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LABOR LAW

REMOVAL OF UNION MEMBER FROM POSITION AS JOB STEWARD NOT VIOLATIVE OF TITLE I OF LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Newman v. Local 1101, CWA

Title I of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA)¹ was enacted to insure internal union democracy and to guarantee members a voice in their union's affairs.² Section 101(a)(2)³ secures a member's freedoms of speech and assembly, subject to the union's right to prescribe reasonable rules pertaining to a member's responsibility to the union and to restrain conduct that would impair the union's ability to carry out its obligations.⁴

¹ Pub. L. No. 86-257, 73 Stat. 522, 523 (codified at 29 U.S.C. §§ 411-415 (1976)). The Labor Management Reporting and Disclosure Act of 1959 (LMRDA) represents an attempt by Congress to protect union members against discriminatory practices of labor organizations. See 29 U.S.C. § 401 (1976); S. REP. NO. 187, 86th Cong., 1st Sess. 2-5, reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2318-21; H.R. REP. NO. 741, 86th Cong., 1st Sess. 1-7, reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2424-29. For a discussion of the background and provisions of the LMRDA, see A. McADAMS, POWER AND POLITICS IN LABOR LEGISLATION (1964); SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (R. Slovenko ed. 1961); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226 (1959); Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199 (1960).

² In 1957, the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee) conducted an investigation and found "corruption, abuse of power" and a lack of democratic procedure in many labor organizations. As a result of these findings, the Committee made several recommendations which ultimately were incorporated into the Title I "Bill of Rights" and passed as a floor amendment to the original version of the LMRDA. Rothman, *supra* note 1, at 206-09. For an interesting comparison of the LMRDA Bill of Rights and the United States Constitution, see Rose, *A Comparison of the Statutory and Constitutional Bill of Rights*, in SYMPOSIUM ON THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 290 (R. Slovenko ed. 1961).

³ 29 U.S.C. § 411(a)(2) (1976) provides:

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

⁴ The rights enumerated in § 101(a)(2) are further secured by § 609, 29 U.S.C. § 529 (1976), which provides:

As a result of ambiguities in the statutory language,⁵ however, there has been some inconsistency in judicial interpretations concerning the scope of Title I's coverage. In particular, the courts have had difficulty in determining the applicability of the statute to union members who also hold positions as union officers.⁶ Recently, in *Newman v. Local 1101, CWA*,⁷ the Second Circuit held that the LMRDA does not permit a union from decertifying a job steward when his criticism of management prevents him from effectively representing the union, provided that the union does not infringe upon his right as a member to exercise his Title I privileges.⁸

Dave Newman, an active opponent of the policies of Local 1101,⁹ had been elected job steward by his fellow union members.¹⁰ His duties in that position included assisting the Local's leadership in carrying out its obligations and acting as its official representative on the job.¹¹ After having held the position for over a year, Newman attended a membership meeting¹² and spoke in opposition to the union's policy of conducting peaceful negotiations for a new col-

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

⁵ See Cox, *supra* note 1, at 833, 852. Professor Cox describes the ambiguities as being the result of "calculated or political compromises" made to insure passage of the bill. *Id.* at 852.

⁶ See notes 32-40 and accompanying text *infra*.

⁷ 570 F.2d 439 (2d Cir. 1978), *rev'g* No. 77-598 (S.D.N.Y. May 27, 1977).

⁸ 570 F.2d at 445.

⁹ Local 1101, a subsidiary of the Communications Workers of America (CWA), is made up of approximately 11,000 employees who install and maintain the communications systems of the New York Telephone Company in Manhattan and the Bronx. *Id.* at 442. The Local does not negotiate the collective bargaining agreement for its members, that being done by the national union, CWA. *Id.* The function of Local 1101 is to enforce the agreement negotiated by CWA, and to act as a "liaison" between CWA and the members of the Local, implementing the programs and policies of CWA. *Id.*

¹⁰ *Id.* at 443. In accordance with the Local's bylaws, its Executive Committee opted to have job stewards selected by election rather than appointment. See *id.* at 442-43.

