

COMMENT

APPLICABILITY OF LMRDA SECTION 101(a)(5)
TO UNION INTERFERENCE WITH
EMPLOYMENT OPPORTUNITIES

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959¹ requires a union to provide certain enumerated procedural safeguards before it may fine, suspend, expel, or "otherwise discipline" a member.² Its provisions are enforceable through civil suits brought by individual members in the federal district courts.³ In the seven years since its enactment the section has presented the courts with the problem of giving meaning to its somewhat vague terms.⁴ Much of the litigation arising under the section has centered around the interpretation to be given to the phrase "otherwise disciplined."⁵ In essence the controversy has focused upon the question whether "otherwise disciplined" includes union interference with the employment opportunities of its members or whether it applies only to union action which affects those rights or privileges which arise out of the union-member relationship.

In *Detroy v. American Guild of Variety Artists*,⁶ the Second Circuit held that blacklisting a union member for his failure to abide by an arbitration decision was "discipline" within the meaning of section 101(a)(5). The court's decision appears to have rested upon the dictionary definition of the word "discipline."⁷ The court found that the union had taken steps against the member, that those steps were disciplinary in nature, and that they were, therefore, subject to the protection of section 101(a)(5). Other courts have reached similar conclusions.⁸ Although the language

¹ 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(5) (1964).

² Safeguards Against Improper Disciplinary Action.

—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.

Ibid.

³ 73 Stat. 523 (1959), 29 U.S.C. § 412 (1964).

⁴ See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

⁵ For a brief survey of the holdings in cases under this section see Note, 40 NOTRE DAME LAW. 86, 98-99 (1964).

⁶ 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

⁷ Compare WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 644 (1964) ("discipline . . . punishment by one in authority esp. with a view to correction or training"), with *Detroy v. American Guild of Variety Artists*, *supra* note 6, at 81 ("any member against whom steps are taken by the union in the interest of promoting the welfare of the group is [disciplined]").

⁸ *Burris v. Teamsters Union*, 224 F. Supp. 277 (W.D.N.C. 1963) (blacklisting, citing *Detroy*, although the member was also expelled); *Rekant v. Shochtay-Gasos Union*, 205 F. Supp. 284 (E.D. Pa. 1962), *rev'd*, 320 F.2d 271 (3d Cir. 1963) (causing loss of employment); *Gross v. Kennedy*, 183 F. Supp. 750 (S.D.N.Y. 1960) (same); see *Figuroa v. National Maritime Union*, 342 F.2d 400 (2d Cir. 1965).

of *Detroy* would seem to indicate that any steps taken against a member may be "discipline," at least one circuit has narrowed the scope of coverage to union actions having a substantial effect on the member.⁹

In the more recent case of *Figueroa v. National Maritime Union*¹⁰ the Second Circuit specifically eschewed the distinction between membership rights and employment rights and reaffirmed its decision in *Detroy*.¹¹ In *Figueroa*, however, the court found section 101(a)(5) inapplicable, holding that a union's refusal to refer for employment a member who, according to the provisions of the collective bargaining agreement, was ineligible for such employment because of a former narcotics conviction was not "discipline."

On its face the scope of coverage defined by the Second Circuit seems sound. Congress said "discipline," and if the union's action is disciplinary in nature, section 101(a)(5) may be supposed to require that its safeguards first be granted. Several federal courts have, however, defined the section's coverage more narrowly than the Second Circuit, and have excluded from section 101(a)(5)'s protection union interference with the employment opportunities of its members.¹² These courts have based their interpretation of the scope of the provision primarily upon the rationale set forth in *Strauss v. Teamsters Union*.¹³ In that case the court pointed out that all of the subsections of Title I of the Labor-Management Reporting and Disclosure Act, of which section 101(a)(5) is a part, deal with rights which members obtain by virtue of their union membership and concluded that section 101(a)(5) was also limited to those rights which arise out of the union-member relationship.¹⁴ Unfortunately the

⁹ *Rekant v. Shochtay-Gasos Union*, 320 F.2d 271 (3d Cir. 1963). The union had previously passed a resolution to share work with a member who could not obtain it elsewhere. When the member's work proved to be consistently unsatisfactory, the union voted to rescind the resolution. In holding this action not to be "discipline," the court said: "Viewing the rescinding resolution in the light of its actual effect on appellee we find . . . that . . . at most . . . [it] was an implied and indirect reprimand or censure of appellee for his behavior. . . . a mere 'slap on the wrist'" *Id.* at 277.

