Office and Professional Employees International Union, Local 251, AFL–CIO (Sandia Corporation d/b/a Sandia National Laboratories) *and* Mary Ann Mitchell-Carr *and* Mildred G. Smith. Cases 28–CB–3902, 28–CB–3902–2, and 28–CB–3924

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On August 23, 1994, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order.

This case presents the issue of whether the Respondent violated Section 8(b)(1)(A) of the Act when it imposed internal union discipline against its members, including elected officers, for opposing the policies of the Respondent's president. For the reasons discussed below, we find that the Respondent did not violate Section 8(b)(1)(A).

I. FACTS

In February 1991, the Respondent held an internal union election in which William McLendon was elected president. Charging Party Mary Ann Mitchell-Carr was elected vice president; Charging Party Mildred Smith was elected secretary-treasurer; and members Robert Vaughan and Bernardino Herrera were elected to trustee positions. Beginning in 1992, secretary-treasurer Smith had numerous arguments with McLendon regarding the finances of the Union and "where the monies were being spent." Mitchell-Carr had similar problems with McLendon, particularly his handling of the disbursement of a $58,000 check from the International Union, which McLendon caused to be endorsed directly to a law firm in settlement of a lawsuit against the Respondent.

On February 1, 1993,[1] the Respondent's executive board directed McLendon to gather certain information concerning the disbursement of the $58,000 check. On February 4, McLendon and Mitchell-Carr were re-elected as president and vice president, respectively, and Vaughan was re-elected to a trustee position. Mitchell-Carr testified that on February 5, she congratulated McLendon on his election and told him that she felt they could work together but that she didn't "want to be held responsible for monies that cannot be accounted for."[2] According to Mitchell-Carr, McLendon replied that "[i]f I go down, you're going down with me." Mitchell-Carr responded that, in that case, she would seek legal counsel.

On February 10 the Respondent's executive board passed a motion by Mitchell-Carr and Herrera to request an investigation or audit of the Respondent's financial records by the Department of Labor. At a general membership meeting on February 11 the membership approved the motion. The membership also approved a motion by Herrera establishing that the Respondent's president make no financial commitments without the approval of the executive board.[3]

On March 10 Mitchell-Carr presented to the Respondent's executive board a petition to impeach McLendon. The signatures of Mitchell-Carr, Vaughn, Smith, and Herrera were near the top of the petition's signature list. The gravamen of the petition was that McLendon had not adequately explained the circumstances pertaining to the disposition of the $58,000 check.[4]

On April 7 McLendon presented to the executive board his own petition to impeach Mitchell-Carr. This petition alleged that Mitchell-Carr had improperly called special membership and executive board meetings contrary to the provisions of the Union's constitution and bylaws; had made unauthorized expenditures for the special board meetings; had improperly publicized matters pertaining to the settlement underlying the $58,000 check; and had slandered McLendon and others. Shortly thereafter, impeachment and disciplinary petitions alleging similar misconduct against Smith, Vaughn, and Herrera were presented to the executive board.

On April 27 the Respondent's trial board voted to remove Mitchell-Carr from the office of vice president and to expel her permanently from the Union. Thereafter, the trial board voted to remove Vaughn from the elected office of trustee and to suspend his membership for 5 years, to suspend Herrera from membership for 5 years, and to expel Smith permanently from the Union. Mitchell-Carr, Vaughn, Herrerra, and Smith are employed by Sandia National Laboratories, with which the Respondent has a collective-bargaining relationship, but there is no contention that the internal disciplinary action taken against them by the Respondent affected their employment with Sandia.

II. THE JUDGE'S DECISION

The judge dismissed the complaint. Although he found that McLendon's petition to impeach Mitchell-Carr was "transparently in retaliation" for the Mitchell-Carr faction's petition to impeach him, he concluded that the activities engaged in by these individuals did not per-

[1] All dates hereinafter are in 1993 unless stated.

[2] McLendon did not testify.

[3] According to the uncontradicted testimony of the Respondent's secretary-treasurer, Patricia Tafoya, an audit by the Department of Labor ultimately revealed no irregularities by McLendon or by the Respondent.

[4] The petition also mentioned allegations that McLendon had circumvented the collective-bargaining agreement with respect to job bidding, had created a hostile environment for some elected officials, had intimidated members and acted unprofessionally, and had interfered with the Union's election process.

tain to employee mutual aid or protection under Section 7.[5] The judge also found that Section 8(b)(1)(A) did not reach the union membership issues because the employer-employee relationship was not affected by the Union's discipline. He concluded that the Board lacks subject matter jurisdiction over the dispute because it relates exclusively to rights of union members under the Labor Management Reporting and Disclosure Act (LMRDA).

The General Counsel excepts to the judge's findings. He argues that the expulsions and suspensions from membership and the removals from union office violated Section 8(b)(1)(A).[6] The General Counsel relies on Board precedent, which, he argues, holds that efforts by a union member to change union policies or to engage in politics against incumbent union officers are protected under Section 7 of the Act. *Teamsters Local 186 (Associated General Contractor)*, 313 NLRB 1234 (1994). Further, he argues that internal union discipline imposed in retaliation for a member's intraunion activities in opposition to the incumbent leadership violates 8(b)(1)(A) because it does not reflect a legitimate union interest and impairs a policy which Congress imbedded in the labor laws, e.g., the right guaranteed by the LMRDA to participate fully and freely in internal union affairs. *Carpenters Local 22 (Graziano Construction Co.),* 195 NLRB 1 (1972); and *Teamsters Local 579 (Janesville Auto Transport)*, 310 NLRB 975 (1993), enf. denied 145 LRRM 2200 (7th Cir. 1994). For remedial purposes, the General Counsel seeks restoration of the status quo ante, including restoration of membership rights and reinstatement of elected officers to union office for the remainder of their terms.

The Respondent opposes the General Counsel's exceptions and argues that the judge correctly found that the complaint should be dismissed for lack of subject matter jurisdicton. The Respondent claims that the dispute relates exclusively to internal union affairs, i.e., the rights of union members under the LMRDA, and not to the rights set forth in Section 7 of the Act.

III. DISCUSSION

A. Overview

The dispute in this case is essentially an intraunion factional quarrel over intraunion policies and politics. As discussed above, the Respondent's two highest ranking elected officers, shortly after their reelection, each filed impeachment petitions against one another, and others. The initial impeachment petition, filed by Vice President Mitchell-Carr, followed on the heels of remarks by President McLendon that Mitchell-Carr might be equally responsible for any alleged financial improprieties arising during their previous incumbency together, i.e., "if I go down, you're going down with me." After Mitchell-Carr filed her impeachment petition, McLendon did the same.

What is of critical significance in our judgment is that the only sanctions visited on the Charging Parties by the victorious intraunion faction were internal union sanctions, such as removal from union office and suspension or expulsion from union membership. The relationship between the Charging Parties and their Employer, Sandia, was wholly unaffected by the discipline. Nor are any policies specific to the National Labor Relations Act implicated by the union discipline at issue.

This case has been brought before us under the Act only because, as the General Counsel points out, there is currently decisional precedent that supports the notion that a union may violate Section 8(b)(1)(A)[7] even when its conduct has no meaningful connection to the employment relationship and the union discipline impacts union members solely in their capacity as members, and not as employees. We have re-examined that precedent in light of the plain language of Section 8(b)(1)(A) and its proviso, its legislative history, the seminal Board cases, and the Supreme Court cases pertaining to union discipline of its members.

On the basis of our re-examination we have concluded that Section 8(b)(1)(A) does not proscribe the wholly intraunion conduct and discipline in this case. Instead**,** as detailed below, we find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded

[5] Our dissenting colleague states that the asserted reasons for the discipline at issue were "pretextual." Although the judge found that McLendon's petition was in retaliation for Mitchell-Carr's petition against him, the judge did not find that the reasons set forth in McLendon's petition were pretextual. As to the substantive reasons set forth in the petitions against the Mitchell-Carr faction, the judge stated that some accusations were "petty," "suspect," and possibly "improper." However, the parties did not litigate in detail the merits of the accusations contained in any of the petitions and the judge made no definitive factual findings on the merits, including the accusations by Mitchell-Carr against McLendon, nor do we. Indeed, most of the matters addressed at the hearing in this case concerned alleged procedural deficiencies in the intraunion hearings, which the judge noted were conducted in absentia. Without addressing or deciding whether the Respondent met LMRDA procedural due process requirements, we note that members of the Mitchell-Carr faction were given advance notice of the intraunion hearings and, after unsuccessfully seeking extensions of time, elected not to attend.

[6] In addition to the expulsions and suspensions, the complaint makes reference to other acts related to the removal from office, e.g., the denial of access to the Respondent's premises and to personal items at the Respondent's premises, and removal from appointed office. The General Counsel does not refer to these matters in his brief or contend that they raise any issue distinct from the expulsions and suspensions.

[7] Sec. 8(b)(1)(A) provides that:

> 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 [of this title]: *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.

in the Act. Consistent with our holding, we shall overrule several cases in which the Board has found violations of Section 8(b)(1)(A) even in the absence of any meaningful correlation to the employment relationship and the policies of the Act, including *Carpenters Local 22 (Graziano Construction*), 195 NLRB 1 (1972). As we demonstrate below, the position that we adopt here represents a return to the law as it was before *Graziano Construction* expanded the reach of Section 8(b)(1)(A) and made the Board a forum for vindicating policies that Congress intended to be enforced through the procedures of the Landrum Griffin Act.

B. The Early Board Cases

In 1947 Congress passed the Taft-Hartley amendments to the National Labor Relations Act. In a series of early cases interpreting the scope of "restraint or coercion" under Section 8(b)(1)(A) and its proviso, the Board found that the legislative history of the amendments called for a narrow construction directed to actual or threatened economic reprisals and physical violence by unions. *National Maritime Union (Texas Co.),* 78 NLRB 971 (1948)**,** enfd. 175 F.2d 686 (2d Cir. 1949). In *Typographical Union (American Newspaper Publishers Assn.)*, 86 NLRB 951, 956, (1949), enfd. 193 F.2d 782 (7th Cir. 1951), affd. on other grounds 345 U.S. 100 (1953), the Board summarized the early cases as follows:

> In the *National Maritime Union* case, the first of the series, we decided on the basis of the legislative history there cited, that, although Congress used the generic term "restraint and coercion" on this section, the legislative scheme envisaged a narrow construction of the terms. We held its proscriptions were limited to situations involving actual or threatened economic reprisals and physical violence by unions or their agents against specific individuals or groups of individuals in an effort to compel them to join a union or to cooperate in a union's strike activities. [Footnotes omitted.]

Thereafter, in *Teamsters Local 823 (Roadway Express, Inc.),* 108 NLRB 874 (1954), the Board considered the application of Section 8(b)(1)(A) to acts of reprisal against "dissident" employees who had requested that their International union investigate the propriety of certain activities of their local union. The local union threatened a loss of employment and the removal of employees' "union book" which was required to be kept by employees while working, physically assaulted an employee, and ultimately caused the discharge of two employees, because of their complaint to the International union about the local union. The Board found that the union's course of conduct against these "dissident" employees violated Section 8(b)(1)(A) and (2).

The Board's construction of Section 8(b)(1)(A) in these early cases faithfully reflected Congress' purpose, in enacting that section, to regulate the use of threats and violence by unions in the employment context. As Senator Taft and the other supporters explained, the impetus for their proposal to add Federal regulation in an area previously left to the states was the evidence before the committee that unions had used threats and violence as an organizing tool and in conjunction with strikes:

> The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act.

S. Rep. No 105, 80th Cong., 1st Sess. 50 (1947), 1 Leg. Hist. 456; and *NLRB v. Teamsters Local 639 (Curtis Bros.),* 362 U.S. 274, 285–286 (1960).

Explaining the scope of the proposed amendment, Senator Taft sounded what the Supreme Court in *Curtis Bros*. later described as "the central theme" of the debate—"the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal." 362 U.S. at 287–288. Senator Taft stated:

> The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment.

93. Cong. Rec. 4436 (1947), 2 Leg. Hist. 1206; *Curtis Bros*., 362 U.S. at 287–288.

Both of the key sponsors of the final legislation stressed that a principal aim of the new section was to outlaw union intimidation of nonstriking employees. Representative Hartley stated,

> This bill, contrary to reports that have gone out—and the Senate conferees agreed with us on this—does prohibit mass picketing and the use of violence in the conduct of a strike. On that provision we accepted the Senate language, which does restrict intimidation and coercion.