¹¹ *Id.* at 442. According to the "CWA Steward's Manual," the job steward must: "1. Work under the direction of the [leadership]. 2. Perform whatever duties as may be assigned by the [leadership]." Brief for Appellants at 12. The Manual summarizes the job steward's functions as follows:

The Steward is CWA's official representative right on the job. He or she is the backbone of the Union, the pipeline for dissemination of information and Union policy; a kind of Union watchdog for contract enforcement; the key contact with the members and, for purposes of internal organizing, our major link with the nonmember.

Id.

¹² The meeting was called by management to discuss with the membership CWA's program for negotiating a new collective bargaining agreement. 570 F.2d at 447.

lective bargaining agreement. In addition, he distributed copies of an article he had written in which he advocated a militant bargaining approach as a method of securing greater benefits for the members.¹³ Citing his "disruptive conduct" at the meeting, the leadership of Local 1101 decertified Newman as job steward.¹⁴ Seeking reinstatement and an order enjoining the leadership from disciplining any member of Local 1101 for exercising rights guaranteed by the LMRDA, Newman and other members of the Local brought suit in federal district court.¹⁵ The district court found that Newman had been decertified "solely because of the views he repeatedly expressed . . . in opposition to the leadership" of Local 1101.¹⁶ Concluding that the removal of Newman violated the LMRDA,¹⁷ the court granted a preliminary injunction ordering Newman's reinstatement and prohibiting the defendants from decertifying or refusing to certify any member as a job steward because of his exercise of Title I rights.¹⁸

Reversing the district court's order, Judge Mansfield¹⁹ initially noted that the purpose of the LMRDA was to insure the rights of *union members* to express openly their views on the management

¹³ *Id.* at 446-47. Newman apparently had a history of opposition to the Local's leadership. The article he distributed at the meeting originally had been published in a membership periodical. *Id.* at 447. In the article, Newman expressed disgust for the apathy that existed among the membership and attributed this apathy to the lack of democracy within the Local. *Id.* Newman also had played an important role in the passage of a resolution in which the members he represented called for a nationwide strike unless the new collective bargaining agreement between CWA and Bell Telephone satisfied their demands. *Id.* at 446 & n.5.

¹⁴ *Id.* at 443.

¹⁵ *Id.* Federal jurisdiction was invoked under § 102 of the LMRDA, 29 U.S.C. § 412 (1976), which provides in pertinent part: "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

¹⁶ 570 F.2d at 444. The district court held that the action taken by the union constituted "unlawful discipline" in violation of § 609 of the LMRDA, 29 U.S.C. § 529 (1976). 570 F.2d at 444. It found, however, that the plaintiffs had no cause of action under § 101(a)(1) of the LMRDA, 29 U.S.C. § 411(a)(1) (1976), which guarantees union members equal rights to nominate candidates and to vote in union elections. 570 F.2d at 444; see *Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973); note 39 and accompanying text *infra*.

¹⁷ 570 F.2d at 444. The court also found that the other members "were likely to succeed in showing that" the removal of Newman had a chilling effect on their § 101(a)(2) right of free speech. *Id.*; see *Hall v. Cole*, 412 U.S. 1 (1973). The *Cole* Court stated: "When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others." *Id.* at 8.

