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LABOR LAW

INTRODUCTION

Last term, the Court of Appeals for the Ninth Circuit decided over forty-five cases involving labor law issues. In *Cooke v. Orange Belt District Council of Painters No. 48*,[1] the Ninth Circuit held that the Labor-Management Reporting and Disclosure Act of 1959 precluded job reassignments of union officials as a consequence of their participation in intra-union political activity.[2] The *Cooke* decision is discussed extensively below.

Five additional labor law cases are also briefly noted here. In these cases, Ninth Circuit panels examined the internal affairs exemption of section 8(b)(1)(A) of the National Labor Relations Act,[3] the power of a federal court to enjoin a strike by a union over a grievance that it has contractually agreed to arbitrate,[4] the adequacy of intra-union remedies,[5] the propriety of awarding damages and attorneys' fees for unlawful secondary activity[6] and the award of damages for breach of a collective bargaining agreement prohibiting subcontracting.[7]

I. OVERVIEW

A. INTERNAL AFFAIRS EXEMPTION OF SECTION 8(b)(1)(A)

Section 8(b)(1)(A) of the National Labor Relations Act[8]

1. 529 F.2d 815 (9th Cir. Jan., 1976) (per Sneed, J.).
2. *Id.* at 819.
3. *See* NLRB v. Retail Clerks Local 1179, 526 F.2d 142 (9th Cir. Nov., 1975) (per Kennedy, J.).
4. *See* Donovan Constr. Co. v. Construction Laborers Local 383, 533 F.2d 481 (9th Cir. Mar., 1976) (per Sneed, J.). *See also* Amalgamated Transit Union v. Greyhound Lines, Inc., 529 F.2d 1073 (9th Cir. Jan., 1976) (per Sneed, J.), *vacated*, 45 U.S.L.W. 3224 (U.S. Oct. 4, 1976).
5. *See* Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. Mar., 1976) (per Zirpoli, D.J.).
6. *See* Mead v. Retail Clerks Local 839, 523 F.2d 1371 (9th Cir. Oct., 1975) (per Browning, J.).
7. Associated Gen. Contractors of America, Inc. v. Operating Eng'rs, Local 701, 529 F.2d 1395 (9th Cir. Jan., 1976) (per Duniway, J.), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 4, 1976).
8. 29 U.S.C. § 158(b)(1)(A) (1970) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents —

(NLRA) provides that a union commits an unfair labor practice when it restrains or coerces employees in the exercise of rights guaranteed by section 7 of the Act.[9] However, the Supreme Court has acknowledged a union's right to control its internal affairs, including its internal disciplinary proceedings, free from the proscriptions of section 8(b)(1)(A).[10] In a recent case, *NLRB v. Retail Clerks Local 1179*,[11] the Ninth Circuit reaffirmed established principles which limit the internal affairs exemption and thereby delineated the scope of union disciplinary power.

In *Retail Clerks*, several employee union members, in noncompliance with their union's instructions to honor a sister union's picketing[12] at their employer's premises, refused to partici-

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title [section 7]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

9. *Id.* § 157 (1970) provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

10. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). For a discussion of *Allis-Chalmers* and union discipline see Menard & Palmer, *The Freedom Not To Take Concerted Union Action*, 9 WAKE FOREST L. REV. 31 (1972). The authors suggest that constitutional principles should be applied to a review of the propriety of union action in section 8(b)(1)(A) cases. *See also* Coleman, *Union Discipline Under Section 8(b)(1)(A) of the National Labor Relations Act: The Emergence of a New Trilogy*, 45 ST. JOHN'S L. REV. 219 (1970).

11. 526 F.2d 142 (9th Cir. Nov., 1975) (per Kennedy, J.).

12. The Teamsters Union commenced picketing Alpha Beta-Acme Markets and sought "strike sanction support" by unions which were affiliated with the local Central Labor Council and which represented Alpha Beta employees. Along with another union, the Council directed Retail Clerks Local 1179 (a party in the instant case) to respect the Teamsters' picket line. Pursuant to unfair labor charges filed by Alpha Beta, the NLRB issued a complaint against the Teamsters and obtained a preliminary injunction restraining their picketing. The Teamsters' picketing was subsequently held to violate section 8(b)(7) of the NLRA, 29 U.S.C. § 158(b)(7) (1970). *See* Alpha Beta-Acme Markets, Inc., 205 N.L.R.B. 462 (1973). Section 8(b)(7), 29 U.S.C. § 158(b)(7) (1970), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . .

pate in the sympathy strike and continued to work. Thereafter, the union fined the employees who crossed the picket line, instituted state court suits to enforce the fines and denied the members' request to transfer their membership to another local as penalty for their having crossed the picket lines. In response, the employees filed an unfair labor practice charge with the National Labor Relations Board (NLRB).[13] The Board affirmed the administrative law judge's decision that the union had violated section 8(b)(1)(A) by taking punitive measures against the employees and ordered the union to rescind all punishments imposed, refund the fines collected and have the state court proceedings dismissed.[14]

In analyzing whether the union's action fell substantively within the internal affairs exemption[15] of section 8(b)(1)(A), the Ninth Circuit, applying the test enunciated in *Scofield v. NLRB*,[16] proceeded to determine (1) whether the union's disciplinary action furthered a legitimate union interest; and (2) whether the disciplinary action impaired national labor policy.

Relying on language in section 7,[17] the court reasoned that a sympathy strike serves the legitimate union interest of promoting mutual aid and cooperation with other labor organizations and that the union, therefore, had a legitimate interest in having its members observe the sister union's picket lines, even though the

13. Retail Clerks Local 1179, 211 N.L.R.B. 84, 86 L.R.R.M. 1588 (1974).

14. 526 F.2d at 144.

15. In order to come within the internal affairs exemption, union disciplinary actions must qualify as "internal," both in a procedural and substantive sense: "Procedurally, the means of enforcement must not exceed the contractual authority of the union over its members. Substantively, the rule being enforced must reflect a legitimate union interest and must not impair national labor policy." *Id.* at 145. This dual test was set forth in Scofield v. NLRB, 394 U.S. 423 (1969). For a discussion of *Scofield* see note 16 *infra*. In *Retail Clerks*, the Ninth Circuit summarily held that the union's enforcement procedures—the levying of fines, the institution of suits to enforce the fines and the refusal to transfer membership to another local—were internal matters. 526 F.2d at 145-46.

16. 394 U.S. 423 (1969). The *Scofield* court stated that "§ 8(b)(1)(A) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 430.

17. For the text of section 7 see note 9 *supra*. In NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), the Supreme Court held that a union has a "particularly vital" interest in disciplining members who failed to support its own lawful economic strike. The Ninth Circuit has previously held that a union may discipline members for failing to observe a sister union's lawful economic strike. Morton Salt Co. v. NLRB, 472 F.2d 416 (9th Cir. 1972), *vacated on other grounds*, 414 U.S. 807 (1973), *reconsidered sub nom.* O'Reilly v. NLRB, 510 F.2d 428 (9th Cir. 1975).

picketing was subsequently held to have violated section 8(b)(7) of the NLRA.[18] However, the union, in continuing to discipline the employees after the union was on notice[19] that the picketing was unlawful, tended to impair the congressional policy[20] expressed in section 8(b)(7) against such picketing. The court concluded that the union's legitimate interest at the time of the sympathy strike did not outweigh the impairment of national labor policy and, consequently, the union disciplinary action was not exempt from section 8(b)(1)(A) as an internal matter. Accordingly, the court enforced the Board's order.[21]

The decision of the Ninth Circuit in *Retail Clerks* appears equitable. No valid purpose is served in immunizing union disciplinary action that compels adherence to unlawful conduct. It is important to note that *Retail Clerks* does not stand for the proposition that unions must wait for a subsequent determination of the legality of a sister union's picketing before instituting a sympathy strike or initiating disciplinary action against union members who crossed picket lines. Rather, it only requires that unions cease their imposition of discipline once the union has obtained notice that the picketing is unlawful.