93 Cong. Rec. 6383 (1947), 1 Leg. Hist. 882.

By 1954, in *Minneapolis Star & Tribune Co.*, 108 NLRB 727, 729, 738 (1954), the Board noted that it was now "well established" that Section 8(b)(1)(A) and its proviso precluded interference with the internal affairs of a labor organization in the absence of an effect on em-

ployment. The Board's treatment of two somewhat similar cases 10 years later in 1964 is instructive with respect to the reach of Section 8(b)(1)(A) in the employment context. In *Wisconsin Motor Corp.*, 145 NLRB 1097 (1964),[8] the Board held that fines to enforce production ceilings did not violate Section 8(b)(1)(A) because the enforcement of the rule was restricted to the status of a member, as a *member*, rather than as an *employee*. But, in *American Home Builders of the Greater East Bay,* 145 NLRB 1775 (1964), the Board found an 8(b)(1)(A) violation when a rule similar to that in *Wisconsin Motor Corp.* was enforced by threats of loss of employment. In short, there can be no dispute that the Board, in the early cases, consistently distinguished between, on the one hand, internal union enforcement and, on the other, external enforcement, impacting the employment relationship. Indeed, the Board viewed this distinction as a central tenet of Section 8(b)(1)(A) and its proviso.

To the limited extent that the Board, prior to *Graziano Construction*, held that internal union discipline fell within the reach of Section 8(b)(1)(A), it did so only in narrowly defined circumstances, namely, where that discipline impaired fundamental policies of the Act itself. Thus, for example, in *Operating Engineers Local 138 (Charles S. Skura),* 148 NLRB 679 (1964), the Board held that fining a member for filing unfair labor practice charges without first exhausting internal union remedies violated Section 8(b)(1)(A) because it was an attempt to regulate its members' access to the Board's processes. (The Board also noted that by fining a union member for filing an 8(b)(2) charge, the union impaired his rights as an employee and that the right to file such a charge was itself an incident of employment status. 148 NLRB at 684 fn. 16.) Thereafter, in *Mine Workers Local 12419 (National Grinding Wheel Co.*), 176 NLRB 628 (1969), the Board found that a union had violated Section 8(b)(1)(A) by fining employees in order to compel conduct in violation of a contractual no-strike obligation. Similarly, in *Molders Local 125 (Blackhawk Tanning Co.,)*, 178 NLRB 208 (1969), the Board held that a union fine imposed against an employee who had filed a decertification petition violated Section 8(b)(1)(A) because it interfered with the statutory right to invoke the Board's election process.[9] And in *Seafarers* (*Spitler-Demmer, Inc.*), 184 NLRB 608 (1970), the Board held that union discipline against an employee for giving testimony damaging to the union in an unfair labor practice proceeding violated Section 8(b)(1)(A).

As this history shows, the Board's consistent interpretation of Section 8(b)(1)(A) for the first 25 years following its enactment was that it did not reach internal union discipline that affected only the union member's status as a member and did not impair policies imbedded in the Act itself. It was not until 1972, in the *Graziano* case, supra, that the Board for the first time ventured into new territory by proscribing under 8(b)(1)(A) union discipline that bore no meaningful connection to coercion that interfered with the employer-employee relationship or to coercion that otherwise impaired fundamental policies of the NLRA.

C. Graziano Construction

In *Graziano*, a union was found to have violated the Act for disciplining a union member—on what the Board found were pretextual charges of violating certain internal union rules—in order to retaliate against him for having protested against alleged irregularities in the union's election procedures for the selection of delegates to the international union's convention. There was no indication that the discipline in any way affected the member's employment or opportunities for employment with any employer. Nevertheless, the Board found a violation of Section 8(b)(1)(A) on grounds that the discipline sought to deprive the member of a right guaranteed him under the LMRDA to participate fully and fairly in the internal affairs of his union.

In so finding, the Board acknowledged that "[t]he policies which the Union's conduct [sought] to frustrate are embodied in the Labor Management Reporting and Disclosure Act of 1959 rather than specifically in the National Labor Relations Act." 195 NLRB at 2. It also noted that it was "not unmindful of the fact that the Department of Labor, and not this agency, is directly charged with the administration of the Landrum-Griffin Act." Id. at fn. 5. However, citing language in *Scofield v. NLRB,* 394 U.S. 423 (1969), stating that a union does not violate the Act by enforcing a properly adopted rule that reflects a legitimate union interest and "impairs no policy Congress has imbedded in the labor laws," the Board said it viewed itself as charged with considering "the full panoply of congressional labor policies" in determining the legality of a union fine. "In this area," the Board stated, "[A]s we understand it, we have been specifically charged by the Supreme Court with the duty of determining the overall legitimacy of union interests, and must therefore take into account all federal policies and not limit ourselves to those embodied in our own Act." Id.

With this broad statement, the Board abandoned its earlier narrow construction of Section 8(b)(1)(A) insofar as it applies to internal discipline imposed by a union against a member and entered the domain of regulating intraunion matters that neither impact the employment relationship nor impair policy interests arising under the Act. By no means, however, did the Supreme Court's decision in *Scofield* compel the Board's finding in *Graziano*. To the contrary, as discussed below, the Su-

[8] The *Wisconsin Motor Corp.* case subsequently reached the Supreme Court as *Scofield v. NLRB*, 394 U.S. 423 (1969), discussed infra.

[9] The Board distinguished between the fine imposed for filing the decertification petition in *Blackhawk Tanning* and the expulsion from membership for filing a similar petition in *Tawas Tube Products,* 151 NLRB 46 (1965). In the latter case, the Board found that the expulsion was lawful because retention of membership would have allowed the employee to remain privy to union strategy and tactics in opposition to the petition.

preme Court, in a consistent line of decisions that includes *Scofield*, has expressly embraced the Board's original, narrow construction of Section 8(b)(1)(A) and rejected the notion that either Section 8(b)(1)(A) or the LMRDA gives the Board the broad power to regulate the internal affairs of unions that it has asserted in *Graziano* and subsequent cases.

D. The Supreme Court Cases

The question of whether Section 8(b)(1)(A) of the Act reaches conduct by a union against members in their capacity as members was first addressed by the Supreme Court in *Machinists v. Gonzalez*, 356 U.S. 617 (1958), in which the Court was considering whether a State court action seeking restoration of membership by a union member who claimed that he was illegally expelled from membership in his union was preempted by the NLRA. Rejecting claims that to allow the State court suit to proceed might create conflicts between Board enforcement of Federal policy under the NLRA and the assertion of State power, the Court noted that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by Federal law, and indeed the assertion of any such power has been expressly denied [in the proviso to Section 8(b)(1) of the Act]." 356 U.S. at 620. Thus, the Court said, "[T]he State court should not be prevented from exercising its jurisdiction."

The year after the decision in *Gonzalez*, Congress enacted the LMRDA, which for the first time established Federal protections for union members in their rights as members. Yet in *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967), the Supreme Court reiterated that Section 8(b)(1)(A) did not reach union discipline of members affecting only their status as members. Upholding a union's right to fine members who crossed a picket line and went to work during an authorized strike, the Court specifically noted that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 395 U.S. at 195. The Court thus embraced the view of the Board, as set forth in *Minneapolis Star & Tribune Co.,* supra, that Section 8(b)(1)(A) reaches only the external enforcement of union rules, impacting the employment relationship, and not their purely internal enforcement.

Two years later, in *NLRB v. Shipbuilders,* 391 U.S. 418 (1968), the Court also embraced the Board's view that union discipline may run afoul of Section 8(b)(1)(A) when it interferes with an important policy promoted by the Act. In the decision under review in that case, the Board had applied its earlier decision in *Skura*, supra, to find a violation of Section 8(b)(1)(A) by a union which had expelled a member for filing an unfair labor practice charge with the Board before first exhausting internal union remedies. The member had initially filed intraunion charges with his local alleging that the local president had wrongfully caused his employer to discriminate against him because of certain protected activity he had engaged in. But when the local union ruled against him on the charge, instead of pursuing the internal union appeals procedure that was available to him, the member had filed a charge with the Board alleging that the local union president's actions had violated his rights under the Act. The union then tried and expelled him for violating a union constitutional provision requiring that members aggrieved by actions of their local unions first exhaust all appeals within the union before resorting to the courts or other tribunals.

In upholding the Board's determination that the expulsion violated Section 8(b)(1)(A), the Court agreed with the Board that union rules requiring exhaustion of internal remedies under such circumstances were contrary to the policy of the Act to keep employees free from coercion when making complaints to the Board about perceived encroachments of their statutory rights as employees. While emphasizing that Section 8(b)(1)(A) assures a union the freedom of self-regulation where its legitimate internal affairs are concerned, 391 U.S. at 424, the Court noted that in the case at issue, the charging party's complaint against the union "implicated not only the union but the employer," and that the employer "might also have been made a party and comprehensive and coordinated remedies provided." Id. at 425. Under those circumstances, where the internal union procedures were "plainly inadequate to deal with all phases of the complex problems concerning employer, union, and union member," id. the Union's interest in enforcing its exhaustion requirement was outweighed by the statutory interest in maintaining unimpeded access to Board processes. Id.

In sum, the Court concluded, "when the complaint or grievance does not concern an internal matter, but touches a part of the public domain covered by the Act, failure to resort to any intraunion grievance procedure is not ground for expulsion from a union." Id. at 438. Rather, "the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved." Id. at 424.

The Supreme Court next considered the lawfulness of internal union discipline under Section 8(b)(1)(A) in *Scofield v. NLRB*, supra, in which it reviewed the Board's decision in *Wisconsin Motor Corp.*, supra, and affirmed the Board's finding that the union's enforcement through fines and suspensions of an internal rule imposing production ceilings on its members did not violate Section 8(b)(1)(A). The Court first noted that, in *Allis-Chalmers*, it had "essentially accepted" the Board's longstanding position, dating from *Minneapolis Star & Tribune,* supra, that Section 8(b)(1)(A) is to be narrowly construed so as not to reach internal union discipline unless such discipline affects a member's employment status. The Court then observed that in *Shipbuilders*, it

had also agreed with the Board that Section 8(b)(1)(A) prohibits unions from enforcing rules that invade or frustrate an overriding statutory policy. "Under this dual approach," the Court then stated in summary, "Section 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."

As our dissenting colleague notes, the quoted passage—cited by the Board in *Graziano* as a mandate to expand the reach of Section 8(b)(1)((A) to cover matters regulated under the LMRDA—speaks of policies reflected in "the labor laws." It is clear, however, from any fair reading of the decision in its entirety that the statutory policies to which it was referring are those set forth in the Act. Thus, not only did the Court at other points in the decision specifically describe the relevant inquiry as whether the union rule violates a policy of "the Act,"[10] but in considering the legality of the production ceilings at issue, the Court examined only policy interests arising under the NLRA—specifically, whether the rule impeded the collective-bargaining process (described by the Court as "a process nurtured in many ways by the Act, id. at 432); whether the rule ran afoul of the anti-featherbedding provisions of Section 8(b)(6) of the Act; whether the rule induced the employer to discriminate against any class of employees; and whether the rule was a dereliction by the union of its duty of fair representation. At no point did the court purport to analyze whether the rule at issue impaired policies promoted by any other statute such as the LMRDA. Indeed, while the decision does make mention of the LMRDA, it does so only to make the point that the LMRDA "did not purport to overturn or modify the Board's interpretation of 8(b)(1)(A)." Id. at 429.

As we have shown, the Board's interpretation of Section 8(b)(1)(A) at that time was a narrow one which distinguished between internal and external enforcement of union rules and which asked whether the discipline violated fundamental policies of the National Labor Relations Act itself. Narrow construction was specifically embraced by the Court. Thus, no reasonable reading can interpret the decision in *Scofield* as a directive to the Board to expand its interpretation of Section 8(b)(1)(A) to reach the purely internal enforcement of union rules having no impact on the employment relationship. To the contrary, as stated by the Court in its subsequent decision in *NLRB v. Boeing Corp.*, 412 U.S. 67, 72 (1973): "The underlying basis for the holdings *of Allis-Chalmers* and *Scofield* was . . . that [the provisions of 8(b)(1)(A)] were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act."

The issue in *Boeing* was whether the Board is authorized to pass on the "reasonableness" of union fines in deciding whether union discipline violates Section 8(b)(1)(A). Yet again, the Court reaffirmed the Board's narrow construction of Section 8(b)(1)(A), noting that previously, in *Scofield*, "we decided that Congress intended to distinguish between the external and the internal enforcement of union rules, and that therefore the Board would have authority to pass on those rules affecting an individual's employment status but not on his union membership status." Id. at 73–74. The Court then clarified that, although it had held in *Scofield* that enforcement of union rules by "reasonable" fines does not violate 8(b)(1)(A), its use of the adjective "reasonable" was only dicta in that case and was not meant to suggest that imposition of an "unreasonable" fine would be an unfair labor practice. Affirming the Board's determination that it lacked authority under Section 8(b)(1)(A) to pass on the reasonableness of the amount of the fine, the Court emphasized that inquiry by the Board into the "multiplicity of factors . . . bearing on the issue of reasonableness would necessarily lead the Board to a substantial involvement in strictly internal union affairs," and that "to the extent that the Board was required to examine into such questions as union's motivation for imposing a fine it would be delving into internal union affairs in a manner which we have previously held Congress did not intend." Id. at 74.