¹⁸ 570 F.2d at 444. The district court concluded that the implication inherent in Newman's decertification was that any member who expressed views opposing the Local's leadership could be deemed ineligible to take the elective position of job steward. *Id.*

¹⁹ Joining in the Second Circuit's unanimous decision were Judges Smith and Oakes.

of their unions.²⁰ Acknowledging that the statute proscribes removal of a union officer in retaliation for his exercising a right guaranteed to him as a member,²¹ Judge Mansfield went on to observe that a union officer's right of free expression must be balanced against his responsibilities as an agent of those charged with managing the affairs of the union.²² If his opposition to the union's leadership prevents a union officer from effectively discharging his official duties, Judge Mansfield reasoned, the union is entitled to remove him from office.²³ Comparing a union to "any other going enterprise,"²⁴ Judge Mansfield cautioned that, unless a union could demand sufficient support from its agents, it could not carry out its responsibilities to its membership.²⁵ On the other hand, if the union officer demonstrates by clear and convincing proof that "the purpose . . . or effect of [his removal was] to inhibit or stifle his exercise of free speech rights," he might be entitled to relief.²⁶

Turning to the merits,²⁷ the court reviewed Newman's duties as

²⁰ 570 F.2d at 444 (quoting *Salzhandler v. Caputo*, 316 F.2d 445, 448-49 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963)).

²¹ 570 F.2d at 444-45 (citing *Bradford v. Textile Workers of America, Local 1093*, 563 F.2d 1138 (4th Cir. 1977); *Miller v. Holden*, 535 F.2d 912 (5th Cir. 1976); *Wood v. Dennis*, 489 F.2d 849 (7th Cir. 1973) (en banc), *cert. denied*, 415 U.S. 960 (1974); *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973)).

²² 570 F.2d at 445. *But cf.* *Navarro v. Gannon*, 385 F.2d 512, 518-19 (2d Cir. 1967), *cert. denied*, 390 U.S. 989 (1968) ("balance" between the collective bargaining power of the union and the ideal of self-government must be "struck in favor of union democracy"). The *Newman* court noted that the leadership of Local 1101 had been elected by the membership to formulate policies believed to be in their best interest, and that the union representative has a duty to the union to carry out these policies. 570 F.2d at 445. In discussing the responsibilities the official has toward the union, the court relied on the Fifth Circuit's decision in *Wambles v. International Bhd. of Teamsters*, 488 F.2d 888 (5th Cir. 1974) (per curiam). It is interesting to note, however, that unlike Newman, the employee in *Wambles* was in an appointive position and was subject to discharge at any time by the appointing authority. *See id.* at 889.

²³ 570 F.2d at 445. The parties had submitted conflicting affidavits concerning the precise reason for Newman's decertification. *Id.* at 447. Judge Mansfield found it "unnecessary to resolve this factual issue," however, since the union would have been within its rights even if it had discharged Newman on the basis of his expressed opposition to the Local's leadership. *Id.*

²⁴ *Id.* at 445.

²⁵ *Id.*; *cf.* *Sewell v. Grand Lodge Int'l Ass'n of Machinists*, 445 F.2d 545, 551 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972) (employee of union may not undermine the policies of his employer by engaging in conduct "diametrically opposed to" the execution of his prescribed obligations). The *Newman* court stated: "We do not believe that Congress intended Title I of the LMRDA . . . to permit a union representative who disagrees with its leadership to freeze himself in office on First Amendment grounds." 570 F.2d at 445.

²⁶ *See* 570 F.2d at 445-46.

²⁷ The usual rule in federal practice is that the factual determinations reached by the lower court must be upheld on appeal unless "clearly erroneous." FED. R. CIV. P. 52(a). In *Newman*, the decision of the district court was made on the basis of the affidavits of the

job steward²⁸ and found that, as a result of the antagonism that existed between his political views and the policies of Local 1101, he was unable to carry out the functions of his office.²⁹ Thus, in the absence of a showing that Newman was prevented from exercising his section 101(a)(2) membership rights or that the leadership intended such a result, the court did "not believe that judicial intervention [was] necessary or justified."³⁰