B. Federal Court's Power to Enjoin a Strike

The Supreme Court decision in *Boys Markets, Inc. v. Retail Clerks Local 770*,[22] granting federal courts jurisdiction to enjoin a strike by a union over a grievance that it has contractually agreed to arbitrate, marked an exception to the national labor policy

18. For the text of section 8(b)(7) see note 12 *supra*. At the time of the sympathy strike, the Teamsters' picketing had not yet been declared unlawful. In addition, the Retail Clerks Union members had the right under the applicable collective bargaining agreement to honor the picketing line without regard to its legality, if sanctioned by the local Central Labor Council. Thus, the union was allegedly acting in good faith when it initiated the sympathy strike.

19. The union continued its efforts to discipline the employees after the Board issued a complaint and obtained a federal injunction against the Teamsters, and after the Board's determination that the picketing was unlawful. 526 F.2d at 147.

20. In other circuits, union discipline has been invalidated as an impairment of national labor policy when imposed to compel members to strike in violation of the NLRA or of their collective bargaining contracts. *See, e.g.*, Local 1104, Communications Workers v. NLRB, 520 F.2d 411 (2d Cir.), *cert. denied*, 423 U.S. 1051 (1976) (unlawful secondary boycott); Verville v. International Ass'n of Machinists, 520 F.2d 615 (6th Cir. 1975) (sympathy strike in violation of no-strike clause in collective bargaining agreement).

21. 526 F.2d at 147.

22. 398 U.S. 235 (1970). For a discussion of the historical background of this decision see Axelrod, *The Application of the* Boys Markets *Decision in the Federal Courts*, 16 B.C. Ind. & Com. L. Rev. 893, 895-96 (1975).

against issuance of injunctions embodied in the Norris-LaGuardia Act.[23] In *Donovan Construction Co. v. Construction Laborers Local 383*,[24] the Ninth Circuit sought to delineate the scope of that exception.

The action in *Donovan*, which led to a contested injunction, arose out of a work stoppage incident to a jurisdictional dispute between the Laborers Union and another union. Donovan, the general contractor, sought and obtained a preliminary injunction against the Laborers under section 301 of the Labor Management Relations Act (LMRA)[25] to enforce the provisions of his collective bargaining agreement prohibiting strikes or work stoppages over jurisdictional controversies.[26] Subsequently, the district court granted a permanent injunction enjoining the Laborers Union from "engaging in any strike or work stoppage at the operations of plaintiff at the United States Veterans Hospital . . . concerning matters which are subject to being resolved by procedures contained in labor agreements by which plaintiffs and defendants are bound."[27]

The primary issue on appeal was whether the injunction instituted by the district court exceeded the authority vested in the court by *Boys Markets*. *Boys Markets* requires that injunctive relief under section 301 must be conditioned upon the issuing court's finding that: (1) the parties are contractually bound to arbitrate the dispute at issue; (2) the dispute is arbitrable; (3) the moving party

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23. 29 U.S.C. §§ 101-115 (1970). Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970), provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following . . . .

24. 533 F.2d 481 (9th Cir. Mar., 1976) (per Sneed, J.)

25. LMRA § 301(a), 29 U.S.C. § 185(a) (1970), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in [the Act], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

26. The day before filing for a preliminary injunction, Donovan requested the NLRB to decide which union was entitled to the work. Two weeks later, the Board issued its decision awarding the disputed work to the Laborers. Three months later, the district court granted a permanent injunction. 533 F.2d at 483.

27. *Id.* at 485.

is ready and willing to arbitrate; and (4) the requested relief is warranted under the ordinary principles of equity.[28]

Finding the first three requirements of *Boys Markets* met, the Ninth Circuit examined the equitable considerations and found no evidentiary support that future strikes were likely, that they would cause irreparable harm, that there was no adequate remedy at law or that Donovan would be damaged more from the denial of the injunction than the union would from its issuance.[29] Consequently, the *Donovan* court concluded that the contested injunction—directed against "any strike or work stoppage or a threat of a work stoppage" at the construction site—was overly broad[30] and should be remanded for modification.[31] In requiring precision in the construction of labor injunctions, the Ninth Circuit has demonstrated its sensitivity both to the substantive criteria imposed by the equity requirements of *Boys Markets* and to the prescriptions of the Norris-LaGuardia Act.

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28. 398 U.S. at 254. *See generally* Note, *Federal Labor Policy and Scope of the Prerequisites for a Boys Markets Injunction*, 19 ST. LOUIS L.J. 328 (1975). Equitable considerations include: (1) whether breaches are occurring and will continue, or have been threatened and will be committed; (2) whether they have caused or will cause irreparable injury to the employer; (3) whether the employer will suffer more from the denial of an injunction than the union from its issuance; and (4) whether the complainant has an adequate remedy at law. Courts have been remiss in carefully scrutinizing the equitable requirements in *Boys Markets* injunction cases. Axelrod, *supra* note 22, at 937.

In another case decided during the survey period, the Ninth Circuit was presented with an employer's contention that the ordinary principles of equity warranting a *Boys Markets* injunction require that the union establish a "reasonable likelihood of success" in having its position in arbitration accepted by the arbitrator. The court rejected this standard and held that the plaintiff need only establish that arbitration will not be a futile endeavor. Amalgamated Transit Union v. Greyhound Lines, Inc., 529 F.2d 1073, 1077-78 (9th Cir. Jan., 1976) (per Sneed, J.). On certiorari, the Supreme Court vacated the judgment without an opinion. 45 U.S.L.W. 3224 (U.S. Oct. 4, 1976). The Supreme Court remanded the decision to the Ninth Circuit for further consideration in light of Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976). The closely divided *Buffalo* Court held that a district court could not enjoin the strike in question since the Court found that the strike was not over an arbitrable grievance. *Id.* at 3147. The dissent stated that a correct interpretation of *Boys Markets* required a different result. *Id.* at 3150. Recently, the Fourth Circuit expressly adopted the Ninth Circuit's opinion in *Amalgamated*. *See* Lever Brothers Co. v. International Chem. Workers Local 217, No. 76-1340 (4th Cir., Nov. 30, 1976).

29. 533 F.2d at 486.

30. Both section 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109, (1970), and rule 65(d) of the Federal Rules of Civil Procedure mandate that an order granting an injunction designate with specificity the acts to be restrained. Despite these requirements, the labor injunction is often overbroad because "the employer's attorney, who naturally seeks the broadest possible relief, often determines the scope of the order since the judge may simply adopt his proposed draft." Axelrod, *supra* note 22, at 947-48.

31. 533 F.2d at 486.

C. Adequacy of Intra-Union Remedies

Almost a decade ago, nonunion employees brought suit in district court, challenging a union's expenditure of compulsory agency fees for political and ideological purposes over their objection as violative of the fair representation duty.[32] A first appeal followed the district judge's dismissal of the suit on the ground that the preemption doctrine created exclusive jurisdiction in the National Labor Relations Board. The Ninth Circuit reversed,[33] holding that the district court had jurisdiction under section 301 of the LMRA.[34] Prior to the district court's reconsideration of the case, the union adopted an intra-union procedure whereby employees could receive a rebate of that portion of their dues or fees spent for political activities to which they objected. On remand, the district court granted the union's motion for summary judgment on the issue of breach of the duty of fair representation, finding that the internal union remedy was a fair, reasonable and adequate procedure.[35] Plaintiffs in *Seay v. McDonnell Douglas Corp.*[36] brought this second appeal, contesting the propriety of the granting of summary judgment. The Ninth Circuit held that the district court erred in not granting the employees a full hearing on the fairness and adequacy of the intra-union remedy[37] and declined to follow the Tenth Circuit's contrary result in *Reid v. UAW, District 1093*,[38] a case identical to the present one.