Graziano, of course, involved precisely the kind of inquiry into the union's motivation for imposing a fine that the Court held in *Boeing* is beyond the Board's authority. And as subsequent decisions demonstrate, it has indeed led the Board to "delv[e] into internal union affairs" in a manner which the Court has held that Congress did not intend. In undertaking to enforce policies that Congress entrusted to the Department of Labor and the courts, moreover, the Board has substituted the Act's procedures for the procedures Congress worked out in making the legislative compromises necessary to secure the passage of the Landrum Griffin Act. The substantive rights at issue in *Graziano* were principally those provided for in Title IV of the Landrum Griffin Act, 29 U.S.C. § 481, which, in relevant part, ensures fair election procedures and the right to support the candidate of one's choice without retaliation. Section 402 of Title IV, 29 U.S.C. § 482, prescribes the procedures for enforcing those rights. The decision to prosecute such claims is to be made by the Department of Labor, on the initiative of a union member, and the forum for such prosecutions is the federal district courts. *Graziano* supplants the procedures chosen by Congress for the enforcement of Title IV in important ways: under Section 10(b) of the Act, "any person," whether or not a union member, may initiate pro-

[10] See the Court's statement that the inquiry must focus on "the extent to which any policy of the Act may be violated by the union-imposed production ceiling," id. at 431, and its conclusion that because it is "impossible to say that [the ceiling] contravened any policy of the Act," it is finding no violation of Sec. 8(b)(1)(A). Id. at 436.

ceedings; under Section 3(d) of the Act, the Board's General Counsel, not the Secretary of Labor, decides whether the private party's claim warrants prosecution; and under Section 10(c) of the Act, the Board and its administrative law judges hear such claims, not federal district courts. By allowing Section 8(b)(1)(A) to be used to enforce rights provided for in Title I of the LMRDA, the *Graziano* line of cases also contravenes the deliberate decision made by Congress, in enacting the LMRDA, that only aggrieved individuals, and not the government, would have the right to enforce the rights guaranteed to union members by Title I of the LMRDA.[11]

E. Post Graziano Board Decisions

One recent example demonstrating the reach of *Graziano* is *Laborers Local 652 (Southern California Contractors' Assn.*), 319 NLRB 694 (1995). In that case, the Board, pursuant to *Graziano*, considered under Section 8(b)(1)(A) a union's application of its internal rules of decorum during a membership meeting held at a union hall. A dissident faction and an opposing group supportive of the incumbent union leadership had long been at odds, to the extent that the former group customarily sat on the right side of the union hall during membership meetings, the latter group customarily sat on the left side of the union hall, and other members stood in the back of the room. At one meeting, the union president ordered the ejection of several members of the dissident group because of their allegedly disruptive behavior. Thereafter, these members were charged with breaching the union's rules of decorum and, as punishment, two members ultimately were suspended from attending the next union membership meeting.

The Board found that the charges against members of the dissident faction were discriminatory because decorum at the membership meetings was commonly disruptive, marked by members speaking out of turn, uttering insults, and interrupting other speakers. Because the union president's attempt to maintain decorum was disparately enforced and he failed to give the alleged offenders "repeated warnings," the Board found that the internal union charges violated Section 8(b)(1)(A). Nothing whatsoever in *Southern California Contractors Assn*. pertained to the members' status as employees or impaired any policy specific to the Act. On the contrary, the conduct at issue was entirely an intraunion matter having to do with rules of behavior and decorum within the union hall, and the discipline imposed concerned only attendance at subsequent intraunion meetings.

Moreover, the procedural assumptions underlying *Southern California Contractors Assn.* were even more extraordinary than those of *Graziano*, because the right at issue—the right to meet with other members and "to express any views, arguments, or opinions," as provided in Title I of the Landrum Griffin Act, 29 U.S.C. § 411(a)(2)—is one for which Congress deliberately refrained from establishing any administrative enforcement mechanism. Instead, Section 102 of Title I provides only that aggrieved persons may initiate proceedings in Federal district court. See *Boilermakers v. Hardeman*, 401 U.S. 233, 239 (1969) (in enacting Title I, Congress explicitly referred claims "not to the NLRB but to the federal district courts").[12]

The expansive reach of *Graziano* is perhaps best illustrated by *Teamsters Local 579 (Janesville Auto Transport)*, 310 NLRB 975 (1993), enf. denied 145 LRRM 220 (7th Cir. 1994). In *Janesville*, a union entered into an endorsement arrangement with a private third-party vendor. The vendor then furnished discounts to union members and retirees which enabled them to receive reduced rates on vision care products and services. The discounts were promotional in origin and were wholly unrelated to collective bargaining. Several union members objected to this arrangement and wrote a letter to the vendor declaring that they would never patronize the vendor's business. In response, the union removed the names of the objecting members from mailing lists that pertained to similar "special" noncontractual benefit programs.

The Board found that the union violated Section 8(b)(1)(A) because the removal from the mailing lists "retaliated" against the objecting members. It so found even though the matter had nothing to do with the employment relationship, had nothing to do with the kind of "coercion" envisioned in the passage of Section 8(b)(1)(A, impaired no policy arising under the Act, and was in every respect simply an intraunion dispute. The long-held "narrow construction" of Section 8(b)(1)(A), repeatedly endorsed by the Supreme Court, now had been widened to the extent that the Board was now effectively regulating intraunion disputes concerning vision care vendors and regulating discipline that took the form of removing members from mailing lists pertaining to discounts from such vendors.[13]

[11] As originally introduced in the Senate, Title I of the LMRDA empowered the Secretary of Labor to seek injunctive and other relief in Federal district court to enforce union members' free speech rights. In large part because of other Senators' concerns, however, the bill was amended to provide for suits by individual members in Federal district court. Senator Kuchel, who offered the amendment, explained it as being in the "interest of justice" and it received widespread support from Senators who "wished to limit federal interference with the internal affairs of labor unions." *Teamsters Local 82 v. Crowley*, 467 U.S. 526, 537–538 and fn. 12 (1984), quoting 105 Cong. Rec. 6720, 6726 (1959).

[12] Although Sec. 102 is not exclusive, in the sense that the next section, Sec. 103 of Title I, 29 U.S.C. § 413, provides for the retention of existing rights, employees had no preexisting right to bring such disputes before the Board. See *Machinists v. Gonzalez*, supra, 356 U.S. at 620, where, prior to the enactment of the LMRDA, the Supreme Court recognized that Sec. 8(b)(1)(A) of the Act afforded no protection against a union's arbitrary treatment of union members in their capacity as members.

[13] See also *Laborers Local 324 (AGC of California),* 318 NLRB 589 (1995), enf. denied in relevant part 123 F.3d 1176 (9th Cir. 1997), in which the Board found that a union violated 8(b)(1)(A) by enacting an internal rule designed to preclude the distribution of dissident union literature in the union's offices and hallways.

F. The Present Case in Light of Graziano

We conclude that the present case raises a factual scenario beyond the reach of Section 8(b)(1)(A). Here, as noted above, we are presented with an intraunion dispute between two rival union factions which both include high level elected officers, each of whom, in turn, filed intraunion impeachment petitions against the other. As with the dispute over a vision care provider in *Janesville*, the dispute over who shall attend the union's international convention in *Graziano*, and the dispute over decorum at a union meeting in *Southern California Contractors Assn*., the instant case neither impacts the participants' relationship with their employer nor impairs a policy of the Act. Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A).

The Respondent's conduct simply does not fit within the scope of conduct that is properly addressed by Section 8(b)(1)(A). First, Section 8(b)(1)(A) does, of course, proscribe unacceptable methods of union coercion in the employment context, such as threats of loss of employment or physical violence to force a dissenting employee to join a union during an organizational campaign or to participate in a strike—conduct that was at the core of the adoption of Section 8(b)(1)(A) in the first instance. See *Typographical Union (American Newspaper Publishers Assn.*), 86 NLRB 951, 955–957 (1949); and *National Maritime Union (Texas Co.)*, 78 NLRB 971 (1948). See also *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 248 (1979) (union violated Sec. 8(b)(1)(A) by threatening to cause discharge of employees).

Second, Section 8(b)(1)(A) proscribes conduct against union members that directly impedes access to the Board's processes. Thus, as in *Shipbuilders*, supra, 391 U.S. 418 (1968), a union may not enforce rules that unduly hamper the ability of its members to bring a matter to the Board for consideration.

Third, the proscriptions of Section 8(b)(1)(A) apply when intraunion discipline clashes directly with statutory policy interests and prohibitions incorporated in the Act. See, e.g., *National Grinding Wheel,* supra, 176 NLRB 628 (1969); *Blackhawk Tanning Co.,* supra, 178 NLRB 208 (1969); and *Plumbers (Hanson Plumbing),* 277 NLRB 1231 (1985).

Accordingly, our decisions in *Graziano*, *Janesville Transport, AGC of California,* and *Southern California Contractors Assn.,* supra, are overruled to the extent they are inconsistent with our decision today.

Our dissenting colleague contends that the Respondent's discipline here contravenes a policy of the Act: that the discipline interferes with the Section 7 right to concertedly oppose the policies of union officials**.** We disagree. Our colleague overlooks that the right to concertedly oppose the policies of union officials is protected by Section 7 *if* that activity is "for the purpose of collective bargaining or other mutual aid or protection. . . ." That protection is broad but not unlimited and it assumes that the activity bears some relation to the employees' interests as employees. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978); *Firestone Steel Products Co.*, 244 NLRB 826, 827 (1979); *Trover Clinic*, 280 NLRB 6 (1986); and *Southern California Gas Co.,* 321 NLRB 551, 555–557 (1996). Furthermore, union restraint and coercion of Section 7 rights is regulated under Section 8(b)(1)(A), and, as discussed above, the central theme of both the Supreme Court's 8(b)(1)(A) decisions and of Board's 8(b)(1)(A) cases prior to *Graziano* is that that section was not enacted to regulate the relationship between unions and their members unless there was some nexus with the employer-employee relationship and a violation of the rights and obligations of employees under the Act. Prior to *Graziano*, our decisions applying Sections 7 and 8(b)(1)(A) to concerted activity in opposition to the policies of union officials were consistent with these limitations.

For example, in *Nu-Car Carriers,* 88 NLRB 75, 76–77 (1950), enfd. 187 F.2d 298 (7th Cir. 1951), where the Board found that Section 7 encompassed the right of employees to influence policies of a union**,** it did so because the employees sought to convince their union to pursue changes in working conditions. In that case, an employer discriminated against several employees by affecting their job tenure. The Board found that the employer violated Section 8(a)(1) because the employer's conduct specifically interfered with employees' conditions of employment and their right of self-organization.

Thereafter, in *Roadway Express*, supra, the Section 7 principles of *Nu-Car Carriers* were applied to a union pursuant to Section 8(b)(1)(A). Importantly, the prohibited union conduct there was linked directly to employees' terms of employment, or to threats of violence pertaining to the employment context, and not, as in the present case, to wholly intraunion affairs. Thus, the Section 7 foundation of *Roadway Express* is precisely what Congress intended to reach when it passed Section 8(b)(1)(A): union violence and union conduct affecting job tenure.

Similarly, in *Operating Engineers Local 400 (Hilde Construction Co.)*, 225 NLRB 596, 600–602 (1976), enfd. mem. 561 F.2d 1021 (D.C. Cir. 1977), relied on by our dissenting colleague, the principles of *Nu-Car Carriers* and *Roadway Express* were applied to a union that disciplined certain of its members for convening a meeting of member employees for the purpose of redirecting the bargaining strategy of their representative. Id. at 601. The employees' activity in that case was thus directly related to the process by which the terms and conditions of their employment would be settled for the term of a contract and there was a clear nexus to the employer-employee relationship. Moreover, although the judge made reference to *Graziano* and the policy of the LMRDA to protect the rights of union members to meet freely and to criticize the management of their unions, id. at 601–602, that discussion was unnecessary to the decision, which rested squarely on the Section 7 right of employees to question the wisdom of their bargaining repre-

sentative "and to take 'such steps as they deem necessary to align their union with their position.'" Id. at 601 (quoting *Nu-Car Carriers*, supra at 76).