The *Newman* decision represents a clarification and refinement of the Second Circuit's position with respect to the rights of union officers under the LMRDA. The Second Circuit was one of the first to adopt a liberal interpretation of section 101(a)(2) and thereby confer a broad right to free speech on both members and officers of the union.³¹ In *Salzhandler v. Caputo*,³² the court appeared to hold that the rights guaranteed in section 101(a)(2) are absolute, circumscribed only by the limited exceptions carved out by the statutory language.³³ Although the *Salzhandler* opinion did not directly ad-

parties and without an evidentiary hearing. 570 F.2d at 446 n.4. In such a case, the reviewing court has the same advantages in judging credibility as the lower court and may therefore make its own findings of fact. *See id.*; *United States v. La Vallee*, 472 F.2d 960 (2d Cir. 1973). After reversing the order granting the preliminary injunction, the *Newman* court remanded the case to the district court where a nonjury trial was conducted. *See note 47 infra*.

²⁸ Noting that the term "job steward" is not defined in the LMRDA, Judge Mansfield concluded that a job steward is equivalent to a member of "union administrative personnel" as defined in the statute. 570 F.2d at 443 n.3; *see* 29 U.S.C. § 402(q) (1976).

²⁹ 570 F.2d at 446-48.

³⁰ *Id.* at 449. Significantly, Judge Mansfield distinguished the facts in *Newman* from those in earlier cases in which the Second Circuit found that union discipline of an officer did violate Title I of the LMRDA. *Id.* at 448 n.6; *see* *Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973); *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963). In these earlier decisions, the union officers in question had been penalized by the removal of rights they would otherwise have enjoyed as members. 570 F.2d at 448 n.6; *see* notes 32-33, 36-37 & 39 and accompanying text *infra*. *Newman*, in contrast, merely was deprived of his position as job steward, while his membership rights remained undisturbed, and injunctive relief therefore was not necessary. 570 F.2d at 448-49. The court also refused to grant injunctive relief on the basis of the members' complaint that *Newman's* removal violated their Title I rights, finding that the sanctions placed on *Newman* had not inhibited any other member in exercising rights guaranteed by the LMRDA. *Id.*

³¹ *See* *Beaird & Player, Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 589-93 (1973); *Kroner, Title I of the LMRDA: Some Problems of Legal Method and Mythology*, 43 N.Y.U.L. REV. 280, 281-83 (1968).

³² 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963). The plaintiff in *Salzhandler* was discharged from his elected position as financial secretary of the Local and was prohibited from holding office and attending or voting at union meetings for 5 years because of his allegedly libelous statements concerning the misuse of union funds by the President of the Local. 316 F.2d at 448. The Second Circuit held that the union's action was impermissible and directed the district court to enjoin the leadership from carrying out these sanctions. *Id.* at 451.

³³ The Second Circuit based its decision in *Salzhandler* on the premise that the LMRDA was enacted to ensure the rights of union members to discuss openly the management of the union. 316 F.2d at 448-49. The court noted that § 101(a)(2) of the LMRDA contains a proviso which makes the right of free speech subject to reasonable rules adopted by the union to

dress the issue, a majority of the circuits subsequently held that the section 101(a)(2) rights of union members are applicable to union officers.³⁴ Under this view, section 609, which prohibits unions from "disciplining" *members* for exercising rights secured by the LMRDA,³⁵ makes it unlawful for a union to penalize an officer for exercising his section 101(a)(2) rights. In *Schonfeld v. Penza*,³⁶ the

insure that every member's responsibility to the union be fulfilled and to prohibit conduct that would interfere with the union's performance of its obligations. *Id.* at 550; see note 3 *supra*. Concluding that information about the handling of union funds was beneficial to the proper management of the union, however, the court held that any statement on the subject would not come within the proviso but would rather enjoy absolute protection under § 101(a)(2). 316 F.2d at 450-51. One commentator has stated that by this decision, the Second Circuit "emasculated the proviso." Kroner, *supra* note 31, at 287 (footnote omitted).