In reaching its conclusion that a genuine issue of fact was

32. The Supreme Court has held that unions may not appropriate union dues and agency fees to finance political activities if members or fee payers object to the utilization of these funds for such purposes. *See, e.g.*, Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). Although *Street* and *Allen* were decided under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), the Ninth Circuit has held that these holdings are equally applicable to the National Labor Relations Act, the Act involved in the present litigation. *See* Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003 (9th Cir. 1970).

33. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970).

34. *Id.* at 999-1000. Section 301 of the Labor-Management Relations Act is codified at 29 U.S.C. § 185 (1970).

35. Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 763 (C.D. Cal 1973).

36. 533 F.2d 1126 (9th Cir. Mar., 1976) (per Zirpoli, D.J.). Plaintiffs also appealed orders of the district court denying their motions for class action status and denying them leave to amend the complaint. *Id.* at 1129 n.4.

37. *Id.* at 1132.

38. 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973). Both *Reid* and *Seay* involved the same factual issues, the same legal issues, the same employer (McDonnell Douglas Corp.) and identical prayers for relief. 371 F. Supp at 756. In affirming the district court's order granting the union's motion for summary judgment, the *Reid* court held that plaintiffs' conjectural statements condemning the fairness and effectiveness of the union remedy did not suffice to create an issue of fact. 479 F.2d at 520.

presented, the *Seay* court focused on three critical factors. First, under the rule of *Brotherhood of Railway Clerks v. Allen*,[39] the union bears the burden of proof in ascertaining the percentage of plaintiffs' fees which it is entitled to retain, whereas under the remedy established by the union, the burden falls on the employees to challenge the amount allocated for political purposes. Thus, the court agreed with the plaintiffs' contention that the internal union remedy deprived them of a procedural right to which they were entitled were a judicial remedy to be imposed. Second, the court noted that the union had been on notice since the Supreme Court decision in *International Association of Machinists v. Street*[40] that unions must provide for a rebate of fees misappropriated for political purposes, yet they did not comply with that requirement until twelve years after *Street* was decided and six years after the institution of the instant action. Such conduct, the *Seay* court maintained, raised serious doubts concerning the willingness and ability of the union to administer its internal remedy fairly and accurately. The Ninth Circuit further observed that to require the employees to exhaust the intra-union remedy, with its lengthy appellate procedure, would impose an intolerable burden on the plaintiffs in *Seay*.

Although the Ninth Circuit evinced a willingness to scrutinize intra-union remedies, *Seay* does not represent an erosion of the policy favoring minimum judicial interference in internal union affairs. Rather, the union's dilatory conduct and the lengthy period of litigation involved in this case suggest that the Ninth Circuit will require a judicial determination of employees' rights in the absence of guarantees that the union procedures will be fairly and accurately administered.

D. Damages and Attorneys' Fees for Unlawful Secondary Activity

In *Mead v. Retail Clerks Local 839*,[41] the Ninth Circuit considered the propriety of a district court's issuance of an order awarding damages to a primary employer injured by unlawful secondary activity and denying the recovery of attorneys' fees incurred in bringing the damage suit. The Meads, plaintiffs and storeowners, had refused to sign a contract which contained a "demonstration clause." This provision provided that food dem-

39. 373 U.S. 113 (1963).
40. 367 U.S. 740 (1961).
41. 523 F.2d 1371 (9th Cir. Oct., 1975) (per Browning, J.).

onstrators passing out samples of various products to the store's customers must be covered by all terms of the collective bargaining agreement, whether the demonstrators were hired by the Meads or by the supplier of the item being promoted. Following the Meads' rejection of the proposed contract, the union commenced picketing. Shortly thereafter, the Meads filed an unfair labor practice charge with the NLRB, contesting the validity of the "demonstrator clause" on the basis of the fact that it was a "hot cargo" clause proscribed by section 8(e) of the NLRA[42] in so far as it applied to demonstrators who were employed by a supplier but not by the Meads.[43] Subsequently, the Meads instituted a suit under section 303 of the LMRA[44] in district court to recover damages for injuries sustained as a result of the strike. The district court granted the Meads damages and attorneys' fees incurred in the prior unfair labor practice proceeding, but denied attorneys' fees expended in the section 303 action. Both parties to the district court suit appealed.

The Ninth Circuit, extending the rationale of *United Brick & Clay Workers v. Deena Artware, Inc.*[45] affirmed the district court's

42. Section 8(e) of the NLRA, 29 U.S.C. § 158(e) (1970), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

The Meads also contended that the union was violating *id.* § 158(b)(4)(A) by exerting economic pressure to compel them to accede to the clause. 523 F.2d at 1373.

43. The NLRB issued an order compelling the union to cease striking and insisting that the clause be included in the contract. Retail Clerks Local 1288, 163 N.L.R.B. 817 (1967). The Board's order was later enforced with a modification to make it clear that demonstrators who were employees of the Meads could be covered by the bargaining agreement. Retail Clerks Local 1288 v. NLRB, 390 F.2d 858 (D.C. Cir. 1968).

44. LMRA § 303, 29 U.S.C. § 187 (1970), provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b) (4) of this title.
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> (b) Whoever shall be injured in his business or property by reason or [*sic*] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

45. 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952). In *Deena Artware*, the

decision which held that a primary employer could maintain a section 303 suit for damages incurred as a result of unlawful secondary activity.[46] The congressional purpose in enacting section 8(b)(4)(A) was to prohibit the secondary activity.[47] Thus, there was no apparent reason, the *Mead* court asserted, for denying the statutory remedy to an employer injured by such proscribed secondary activity.

The court then dealt with the issue of the quantum of proof necessary to establish damages in a section 303 action. The district court had found that the union's picketing was motivated by both unlawful secondary purposes and lawful primary purposes; that the consequences of those activities were inseparable; and that the Meads, therefore, were entitled to recover the total damages suffered as a result of the picketing. The Ninth Circuit agreed that under the circumstances of this case the damages could not be apportioned, but held that a showing that the unlawful objective "materially contributed" to the loss or has been a "substantial factor" in bringing it about is required before an employer's injury is compensable.[48] This quantum of proof strikes a satisfactory balance between the dual congressional objectives of preserving the right of unions to engage in strikes to achieve primary pur-

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court allowed the primary employer to recover for injury resulting from secondary pressure brought to bear upon another employer.

46. There is conflicting authority as to whether a prior decision by the NLRB under section 8(b)(4) should be determinative on the issue of liability in a subsequent section 303 damage suit. *Compare* Old Dutch Farms, Inc. v. Milk Drivers Local 584, 281 F. Supp. 971 (E.D.N.Y. 1968); Strip Clean Floor Refinishing, Inc. v. Painters Dist. Council No. 9, 333 F. Supp. 385 (E.D.N.Y. 1971), *with* International Wire v. Local 381, IBEW, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973); Paramount Transp. Sys. v. Teamsters Local 150, 436 F.2d 1064 (9th Cir. 1971). For a general discussion of this issue see Dawson, *Why a Decision by the NLRB Under 8(b)(4) Should be Determinative on the Issue of Liability in a Subsequent Section 303 Damage Suit*, 27 OKLA. L. REV. 660 (1974). For a discussion of the civil damage remedy under section 303 see Leslie, *The Role of the NLRB and the Courts in Resolving Union Jurisdictional Disputes*, 75 COLUM. L. REV. 1470, 1510 (1975).

