theme was presented when the same person who served on an initial tribunal and prepared the report recommending expulsion also served as chairman of a second commission reviewing

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[166] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167-68 (1921).

[167] W. GELLHORN & C. BYSE, *supra* note 66, at 948.

[168] Etelson & Smith, *supra* note 12, at 748.

[169] Kuchler v. Local 24, Lithographers, 473 F.2d 359 (6th Cir. 1973); Simmons v. Local 713, Textile Workers, 350 F.2d 1012 (4th Cir. 1965); Air Line Stewards, Local 550 v. Transport Workers' Union, 55 L.R.R.M. 2711 (N.D. Ill. 1963), *rev'd on other grounds*, 334 F.2d 805 (7th Cir. 1964). *See* Note, *The Right to an Unbiased Tribunal in Union Disciplinary Proceedings*, 49 N.C. L. REV. 164 (1970). Administrative law also demands a strict separation of functions. Prosecutors may not adjudicate. *See* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

the recommendation. The court concluded that the second hearing was not impartial because the official serving on both commissions must have "prejudged" the case by the time of the second hearing.[170]

Structural defects occasionally are not apparent on their face, and surface only when particular circumstances arise. For example, the charging party may sit on the tribunal,[171] or a member of the tribunal may be a witness against the accused.[172] In both cases impartiality is destroyed. Similarly, a union president may not sit on a tribunal that is trying charges of slandering the union president and a tribunal composed of members personally appointed by the president is likewise inherently biased.[173] On the other hand, impartiality is not necessarily destroyed because those preferring charges are union officers or respected members of the union.[174] Even when the governing council, as a corporate body, prefers charges, it is permissible for individual members of that council to serve on the trial board that adjudicates the charges.[175]

The second major area of impartiality involves individual bias unrelated to structural defects. Here the issue is factual, the question being whether the individual member's prejudice amounts to more than a "generalized attitude." Given the potential for political conflicts within unions, this type of bias has been found to exist when one political adversary sits in judgment of another. In *Needham v. Isbister*,[176] the court found that a member had not received a fair hearing because five of the seven members of the

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[170] Cefalo v. Moffet, 78 L.R.R.M. 2112 (D.D.C. 1971). *But see* Parks v. IBEW, 314 F.2d 886, 911-13 (4th Cir. 1963).

[171] Air Line Stewards, Local 550 v. Transport Workers' Union, 55 L.R.R.M. 2711 (N.D. Ill. 1963) *rev'd on other grounds*, 334 F.2d 805 (7th Cir. 1964); Barry v. Franscona, 28 L.R.R.M. 2480 (N.Y. Sup. Ct. 1951).

[172] Kiepura v. Local 1091, Steelworkers, 358 F. Supp. 987 (N.D. Ill. 1973).

[173] Lanigan v. Local 9, IBEW, 327 F.2d 627 (7th Cir. 1964). *See also*, Cohen v. Rosenberg, 262 App. Div. 274, 27 N.Y.S.2d 834 (1941), *aff'd*, 287 N.Y.S. 800, 40 N.E.2d 1018 (1942).

[174] Falcone v. Dantinne, 420 F.2d 1157, 1160 (3d Cir. 1969); Burke v. International Bhd. of Boilermakers, 57 CCH Lab. Cas. ¶ 12,496 (N.D. Cal. 1967); Cornelio v. Carpenters Metropolitan Dist. Council, 243 F. Supp. 126 (E.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 728 (3d Cir. 1966).

[175] Null v. Carpenters Dist. Council, 239 F. Supp. 809, 815 (S.D. Tex. 1965). This decision is of doubtful validity but has been justified on two grounds. First, a council composed of several members is "less likely to be dominated by personal prejudices and motivations than are individual officers of the union." Etelson & Smith, *supra* note 12, at 749. Second, if council members were forced "to disqualify themselves whenever they were personally familiar with the events in question, unions, and particularly small local organizations where the members share a close working arrangement with each other, would often be unable to take any disciplinary action." *Id.*

[176] 84 L.R.R.M. 2105 (D. Mass. 1973).

union tribunal were political enemies "who wanted [him] eliminated as a political factor."[177] In *Kiepura v. Local 1091, Steelworkers*,[178] the court noted that the plaintiff had been a candidate for union office and planned to run again; thus, the present officers and those appointed by them could hardly be considered impartial or disinterested.[179] In such situations, the inference of personal bias is irrefutable and is tantamount to a structural defect.