Although it was thought at the time that the first amendment did not protect defamatory statements made in a political context, see *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the *Salzhandler* court rejected the argument that such statements were similarly unprotected by the LMRDA. 316 F.2d at 449-50. The court concluded that the analogy was unsound because in the arena of labor unions it would be the union tribunal rather than a court of law that is deciding what is libelous. *Id.* at 450. Several commentators, however, have criticized this reasoning, contending that Congress did not intend the protection of § 101(a)(2) to extend to defamatory speech. *E.g.*, Beard & Player, *supra* note 31, at 591. See also Kroner, *supra* note 31, at 292-93.

³⁴ See, e.g., *Bradford v. Textile Workers of America, Local 1093*, 563 F.2d 1138, 1142 (4th Cir. 1977); *Miller v. Holden*, 535 F.2d 912, 914-15 (5th Cir. 1976); *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815, 818 (9th Cir. 1976); *Gabauer v. Woodcock*, 520 F.2d 1084, 1091 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976); *Wood v. Dennis*, 489 F.2d 849, 852-54 (7th Cir. 1973) (en banc), *cert. denied*, 415 U.S. 960 (1974); *Grand Lodge Int'l Ass'n of Machinists v. King*, 335 F.2d 340 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964). The plaintiffs in *Grand Lodge* were appointed union officers who were summarily dismissed by the victorious candidate in a union election because they had supported his opponent. 335 F.2d at 341, 346. The *Grand Lodge* court first considered whether § 101(a)(5), 29 U.S.C. § 411(a)(5) (1976), which requires the union to follow certain procedural safeguards before imposing specific sanctions or "otherwise disciplin[ing]" a member, applies to the removal of union officers. 335 F.2d at 341-43. Relying on the legislative history of the statute, the court held that the term "otherwise discipline" in § 101(a)(5) does not include removal of union officers regardless of the underlying reason. *Id.* This is the interpretation given to § 101(a)(5) by the majority of the courts. See, e.g., *Lux v. Blackmun*, 546 F.2d 713, 715 (7th Cir. 1976); *Gabauer v. Woodcock*, 520 F.2d 1084, 1093 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976); *Wood v. Dennis*, 489 F.2d 849, 857 (7th Cir. 1973) (en banc), *cert. denied*, 415 U.S. 960 (1974); *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973); *Martire v. Laborers' Local 1058*, 410 F.2d 32, 35 (3d Cir.), *cert. denied*, 396 U.S. 903 (1969). But see *Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976).

The *Grand Lodge* court then examined the effect of § 609, 29 U.S.C. § 529 (1976), which prohibits the union from disciplining any member for exercising a right guaranteed by the LMRDA. Although the term "otherwise discipline," which appears in § 101(a)(5), is also used in § 609, the court found no analogous legislative history to aid in construing the applicability of § 609 to union officers. 335 F.2d at 345. After examining the overall statutory design, the Ninth Circuit concluded that "otherwise discipline" has a broader meaning in § 609 than it does in § 101(a)(5) and that § 609 does prohibit unions from discharging union officers in retaliation for their exercising any right guaranteed by Title I of the LMRDA. *Id.* at 343-46.

³⁵ See note 4 *supra*.

³⁶ 477 F.2d 899 (2d Cir. 1973). *Schonfeld* was a consolidation of two actions, one of which

Second Circuit narrowed its earlier view by holding that a union officer who exercises Title I rights is protected only against interference with the privileges and rights inherent in union membership.³⁷ In an abrupt departure from its previous position, the *Schonfeld* court adopted the minority construction of Title I rights,³⁸ finding that "removal from union office gives rise to no rights in the removed official *as an official* under the Act."³⁹

was brought by an elected officer who has been removed from office by the union and prohibited from running for office for 5 years. *Id.* at 900-01.