47. For a general discussion of secondary boycotts see C. MORRIS, THE DEVELOPING LABOR LAW 604 (1971).

48. 523 F.2d at 1379. In so far as the premise of the district court's award was that the Meads were entitled to damages because the picketing was motivated in part by the union's unlawful secondary objective, the Ninth Circuit remanded for a factual determination of whether the unlawful objective was a substantial cause of injury. *Id.* As the court noted, an employer is not without remedy simply because he or she is unable to meet this standard of causation. The employer may still be afforded relief in the form of an NLRB cease-and-desist order issued under section 10(c) of the LMRA, 29 U.S.C. § 160(c) (1970), or a court injunction may issue under section 10(*l*), 29 U.S.C. § 160(*l*) (1970). Such equitable relief, unlike the award of damages, can be directed solely against the unlawful demand. 523 F.2d at 1379 n.9.

poses and of deterring unlawful secondary activity and compensating those unjustly damaged.

Finally, the Ninth Circuit confronted the issue of the award of attorneys' fees.[49] Relying upon *Teamsters Local 20 v. Morton*[50] and *Alyeska Pipeline Service Co. v. Wilderness Society*,[51] the court pointed out that recoverable damages in suits under section 303 were actual compensatory damages only and that, absent a statute or an enforceable contract, the general American rule is that litigants must pay their own attorneys' fees. In denying recovery of attorneys' fees expended in the NLRB proceeding, the Ninth Circuit maintained that a contrary holding would circumvent the NLRB rule which permits recovery only where the charged party's defense is frivolous or in bad faith.[52]

The decision in *Mead* signifies that the Ninth Circuit has increased the quantum of proof necessary for an employer to establish damages when the union has engaged in both lawful and unlawful conduct. However, the court suggested that a less rigorous burden of proof, allowing recovery on evidence supporting "a just and reasonable inference" that the employer was damaged because of picketing, will assure recovery in most cases in which the unlawful motivation materially contributed to the picketing.

E. Collective Bargaining and Subcontracts: Between the Devil and the Deep Blue?

In order to effectuate the purposes of section 10(k) of the Norris-LaGuardia Act,[53] which provides for adjudication of juris-

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49. Sillman v. Teamsters Local 386, 535 F.2d 1172 (9th Cir. May, 1976) (per Lucas, D.J.), decided later in the survey term, presented the identical issue of the possibility of recovery of attorneys' fees for prosecuting a section 303 suit. Not surprisingly, the Ninth Circuit denied their recovery. *Id.* at 1175. Several circuits have rejected the view that section 303 litigants are entitled to recover attorneys' fees. *See* Bryant Air Conditioning & Heating Co. v. Sheet Metal Workers Local 541, 472 F.2d 969, 972 (8th Cir. 1973); Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co., 384 F.2d 101, 110 n.10 (5th Cir. 1967); Teamsters Local 984 v. Humko Co., 287 F.2d 231, 243-44 (6th Cir. 1961).

50. 377 U.S. 252 (1964).

51. 421 U.S. 240 (1975).

52. This rule was recently announced in Tiidee Prods. Inc., 194 N.L.R.B. 1234, 1236-37 (1972), *modified and enforced*, International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974).

53. Section 10(k), 29 U.S.C. § 160(k) (1970), provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(d) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such

dictional (work assignment) disputes, it is essential that no federal or state court be permitted to impair compliance with a final NLRB order.[54] In *Associated General Contractors of America, Inc. v. Operating Engineers Local 701*,[55] the Ninth Circuit held that preemption principles do not preclude an award of damages for an employer association's breach of a collective bargaining agreement prohibiting subcontracting the union's work to non-signatories to the agreement, even though an NLRB jurisdictional dispute determination refused the union the disputed work.[56] The court agreed with the union's contention that the NLRB decision did not prevent the employer association from complying with its contractual obligations and reversed and remanded for a determination on the issue of damages for breach of contract.[57]

The dispute in *Operating Engineers* arose when a member of Associated General Contractors of America, Inc. (AGC), an employer association, contracted with a nonmember subcontractor in violation of the collective bargaining agreement between AGC and Operating Engineers. The subcontractor, pursuant to his contract with his own employer association (Northwest Concrete Pumping Association), employed the Teamsters Union to perform work claimed by the Operating Engineers under their collective bargaining agreement with AGC. Operating Engineers submitted their grievance to a Board of Adjustment, pursuant to the AGC-Operating Engineers Agreement, and were assigned the contested work. In response, the Teamsters Union threatened to strike, and one of the contractors filed a LMRA section 8(b)(4)(D)[58] charge with the NLRB against the Teamsters Union.

> unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

54. *See* Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953).

55. 529 F.2d 1395 (9th Cir. Jan., 1976) (per Duniway, J.), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 4, 1976).

56. *Id.* at 1398.

57. *Id.* The issue of damages was not presented to the NLRB. *Id.*

58. 29 U.S.C. § 158(b)(4)(D) (1970) provides that it shall be an unfair labor practice for a labor organization or its agents

> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, proc-

The NLRB conducted a hearing under section 10(k) of the NLRA and awarded the work to the Teamsters.[59] When the Operating Engineers continued to file grievances against AGC members who subcontracted work to members of Northwest Concrete, AGC filed an action in federal district court for injunctive relief restraining the Operating Engineers from pursuing arbitration of such grievances and for reformation of the collective bargaining contract. Operating Engineers counterclaimed for damages for breach of contract.[60]

In reversing the district court's order granting AGC its requested relief, the Ninth Circuit declared that the Board's decision, so far as actual assignment of the work to the Teamsters was concerned, preempted the contract provision, but held that the preemption doctrine did not invalidate the contract provision for all purposes.[61] Thus, although the NLRB order compelled AGC members, who subcontracted with nonsignatory members in breach of the AGC-Operating Engineers contract, to employ Teamsters to perform the work, the order did not prevent AGC

> ess, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . .

59. *See* Joint Council of Teamsters No. 37, 205 N.L.R.B. 383, 83 L.R.R.M. 1693 (1973). In resolving the dispute in favor of the Teamsters, the Board placed particular emphasis on the practice of the employer and other employers in similar situations in the area, the experience of the Teamsters in performing the disputed work and considerations of efficiency and economy of operation. *Id.* at 385, 83 L.R.R.M. at 1695. Finding the dispute was likely to recur at other jobsites, the Board expanded the scope of its order to apply coextensively with the coinciding jurisdictional areas of the two unions. *Id.* at 386, 83 L.R.R.M. at 1696.

60. The Operating Engineers could have also challenged the validity of the Board's 10(k) determination through a section 8(b)(4)(D) enforcement proceeding. Rarely are such attempts successful, as the Ninth Circuit noted. Out of 14 reported cases since the Supreme Court decision NLRB v. Radio & Television Eng'rs Local 1212, 364 U.S. 573 (1961), enlarged the scope of the Board's power in 10(k) proceedings, those circuit courts which have reached the merits of a section 10(k) decision have consistently sustained the Board's decision. However, in a spirited move, the Ninth Circuit recently held a section 10(k) determination to be "arbitrary and capricious." NLRB v. ILWU Local 50, 504 F.2d 1209 (9th Cir.), *cert. denied*, 420 U.S. 973 (1975).

61. 529 F.2d at 1397.

from carrying out its obligations under the AGC-Operating Engineers agreement to contract only with signatory members. The court asserted, therefore, that the rationale for the preemption doctrine—avoiding the creation of conflicting or incompatible standards of conduct—was not applicable.[62]

II. RETALIATORY ASSIGNMENTS AND UNION DEMOCRACY: APPLICATION OF SECTION 609 OF THE LMRDA

Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA),[1] designed to foster internal union democracy, guarantees to members of labor organizations the right of free expression and free participation in their union's democratic processes. Section 609[2] of the LMRDA buttresses Title I by making it unlawful for unions to discipline members for exercising rights conferred under the Act.[3] The applicability of section 609 protection to members who are also officers of the union has been a source of controversy among the circuits. Recently, a panel of the Ninth Circuit, in *Cooke v. Orange Belt District Council of Painters No. 48*,[4] held that the statutory scheme of the LMRDA should be construed so as to preclude retaliatory job reassignments of union officials because of their participation in intra-union political activity.[5] The effect of such a ruling is to further the right of freedom of expression of union officer-members, thereby increasing the likelihood of democratic operation of the union.