It is a quantum leap from these seminal cases to the factual scenario arising in the present case which, in contrast, bears no meaningful connection to the employment relationship or the policies of the Act. Although the dissent notes that one of the matters raised in Mitchell-Carr's impeachment petition against McLendon is that he allegedly "circumvented" the collective-bargaining agreement, it is evident that the predominant issue underlying the dispute concerned the disposition of the $58,000 settlement check, and not a collective-bargaining matter. Indeed, counsel for the General Counsel fails to even mention this matter in his brief and concedes that the dispute was "primarily caused" by the handling of the check and the selection of legal counsel concerning the settlement. Further, nothing concerning the alleged circumvention of a contract was discussed in the February executive board and membership meetings preceding the petition against McLendon. Accordingly, the present case is factually distinguishable from *Hilde Construction Co*., supra, cited by the dissent, in which the "principal purpose" of the objecting members was to review bargaining strategy and conduct a new strike vote. 225 NLRB at 601.[14]

Our dissenting colleague also contends that the Respondent's conduct had a *potential* effect on the employment relationship because members of the Mitchell-Carr faction were seeking to alter the nature of the Union's dealings with the employer by protesting McLendon's handling of the settlement check. But, this is tantamount to declaring that any intraunion quarrel over a matter potentially subject to the union's representational interests, no matter how attenuated, is an impairment of the employment relationship itself and, as such, must trigger the proscriptions of Section 8(b)(1)(A). We decline to take such an approach, which in our judgment would unduly expand Section 8(b)(1)(A) to enmesh the Board in intraunion disputes that have only a speculative impact on the employer-employee relationship and do not significantly implicate the rights and duties established by the Act.

In short, while we reaffirm the principle that Section 7 encompasses the right of employees to concertedly oppose the policies of their union, we reject our dissenting colleague's insistence that Section 8(b)(1)(A) will proscribe virtually each and every form of intraunion discipline pertaining to virtually any form of intraunion dispute without regard to the employment context or the policies of this Act.[15]

Finally, we note that there is, of course, a forum for resolving purely intraunion quarrels concerning the propriety of intraunion decision making. That forum is a cause of action under the LMRDA.[16] Congress gave to the federal district courts, not to the Board, authority to hear and decide suits brought by union members to enforce rights under the LMRDA and that is the appropriate forum for the Charging Parties in this case to pursue their complaints against the Respondent. In *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963), cert. denied 375 U.S. 946 (1963), the Second Circuit held that Section 101(a)(2) of the LMRDA protects accusations against union officials of improper financial transactions even when such accusations may constitute defamation. The court directed that the union be enjoined from imposing discipline and that damages be considered by the district court. Accordingly, it appears that the Mitchell-Carr faction could have pursued remedies under the LMRDA.

Our dissenting colleague argues that it is significantly less expensive and burdensome for an individual union member to file a charge with the Board than it is to file an action in Federal district court. As we have stated, however, it was Congress, and not the Board, that decided that individuals, and not the Government, should

[14] Similarly distinguishable is *Teamsters Local 610 (Browning-Ferris Industries*), 264 NLRB 886, 905 (1982), where the union discipline found to have violated Sec. 8(b)(1)(A) sanctioned an employee for attempting to persuade employees to vote to accept employer's last contract offer. The union conduct there had a direct and immediate relationship to employment and to the right to engage in concerted activity for the purpose of collective bargaining and mutual aid and protection.

[15] Our dissenting colleague, at sec. II,B of his opinion, relies on court decisions of the Ninth Circuit and the D.C. Circuit to support his interpretation of Sec. 8(b)(1)(A). The cases cited, however, all pertain to policies specifically arising under the National Labor Relations Act, such as discipline for refusing to engage in impermissible work stoppages or in support of illegal picketing, or to union conduct affecting employees' actual employment. Accordingly, they are distinguishable from the present case. On the other hand, the Seventh Circuit has considered factual scenarios similar to the present case and found no violation of Sec. 8(b)(1)(A) in each instance. See *NLRB v. Operations Engineers Local 139,* 796 F.2d 985 (7th Cir. 1986) (no violation for disciplining dissident member where Union's action did not impair employer-employee relationship); see also *Teamsters Local 579 (Janesville Auto Transport) v. NLRB,* 145 LRRM 220 (7th Cir. 1993).

The dissent also contends that our interpretation of Sec. 8(b)(1)(A) is contrary to the Board's treatment of Sec. 8(a)(1) issues that might also be considered a violation (by employers) of other Federal statutes. The issue, however, is not whether certain conduct might happen to violate another statute, but rather, as in *Graziano*, and the present case, the reach of Sec. 8(b)(1)(A) when the alleged unfair labor practice turns entirely on the interpretation of another statute**.** As discussed above, we disagree with our dissenting colleague's contention that a violation could be sustained in this case solely by reference to the policies of the Act.

[16] Sec. 101(a)(2) of the LMRDA 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.

be required to initiate their own proceedings to enforce the rights secured by Title I.[17]

We note finally that when the Board injects itself into matters regulated under the LMRDA it is not only acting in contravention of Congress's decision to confer jurisdiction over LMRDA claims on the Secretary of Labor and the Federal district courts, rather than the Board, but it is also creating the very real risk that its interpretations of the requirements of the LMRDA will conflict with those of the Secretary and the courts, as occurred in the case of *Iron Workers (Walker Construction Co.*), 285 NLRB 770 (1987), modifying 277 NLRB 1071 (1985). In *Walker Construction*, the Board initially ordered the reinstatement of an elected union officer to his former elected position, but in response to the urging of the solicitor of the Department of Labor, the Board modified its original order because of conflict with the LMRDA.

For all these reasons, we shall no longer proscribe intraunion discipline under Section 8(b)(1)(A) which involves a purely intraunion dispute, and does not interfere with the employee-employer relationship, or contravene a policy of the National Labor Relations Act. For all the foregoing reasons, we find that the Respondent did not violate the Act.

ORDER

The order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER HURTGEN, concurring.

This case involves a union's intraunion discipline of employee-members because of their intraunion activities.

I agree with the result reached by my colleagues (i.e., dismissal of complaint), but I do so on somewhat different grounds.

I agree with my colleagues' distinction between external and internal discipline. The former affects the employee's terms and conditions of employment (e.g., removing an employee from an exclusive hiring hall list). If the union imposes such discipline in reprisal for Section 7 activity, Section 8(b)(1)(A) may be violated. By contrast, internal discipline affects the employee only vis-a-vis the union (e.g., expulsion and suspension). The legality of such conduct is regulated by the *Scofield* test.[1] In that case, the Supreme Court said:

> Under this dual approach, § 8(b)(1) 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. [394 U.S. at 430].

The cases are consistent with this approach. In *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), the employees were not free "to leave the union and escape the rule," i.e., the union prevented them from doing so. Thus, the fines imposed on these employees were unlawful. Similarly, in *NLRB v. Shipbuilders*, 391 U.S. 418 (1968), the union disciplined an employee because he filed a charge with the Board. Such conduct is plainly contrary to the Congressional policy of guaranteeing free access to the Board. In *Scofield* terms, the conduct "impaired [a] policy Congress has imbedded in the labor laws." 394 U.S. at 430.

It should be noted that *Scofield* instructs the Board to consider policies "imbedded in the labor laws," not simply those imbedded in the NLRA. Thus, if a union disciplines a member for speaking out against union policy, such conduct may violate Section 8(b)(1)(A). That is, the act of speaking out is protected by Section 7 and it is contrary to policies imbedded in the LMRDA. Thus, the discipline coerces a Section 7 right *and* it is contrary to the *Scofield* proviso.

The three cases overruled by my colleagues[2] fall within this principle. In each of these, the union's conduct was coercive of a Section 7 right and contrary to LMRDA principles. Accordingly, violations were found. I believe that these cases are consistent with *Scofield*.

My colleagues acknowledge the *Scofield* principle that a union may not impair a policy that "Congress has imbedded *in the labor laws*." (Emphasis added.) However, they say that this includes only policies that Congress has imbedded *in the NLRA*. In my view, the Court's sentence simply cannot be read as my colleagues read it. Surely, the NLRA is not the only labor law passed by the Congress. For example, in this case, the Union's conduct transgressed a Section 7 right and ran afoul of the LMRDA. Thus, I conclude that the instant case is cognizable under Section 8(b)(1)(A), as construed in *Scofield*.

However, as a matter of comity, efficiency, and economy, I do not think it prudent to have two tribunals plowing the same ground. Where, as here, the underlying dispute is wholly intraunion, and the discipline is wholly internal and nonmonetary, I believe that the LMRDA should be the primary means of enforcement. Thus, absent some indication that the discipline herein was not cognizable under that statute, I would leave the parties to the processes of that statute. Accordingly, I would dismiss the complaint.[3]

I do not disagree with the legal thrust of the dissent. As discussed above, the threshold inquiry in this case is whether the Union's conduct restrained or coerced *a Section 7 right*. Like the dissent, I conclude that it did. Sec-

[17] See fn. 12, supra.

[1] *Scofield v. NLRB*, 394 U.S. 423 (1969).

[2] *Carpenters Local 22 (Graziano Construction Co.),* 195 NLRB 1 (1972); *Teamsters Local 579 (Janesville Auto Transport*), 310 NLRB 975 (1993), enf. denied 145 LRRM 2200 (7th Cir. 1994); *Laborers Local 324 (AGC of California)* 318 NLRB 589 (1995), enf. denied in relevant part 123 F.3d 1176 (9th Cir. 1997).

[3] As a matter of fairness, I would entertain a motion for reconsideration based on an assertion that the conduct herein was not cognizable under the LMRDA.

tion 7 embraces the right to protest the policies and practices of the officers of the exclusive bargaining representative.

The next inquiry is whether the Union's retaliatory conduct transgressed one or more of the *Scofield* principles. In this regard, I agree with the dissent that the policies "imbedded in the labor laws" include the NLRA and the LMRDA. In the instant case, both policies were transgressed.

In light of the above, the Board has the power to adjudicate Respondent's conduct as unlawful under Section 8(b)(1)(A). However (and this is where I part company with the dissent), there is no requirement that the Board *must* do so. In other contexts, the Board has chosen to withhold its processes and allow other tribunals to proceed.[4] In the instant case, the employee directed his actions solely within the Union. That is, the Charging Party's protests concerned the actions of Union President William McLendon, and these protests included the Charging Party's efforts to impeach McLendon. These protests and efforts were based on McLendon's alleged mishandling of union funds. Although the impeachment petition also mentioned an alleged circumvention of the collective-bargaining agreement, this matter was not spelled out and was not the principal thrust of the petition. Thus, any relationship between the Charging Party's actions and the working conditions of his Employer (Sandia) was, at most, attenuated. Further, the Union's retaliatory conduct was wholly internal. In sum, at both ends, i.e., the employee's activity and the Union's response, this is an intraunion case. In these circumstances, I would opt to have these cases litigated in court under the LMRDA.[5]

The dissent also asserts that acceptance of the *Scofield* principle means that the Board must entertain the case and find the violation. I disagree. Acceptance of *Scofield* simply means that the Board *could* find a violation. But *Scofield* does not *compel* the Board to entertain the case and find the violation. The situation is no different from a meritorious 8(a)(3) or (5) case. The Board can find the violation and enter a remedial order. But, the Board is not compelled to do so. The Board can, and often does, choose to defer such cases under *Collyer*.

The dissent also suggests that *Collyer* is to be confined to "disputes between a union and employer," i.e., a case cannot be deferred under *Collyer* if the Charging Party is an individual who asserts individual statutory rights. Based on this premise, the dissent argues that the Board must entertain the instant case because the Charging Party is an individual who is asserting an individual statutory right. The problem with the argument is that the first premise is wrong. The Board, with court approval, defers cases, even if the charging party is an individual asserting an individual right.[6]

Of course, I recognize that *Collyer* is grounded in the salutary principle of grievance arbitration. However, comity and judicial economy are equally salutary principles. As discussed above, those principles are operative here.

I also recognize that, under *Collyer*, the Board does not completely yield jurisdiction. The Board retains the authority to give a limited review of the arbitral award to assure that it is not repugnant to statutory rights.[7] However, in cases like the instant situation, I am confident that a Federal district court would not render an opinion that is repugnant to statutory rights. And, if it did, I am confident that a federal appellate court would correct the error.

Finally, the dissenter quarrels with my citation to *Siemons*. He correctly notes that the Board, in that case, expanded its discretionary jurisdiction. The dissent has missed the point. The essential point, confirmed in *Siemons*, is that the Board *has discretion* to decline jurisdiction. That is the principle that I apply here.[8]

MEMBER BRAME, dissenting.

I.

A. Introduction

In this case, the Union removed two elected officers from office and expelled or suspended them from membership, along with two others, in retaliation for their challenging another officer's handling of union funds and administration of the collective-bargaining agreement. Under the National Labor Relations Act (the NLRA or the Act), unions are given powers akin to those of a government with regard to their members and bargaining unit employees.[1] With these powers must come accountability, and the Act provides for such by its grant of rights to individual employees in Section 7[2] and by making it an unfair labor practice in Section 8 for either

[4] See *Collyer Insulated Wire*, 192 NLRB 837 (1971). See also the Board's discretionary jurisdictional limits. *Siemons Mailing Service*, 122 NLRB 81 (1958). The Board does not, and should not, entertain every possible case in which it has statutory jurisdiction.