¹⁰ 342 F.2d 400 (2d Cir. 1965).

¹¹ *Id.* at 406.

¹² *E.g.*, *Seeley v. Brotherhood of Painters*, 308 F.2d 52 (5th Cir. 1962) (supervisor discharged through union pressure not "disciplined" since membership rights not disturbed); *Lucas v. Kenny*, 220 F. Supp. 188 (N.D. Ill. 1963) (refusal to assign work not "discipline" because no injury to membership relationship); *Forline v. Local 42, Helpers Union*, 211 F. Supp. 315 (E.D. Pa. 1962) (causing loss of employment not "discipline" if unfair labor practice); *Beauchamp v. Weeks*, 43 CCH LAB. L. REP. ¶ 17,196 (S.D. Cal. 1961) (causing suspension from employment not "discipline" if unfair labor practice).

¹³ 179 F. Supp. 297 (E.D. Pa. 1959).

¹⁴ Although the case was a suit by a union member who had been summarily removed from his office as business agent for the union, the court's rationale was that this part of the Act deals with (and is directed toward) the *membership in general* and their relationship, *as members*, with their union. The rights which are created are repeatedly referred to as "the right of any member" or "the right of every member." The rights themselves are internal civil and political rights such as the right to vote in elections § 101(a)(1), to nominate candidates § 101(a)(1) . . . to freedom of speech and assembly § 101(a)(2), to participate in the fixing of dues, initiation fees and assessments § 101(a)(3)

courts have not offered much reasoning in support of their conclusions. Generally only those courts which have limited the coverage of section 101(a)(5) have even recognized the possibility of a contrary view.¹⁵ Those courts have supported their conclusion primarily with the mere assertion that it is correct.¹⁶ Nonetheless several considerations lead to the conclusion that interference with employment opportunities should be excluded from the scope of section 101(a)(5).

The language of the section gives little indication that there should be a distinction drawn between interference with employment opportunities and interference with membership rights, and it would seem that Congress should be concerned with protecting the member regardless of the kind of discipline imposed by the union. But the solution is not so simple. National labor statutes represent a closely integrated scheme for labor regulation, and no construction of them can properly be made without considering the entire structure.¹⁷ In other labor legislation Congress has expressed a policy of neither encouraging nor discouraging union membership. Section 7 of the National Labor Relations Act gives the employee the right to decide for himself whether or not he chooses to be anything more than a nominal union member.¹⁸ Other sections of the same act entitle him to freedom from coercion or interference in the exercise of this choice¹⁹ and prohibit others from discriminating against him because of his decision.²⁰ To construe section 101(a)(5) to include interference with employment opportunities would directly conflict with this policy. That section applies only to union members. Including within its prohibition actions which the union could take against members and nonmembers alike—for example, interference with employment opportunities—would lead to the anomalous result of granting a protection to union members, but not to nonmembers who have suffered the same injury. This discriminatory result and its consequent encouragement of union membership would seem to be inconsistent with congressional intention. An interpretation of “otherwise disciplined” which excludes interference with employment opportunities is more in accord with the congressional policy of neither encouraging nor discouraging union membership.

. . . . In short, this Title deals with the *union-member* relationship and in no way supports jurisdiction of a suit involving the *employer* (union)-employee (business agent) relationship which is the essence of the present suit.

Id. at 300 (emphasis in original).

¹⁵ Compare cases cited note 12 *supra*, with cases cited note 8 *supra*.

¹⁶ See, e.g., *Seeley v. Brotherhood of Painters*, 308 F.2d 52, 59 (5th Cir. 1962) (“Certainly the alleged ‘discipline’ must have some relation to the plaintiff’s membership in the labor organization”).