A. THE *Cooke* DECISION

Cooke served as business representative for the membership of Local 286, one of the defendant's affiliated unions, in Riverside

62. *Id.* at 1398. However, the court noted that the NLRB determination would preclude relief if Operating Engineers were suing Northwest Concrete to compel it to employ its members rather than the Teamsters and would "arguably" preclude relief if Operating Engineers were suing Northwest for damages. Otherwise, a judgment in favor of Operating Engineers could place the employer "between the devil and the deep blue," *i.e.*, between the choice of violating an NLRB decision or paying damages. This phrase was originally coined by a hearing examiner of the NLRB and was quoted in NLRB v. Radio & Television Broadcast Eng'rs Local 1212, 364 U.S. 573 (1961).

1. LMRDA (Landrum-Griffin Act) §§ 101-105, 29 U.S.C. §§ 411-415 (1970).

2. LMRDA § 609, 29 U.S.C. § 529 (1970). For the text of section 609 see note 8 *infra*.

3. Enforcement of section 609 is through civil suit brought by the individual member in federal district court under section 102 of the LMRDA. For the text of section 102 see note 11 *infra*.

4. 529 F.2d 815 (9th Cir. Jan., 1976) (per Sneed, J.).

5. *Id.* at 819.

County, California. In June, 1973, when elections were held throughout the district council, Cooke was reelected business representative. However, the incumbent executive-secretary, whom Cooke supported, lost, and shortly after the election, Cooke was reassigned to service the membership of another local, at a desert location approximately 167 miles from his residence. Objecting to the transfer, Cooke brought suit in federal district court challenging the union's actions as violative of sections 101(a)(1),[6] 101(a)(2)[7] and 609[8] of the LMRDA. The district court restored Cooke to his former jobsite in Riverside and awarded him compensatory and punitive damages and attorneys' fees.[9] On appeal, the union contended that[10] (1) it had not violated section 609 of the LMRDA; (2) Cooke had first to exhaust available

6. LMRDA § 101(a)(1), 29 U.S.C. § 411(a) (1970), provides:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws.

7. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970), 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.

8. Section 609 provides in pertinent part:

> 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 . . . .

29 U.S.C. § 529 (1970) (emphasis added).

9. On April 1, 1974, the trial judge, after securing oral waivers of findings of facts and conclusions of law, issued an injunction requiring the union to restore Cooke to his former jobsite. On July 26, 1974, the judge modified the injunction to prevent the union from ousting Cooke from his post as business representative at Riverside pursuant to intra-union disciplinary proceedings. Thereafter, on August 27, 1974, the reinstatement of Cooke was suspended by the district court pending the disposition of this appeal. 529 F.2d at 817.

10. The union also contended on appeal that the July 26, 1974 modification of the

internal remedies before initiating a civil action; (3) the NLRB had exclusive jurisdiction over this dispute; and (4) punitive damages did not constitute "appropriate relief" under section 102 of the LMRDA.[11]

B. *Grand Lodge of the IAM v. King*: The Ninth Circuit and Section 609

The *Cooke* court first examined the proper statutory interpretation to be given section 609. In reaching its conclusion, the court relied primarily on its earlier decision in *Grand Lodge of the IAM v. King*.[12] In *King*, appointed union officials, discharged as a consequence of their injudicious choice of candidates in a union election, claimed violations of sections 101(a)(1), 101(a)(2) and 609 of the LMRDA.[13] The union argued that Title I rights did not extend to members who are also officers.[14] The court disagreed, stating that there was nothing in either the statutory language or the legislative history of the LMRDA to indicate that the guarantees of sections 101(a)(1) and 101(a)(2) were intended to be inapplicable to officer-members.[15] In addition, the court noted that such a construction would undermine the statutory objective of promoting internal union democracy by denying "protection to those best equipped to keep union government vigorously and effectively democratic."[16]

The *King* court then proceeded to determine whether removal from office in retaliation for exercising Title I rights constitutes "discipline" within the meaning of section 609. In its

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injunction was improper. The court of appeals found that the inadequacy of the district court record prevented a proper review of the modification and remanded for further proceedings. *Id.* at 821.

11. LMRDA § 102, 29 U.S.C. § 412 (1970), provides:

> 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. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

12. 335 F.2d 340 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964).

13. For the text of these sections see notes 6-8 *supra*. The officers in *King* also asserted that their summary removal from office was in violation of LMRDA § 101(a)(5), 29 U.S.C. § 411(a)(5) (1970) (procedural safeguards against improper disciplinary action). For the text of section 101(a)(5) see note 17 *infra*.

14. 335 F.2d at 343.

15. *Id.*

16. *Id.* at 344.

analysis, the *King* court noted that section 101(a)(5) of the Act,[17] which provides that union members shall not be "fined, suspended, expelled, or otherwise disciplined" without certain procedural guarantees, has been unanimously held not to apply to removal or suspension from office.[18] The union urged that the same restrictive interpretation be given the identical words found in section 609.

In rejecting this position, the court emphasized the different purposes underlying these two sections despite their similarity in language. Relying on the legislative history of section 101(a)(5), the Ninth Circuit pointed out that the section was clearly intended to protect unions from the continued unauthorized conduct of suspected officers by granting unions the power to summarily remove them. Section 609, on the other hand, has no relation to procedural requirements. It is an enforcement provision meant to effectuate the rights conferred under the Act by prohibiting unions from disciplining members who exercise such rights. Absent legislative history to the contrary, the court reasoned that no useful purpose would be served by interpreting section 609 as having the same limitation. The Ninth Circuit's decision was tantamount to a recognition of the importance of union officers in promoting union democracy. The court concluded:

> [T]o construe section 609 to exclude from its coverage dismissal from union office would immunize a most effective weapon of reprisal against officer-members for exercising political rights guaranteed by the Act without serv-

17. 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.

18. *See, e.g.*, Nelms v. United Ass'n of Journeymen, 405 F.2d 715 (5th Cir. 1968) (union business agent removed from office for insubordination); Air Line Stewards Local 550 v. Transport Workers, 334 F.2d 805 (7th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965) (local union president removed from office for financial malfeasance); McKee v. Sales Drivers Local 166, 82 L.R.R.M. 3126 (C.D. Cal. 1973) (appointed business agent terminated at will of secretary-treasurer); Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968) (union business representative discharged from office for election misconduct). For a discussion of the judicial treatment of "discipline" under section 101(a)(5) see Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum Griffin: What is "Discipline" and How Much Process is Due?* 9 GA. L. REV. 383 (1975); Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference with Employment Opportunities*, 114 U. PA. L. REV. 700 (1966).

> ing any apparent legislative purpose; and, as we have noted, the members thus exposed to reprisal would be those whose uninhibited exercise of freedom of speech and assembly is most important to effective democracy in union government.[19]

Under the interpretation of section 609 given by the *King* court, the *Cooke* court had little difficulty in holding that job reassignments of union officer-members initiated in retaliation for the exercise of protected LMRDA rights also violates section 609. In reaching its conclusion, the court acknowledged both the presence of the restrictive proviso set forth in section 101(a)(2)[20] and the need for union administrative coherence. Therefore, the court required that in order for a reassignment to qualify for section 609 treatment, the complaining official must demonstrate that the reassignment "reasonably cannot be related to a legitimate desire of the elected officials to secure a structure of job assignments that will permit them to manage the union in accordance with the mandate of their election."[21] Furthermore, the *Cooke* court stated that union officials have the right to "preserve administrative coherence" by assuring the loyalty of the people they work with, and thus

> [a] certain number of . . . reassignments very likely will occur following the election of certain new officers even in unions deeply committed to the values which animate sections 101(a)(1) and (a)(2).[22]

Thus, to meet the burden of persuasion, a showing that the reassignment took place shortly after the election of an officer whom the complainant opposed is not sufficient. Rather, the reassignment must be shown to be retaliatory.[23]

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19. 335 F.2d at 345.