[5] If the activity were not intraunion (e.g., if the employee protested the application of a union-security clause) or if the discipline affected employee status, I would have a different view.

[6] *Consolidated Freightways*, 288 NLRB 1252 (1988), affd. sub nom. *Hammontree v. NLRB,* 894 F.2d 438 (D.C. Cir. 1990).

[7] *Spielberg Mfg.,* 112 NLRB 1080 (1955).

[8] Contrary to the dissent, my approach is not ad hoc. It applies to that class of cases, cognizable under the LMDA, where the underlying dispute is wholly intraunion and the discipline is wholly internal.

[1] For a more detailed explanation of the extent of unions' power over members and bargaining-unit employees, see infra, fn. 135.

[2] Sec. 7 of the National Labor Relations Act 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 8(a)(3) of this title.

an employer or a union to disturb those Section 7 rights.[3] Congress has vested in the Board the authority and responsibility to explicate and protect those Section 7 rights against encroachment by both employers and unions. Today, in rejecting a long line of Supreme Court, court of appeals, and Board precedent and in refusing to find a violation of Section 8(b)(1)(A) on the part of the Union, the Board abdicates that responsibility and abandons those individual employees. The Board's new reading of the Act applies a completely different standard to union conduct under Section 8(b)(1)(A) than it applies to employer conduct under Section 8(a)(1). When properly and equitably applied, Section 8(b)(1)(A) demands a finding that the Union here violated the Act and trammeled on the Section 7 rights of its individual members.

Section 8(b)(1)(A) makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of their Section 7 rights. During the course of its elucidation of 8(b)(1)(A) analysis, the Supreme Court, in *Scofield v. NLRB*,[4] explained that that section "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."[5] Since that time, the Board has applied the Supreme Court's analysis consistently, finding that union rules calling for the discipline of members for challenging and speaking out against incumbent union administrations reflect no legitimate union interests and impair labor-law policies found in both the National Labor Relations Act itself and the Labor-Management Reporting and Disclosure Act (LMRDA)[6] and are therefore violative of Section 8(b)(1)(A). In this regard, such union conduct impairs NLRA policies found in Section 7, which guarantees union members the right "to protest and to question the wisdom of their bargaining representative and to persuade others or take such steps as they deem necessary to align their union with their position."[7] In addition, this type of union conduct also impairs the LMRDA policy of free expression.[8]

B. The Facts and Findings

The Charging Parties, Mary Ann Mitchell-Carr and Mildred G. Smith, and members Robert Vaughan and Bernardino Herrera are former officials of the Respondent Union. Mitchell-Carr had served as vice president, and Smith had served as secretary-treasurer; both Vaughan and Herrera were trustees. On February 4, 1993, Mitchell-Carr and Vaughan were reelected to their positions as vice president and trustee for terms to run through March 1996.[9]

The events leading up to the disciplinary action taken by the Union occurred during this same time period. On February 1, 1993,[10] apparently after Mitchell-Carr had expressed her concern regarding Union President William McLendon's possible mishandling of certain funds, the Respondent Union's executive board directed McLendon to gather information regarding the disbursement of a specific check. Subsequently, at a regular executive board meeting on February 10, the board voted on a motion made by Smith and Herrera, to have the United States Department of Labor conduct an audit of the Respondent Union's financial records. The next day, at a general membership meeting, the membership approved the motion.

At a March 10 executive board meeting, Mitchell-Carr presented the board with a petition to impeach Union President McLendon on charges of misconduct. The charges included, among other things, the mishandling of funds that had led to Mitchell-Carr's original call for an audit, circumventing the collective-bargaining agreement with the Employer, Sandia Corporation, and intimidating members. Among the first signatures on the petition were Mitchell-Carr's, Vaughan's, Smith's, and Herrera's, a group that became known as "the Mitchell-Carr faction."

Shortly thereafter and, as found by the administrative law judge, "transparently in retaliation," McLendon, at an executive board meeting on April 7, presented a petition calling for the impeachment of Mitchell-Carr on the ground that she improperly called special membership and executive board meetings. This impeachment peti-

[3] The relevant portion of Sec. 8(a)(1) of the National Labor Relations Act provides:

> 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 of this title

The relevant portion of Sec. 8(b)(1)(A) provides:

> 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 of this title: 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.

[4] 394 U.S. 423 (1969).

[5] Id. at 430.

[6] 29 U.S.C.§ 411, et seq.

[7] *Roadway Express, Inc.*, 108 NLRB 874, 875 fn. 3 (1954), enfd. 227 F.2d 439 (10th Cir. 1955) (citing *Nu-Car Carriers, Inc.*, 88 NLRB 75, 76–77 (1952), enfd. 189 F.2d 756 (3d Cir. 1951), cert. denied 342 U.S. 919 (1952)).

[8] Sec. 101(a)(2) of the LMRDA 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. [29 U.S.C. Sec. 411(a)(2).]

[9] Smith and Herrera did not run for reelection, and therefore, their terms were set to end in March 1993.

[10] All dates refer to 1993 unless otherwise stated.

tion stated additional grounds, which the judge described as "a veritable laundry list of alleged infractions, some quite petty." Petitions for the impeachment of Vaughan, Smith, and Herrera then followed.

On April 27 the Union's trial board voted to remove Mitchell-Carr from her elected office of vice president and to expel her permanently from the Union. Then, on May 26, the trial board voted to remove Vaughn from his elected office of trustee and to suspend his membership for 5 years, to suspend Herrera's membership for 5 years, and to expel Smith permanently.[11] The Union never did act on the petition to impeach President McLendon.

The General Counsel asserted that the Union violated Section 8(b)(1)(A) when it disciplined the four members of the Mitchell-Carr faction in retaliation for their opposition to McLendon's policies and alleged misconduct. The judge refused to find an 8(b)(1)(A) violation and instead found that the Board has no subject-matter jurisdiction over these issues.

The judge initially expressed doubt that the four individuals at issue here were in fact "employees" within the meaning of Section 8(b)(1)(A). He noted that, although they were clearly employees of Sandia Corporation, the events at issue involved an internal union dispute unrelated to that employment. Additionally, the judge found that the dissident activities of Mitchell-Carr and the other three employees were not protected by Section 7 because, as stated by the judge, "Section 7 is aimed at the mutual interests of employees in their capacity as employees, not in their capacity as union officers or members."[12] The judge also found that the Union's conduct in the present case fell within the proviso to Section 8(b)(1)(A) insulating certain internal union matters from the effects of that section.[13] Finally, the judge determined that the only remedy available to the employees here was under the LMRDA, a statute that places jurisdiction in the United States District Courts.

My colleagues affirm the judge's decision with their own explication. They adopt a much more narrow reading of Section 8(b)(1)(A) than that traditionally applied by the Board and the United States Supreme Court. They emphasize the difference between external and internal enforcement of union rules, the former involving discipline that impacts the employee's employment relationship, and assert that Section 8(b)(1)(A) does not prohibit discipline falling into the latter category. My colleagues acknowledge, however, that "unacceptable methods of union coercion in the employment context, such as threats of loss of employment or physical violence to force a dissenting employee to join a union during an organizational campaign or to participate in a strike" and conduct "that directly impedes access to the Board's processes" may be proscribed by Section 8(b)(1)(A), although it would appear that such cases need not impact an employee's employment relationship. Additionally, my colleagues recognize one other situation in which Section 8(b)(1)(A) may proscribe union conduct, although they again attempt to limit the applicability of that section to instances where the employment relationship is directly affected. In this regard, they state that "the proscriptions of Section 8(b)(1)(A) apply when intra-union discipline clashes directly with statutory policy interests and prohibitions incorporated in the Act." In such a situation, my colleagues aver that the underlying activity "bear[] some relation to the employees' interests as employees." And they assert that, under Section 8(b)(1)(A), there must be "some nexus with the employer-employee relationship and a violation of the rights and obligations of employees under the Act."

With regard to the instant case, my colleagues find that the Union did not violate Section 8(b)(1)(A) because it "neither impacts the participants' relationship with their

[11] The judge noted that "[t]he General Counsel did adduce evidence . . . that may give rise to the conclusion that these trials were caused and conducted in a fundamentally unfair and irregular manner. At the very least they were conducted *in absentia*."

[12] These findings of the judge are clearly incorrect. As noted *supra* and as explained infra, dissident activities by union members are clearly protected by Sec. 7. See, e.g., *Mobil Exploration & Producing v. NLRB*, No. 97-60789 (5th Cir. Dec. 23, 1999), slip op. at 6 ("The Board correctly relied on the well settled principle that Section 7 encompasses the right of employees to oppose the policies and actions of their incumbent union leadership and to seek to persuade other employees to take steps to align the union with these opposing views."); *Laborers Local 324 v. NLRB*, 123 F.3d 1176, 1178 (9th Cir. 1997) ("The Sec. 7 rights have long been understood to include the right of employees to be critical of the union and its management."); *Laborers Local 324 (AGC of California)*, 318 NLRB 589 (1995), enf. granted in part and denied in part 123 F.3d 1176 (9th Cir. 1997) ("The Board has long held that Sec. 7 guarantees employees the right to criticize their bargaining representative or to persuade others to take such steps as they deem necessary to align their union with their position."); *Teamsters Local 186 (Associated General Contractors)*, 313 NLRB 1232, 1234–1235 (1994) (affirming administrative law judge's decision, which stated that "[f]or many years the Board has ruled efforts by a union member/employee to attempt to change current policies of the union which represents him or to politically oppose an incumbent officer of that union are the exercise of rights guaranteed by Sec. 7 of the Act.") (footnote omitted); *East Texas Motor Freight*, 262 NLRB 868, 871 (1982) ("It has long been held that Sec. 7 guarantees to employees the right to question the wisdom of their representative or to take steps to align their union with their position.") (footnote omitted); *Steelworkers Local 1397*, 240 NLRB 848, 849 (1979) ("That an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7 is, of course, elementary."); *Operating Engineers Local 400 (Hilde Construction Co.)*, 225 NLRB 596, 600 (1976), affd. mem. 561 F.2d 1021 (D.C. Cir. 1977) (affirming the administrative law judge's findings, including that union members "have a right . . . under Section 7" to "[question] the wisdom of [the union's] conduct as their bargaining representative"); *Roadway Express*, 108 NLRB at 875 fn. 3 ("The privilege to protest and to question the wisdom of their bargaining representative and to persuade others or take such steps as they deem necessary to align their union with their position is inherent in the employee's right to self-organization as guaranteed by Section 7 of the Act."); *Nu-Car Carriers*, 88 NLRB at 76 (stating that "inherent in th[e] right [to self-organization] is the privilege of protest and persuasion of others").

[13] The proviso to Sec. 8(b)(1)(A) states: "[T]his 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." [29 U.S.C. Sec. 158.]

employer nor impairs a policy of the National Labor Relations Act." Rather, my colleagues find that the conduct at issue centers around what is "essentially an intraunion factional quarrel over intra-union policies and politics." According to my colleagues, this type of conduct is not covered by Section 8(b)(1)(A). They assert instead that the Federal courts are the only proper forum and the LMRDA the only applicable law.

In narrowing the Section 8(b)(1)(A) analysis, my colleagues explicitly overrule several Board cases that would bear directly on the conduct at issue here and would clearly call for a different result, including *Carpenters Local 22 (Graziano Construction)*,[14] *Teamsters Local 579 (Janesville Auto Transport);*[15] *Laborers Local 324 (AGC of California);*[16] and *Laborers, Local 652 (Southern California Contractors' Assn.)*.[17] As explained below, however, these cases, along with other Board precedent, follow the Supreme Court's 8(b)(1)(A) analysis, which, properly applied, requires that the Board find a violation in the instant case.

II.

A. The Supreme Court Cases

In order fully to understand the application of Section 8(b)(1)(A) in the context of this case, it is important to be familiar with how the 8(b)(1)(A) analysis has developed in the Supreme Court, the lower Federal courts, and the Board. Therefore, this section offers a brief examination and explanation of that law.