³⁷ *Id.* at 904. The court reasoned that a sanction prohibiting a union officer from running for office affects him as a member. Thus, under the terms of the LMRDA, *Schonfeld* had a cause of action to "challenge the fairness" of the sanction. *Id.* It appears that the strong language used by the Second Circuit in construing the protections of Title I of the LMRDA with respect to union officers was directed only to the application of § 101(a)(5), which prescribes certain procedural safeguards that must be followed before a member may be "fined, suspended, expelled or otherwise disciplined" by the union. 29 U.S.C. § 411(a)(5) (1976). It was in its discussion of the officer's claim that his due process rights had been violated that the Second Circuit declared that removal from union office does not violate the official's rights as an official under Title I. Rendering him ineligible to run for office for 5 years, however, affected him as a member and could not be carried out without following the procedural requirements of § 101(a)(5). 447 F.2d at 904. This conclusion is wholly consistent with the position of the majority of jurisdictions. *See* note 34 and accompanying text *supra*. On the other hand, the court noted without further discussion that the officer's free speech claim under Title I was "cognizable in federal court." 447 F.2d at 904.

³⁸ The Third Circuit has held that a member's status as an officer is not protected by the provisions of Title I and therefore that a union is not prohibited by the statute from discharging an officer for any reason. *Harrison v. Local 54, American Fed'n of State, County & Mun. Employees*, 518 F.2d 1276, 1281 (3d Cir. 1975), *cert. denied*, 423 U.S. 1042 (1976); *Sheridan v. United Bhd. of Carpenters, Local 626*, 306 F.2d 152, 156 (3d Cir. 1962). *Sheridan* involved a business agent of the union who was removed from office by a vote of the members after he had a member of the union arrested and prosecuted for assault. *Id.* at 153-54. He brought an action against the union, claiming that his dismissal was in violation of his right to institute a court action against any member, as secured by § 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4) (1976). 306 F.2d at 154. The court stated that "[i]t is the union-member relationship, not the union-officer or union-employee relationship, that is protected" by Title I of the LMRDA. *Id.* at 157.

Although reaffirmed by the Third Circuit in *Harrison v. Local 54, American Fed'n of State, County & Mun. Employees*, 518 F.2d 1276, 1281 (3d Cir. 1975), *cert. denied*, 423 U.S. 1042 (1976), the decision was criticized by the dissent in *Sheridan* on the ground that it concentrates more on the form of the sanction than the reasons behind the removal. 306 F.2d at 165 (McLaughlin, J., dissenting).

³⁹ 477 F.2d at 904 (emphasis by the court). A second action in *Schonfeld* was brought by other members of the union who alleged that *Schonfeld's* removal and ineligibility to run for office violated their rights to nominate and vote for candidates in union elections under § 101(a)(1), 29 U.S.C. § 411(a)(1) (1976). 477 F.2d at 901-02. Section 101(a)(1) provides in pertinent part: "Every member of a labor organization shall have equal rights . . . to nominate candidates, to vote . . . , to attend membership meetings, and to participate in . . . such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws." The court reasoned that § 101(a)(1) merely prescribes that there be no *discrimination* against any member in his right to nominate and vote for candidates in union elections. *Id.* at 902; *see Calhoun v. Harvey*, 379 U.S. 134, 139 (1964). Noting that every member had the same right to nominate and vote for candidates who were eligible to run,

A comparison of the opinions in *Schonfeld* and *Newman* indicates that the latter decision represents a liberalization of the position taken by the Second Circuit. Since the sanction imposed on the job steward in *Newman* did not affect his rights as a member, it would appear that a strict adherence to the *Schonfeld* rationale would have resulted in summary dismissal of Newman's claims. The *Newman* court, however, expressing a reluctance to draw such a conclusion, formulated a new test to be utilized in cases involving the dismissal of a member from union office when a violation of his Title I rights as a member is alleged. This test requires a careful "analysis of the nature of the union position in question, the extent of the allegedly unlawful discipline, and the motivation behind the removal."⁴⁰ If the union officer's exercise of his right to freedom of expression may reasonably be viewed as precluding him from carrying out his official duties, the union apparently may remove him from office, provided it does not also take away his privileges as a member. On the other hand, if the officer can come forward and affirmatively establish that the purpose or effect of the removal was to "inhibit or stifle" the officer or other members in the exercise of their rights as union members, he may prevail in a suit brought under Title I of the LMRDA.⁴¹ In all other cases, however, the court