20. For the text of section 101(a)(2) see note 7 *supra*. The proviso permits a union to adopt and enforce reasonable rules governing the loyalty of members to the institution as a whole. The question of whether the reassignment of officers from the previous administration falls within the protective mantle of the proviso when such reassignment is necessary to the continued vitality of the union was not at issue in *Cooke*. Rather, the Ninth Circuit was confronted only with the question of whether such reassignments can be initiated for exercising Title I rights.

21. 529 F.2d at 819.

22. *Id.*

23. Whether the union harbors an illegal retaliatory motive is a question of fact which may pose proof problems for plaintiffs. A better approach is the one suggested in Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012 (D.D.C. 1969), which shifts the burden to the defendant union "to justify the discharges which came so

C. Other Circuits and the *King* Decision

The Ninth Circuit's view regarding the applicability of section 609 to disciplinary action against union officers because of intra-union political activity has not met with acceptance in the Third and Fifth Circuits. Courts within these circuits have decided that officer-members may be discharged from their posts for exercising their political rights.

In *Sheridan v. Local 626, United Brotherhood of Carpenters*,[24] the Third Circuit rejected the proposition that section 609 prohibits a union from removing an officer-member from office.[25] In *Sheridan*, an elected union business agent claimed that his local had violated section 609 by discharging him from office for exercising his membership right to sue.[26] Examining the language of section 609, Judge Kalodner[27] determined that removal from office did not constitute "discipline" within the meaning of that section.[28] He relied on the legislative history of the LMRDA and reasoned

shortly after the ballots were counted." *Id.* at 1019. It has been suggested that even where legitimate reasons for discharge exist, the courts should not sustain a discharge motivated in "substantial degree" by the exercise of protected LMRDA rights. Note, *Union Officers and Employee-Members: Reprisal Discharges as Unlawful Discipline Under Section 609 of the LMRDA*, 6 Ga. L. Rev. 564, 609 (1975) [hereinafter cited as *Reprisal Discharges* Note].

An analogous problem of determining liability when several motivations may have brought about a discharge arises in cases decided under section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1970). *See* Mead v. Retail Clerks Local 839, 523 F.2d 1371, 1377 n.7 (1975). The appropriate test has been expressed as whether the legitimate motivation was the "moving cause" behind the discharge, NLRB v. West Coast Casket Co., 469 F.2d 871, 874 (9th Cir. 1972), or whether the employee would have been discharged "but for" his or her union activity, NLRB v. Central Press of Cal., 527 F.2d 1156 (9th Cir. Dec., 1975) (per Wright, J.); NLRB v. Ayer Lar Sanitorium, 436 F.2d 45 (9th Cir. 1970). Some courts have maintained that the major or dominant reason for the decision must have been an illegal retaliatory motive. *See, e.g.*, NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312, 1315 (1st Cir. 1971); NLRB v. Plumbers & Pipefitters Local 38, 388 F.2d 679, 680 (9th Cir. 1968). However, all of the formulations contemplate that the proscribed motive must play a substantial role in the termination decision for liability to attach. Mead v. Retail Clerks Local 839, 523 F.2d 1371, 1377 n.7 (1975).

24. 306 F.2d 152 (3d Cir. 1962).

25. *Id.* at 157.

26. The business agent filed criminal charges against a fellow union member who had physically assaulted him. Consequently, the convicted union member filed charges within the union, alleging that the business agent had violated certain provisions of the union constitution in filing the assault charges. After the union trial committee found the business agent guilty, the union membership voted to remove the agent from office.

27. The force of Judge Kalodner's decision is open to question since the two other members of the panel did not join in his lead opinion. One judge dissented, and the other concurred in the result upon a different ground.

28. Judge Kalodner maintained that the disciplinary sanctions enumerated in section 609—fine, suspension and expulsion—manifest a congressional intent to protect mem-

that it is the union-member relationship, not the union-officer or the union-employee relationship, that is protected.[29] Consequently, the Third Circuit took the position that the provisions of section 609 evidenced a congressional intent to apply only to the members *qua* members. Accordingly, the court sustained the removal from office.[30]

In *Wambles v. International Brotherhood of Teamsters*,[31] the Fifth Circuit directly confronted, for the first time,[32] the issue of whether LMRDA protection should be extended to union officers who exercise their Title I membership rights. *Wambles* involved three member-employees who held appointive positions.[33] Plaintiff Mosley had run as candidate for the office of business manager, and the other two plaintiffs had supported him. After Mosley lost the election, all three were discharged. Plaintiffs brought an action alleging that the discharges were in violation of their exercise of protected membership rights. The district court rendered summary judgment for the defendant union, holding that appointed officers and officials were subject to discharge without cause.[34] In a per curiam opinion, the Fifth Circuit affirmed the district court decision, stating that "[t]he elected official has the right to the personal loyalty and loyalty to his programs from

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bers *qua* members. Acknowledging that removal from office is a sanction that can be imposed only on those few members who also serve as officers, Judge Kalodner reasoned that removal from office was not a form of discipline contemplated by section 609. 306 F.2d at 156.

29. *Id.* at 156, 157.

30. The Third Circuit was not completely oblivious to the LMRDA's objective of internal union democracy, since the *Sheridan* court did emphasize the fact that the business agent had been removed from office by the vote of the union membership. The Third Circuit stated its adherence to the ruling of *Sheridan* in Martire v. Laborers' Local 1058, 410 F.2d 32 (3d Cir.), *cert. denied*, 396 U.S. 903 (1969). The decision does give some recognition to the rights of officer-members by affording the right to utilize the remedies of the LMRDA to assert the right to hold office in the future. It is interesting to note that at least two district courts in the Third Circuit have not followed *Sheridan*. *See* Kelsey v. Local 8, Stage Employees, 294 F. Supp. 1368 (E.D. Pa. 1968); DeCampli v. Greeley, 293 F. Supp. 746 (D.N.J. 1968).

31. 488 F.2d 888 (5th Cir. 1974).

32. An earlier Fifth Circuit decision contained dicta that the court would not extend section 609 protection to those union officer-members discharged for having expressed views in opposition to policies which they had been instructed by the union leadership to support. Sewell v. Grand Lodge of the IAM, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972). *But see* Miller v. Holden, 535 F.2d 912 (5th Cir. 1976), characterizing *Sewell* as a case dealing with the union's right to deal with insubordination rather than as a case dealing with a substantive claim of infringement of equal rights or free speech.

33. Plaintiffs Mosley and Wambles held the positions of assistant business managers of the Local, and plaintiff Rachel was bookkeeper. 488 F.2d at 889.

34. *Id.*

those working under him."[35] To force a union president to work with those who have opposed him, the court reasoned, "would create an intolerable situation for the elected official in implementing his programs on which he was elected."[36]

Wambles *and* Sheridan *Evaluated*

Both the Third and Fifth Circuits, in declining to follow *King* and its progeny,[37] can be criticized for their failure to distinguish between discipline related to a labor organization's cohesive administration and discipline directed against the exercise of Title I rights. By characterizing bona fide criticism as insubordination and political opposition as disloyalty, these courts have failed to fulfill effectively the Act's commitment to internal union democracy and have thus undermined the spirit and purpose of the LMRDA.