¹⁷ Cf. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 40, 42 (1956); *Pennello v. Sheet Metal Workers*, 195 F. Supp. 458, 463-64 (D. Del. 1961).

¹⁸ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964).

¹⁹ § 8(a)(1), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1964); § 8(b)(1)(A), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

²⁰ § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964); § 8(b)(2), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1964).

Another consideration is that union interference with members' employment opportunities as a means of disciplining them for reasons related to union activity violates the National Labor Relations Act.²¹ Section 7 of that act grants an employee the right to engage in any legal union activity or to refrain from any or all such activity.²² The employee is entitled to be a good, bad or indifferent union member, or not to be a union member at all,²³ subject to the proviso that in the presence of a valid union security agreement he may be required to tender uniform initiation fees and periodic dues.²⁴ Any attempt by a union²⁵ or an employer²⁶ to coerce the employee in the exercise of these rights violates the act. Furthermore, any attempt by the union to cause the employer

²¹ *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954) (because of union member's failure to obey union rules); *NLRB v. Shear's Pharmacy, Inc.*, 327 F.2d 479 (2d Cir. 1964) (same); *NLRB v. International Union of Operating Eng'rs*, 281 F.2d 313 (5th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *Brunswick Corp.*, 135 N.L.R.B. 574 (1962), *enforced sub nom.* *NLRB v. Carpenter's Local 65*, 318 F.2d 419 (3d Cir. 1963) (to encourage individual members to accept authority of union officers).

Similarly union refusal to refer in an exclusive hiring hall situation constitutes an unfair labor practice when the refusal is based upon considerations of union status or activity. *Lumms Co. v. NLRB*, 339 F.2d 728 (D.C. Cir. 1964) (disrespect for union official); *NLRB v. H. K. Ferguson Co.*, 337 F.2d 205 (5th Cir. 1964), *cert. denied*, 380 U.S. 912 (1965) (refusal to obey union steward); *NLRB v. Local 340, Electrical Workers*, 301 F.2d 824 (9th Cir. 1962); *NLRB v. Local 490, Int'l Hod Carriers Union*, 300 F.2d 328 (8th Cir. 1962) (member worked for blacklisted employer).

²² 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.

49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964). Section 8(a)(3) permits an employer and a union to enter into an agreement requiring membership in a labor organization as a condition of employment on or after the thirtieth day of employment. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964).

²³ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

²⁴ The union security agreement permissible under § 8(a)(3) has been construed to require only the tender of fees and dues: "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Id.* at 41; *Union Starch & Ref. Co.*, 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951). The member may also be required to permit the union to place his name on the membership rolls, although this will place no additional obligations upon him. *NLRB v. General Motors Corp.*, 373 U.S. 734, 744 (1963) (dictum).

²⁵ 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1)(A) (1964):

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7.

²⁶ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1964):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

to use his control over the job to encourage the employee to be a good union member and abide by the union's rules is also a violation of the act.²⁷

Of course, not all union interference with the employment rights of an employee is an unfair labor practice. In *Teamsters Local 357 v. NLRB*,²⁸ the Supreme Court held that where the union does nothing more than enforce the terms of a collective bargaining agreement against an employee it does not violate the act, even though such enforcement may interfere with his employment opportunities.²⁹ Mr. Justice Harlan, concurring, explained that the union as well as the employer is entitled to make reasonable business decisions, and enforcing a collective bargaining agreement is the business of the union.³⁰ In *Miranda Fuel Co.*³¹ the National Labor Relations Board decided that the only permissible union interference with employment opportunities is that which is both necessary to the performance of the union's function as exclusive bargaining agent³² and consistent with its duty of fair representation.³³ Although the Second Circuit denied enforcement of the Board's order,³⁴ decisions of the Supreme

²⁷ 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1964):

(b) It shall be an unfair labor practice for a labor organization or its agents . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)

²⁸ 365 U.S. 667 (1961).