the Second Circuit concluded that the union's action in disqualifying *Schonfeld* did not constitute a violation of § 101(a)(1). 477 F.2d at 903; *accord*, *Calhoun v. Harvey*, 379 U.S. at 139. The court, however, found that the members' complaint alleged a violation of the Title IV right of every member to a reasonable opportunity to nominate and vote for the candidates of his choice. 477 F.2d at 902-03; *see* 29 U.S.C. § 481(e) (1976). Such complaints must be heard in the first instance by the Secretary of Labor after the member has exhausted his remedies within the union. *Id.* § 482(a). Judicial review is available only after the Secretary has investigated the matter and found "probable cause to believe" that there has been a violation of Title IV. At that point, the Secretary is empowered to bring an action in federal district court to remedy the violation. *Id.* § 482(b). In view of this mandated procedure, the *Schonfeld* court found that the district court had no jurisdiction over the members' Title IV claims. 477 F.2d at 902-03. Nevertheless, the court did find jurisdiction over the union members' claim that the sanctions placed on *Schonfeld* intimidated them in the exercise of their rights of free speech and association under § 101(a)(2) of the LMRDA. *Id.* at 903.

⁴⁰ 570 F.2d at 445. In *Salzhandler*, the Second Circuit seemed to conclude that, once the plaintiff alleges a violation of his § 101(a)(2) freedom of speech, it is up to the union to prove that the disciplinary action was a "reasonable rule" within the meaning of the exception described in § 101(a)(2). *See* 316 F.2d at 450-51; note 3 *supra*. In contrast, the *Newman* court stated that it is the plaintiff's burden to prove that the purpose or effect of the union discipline was to stifle his freedom of speech as a union member. 570 F.2d at 445-46.

⁴¹ It is submitted that the *Newman* decision is consistent with the results reached by the Supreme Court in cases arising under the first amendment where public employees have challenged the constitutionality of their discharge or a refusal to rehire. The approach taken by the Court has been to balance the interests of the public employee in freedom of speech against the interests of the public employer in the efficient provision of its services. *See, e.g.*, *Arnett v. Kennedy*, 416 U.S. 134, 160-61 (1974); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973); *Pickering v. Board of Educ.*, 391 U.S.

is to be guided by the established federal policy against unnecessary interference with union affairs.⁴²

What distinguishes the Second Circuit's resolution of the *Newman* case from earlier cases which addressed similar issues⁴³ is the court's consideration of not only the Title I rights of the officer-member, but also the responsibilities that the officer has toward the union and the union toward its membership.⁴⁴ It is submitted that the previous interpretations of the applicability of Title I of the LMRDA to officers of the union lost sight of the interests of the union in effective organization while concentrating solely on the Title I rights of the individual involved.⁴⁵ Moreover, the test articu-

563, 568 (1968). In *Pickering*, a public school teacher was dismissed on the ground that a letter he had written to the editor of a local newspaper, criticizing the fiscal management of the board of education and the superintendent of schools, was detrimental to the administration of the school system. *Id.* at 564. Although holding that the dismissal violated the teacher's first amendment rights, *id.* at 574-75, the Court suggested that the public employer might constitutionally terminate the employment of a subordinate whose criticism of the employer "would seriously undermine the effectiveness of the working relationship." *Id.* at 570 n.3. The Court recently made a similar intimation in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), wherein it stated that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." *Id.* at 230 n.27. Finding that the first amendment rights of public employees are not absolute, the Court has sustained the validity of statutes which limit the political activity of federal employees which may interfere with the efficient operations of the employing agency. *See e.g.*, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (Lloyd-La Follette Act, 5 U.S.C. § 7501 (1976)); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act, 5 U.S.C. § 7324(a)(2) (1976)).