The impetus for the enactment of the LMRDA came in large measure from the sensational disclosures of the McClellan Committee Hearings[38] on the corrupt and dictatorial practices of organized labor. The LMRDA, specifically Title I, demonstrated congressional recognition of the fact that members of labor organizations have the right to participate actively in a union's democratic practices.[39] The interest in democratically governed

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35. *Id.* at 890. The Fifth Circuit failed to distinguish between personal loyalty to the union's leadership and institutional loyalty to the union itself. For an analysis of the significance of the distinction between the two, see *Reprisal Discharges* Note, *supra* note 23, at 593-99. The LMRDA requires only the latter. For the text of section 101(a)(2) see note 7 *supra*. Had *Wambles* involved an officer who exposed a corrupt leadership, the Fifth Circuit might have reached a contrary result.

36. 488 F.2d at 890.

37. *See, e.g.*, Gabauer v. Woodcock, 520 F.2d 1084 (8th Cir. 1975); Wood v. Dennis, 489 F.2d 849 (7th Cir.), *cert. denied*, 415 U.S. 960 (1974); Salzhandler v. Caputo, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963); Gleason v. Chain Serv. Restaurant, 300 F. Supp. 1241 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 342 (2d Cir. 1970); Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012 (D.D.C. 1969); DeCampli v. Greeley, 293 F. Supp. 746 (D.N.J. 1968); Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968); George v. Bricklayers Int'l Union, 255 F. Supp. 239 (E.D. Wis. 1966).

38. *See* SELECT COMMITTEE ON IMPROPER ACTIVITIES IN LABOR OR MANAGEMENT FIELD REPORT, S. DOC. NO. 12157, 86th Cong., 1st Sess. (1959); SELECT COMMITTEE ON IMPROPER ACTIVITIES IN LABOR OR MANAGEMENT FIELD INTERIM REPORT, S. DOC. NO. 12070, 85th Cong., 2d Sess. (1958). Commentary on the legislative history of Title I has been extensive. *See* 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); Sherman, *The Individual Member and the Union: The Bill of Rights Title in the LMRDA of 1959*, 54 NW. U.L. REV. 803 (1960).

39. LMRDA § 2, 29 U.S.C. § 401 (1970) (declaration of findings, purposes, and pol-

unions is clearly frustrated if freedom of expression is made to hinge on any additional status that a particular member may possess as an appointed or elected official. This is not to imply that all speech by officer-members should go unregulated, as the restrictive proviso of section 101(a)(2)[40] clearly contemplates certain limitations on members' speech which undermines a union's institutional integrity and unjustifiably hinders a labor organization's performance of its legal and contractual obligations. Dissent, criticism or political opposition by officer-members that does not in fact institutionally affect a union in contravention of the proviso should come within the protective ambit of sections 101(a)(2) and 609.[41] So long as unions are permitted to curb the advocacy of those views which threaten the institution as a whole, the purpose of section 101(a)(2)'s restrictive proviso is not defeated. However, to allow a union to discipline officer-members on the ground that their expression of candidate preference attenuates

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icy). *See* Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963), wherein the court stated:

> The LMRDA of 1959 was designed to protect the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers. The legislative history and the extensive hearings which preceded the enactment of the statute abundantly evidence the intention of the Congress to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain.

Id. at 448-49.

40. For the text of section 101(a)(2) see note 7 *supra*. Judicial interpretation, under section 101(a)(2), of speech allegedly harmful to the union as an institution demonstrates that the courts have given broad protection to freedom of expression. *See, e.g.*, Salzhandler v. Caputo, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (union financial secretary's allegedly libelous statements regarding the handling of union funds by union officers is protected speech under the LMRDA); Airline Maintenance Lodge 702 v. Loudermilk, 444 F.2d 719 (5th Cir. 1971) (union imposition of fine on its member for dual unionism violated member's right to free speech under the LMRDA); Farowitz v. Musicians Local 802, 330 F.2d 999 (2d Cir. 1964) (union member's advocacy of nonpayment of union dues, regardless of impact on union, will be protected if made in good faith); Reyes v. Laborers Local 16, 327 F. Supp. 978 (D.N.M. 1971) (union member's threats of physical violence against union president are not protected free speech under the LMRDA).

41. Some commentators have argued that these rights should prevail even though their exercise may cause disunity and temporary disruption:

> As expected, the expanding liberal construction of the guarantees of section 101(a)(2) has caused some internal dissension and insurgency in the unions, but the courts, as well as most legal scholars, have felt that it is in the best interest of both workers and society to encourage participatory democracy in the labor movement rather than attempting to protect, through enforced loyalty, the union's solidarity as the exclusive bargaining representative for its members.

Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 610 (1973).

its strength as an institution is to render the political rights guaranteed by the LMRDA meaningless.

The Ninth Circuit, in acknowledging that discharges and transfers may be induced in reprisal for the exercise of protected LMRDA rights, manifested a healthy scepticism that the Fifth Circuit lacked.[42] In concluding that officials who have unsuccessfully opposed the present leadership cannot competently effectuate the new administration's policies,[43] the *Wambles* court failed to give proper weight to the officer-member's interest in freedom of expression guaranteed under Title I. Underlying the holding in *Cooke* is the idea that the institutional interest in sound union administration will outweigh the officer-member's statutory rights only if the strength and effectiveness of the union is threatened.[44] Any contrary result misinterprets the explicit language of section 101(a)(2) and thus subverts the substantive rights conferred by the provision.

The *Cooke* court properly focused its attention on the conduct the union sought to punish rather than on the severity of the penalty imposed.[45] Cooke's union allegedly sought to punish him for exercising his political rights, and this action was no more legitimate under section 609 because the union sought to discipline Cooke by reassignment far from home rather than by discharge

42. The Fifth Circuit appears to lack a fundamental sensitivity to the dilemmas involved in participating in union political activities. Many times, power struggles within a national union's leadership demand the political allegiance of union officers and employees. *See Reprisal Discharges* Note, *supra* note 23, at 571. In denying relief to those officer-members who cannot remain neutral, the Fifth Circuit's approach leaves such officers with the Hobson's choice of forfeiting LMRDA guaranteed rights or risking loss of employment.

43. Although the *Wambles* court's concern for cohesive union administration is not misplaced, labor organizations are not the fragile entities the Fifth Circuit would have one believe. Clearly, the union has a strong interest in preserving the integrity of its bargaining position. Equally clear is that every expression of candidate preference cannot be properly challenged as an attempt to vitiate the union's strength as a collective bargaining representative without violating the spirit and objective of the LMRDA.

44. 529 F.2d at 819 n.1. Also implicit in *Cooke* is the Ninth Circuit's appreciation of the significance of the role that officer-members play in generating union democracy. Since these officers' positions afford them a unique vantage point from which to gain access to information on corruption and mismanagement that the rank and file generally cannot discover, it is essential that officer-members be extended section 609 protection if unions are to remain capable of carrying out internal reform. *Reprisal Discharges* Note, *supra* note 23, at 573 n.51.

45. At least one other court has recognized that reprisal for the exercise of LMRDA membership rights is not limited to the sanction of discharge from employment. Cefalo v. District 50, UMW, 311 F. Supp. 946 (D.D.C. 1970), held that demotion and reassignment of union officials in retaliation for their advocacy of a slate of candidates challenging the incumbent leadership violated sections 101(a)(2) and 609 of the Act.

from employment. The chilling effect of such reassignments upon the free exercise of LMRDA rights by other officer-members is equally inconsistent with the policy considerations underlying the provisions of Title I. Therefore, retaliatory reassignments require the same judicial treatment accorded unlawful discharges when those discharges are used as sanctions against those who exercise their political rights.