²⁹ *Id.* at 675.

³⁰ Mr. Justice Harlan pointed out that the Court had long recognized the right of an employer to make reasonable business decisions, and drew an analogy to union actions: "A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, non union as well as union, even though a foreseeable result of the decision may be to encourage union membership." *Id.* at 679-80 (concurring opinion).

³¹ 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

³² National Labor Relations Act § 9(a), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1964), provides for the establishment of an exclusive bargaining agent "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" It would seem that only union actions directly related to the accomplishment of these ends would be functions of the exclusive bargaining agent. See, e.g., *Yonkers Contracting Co.*, 135 N.L.R.B. 865 (1962), where the union prevailed upon the employer to hire internally from men about to be laid off rather than from outside men. The Board held that it was clear that the union's function was to attempt to obtain benefits for the employees it represented, and that here it was performing that function in inducing the employer to fill desirable new jobs from within rather than from without.

³³ In holding that the union violated the NLRA by taking steps against a member without sufficient reasons, the Board in *Miranda* said:

an 8(a)(3) or 8(b)(2) violation does not necessarily flow from conduct which has the foreseeable result of encouraging union membership, but that given such "foreseeable result" the finding of a violation may turn upon an evaluation of the disputed conduct "in terms of legitimate employer or union purposes."

Miranda Fuel Co., 140 N.L.R.B. 181, 187-88 (1962). (Footnote omitted.) The Board then went on to hold that what constitutes a valid business purpose for a union is to be determined by the statutory duty of fair representation. See Getman, *Section 8(a)(3) of the NLRA and the Effort To Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 764 (1965). See generally Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

³⁴ *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963). Judge Medina, writing for the court, held that to commit an unfair labor practice "the union or the

Court in cases arising under sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act indicate that the NLRB's position is correct.³⁵

Assuming for the moment that the Board's position in *Miranda* is correct, any interference by the union with the employment rights of a member is subject to the jurisdiction of the Board. If section 101(a)(5) were interpreted to include such interference, it is conceivable that little more would be accomplished than a duplication of remedies.³⁶ The only

employer must have committed some act the natural and foreseeable consequence of which is to be beneficial or detrimental to the union." *Id.* at 176. Finding the facts in this case "could not conceivably have been thought to encourage union membership," he denied enforcement. *Ibid.* Judge Lumbard, finding the facts to suggest nothing more than that the union merely enforced the terms of the collective bargaining agreement, concurred in the denial of enforcement without considering the issue of law presented. *Id.* at 180. Judge Friendly, vigorously dissenting, found the union's and employer's conduct to violate § 8(b)(2) and § 8(a)(3) respectively. *Id.* at 180-86.

³⁵ Section 8(a)(3) prohibits the employer from discriminating in terms of employment to encourage or discourage union membership. Section 8(b)(2) prohibits the union from causing the employer to violate § 8(a)(3). In *Radio Officers' Union v. NLRB*, 347 U.S. 17, 52 (1954), the Supreme Court stated that "encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union . . ." A literal application of this language would, of course, have supplied an unworkable test. The union's function is to obtain from the employer benefits for its members and others whom it represents. If the union is successful and demonstrates some control of power over working conditions, it automatically motivates workers to join. Thus if the provisions of §§ 8(a)(3) and 8(b)(2) were strictly construed, many legitimate union functions would violate the act. In *Teamsters Union v. NLRB*, 365 U.S. 667 (1961), the Court foreclosed this possibility and held that mere enforcement of the terms of a collective bargaining agreement against an employee was insufficient to make out an unfair labor practice.

The union serves no legitimate function when it interferes with the employment opportunities of its members for arbitrary or invidious reasons. As the Court pointed out in the *Radio Officers'* case, the union's conduct in *Miranda* was within the language of § 8(b)(2). Certainly it is within the policy of §§ 8(a)(3) and 8(b)(2). "The purpose of isolating an employee's job from his decision as to whether or not to join a union is thwarted as much when an employee learns that his job is threatened if he angers a union official as when he learns that an employer is likely to take action against him because of concerted activity or union affiliation." Getman, *supra* note 33, at 765. See also *Lummus Co. v. NLRB*, 339 F.2d 728 (D.C. Cir. 1964) (union's refusal to refer a member for work because he was a "troublemaker" held an unfair labor practice); *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 180 (2d Cir. 1963) (Friendly, J., dissenting).