The Court's approach in this area has been to balance the first amendment rights of the employee against the needs of the employer. The Second Circuit resolved the *Newman* case in a similar manner. Thus, since the court found that Newman's exercise of free speech impaired his ability to act as an agent of the Local, 570 F.2d at 447-48, it would appear that, had the case arisen under the first amendment, the result would have been the same.

⁴² 570 F.2d at 446 (quoting *Gurton v. Aarons*, 339 F.2d 371, 375 (2d Cir. 1964)).

⁴³ *See* notes 32-38 and accompanying text *supra*.

⁴⁴ *See* 570 F.2d at 444-45. The *Newman* rationale is not unlike that used by the Fifth Circuit in *Sewell v. Grand Lodge of Int'l Ass'n of Machinists*, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972), wherein the court upheld the union's right to terminate an officer's employment for refusing to execute union policy. 445 F.2d at 552. Although the Fifth Circuit dismissed Sewell's complaint as being barred by the statute of limitations, *id.* at 550, the court stated that, even if the complaint were not time-barred, Sewell would still be denied relief because the union was justified in dismissing him for insubordination. *Id.* The *Sewell* court also analyzed the rights of the officer-member under Title I, the duties that an employee owes to his employer and the important role that the union plays in negotiating contracts for its members. *Id.* at 550-52.

⁴⁵ One commentator has argued that the inclusion of the two exceptions in § 101(a)(2) precludes the conclusion that the rights enumerated therein were meant to be absolute. Kroner, *supra* note 31, at 287. According to Professor Kroner, the *Salzhandler* and *Grand Lodge* courts concentrated more on the democratic ideal of free speech than on the substantive issues of fact in the cases. *Id.* at 292-95; *see* notes 32-34 and accompanying text *supra*. The specific issue in both cases was, in Professor Kroner's opinion, whether the union was

lated by the *Newman* court reflects the congressional intent to preserve a policy of minimum governmental interference in the internal operations of labor unions,⁴⁶ while at the same time providing the union officer with a remedy upon a clear showing of an intention to suppress free expression within the union.⁴⁷

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justified in disciplining the officer, based on the facts in the record; in neither case, however, was the question ever squarely addressed. *Kroner*, *supra* note 31, at 283-84.

⁴⁶ This policy is expressed in the language of the statute itself, which conditions the members' rights upon the union's right to enforce reasonable rules to insure internal stability and protect its effectiveness as a bargaining agent. See 29 U.S.C. § 411(e)(2) (1976). In its statement of the "Background and General Approach of the Bill," the Senate cautioned that in enforcing the provision of the LMRDA, efforts must be made not to diminish the self-government of the unions or to enervate the unions in their role as the collective bargaining agents of their members. S. REP. No. 187, 86th Cong., 1st Sess. 5, reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2318, 2323; see *Beaird & Player*, *supra* note 31, at 579-80.

⁴⁷ See notes 26-41 and accompanying text *supra*. On remand, the district court reinstated *Newman* finding that *Newman* fairly and effectively performed his duties as a job steward. No. 77 Civ. 598 (July 26, 1978) at 3-4. The Second Circuit affirmed, concluding that the district court had applied the correct criteria for determining whether there has been a violation of §§ 101(a)(2) and 609 of the LMRDA, 29 U.S.C. §§ 411(a)(2) & 529 (1976); see No. 78-7480, slip op. at 2379 (2d Cir. Apr. 25, 1979), and that the factual findings of the lower court were not "clearly erroneous," see slip op. at 2383; FED. R. CIV. P. 52(a); note 27 *supra*. The Second Circuit noted that, based on the lower court's findings of fact, *Newman* had not been subverting the policies of the Local but merely had been exercising his free speech rights as a member of the union. Slip op. at 2383.

ERRATUM

Page 339, seventh line. For "permit," read "prohibit."