D. Exhaustion of Intra-Union Remedies

The *Cooke* court next considered the union's second contention on appeal: even if the reassignment was actionable under the LMRDA, the complaint should have been dismissed because Cooke failed first to exhaust available internal appellate union remedies.[46] Reaffirming an earlier decision,[47] the Ninth Circuit stated that the exhaustion requirement is a matter of judicial discretion and that exhaustion may be excused when to do so would be futile or when the available remedy is inadequate.[48] While it was clear that Cooke had made some efforts to obtain relief within

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46. The basis for this assertion is rooted in the wording of the first proviso of section 101(a)(4) of the Act, which presents the question of whether the clause's directive is mandatory or discretionary. LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1970), provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

The majority of courts have held that the exhaustion requirement is discretionary. *See, e.g.*, NLRB v. Marine Workers Local 22, 391 U.S. 418 (1968); Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969); Foy v. Norfolk & W. Ry., 377 F.2d 243 (4th Cir. 1967); Semanick v. District 5, UMW, 324 F. Supp. 1292 (W.D. Pa. 1971), *aff'd*, 466 F.2d 144 (3d Cir. 1972).

The exhaustion proviso has also presented some confusion over whether its text empowers courts and administrative agencies to require exhaustion. The Supreme Court settled the matter in NLRB v. Marine Workers Local 22, *supra*, holding that the proviso is to be construed to apply to courts and agencies.

47. Buzzard v. Local Lodge 1040, IAM, 480 F.2d 35 (9th Cir. 1973).

48. 529 F.2d at 820. In addition, courts have refused to require exhaustion of remedies where: (1) intra-union remedies have in fact been exhausted for four months; (2)

the union, the absence of findings of fact and conclusions of law[49] made it impossible for the court to determine the propriety of the trial court's discretion in failing to require further exhaustion of intra-union remedies. Consequently, the Ninth Circuit remanded the case to the district court for further proceedings.[50]

E. District Court Jurisdiction

The Ninth Circuit summarily dismissed the union's contention that the court lacked jurisdiction over the instant action. The union argued that Cooke's reassignment constituted an unfair labor practice within the meaning of subsection 8(a) of the NLRA.[51] Therefore, under the *Garmon* doctrine,[52] Cooke's reassignment was subject to the preemptive jurisdiction of the NLRB. Relying on its earlier decision in *King*,[53] the court correctly pointed out that the rights conferred under the LMRDA are cumulative,[54] and consequently, the NLRB did not have exclusive jurisdiction.

F. Punitive Damages Awarded

Turning to the question of the propriety of the district court's order awarding Cooke punitive damages, the Ninth Circuit de-

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there is no likelihood that a decision will be rendered within the four-month period; (3) no available remedy exists; and (4) the union's action complained of is void (a clear violation of federal law). For a discussion of the exhaustion doctrine see Beaird & Player, *Exhaustion of Intra-Union Remedies and Access to Public Tribunals Under the Landrum-Griffin Act*, 26 Ala. L. Rev. 519 (1974).

49. The trial judge in *Cooke* obtained an oral waiver of findings of fact and conclusions of law. 529 F.2d at 821.

50. *Id.* at 821-22.

51. 29 U.S.C. § 158(a) (1970).

52. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Under the *Garmon* doctrine, if "an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ." *Id.* at 245.

53. 335 F.2d at 347.

54. 529 F.2d at 820. The inapplicability of preemption to LMRDA suits has been recognized by the majority of the courts on the ground that the LMRDA expressly manifests congressional intent to entrust enforcement of these new federal rights to a different federal forum. *See* LMRDA § 103, 29 U.S.C. § 413 (1970). *See also* LMRDA § 102, 29 U.S.C. § 412 (1970); Rekant v. Shochtay-Gasos Local 446, Meat Cutters, 320 F.2d 271 (3d Cir. 1963); Plant v. Local 199, Laborers' Int'l Union, 324 F. Supp. 1021 (D. Del. 1971). For a discussion of the preemption doctrine see Beaird & Player, *supra* note 18, at 384; Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L. Rev. 727, 754-55 (1969). Furthermore, one California appellate court has stated: "Congress has expressly withheld preemption of any rights or remedies which a union member may have under state law." Posner v. Utility Workers, 47 Cal. App. 3d 970, 973, 121 Cal. Rptr. 423, 425 (1st Dist. 1975).

cleared that such damages constitute "appropriate relief" within the meaning of section 102[55] of the Act. Although the Ninth Circuit acknowledged that some decisions had denied recovery of punitive damages,[56] the court chose to follow the view adopted by the Fifth Circuit,[57] namely, that punitive damages are recoverable upon the requisite showing of defendant's malice or reckless or wanton indifference to the rights of the aggrieved union member.[58] In Cooke's case, the absence of any findings of fact or conclusions of law made it impossible for the court to determine whether an award of punitive damages was appropriate. Consequently, the Ninth Circuit remanded *Cooke* for further proceedings on this issue.

Underlying the *Cooke* holding is the idea that punitive damages function as "a deterrent to those abuses which Congress sought to prevent."[59] However, the efficacy of punitive damages in protecting the rights conferred under the LMRDA is not readily apparent. Since damage awards are satisfied out of the union treasury and not out of the assets of the individual officers responsible for the unlawful discipline, it is the labor organization, not the leadership, that is penalized. Therefore, the deterrent function of punitive damages is rendered ineffectual. However, if the union's rank and file membership is notified of the nature of the illegal discipline and the amount of the damages awarded,[60] the officers of the union may be more circumspect in their actions in the future for fear of angering the union's membership.

G. Conclusion

The decision in *Cooke*, juxtaposed with the decision in *King*, represents a blend of statutory analysis and judicial recognition of

55. For the text of section 102 see note 11 *supra*.

56. *See, e.g.*, McGraw v. United Ass'n of Plumbers, 341 F.2d 705 (6th Cir. 1965); Magelssen v. Local Union 518, Operative Plasterers, 240 F. Supp. 259 (W.D. Mo. 1965); Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963). However, the Ninth Circuit has held that "emotional distress, standing alone," is not a sufficient basis for awarding punitive damages under the LMRDA. International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307, 315 (9th Cir. 1965).

57. *See* International Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968).

58. 529 F.2d at 820. *Accord*, Farowitz v. Musicians Local 802, 330 F.2d 999 (2d Cir. 1964). Sipe v. Local 191, United Bhd. of Carpenters, 393 F. Supp. 865 (M.D. Pa. 1975); Robins v. Schonfeld, 326 F. Supp. 525 (S.D.N.Y. 1971); Patrick v. I.D. Packing Co., 308 F. Supp. 821 (S.D. Iowa 1969).

59. 529 F.2d at 820, *citing* International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 200 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968).

60. The fact that unions are reluctant to disclose the amount of union funds that are

the realities of intra-union politics. The construction of the term "discipline" to encompass retaliatory job reassignments within section 609's proscribed sanctions serves to expand LMRDA protection for union officer-members. The *Cooke* court's language, requiring a showing that the reassignment has no reasonable relationship to legitimate union management, is consistent with section 609's mandate of institutional loyalty and the union's need for administrative coherence. However, the vitality of the Ninth Circuit's holding is diminished by its requirement that the plaintiff must bear the burden of proof on this issue.[61]

In denying section 609 coverage to union officer-members, the Third and Fifth Circuits have fixed the balance of the inherent tension between section 101(a)(2) guaranteed rights and section 609 in favor of union administration, thereby unduly tempering the national labor policy of union democracy. The Ninth Circuit's decision not to insulate union reprisals which abridge the political freedom of its officials accords the proper weight to individual rights which the LMRDA commands.[62]

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disbursed for violations of membership rights is aptly demonstrated by the $322,000 settlement reached in *King*. Nowhere in the extensive union's annual officers' report is there mention of the *King* settlement, "nor is there any accounting entry which identifies the disbursement of union funds under the settlement." *Reprisal Discharges* Note, *supra* note 23, at 611 n.192.

61. *See* note 23 *supra*.

62. During the survey period, a Ninth Circuit panel held that sections 101(a)(1) and 101(a)(2) of the LMRDA prevent a union from excluding members from union membership meetings because of their refusal to salute or pledge allegiance to the flag, absent any showing that the union as an institution would be seriously harmed by such conduct. Stachan v. Weber, 535 F.2d 1202 (9th Cir. May, 1976) (per curiam).