In 1967, the Supreme Court made its first major pronouncements regarding 8(b)(1)(A) analysis in *NLRB v. Allis-Chalmers Mfg. Co.*[18] In that case, the union had imposed fines on members who had crossed the union's picket line to return to work during an economic strike of their employer.[19] The Court held that the union had not committed an unfair labor practice either by imposing the fines or by seeking their enforcement in court. In the course of its decision, the Court emphasized both the fact that unions need to be able to discipline their members for violations of union rules in order to maintain their status as bargaining representatives and the fact that a union's power is "particularly vital" when it is engaged in a strike as was the case in *Allis-Chalmers*.[20] The Court explained that a decision that Section 8(b)(1)(A) impinged upon a union's ability to strike in the situation at issue would hit at the very core of a union's arsenal of economic weapons.[21] The Court was unwilling to attribute such an intent to Congress.[22]

The *Allis-Chalmers* Court went on to explain that Section 8(b)(1)(A) did not interfere in the internal affairs of unions in a manner that would forbid the conduct at issue there:

> What legislative materials there are dealing with § 8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate in internal affairs of unions.[23]

The Court, however, explicitly refused to decide whether Section 8(b)(1)(A) might forbid certain other "internal" union conduct:

> In the present case the procedures followed for calling the strikes and disciplining the recalcitrant members fully comported with [the procedural requirements instituted by the 1959 amendments], and were in every way fair and democratic. *Whether § 8(b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader, are matters not presented by this case, and upon which we express no view.*[24]

Thus, although *Allis-Chalmers* does take certain "internal" union conduct out of the universe of Section 8(b)(1)(A), it does not foreclose the possibility that certain other improper conduct, not lying at the heart of a union's economic-weapon arsenal, might be proscribed by that section.[25] And, indeed, later cases demonstrate

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[14] 195 NLRB 1 (1972).
[15] 310 NLRB 975 (1993), enf. denied 145 LRRM 2200 (7th Cir. 1993).
[16] 318 NLRB 589.
[17] 319 NLRB 694 (1995).
[18] 388 U.S. 175 (1967).
[19] Id. at 176.
[20] Id. at 181.
[21] In the course of its opinion, the *Allis-Chalmers* Court specifically emphasized the importance to unions of the ability to engage in economic strikes: "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '(t)he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent.'" Id. (quoting Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049 (1951)) (alteration in original).
[22] Id. at 183.
[23] Id. at 185–186.
[24] Id. at 195 (emphasis added).
[25] In fact, the *Allis-Chalmers* Court conceded that Sec. 8(b)(1)(A) may have a broader reach. Throughout its opinion, the Court relied on legislative history, noting that proponents of the amendment creating that section focused closely on curtailing union misconduct in organizing campaigns. Id. at 185–188. In outlining this legislative history, however, the Court explicitly noted the possibility, found within that legislative history, of a broader application of Sec. 8(b)(1)(A), which would directly encompass the conduct at issue in the present case. In this regard, the Court quoted Senator Taft, who stated in debate:

> If there is anything clear in the development of labor union history in the past 10 years it is that more and more labor union employees have come to be subject to the orders of labor union leaders. *The bill provides for the right to protest against arbitrary powers which have been exercised by some of the labor union leaders."*

Id. at 188 (quoting 93 Cong. Rec. 4023, II Leg. Hist. 1028) (emphasis added). The Court then went on to quote the following commentary in a fn. 24: "It is significant that among the major changes made in the Wagner Act by the Labor Management Relations Act of 1947 was the addition of sections *purported to be aimed at protecting individual union members against undemocratic and corrupt leaders.*" Id. (quoting Summers, *Disciplinary Powers of Unions*, 3 Ind. & Lab. Rel. Rev. 483) (emphasis added).

Thus, even the *Allis-Chalmers* Court, although dealing with a case that did not involve discipline meted out in retaliation for dissident conduct, implied that such discipline might in fact violate Sec. 8(b)(1)(A) and in fact

that Section 8(b)(1)(A) does, in fact, forbid certain types of seemingly "internal" union conduct.

The Supreme Court's next decision regarding the reach of Section 8(b)(1)(A) came in *NLRB v Shipbuilders,* in which the Court determined that the union had violated the Act.[26] In that case, a union member had charged the union president with certain misconduct, and the union had decided in favor of the president. The aggrieved member then filed an unfair labor practice charge in lieu of proceeding through the intra-union appeals process available to him.[27] The union expelled the member on the ground that he had violated the union constitution by failing to exhaust his internal remedies prior to filing the unfair labor practice charge. The union member then filed a second unfair labor practice charge with the Board, asserting that his expulsion from the union violated the Act.[28]

The Supreme Court held that the union's conduct had indeed violated Section 8(b)(1)(A) of the Act. The Court emphasized the fact that the conduct involved in *Shipbuilders* ran counter to public policy: "[Section] 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play."[29] As the Court went on to explain:

> A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization . . . . [T]he overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved.[30]

In *Shipbuilders*, such "plainly internal affairs" were not involved. Rather, the aggrieved union member's original unfair labor practice charge had implicated the employer as well as the union, and purely internal union proceedings would not have included the employer as a party, whereas the Board proceedings could have done so and additionally could have provided for "comprehensive and coordinated remedies."[31] As the Court explained, "There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member."[32] The *Shipbuilders* Court therefore based its finding of an 8(b)(1)(A) violation on public policy and the involvement of more than purely internal union matters.

The next Supreme Court decision in the 8(b)(1)(A) area made clear that both policy and the legitimacy of a union's interest in imposing discipline on members were to play important roles in 8(b)(1)(A) analysis. Although the Court in *Scofield v. NLRB*[33] did not find an 8(b)(1)(A) violation, it did set forth a clear test for determining when such a violation has occurred. In that case, the union had instituted a production ceiling on piecework under which any member could produce as much as he wanted on any given day but could only draw pay up to the set ceiling.[34] The employer would then retain wages due for any additional production and pay them out to the employee for days on which the employee did not reach the production ceiling.[35] Any member who demanded to be paid in full each pay period would receive his wages from the employer but would be assessed a fine by the union for each such violation of the production ceiling.[36] Members who failed to pay the fines would then be subject to expulsion.[37]

The *Scofield* Court determined that the union's production ceiling and enforcement thereof did not violate Section 8(b)(1)(A). However, the Court specifically noted that "it has become clear that if the rule *invades or frustrates an overriding policy of the labor laws* the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)."[38] The Court then set forth the following test for Section 8(b)(1)(A) violations: A union will not violate that section as long as it is "enforc[ing] 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."[39]

In applying this test to the facts before it, the *Scofield* Court noted that the record did not indicate "that the fines were unreasonable or the mere fiat of a union leader" or that membership in the union was involuntary.[40] Additionally, the rule was not improperly enforced, e.g., through violence or employer discrimina-

laid out legislative history directly supporting such a reading of Sec. 8(b)(1)(A).

[26] 391 U.S. 418 (1968).

[27] Id. at 419–420.

[28] Id. at 421.

[29] Id. at 424.

[30] Id. (footnote omitted).

[31] Id. at 425.

[32] Id.

[33] 394 U.S. 423 (1969).

[34] Id. at 424.

[35] Id. at 424–425.

[36] Id. at 425.

[37] Id.

[38] Id. at 429 (emphasis added). As recently as 1987, the Supreme Court reaffirmed the importance of labor policy in determining violations of Sec. 8(b)(1). In *NLRB v. Electrical Workers IBEW Local 340*, 481 U.S. 573 (1987), a case involving Sec. 8(b)(1)(B), the Court compared the application of that section to that of Sec. 8(b)(1)(A) and stated, "Section 8(b)(1)(B) must be similarly interpreted [to Section 8(b)(1)(A)] to allow unions to enforce internal union rules that *impair no labor policy*." Id. at 592 fn. 16 (emphasis added).

[39] 394 U.S. at 430.

[40] Id. at 430.

tion, but instead was accomplished through the internal technique of fines and the threat of expulsion.[41] The Court then turned to whether the rule at issue failed to vindicate a legitimate union interest or violated any labor-law policy.[42] The Court found a legitimate union interest in the historical opposition of unions to the type of pay system at issue in *Scofield*.[43] Additionally, the Court determined that the union's rule did not violate labor policy.[44] Thus, the production-ceiling rule did not violate Section 8(b)(1)(A).

After *Scofield*, the Supreme Court decided three additional cases that further refined the Section 8(b)(1)(A) analysis. In *NLRB v. Granite State Jt. Bd. Local 1029*,[45] the Court, drawing on *Scofield*'s requirement that a union rule must be "reasonably enforced against union members who are free to leave the union and escape the rule,"[46] held that a union that attempts to impose fines on members who have resigned and returned to work during a lawful strike violates Section 8(b)(1)(A).[47] The Court reasoned that, when an employee has resigned his or her union membership, the union "has no more control over [him or her] than it has over the man in the street."[48]

In *Pattern Makers League v. NLRB*,[49] the Supreme Court answered the next logical question: whether a union could lawfully restrict members' ability to resign. In that case, the union's constitution stated that members could not resign during a strike or when a strike was imminent.[50] When certain members resigned during a strike and returned to work, the union imposed fines on them.[51] The Supreme Court determined that the union's fining of these employees violated Section 8(b)(1)(A).[52] The Court reasoned that the union's rule impaired a policy that "Congress has imbedded in the labor laws,"[53] because the union's rule was "inconsistent with the policy of voluntary unionism implied in § 8(a)(3)" of the Act.[54] The Court noted that the Act forbids full union membership as a requirement of employment, meaning that an employee who refuses to join a union cannot have his employment terminated and that an employee who joins a union and subsequently resigns also cannot be discharged.[55] A union rule limiting members' right to resign would "[curtail] this freedom to resign."[56]

Finally, in *NLRB v. Boeing Co.*,[57] the Supreme Court clarified some of the *Scofield* language. In addition to laying out the test explained above, the *Scofield* Court had stated that "the union rule is valid and that its enforcement by *reasonable fines* does not constitute the restraint or coercion proscribed by § 8(b)(1)(A)."[58] In *Boeing*, the question arose whether the Board should police the reasonableness of union fines when determining whether the fines were imposed in violation of Section 8(b)(1)(A).[59] The Court held that the Board should not consider the reasonableness of union fines because Section 8(b)(1)(A) was "not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship *and not otherwise prohibited by the Act*."[60] In so holding, however, the *Boeing* Court clearly did not alter the test to be applied in determining whether an 8(b)(1)(A) violation had occurred. As the Court explained, in that case:

> [T]he Board was warranted in determining that when the union discipline does not interfere with the employee-employer relationship *or otherwise violate a policy of the National Labor Relations Act*, the Congress did not authorize it "to evaluate the fairness of union discipline meted out to protect a legitimate union interest."[61]

Thus, *Boeing* does nothing more than affirm the Board's determination that it should not delve into the reasonableness of a fine when the reason for the imposition of the discipline itself does not fail the *Scofield* test.

In these various cases examining the proper analysis to be performed under Section 8(b)(1)(A) then, the Supreme Court created a fairly clear test. That test is embodied in the language of *Scofield* laid out above. *Boeing* merely reemphasizes the need for the Board to stay its hand when dealing with purely "internal" union matters in the sense that, if union discipline is *otherwise proper* under Section 8(b)(1)(A), then it cannot be found violative of that section based purely on the "unreasonableness" of the amount of the fine. *Boeing*, however, did not alter the central test enunciated in *Scofield*: union discipline will violate Section 8(b)(1)(A) unless the union is "enforc[ing] 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."[62]

B. The Lower Federal Courts and the Board

During the course of the Supreme Court's examination of Section 8(b)(1)(A), the Board and the lower Federal

[41] Id. at 430–431.
[42] Id. at 431.
[43] Id.
[44] Id. at 431–435.
[45] 409 U.S. 213 (1972).
[46] Id. at 216 (quoting *Scofield*, 394 U.S. at 430).
[47] Id. at 217–218.
[48] Id. at 217.
[49] 473 U.S. 95 (1985).
[50] Id. at 96.
[51] Id.
[52] Id. at 100.
[53] Id. at 104 (quoting *Scofield*, 394 U.S. at 430).
[54] Id. at 104–105 (citations and footnote omitted).
[55] Id. at 106.
[56] Id.
[57] 412 U.S. 67 (1973).
[58] Id. at 72 (quoting *Scofield,* 394 U.S. at 436) (emphasis added).
[59] Id. at 68.
[60] Id. at 73 (emphasis added).
[61] Id. at 78 (emphasis added).
[62] *Scofield*, 394 U.S. at 430.

courts continued to explicate employee rights in this area, following the analysis laid out by the Supreme Court in *Allis-Chalmers*, *Shipbuilders*, and *Scofield*. Perhaps the most obvious question to arise after *Allis-Chalmers*'s determination that fining members for returning to work during a lawful strike does not violate Section 8(b)(1)(A) was whether disciplining members for refusing to participate in unprotected or unlawful strikes would violate that Section.