³⁶ See *Forline v. Local 42, Helpers Union*, 211 F. Supp. 315 (E.D. Pa. 1962). There plaintiff brought an action under § 101(a)(5) of the LMRDA, claiming that the union caused plaintiff to be refused employment because of his union activities. The court dismissed the complaint on the ground that it alleged union action which constituted an unfair labor practice and was therefore within the exclusive jurisdiction of the NLRB. In *Beauchamp v. Weeks*, 43 CCH LAB. L. REP. ¶ 17,196 (S.D. Cal. 1961), the union requested the employer to suspend a member from his employment for five days without pay as a means of discipline. The court held that since it was the function of the Board to effectuate the national labor policy in the area of employment relations, the phrase "otherwise disciplined" should be strictly construed and that therefore this conduct did not constitute discipline within the meaning of § 101(a)(5).

It is unlikely that a preemption problem is presented by a broad interpretation of § 101(a)(5), however, since a court's determination of whether the section had been violated would not encroach on the Board's determination of whether an unfair labor practice had been committed. The inquiries are of a totally different nature. On the contrary, forcing the court to decide in a particular case whether union discipline involved employment rights may force the court to usurp the Board's function of deciding whether there had been an unfair labor practice. A court would avoid the problem by hearing all "discipline" cases under § 101(a)(5).

remedies which the courts can grant are an award of damages for the loss of employment³⁷ and an order to the union to stop the interference until it has complied with the procedural safeguards of section 101(a)(5).³⁸ Both of these remedies may also be granted by the Board.³⁹ In fact the Board will be able to order the union to stop interfering with the employment opportunities of its members even after the union has provided the procedural safeguards of section 101(a)(5).

It is possible, however, that including interference with employment opportunities within the coverage of section 101(a)(5) may do more than provide a mere duplication of remedies. If the "full and fair hearing" requirement of the section is interpreted to require a kind of "due process" protection,⁴⁰ there may be cases where the courts can put an end to the disciplinary process. This would become particularly significant should the Board decline jurisdiction of a case,⁴¹ or should the Second Circuit's decision in *Miranda* become the law, thereby freeing union interference with employment opportunities for reasons unrelated to union activity from the sanctions of the National Labor Relations Act.

The union member would not be in a position to complain of the circuitry of litigation which could result from the application of section 101(a)(5)'s protections to union interference with employment opportunities, since he would have a choice of remedies and could avoid delay by electing to bring his complaint immediately before the Board. The union, on the other hand, would be seriously handicapped by such an interpretation of the section. The union serves in two capacities: first, as an association of members and, second, as an exclusive bargaining agent for the employees. While it might not impose too great a burden on the union to require it to give notice and a hearing to a member before taking steps which deprive him of his membership rights, the same is not true of the union operating in its capacity as exclusive bargaining agent. In that capacity almost everything the union does affects the employee's em-

³⁷ *Burris v. Teamsters Union*, 224 F. Supp. 227, 230 (W.D.N.C. 1963).

³⁸ *Detroit v. American Guild of Variety Artists*, 286 F.2d 75 (2d Cir.), cert. denied, 366 U.S. 929 (1961).

³⁹ § 10(c), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(c) (1964).

⁴⁰ See *Vars v. International Bhd. of Boilermakers*, 320 F.2d 576 (2d Cir. 1963), where the court held that the union's findings were unsupported by evidence, and the discipline was thus unwarranted. In setting down guidelines the court admitted lack of authority to weigh the evidence in close cases or to pass on the credibility of witnesses, but said that a "close reading of the record is justified to insure that the findings are not without any foundation in the evidence." *Id.* at 578; cf. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Figueroa v. National Maritime Union*, 342 F.2d 400, 406 (2d Cir. 1965) (dictum). See also *Cole v. Hall*, 49 CCH LAB. L. REP. ¶ 19,035 (E.D.N.Y. 1964), *aff'd*, 339 F.2d 881 (2d Cir. 1965) (union's findings and evidence underlying them inadequate to support discipline). It would seem that at least some minimum "due process" protection must be read into § 101(a)(5) in order to prevent its protections from becoming hollow formalities.