Perhaps the leading case finding individual bias is *Falcone v. Dantinne*.[180] In that case the plaintiff was suspended from the union for allegedly encouraging members not to return to work after the union had reportedly reached a tentative agreement with management, pursuant to which they were urging members to return to work. Prior to his formal hearing, an informal meeting was held as provided in the union's constitution, at which a member of the trial body testified: "We asked Mr. Falcone to simply admit his guilt, because it was obvious that it appeared by the evidence that he was guilty by all evidence possible . . . ."[181] Initially, the court made it clear that the informal procedure had no *per se* built-in bias. The court refused to find "any inherent impropriety in having a union officer who attends and participates in the informal meeting subsequently sit as a member of the trial body as a finder of fact."[182] Nonetheless, the court sustained the plaintiff's allegation of actual bias, relying on the clear evidence that one member of the trial body had, in fact, reached a decision as to his guilt prior to the formal proceeding.

Proof of individual bias, apart from institutional built-in bias, is indeed quite difficult. Few hearing panel members will be sufficiently candid or ill-advised to express their prejudices, and the courts have not been willing to infer individual prejudice on slight evidence. For example, the committee chairman who referred to "our witness" or the "committee witness" was not disqualified for subjective bias.[183] Merely showing that the tribunal might have been

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[177] *Id.* at 2114.

[178] *See* note 173 *supra*.

[179] *See generally* Reilly v. Hogan, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942).

[180] 420 F.2d 1157 (3d Cir. 1969).

[181] *Id.* at 1161.

[182] *Id.*

[183] Anderson v. Brotherhood of Carpenters, 59 L.R.R.M. 2684 (D. Minn. 1965).

prejudiced in favor of the prosecution will not suffice; actual prejudgment is necessary.[184]

In summary, the courts in applying section 101(a)(5)(C) must continue to insist on basic fairness of the hearing tribunals, but this requirement must be tempered with the knowledge that Congress desired internal resolution of intra-union disputes. Thus, demands of absolute neutrality must yield to pragmatic realities. On the other hand, unions may not rest assured in the assumption that courts will not demand unbiased tribunals of purity equal to, if not exceeding, those found in public administrative law. In many unions there is no independent judiciary responsible for union disciplinary hearings. Officers are frequently involved in the dispute underlying the charges. An officer may even be the prosecuting party or an interested witness. He may sit on the hearing panel or designate those who do. This merging of functions must end if unions desire to pursue judicially sustainable discipline.

Constitutions and by laws may be altered in any of several ways to establish independent judiciaries. One method by which this goal could be accomplished would be the appointment of an independent umpire. Also, smaller unions might resort to the common *ad hoc* arbitration method, wherein each party selects a member of the panel, and the two selected appoint the impartial chairman. These persons could be drawn from the membership at large and thus keep the dispute "internal." If the union would dain to use "outside" participation, non-member neutrals could be selected through the auspices of the American Arbitration Association or the Federal Mediation and Conciliation Service. Whatever the means utilized, however, both the courts and the unions must do their part to see that the statutory design functions—the courts by not being excessively demanding of pristine neutrality and the unions by providing a structure wherein reasonable neutrality can be assured.

## V. Conclusion

During section 101(a)(5)'s quarter century of existence, the judicial interpretations accorded it have in general furthered its goal of achieving participatory union democracy. Holding the preemption doctrine inapplicable opened the doors of the federal courts to ag-

[184] Burke v. International Bhd. of Boilermakers, 57 CCH Lab. Cas. ¶ 12,496 (N.D. Cal. 1967); Null v. Carpenters Dist. Council, 239 F. Supp. 809 (S.D. Tex. 1965). *See* Etelson & Smith, *supra* note 12, at 750.

grieved union members. Broadening the definition of "discipline" effectively to include interference with the employment relationship and deprivation of the right of candidacy greatly extended the scope of the section's protection. Finally, the manner in which the courts have construed the procedural safeguards granted by the section demonstrates that arbitrary union disciplinary proceedings will no longer be tolerated. In total, it may safely be concluded that section 101(a)(5), as construed by the courts, promises to fulfill the basic functions contemplated by its framers.

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