In *National Grinding Wheel Co.*,[63] the Board adopted the findings of the trial examiner, who had determined that a union's imposition of fines on certain members for crossing a picket line violated Section 8(b)(1)(A).[64] The trial examiner concluded that the work stoppage, in that case a sympathy strike, violated the no-strike clause to which the union had agreed in its collective bargaining agreement with the employer.[65] The trial examiner then went on to find that the union's imposition of fines for the members' refusal to respect the picket line of a sister local and thus engage in unprotected activity was adverse to public policy and therefore violative of Section 8(b)(1)(A). The trial examiner explained that the policy at issue "concern[ed] the adherence to the terms of a labor contract between representatives of employers and employees and the condemnation of their violation."[66] He noted that this policy was "implicit in the preamble of the Act . . . and in the reports of both houses of Congress."[67] Further, the trial examiner explained that condoning the union's conduct by failing to find a violation would "provide an incentive to unions and members to violate contracts," which would also undermine a policy of the Act.[68]

The Ninth Circuit has approved of the Board's approach to cases involving union discipline of members who refuse to honor picket lines during unlawful or unprotected strikes. In *NLRB v. Stationary Engineers Local 39*,[69] the Ninth Circuit, after noting that the work stoppage at issue was in violation of Section 8(g) of the Act, agreed with the Board that the union had violated Section 8(b)(1)(A) when it fined members who refused to participate in the strike.[70] The court found that the union's conduct was antagonistic to national labor policy because of the union's violation of Section 8(g).[71] Similarly, in *NLRB v Glaziers & Glassworkers Local 1621*,[72] the Ninth Circuit held that a union violated Section 8(b)(1)(A) when it disciplined members who insisted on working for a neutral employer and thus refused to engage in a secondary boycott. The court reasoned that such secondary activity would violate Section 8(e) of the Act and thus disciplining members who refused to engage in it would impair the national labor policy against secondary boycott activity.[73]

Clearly, under these cases, a union that disciplines members who refuse to take part in strikes that are themselves unlawful or unprotected (e.g., in violation of a no-strike clause) violates Section 8(b)(1)(A). Such a determination follows fairly easily from the Supreme Court's 8(b)(1)(A) analysis calling for the finding of a violation when union conduct impairs national labor policy.

The Board and the Ninth Circuit, however, were faced with a similar, but importantly different, situation in *NLRB v. Retail Clerks Local 1179*.[74] There, the union had fined members who crossed the picket line during a sympathy strike. Unlike in *National Grinding Wheel*, *Stationary Engineers*, and *Glaziers & Glassworkers,* the sympathy strike in which the *Retail Clerks* members refused to take part was not itself illegal as it did not violate the NLRA and also was not unprotected activity as the union's no-strike clause specifically allowed for the type of strike at issue.[75] Thus, at first glance, the case would seem to fall within the bounds of *Allis-Chalmers*, which, as explained above, sanctioned the fining of members who refuse to participate in a lawful, protected strike. In *Retail Clerks*, however, the Board and the Ninth Circuit determined that the union's conduct in disciplining the members who refused to take part in the strike violated Section 8(b)(1)(A). The union had called the sympathy strike to support a teamsters strike, which subsequently was found to have violated Section 8(b)(7) of the Act.[76] As noted, however, there was no suggestion that the sympathy strike itself was unlawful or unprotected.[77]

The Ninth Circuit conducted the *Scofield* analysis explained above. First, it determined that the procedure utilized by the union, fining members to enforce its bylaws, was reasonable and proper.[78] Next, the court determined that the union had a legitimate interest in conducting a sympathy strike, because such strikes "[serve] the legitimate union interest of promoting mutual aid and

[63] 176 NLRB 628 (1969).

[64] The Board in *National Grinding Wheel* also held that a union's agreement to a broad no-strike clause waives its right to engage in sympathy strikes. This aspect of the opinion was overruled. See *Operating Engineers Local 18*, 238 NLRB 652, 653–654 (1978) (noting that this aspect of *National Grinding Wheel* was overruled by *Keller-Crescent Co.*, 217 NLRB 685 (1975), enf. denied 538 F.2d 1291 (7th Cir. 1976), and *Gary-Hobart Water Corp.*, 210 NLRB 742 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925 (1975)). However, *Operating Engineers*' determination that a broad no-strike clause does not waive the right to engage in sympathy strikes was then also overruled. See *Indianapolis Power Co.*, 273 NLRB 1715 (1985), review granted 797 F.2d 1027 (D.C. Cir. 1986), supplemental decision 291 NLRB 1039 (1988), enfd. 898 F.2d 524 (7th Cir. 1990).

[65] 176 NLRB at 630.

[66] Id. at 631.

[67] Id. at 631–632 (footnote omitted).

[68] Id. at 632.

[69] 746 F.2d 530 (9th Cir. 1984).

[70] Id. at 533–534.

[71] Id. at 535.

[72] 632 F.2d 89 (9th Cir. 1980).

[73] Id. at 92–93.

[74] 526 F.2d 142 (9th Cir. 1975).

[75] Id. at 146.

[76] Id. at 144.

[77] Id. at 146.

[78] Id. at 145–146.

cooperation with other unions."[79] Finally, however, the court found that the union's conduct impaired national labor policy. The court reasoned that the sympathy strike's purpose had been to support picketing that was later found to be a violation of the Act and that, even though the original decision to call the sympathy strike had been made in good faith, the attempt to discipline members even after the Board had determined that the underlying Teamsters' picket was illegal "tend[ed] to impair the policy against" illegal picketing found in Section 8(b)(7) of the Act.[80] This was true even though the sympathy strike in and of itself was not illegal nor unprotected activity.

The D.C. Circuit has also found union conduct violative of Section 8(b)(1)(A) as an impairment of national labor policy in a situation where it was less clear that the underlying action directly violated a specific provision of the Act or of a collective bargaining agreement. In *Elevator Constructors Local. 8 v. NLRB*,[81] the union's constitution required members to pay fines prior to dues, and the union's collective-bargaining agreement with the employer contained a union-security clause, which required the employer to discharge any employee who failed to maintain union membership.[82] The court noted that union-security clauses are valid under the Act so long as the membership obligations that they impose "include only the 'financial core' of dues and initiation fees."[83] The Act, however, forbids unions from affecting an employee's job status on the ground that he or she failed to pay fines or to adopt a dues-checkoff system, and therefore, the court noted, a threat to discharge an employee for failure to pay fines would violate Section 8(b)(1)(A).[84] After considering the union's rule regarding the payment of fines before dues under the *Scofield* analysis, the D.C. Circuit determined that it was unlawful. Although the court found that the rule served the legitimate union purpose of encouraging the payment of fines, it held that the rule impaired a national labor policy when juxtaposed with the union-security clause.[85] The two provisions together contravened policies of the Act because members might believe, under the terms of the two provisions, that they were required to pay fines before dues and thus that they could not refuse to pay a fine and yet retain their jobs under the union-security clause.[86]

As these cases demonstrate, the courts and the Board have not hesitated to find that union discipline of members violates Section 8(b)(1)(A) when that discipline impairs a national labor policy even when the rule and discipline involved meet the other criteria of the *Scofield* test. The cases discussed so far have not considered how discipline of dissident union members fits into the 8(b)(1)(A) analysis. The following section discusses the application of the 8(b)(1)(A) analysis in this area of discipline in retaliation for dissident activity.

C. Section 8(b)(1)(A) and Dissident Activity

The Board and the Federal circuit courts have had numerous opportunities to address the application of Section 8(b)(1)(A) to cases in which unions disciplined members who had engaged in dissident union activity like that involved in the instant case, such as expressing disapproval of the incumbent union leadership and attempting to persuade other members to join in opposition. For the most part, both the Board and the Federal courts have employed the same analysis as in other areas of 8(b)(1)(A) applicability. That is, they have focused on whether the discipline at issue reflected a legitimate union interest and whether it impaired national labor-law policies. The first major Board decision in this area, *Carpenters Local 22 (Graziano Construction Co.)*,[87] is one that my colleagues reject and overrule.

In *Graziano*, the union fined a member for violation of certain rules, but the Board found that the union was using these rules as a pretext for punishing the member for his opposition to certain incumbent officials.[88] The Board, applying *Scofield*, determined that the union's discipline of the dissident member violated Section 8(b)(1)(A) because it impaired certain policies that Congress had imbedded in the labor laws. Specifically, the Board held that the union's conduct impaired the policies of the LMRDA, which guarantees members the right "to participate fully and freely in the internal affairs of [their] own union."[89]

In *Graziano*, unlike the cases discussed above, the Board based its finding of a Section 8(b)(1)(A) violation on the impairment of labor policies found outside the NLRA. However, the Board explained that it was "charged with considering the full panoply of congressional labor policies in determining the legality of a union fine"[90] and that the Supreme Court had "charged . . . [it] with the duty of determining the overall legitimacy of union interest," requiring it to "take into account all Federal policies and not limit [itself] to those embodied in [the NLRA]."[91] My colleagues take issue with this approach employed in *Graziano*,[92] but as I explain below,

[79] Id.
[80] Id. at 147.
[81] 665 F.2d 376 (D.C. Cir. 1981).
[82] Id. at 377.
[83] Id. at 378 (quoting *NLRB v. General Motors Corp*., 373 U.S. 734 (1963)).
[84] Id. at 378–379.
[85] Id. at 380.
[86] Id. at 382.
[87] 195 NLRB 1 (1972).
[88] Id. at 1.
[89] Id. at 2.
[90] Id. (footnote omitted).
[91] Id. at 2 fn. 5.
[92] It should be noted here that the D.C. Circuit has explicitly approved the Board's consideration of statutes other than the NLRA when making 8(b)(1)(A) determinations. See *Helton v. NLRB*, 656 F.2d 883, 895–896 (D.C. Cir. 1981). For a more detailed explanation of *Helton*, see infra text accompanying fns. 98–103.

even when the LMRDA is not considered, union discipline of members based on their dissident activity violates Section 8(b)(1)(A) because it impairs policies found directly under the NLRA.

Cases after *Graziano* explicitly base Section 8(b)(1)(A) violations on the impairment of Section 7 policies as well as policies found in the LMRDA. For example, in *Operating Engineers Local 400 (Hilde Construction Co.)*,[93] the Board affirmed an Administrative Law Judge's decision that the union had violated Section 8(b)(1)(A) when it disciplined members for holding a meeting to determine if other members agreed with them that the union should redirect its bargaining strategy.[94] The judge first noted that the members, through this meeting, were "questioning the wisdom" of their union and thus that the members were engaged in activity protected by Section 7.[95] In considering whether the union had impaired a policy imbedded in the labor laws, the judge pointed both to this Section 7 policy of protecting members who "question the wisdom of their representative and . . . pursue a course designed to align their representative with their position" and to the LMRDA policy of protecting union members in their right "to discuss freely and criticize the management of their unions and the conduct of their officers."[96] Thus, in *Hilde Construction*, the Board found an 8(b)(1)(A) violation on the ground that the union's conduct in disciplining dissident members violated policies embodied not only in the LMRDA but also in the NLRA itself.[97]

The D.C. Circuit has approved the Board's approach. In *Helton v. NLRB*,[98] the union had refused to allow a member to post on the union's bulletin board literature that criticized the union, although the union would have allowed him to post any other type of material.[99] Although the Board, apparently finding that Section 8(b)(1)(A) applied only to conduct "involv[ing] threats of violence, economic reprisal, or discipline," had found no violation, the D.C. Circuit determined that the union had violated Section 8(b)(1)(A).[100] The court began by noting that the member's attempt to disseminate materials critical of the union was protected dissident activity under Section 7 and that therefore the union's removal of that material from its bulletin board "restrained" the member in the exercise of his Section 7 rights.[101] The court then went on to find that the union's conduct did not fall within Section 8(b)(1)(A)'s internal-affairs proviso and in fact came within the prohibitive reach of that section. In this regard, the court applied the *Scofield* test and found that the union's conduct not only failed to reflect a legitimate union interest but also impaired policies imbedded in the labor laws.[102] The court explained that the union's removal of the member's material from its bulletin board impaired Section 7 policies allowing expression of dissident views and also impaired the free-speech policies imbedded in the LMRDA.[103]

Along the same lines as these cases involving union discipline meted out explicitly as a result of dissident activity, the Board has been confronted with cases involving union discipline for the asserted violation of union rules not aimed at dissident conduct when the asserted reasons for the discipline were merely pretextual, as in the present case.[104] The Board has found 8(b)(1)(A)

[93] 225 NLRB 596 (1976), affd mem. 561 F.2d 1021 (D.C. Cir. 1977).

[94] Id. at 601.

[95] Id. As explained above, the Board has long held that union members have a right, under Sec. 7, to criticize their union and to attempt to persuade other members to join them in opposition to the incumbent union leadership. See supra fn. 12.

[96] Id. at 602 (quoting *Salzhandler v. Caputo*, 316 F.2d 445, 448–449 (2d Cir. 1963), cert. denied 375 U.S. 946 (1963)).