It is also possible that the hearing ordered by the court after finding a § 101(a)(5) violation will bring forth evidence which will lead the union itself to abandon its disciplinary interference with employment rights.

⁴¹ See WOLLETT & AARON, *LABOR RELATIONS AND THE LAW* 111-14 (2d ed. 1960).

ployment opportunities.⁴² To require the union to give notice, time to prepare a defense, and a full and fair hearing every time it must make a decision as to which of two men is entitled to the first or most lucrative work assignment of the day, or whether a man is qualified to be referred for a particular job, would make it virtually impossible for the union to make these decisions at the time when they are needed. To go even further and say that because of the section's limited applicability the union must go through this procedure only before making a decision adverse to a union member produces an even more absurd result. As Mr. Justice Harlan has pointed out, "A union, too, is privileged to make . . . [a reasonable business decision]."⁴³

Furthermore, excluding interference with employment rights from the coverage of section 101(a)(5) would not leave the member completely without protection. If the union makes these business decisions on the basis of union activity or to punish the individual for such activity, it commits an unfair labor practice.⁴⁴ Under the Board's *Miranda* decision it also commits an unfair labor practice if it does not make these decisions fairly.⁴⁵ A recent Supreme Court decision indicates that if the union makes an unjustified decision simply because of a mistaken belief as to the facts, it would violate the act.⁴⁶ These protections do not require a union to comply, before the fact, with a regulation which could cripple its ability to make everyday decisions.

Although the legislative history of section 101(a)(5) gives almost no indication of Congress's intent,⁴⁷ the structure of the statute is more helpful. As the court pointed out in *Strauss v. Teamsters Union*,⁴⁸ Title I of the LMRDA, which includes section 101(a)(5), deals exclusively with union membership, particularly with the relationship between members and their union. The rights created by this section are all rights which apply only to members, and are predominately internal civil and political rights.⁴⁹ The structure then would seem to indicate that the rights protected by section 101(a)(5) are similarly only membership rights. Moreover, the phrase "otherwise disciplined" is, within the context of section 101(a)(5), a general category following several enumerated

⁴² Cf. *Teamsters Union v. NLRB*, 365 U.S. 667, 675-76 (1961).

⁴³ *Id.* at 679-80 (concurring opinion).

⁴⁴ See cases cited note 21 *supra*.

⁴⁵ Getman, *supra* note 33, at 764.

⁴⁶ See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The employer, mistakenly believing that a union organizer threatened to dynamite the employer's plant, discharged him. The Court sustained the Board's finding of an unfair labor practice. The Second Circuit in *Figueroa v. National Maritime Union*, 432 F.2d 400, 406 (2d Cir. 1965), suggested that where there is a factual dispute the union must grant a hearing.

⁴⁷ See Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226, 255 (1959).

⁴⁸ 179 F. Supp. 297 (E.D. Pa. 1959).

⁴⁹ *Id.* at 300.

specifics. Such a configuration usually indicates that the general category is to be limited in scope by the common denominator of the preceding enumerated specifics.⁵⁰ The enumerated specifics of section 101(a)(5)—fine, suspension, and expulsion—are all sanctions which can be imposed only upon union members. It would seem to follow, therefore, that “otherwise disciplined” should likewise be so limited.

Thus despite the contrary view of some courts, the distinction drawn between union conduct which affects membership rights and union conduct which affects employment rights is valid. A proper interpretation of section 101(a)(5) should, therefore, exclude from its coverage union interference with the employment opportunities of its members.

⁵⁰ MISHKIN & MORRIS, ON LAW IN COURTS 399 (1965).