[97] *See also Associated General Contractors*, 313 NLRB 1232 (affirming administrative law judge's finding of 8(b)(1)(A) violation based on impairment of LMRDA and Sec. 7 policies); *Janesville Auto Transport*, 310 NLRB 975 (1993), enf. denied 145 LRRM 2200 (7th Cir. 1993) (finding an 8(b)(1)(A) violation because union's discipline of dissident members impaired policies found in LMRDA right "to participate fully and freely in internal union affairs" *and* in Sec. 7 right "to concertedly oppose the decisions made by the incumbent leadership of the Union").

[98] 656 F.2d 883 (D.C. Cir. 1981).

[99] Id. at 884.

[100] Id. at 887. Although, as briefly explained, this case involved conduct by the union other than actual discipline and may be distinguishable from the present case on that ground, the D.C. Circuit's reasoning remains applicable. It is important to note also that cases like the present one in which the union actually disciplines members for dissident conduct are more clearly within the reach of Sec. 8(b)(1)(A) than *Helton* under Board precedent. Thus, even if the Board should continue to reject the D.C. Circuit's broad finding in *Helton* that the union's failure to allow a member to post dissident material alone violates Sec. 8(b)(1)(A), the reasoning employed by the court, like that of the Board in previous cases, would remain relevant to a case involving actual discipline, such as the one under consideration here.

[101] Id. at 888. In determining that the union's conduct had restrained the member's Sec. 7 rights, the *Helton* court specifically noted the importance of considering Sec. 8(b)(1)(A)'s legislative history in determining that section's reach:

> [T]he Supreme Court has stated that interpretations of Sec. 8(b)(1)(A) must be guided not just by the section's literal language, but also by an understanding of the congressional purpose. Our review of the legislative history fails to convince us that Congress intended Sec. 8(b)(1)(A) to apply solely to union conduct involving threats of violence, economic reprisal, or discipline.
>
> The sponsors of the Taft Hartley Act, in explaining their proposed legislation, focused primarily on the need to control union violence and economic coercion. . . . However, nothing in the legislative history supports the conclusion that violence and economic reprisal were the sole evils at which Sec. 8(b)(1)(A) was aimed. Rather, it appears that Congress intended Sec. 8(b)(1)(A) to cover a range of conduct as broad as that covered by Sec. 8(a)(1). Senator Ball, a co-sponsor of the legislation, stated that "the purpose of the amendment is very simple. It is to insert an unfair-labor practice for unions identical with the first unfair labor practice prohibited to employers in the present act."

Id. at 888–889 (quoting 93 Cong. Rec. 4016 (1947), 2 Leg. Hist. 1018) (citations and footnotes omitted). The D.C. Circuit thus confirmed that the legislative history of Sec. 8(b)(1)(A) calls for an understanding of that section that is broad enough to include protection of dissident conduct.

[102] Id. at 894–895.

[103] Id. at 895–896.

[104] My colleagues question the pretextual nature of the reasons given for the discipline of the Mitchell-Carr faction. Although the judge did not explicitly state that the Union's reasons were pretextual, the following findings laid out in his decision support a determination that the Union's reasons were indeed mere pretext: (1) The judge found that the impeachment peti-

violations in these cases as well and, in fact, in several of these cases, the Board has found an 8(b)(1)(A) violation based on Section 7 policies without mention of the LMRDA. For example, in *Carpenters (Daniel Construction Co.)*,[105] the Board affirmed an administrative law judge's decision that the union had violated Section 8(b)(1)(A) by asserting pretextual charges against a union member who had criticized the incumbent union administration. The judge had found that:

> Pressing groundless charges against a union member by a union official [because of the member's opposition to the incumbent union administration] or out of personal spite growing out of those reasons . . . constitutes union restraint and coercion against the employee in the exercise of his Section 7 rights, and thus also violates Section 8(b)(1)(A) of the Act."[106]

Neither the judge nor the Board found it necessary to mention the LMRDA in finding this violation.[107]

Similarly, in *Machinists Local 707 (United Technologies)*,[108] the Board affirmed an administrative law judge's decision that the union had violated Section 8(b)(1)(A) by making internal disciplinary charges against certain dissident union members in reprisal for their dissident activity.[109] Because he found that these charges would not have been brought against the union members had they not "engaged in activity protected by Section 7" when they distributed a campaign leaflet that was critical of union officials, the judge determined that the union had violated Section 8(b)(1)(A) by charging the members with internal union misconduct.[110] Again, neither the judge nor the Board mentioned the LMRDA, choosing instead to base the 8(b)(1)(A) violation on the Section 7 right at issue.

As these cases demonstrate, the 8(b)(1)(A) analysis enunciated by the Supreme Court in *Scofield* has been applied consistently by the Board over the years. Thus, when unions have attempted to discipline members for dissident activities, such as expressing views different from those of the incumbent leadership or attempting to persuade other members to join them in their opposition to the current approach taken by the union, the Board has found violations of Section 8(b)(1)(A). The Board has appropriately done so in cases involving discipline meted out explicitly in response to dissident activity and in cases involving discipline ostensibly in response to violations of other union rules but where those alleged rule violations were merely a pretext for the use of discipline in retaliation for dissident activity. The Board's approach to these cases has focused on the lack of a legitimate union interest in silencing the dissident views of its members and especially on the tendency of such conduct to impair national labor policies. The policies to which the Board has turned to support its findings of violations have stemmed from both the NLRA's Section 7 right to criticize one's bargaining representative and to persuade others to join in an attempt to change the union's position on a given issue as well as from the LMRDA's right of free expression.

My colleagues' approach in the present case both sets aside this long line of precedent and ignores the Supreme Court's 8(b)(1)(A) analysis. Additionally, what my colleagues accomplish in this case is a derogation of the established rights of individual union members. As explained below, a proper application of precedent, including that of the Supreme Court, would result in a finding of an 8(b)(1)(A) violation. Such an approach is proper based not only on this established precedent but also based on a healthy respect for individual rights as provided for by Congress in the national labor laws.

III.

A. Section 8(b)(1)(A) Applied

Clearly, under the relevant law, including both Board and Federal court decisions, the Union in the instant case violated Section 8(b)(1)(A). As explained above, the four members who made up the Mitchell-Carr faction were, as found by the judge, disciplined as a result of their dissident activity, i.e., drawing attention to the Un-

tion made against Mitchell-Carr was "transparently in retaliation" for Mitchell-Carr's attempt to impeach Union president McLendon and that the petition contained "a veritable laundry list of alleged infractions, some quite petty"; (2) The judge stated that the petitions against the other members of the Mitchell-Carr faction were "similar"; and (3) The judge found that "[t]he verities of the underlying petitions against the four are suspect and may well have been improper."

[105] 227 NLRB 72 (1976).

[106] Id. at 81. In this particular case, the union also caused the member's employer to discriminate against him and thus additionally violated Sec. 8(b)(2). *Id.*

[107] This is not to suggest that the Board, before today, had abandoned the LMRDA as a source of relevant labor policy for purposes of an 8(b)(1)(A) analysis. Rather, as recently as 1993 and 1995, the Board has continued to uphold the reasoning employed in *Graziano*. See *Janesville Auto Transport*, 310 NLRB at 975 ("The Board has interpreted . . . decisions of the Supreme Court to mean that internal union discipline, imposed in retaliation for a member's exercise of the right to engage in intraunion activities in opposition to the incumbent leadership of the union, violates Sec. 8(b)(1)(A) because it . . . impairs a policy which Congress has imbedded in the labor laws, e.g., the right guaranteed by the Labor-Management Reporting and Disclosure Act of 1959 to participate fully and freely in internal union affairs.") (citing *Graziano*, 195 NLRB at 2); *AGC of California*, 318 NLRB at 590 ("[T]he Respondent's . . . rule was aimed at stifling the kind of free speech that Congress sought to protect under the Labor-Management Reporting and Disclosure Act (LMRDA). Thus, the rule 'impairs [a] policy Congress has imbedded in the labor laws.'") (citing *Graziano*, 195 NLRB 1) (quoting *Scofield*, 394 U.S. at 430). As explained *supra*, my colleagues overrule both of these cases.

[108] 276 NLRB 985 (1985), enfd 817 F.2d 235 (2d Cir. 1987).

[109] Also at issue in *United Technologies* were threats and charges based explicitly on the members' dissident activity. Although that conduct by the union was also found to violate Sec. 8(b)(1)(A), id. at 992, the conduct most relevant here is the discipline based on charges not explicitly brought for dissident conduct but rather as a pretext and in reprisal for the members' dissident conduct.

[110] Id. at 996.

ion president's conduct and attempting to have him impeached.

When the *Scofield* analysis is properly applied to the facts of this case, it results in a finding of an 8(b)(1)(A) violation. The most important, and here the most relevant, aspects of *Scofield* are whether the Union's conduct failed to reflect a legitimate union interest and whether it impaired a policy that Congress has imbedded in the national labor laws. It can hardly be said that attempting to silence union members who disagree with the incumbent administration furthers a legitimate union interest, but more importantly, the Union's conduct here clearly impairs national labor policy. As explained, the members of the Mitchell-Carr faction opposed a variety of activity by Union President McLendon, including his allegedly circumventing the collective-bargaining agreement and his mishandling of funds. With regard to the former accusation, it is abundantly clear that disciplining employees for opposing circumvention of a collective-bargaining agreement impairs national labor policy. The most basic policy of the NLRA is its "concern [with] the adherence to the terms of a labor contract between representatives of employers and employees and the condemnation of their violations."[111] As the Board has previously noted, this is a policy that is "implicit in the preamble of the Act . . . and in the reports of both houses of Congress."[112]

The Mitchell-Carr faction's opposition to McLendon's other alleged misconduct (e.g., the mishandling of union funds) is similarly protected activity for which they cannot be disciplined without a violation of Section 8(b)(1)(A). As the cases outlined above demonstrate, the imposition of discipline in retaliation for such dissident activity impairs the policy found in Section 7 of the NLRA, which clearly protects such dissident conduct. Additionally, the Union's conduct impairs the policy explicitly laid out in the LMRDA, which protects union members' right to free expression.

As noted previously, it is clear, under Board precedent, that the NLRA, in Section 7, embodies a policy of protecting dissident union members and that, therefore, a violation of Section 8(b)(1)(A) can be found even without reference to the LMRDA. As explained, the Board has long held that union members have a right under Section 7 to question the wisdom of their representative's actions and the direction that its incumbent administration takes. Similarly, Section 7 provides union members with the right to attempt to convince other members to support them in their challenge of the incumbent administration and their representative's current direction.[113] The fact that Section 7 does not *explicitly* refer to union members who oppose the direction that their representative is taking is irrelevant. The Supreme Court itself, in *Pattern Makers*, referred to the appropriateness of considering *implied* policy when performing the *Scofield* Section 8(b)(1)(A) analysis. As explained above, in *Pattern Makers*, the Court held that restrictions on the right of union members to resign violated Section 8(b)(1)(A) because such restrictions impair "the policy of voluntary unionism *implied* in § 8(a)(3)" of the Act.[114] A policy of protecting dissident union members has surely been implied in Section 7 of the Act, and the union's discipline of its members here in retaliation for their dissident activity impairs that Section 7 policy and thus violates Section 8(b)(1)(A).

Furthermore, as in *Graziano* and other cases discussed above, the Union's conduct here impairs the policy that Congress has imbedded in the LMRDA. Section 101(a)(2) of the LMRDA provides in relevant part:

> 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

[111] *National Grinding Wheel*, 176 NLRB at 631.

[112] Id. at 631–632 (footnote omitted).

[113] For a recapitulation of the Board law with regard to dissident union members' Sec. 7 rights, see supra fn. 12.

[114] 473 U.S. at 104–105 (emphasis added).

Sec. 8(a)(3) of the Act provides that an employer commits an unfair labor practice:

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection]as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement*: Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

This section does not set out an explicit policy of voluntary unionism. However, the Supreme Court in *Pattern Makers* nonetheless relied on the implicit policy of Sec. 8(a)(3) and pointed to cases in which the Board had done the same. 473 U.S. 104–105 (citing *Machinists Local 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB 1330 (1984); *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984, 992 (1982)). See also *National Grinding Wheel*, 176 NLRB at 631–632 (relying on policy encouraging adherence to terms of collective-bargaining agreements, which is "implicit in the preamble of the Act . . . and in the reports of both houses of Congress").

> meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings.[115]

As the Second Circuit has explained, "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";[116] thus, the LMRDA embodies a policy of protecting the type of activity at issue in this case. The Union's discipline of the members of the Mitchell-Carr faction for engaging in such activity therefore impairs a policy that Congress has imbedded in the national labor laws and thus does not pass muster under the *Scofield* test.[117]

It is also important to note that the Union here does not have a legitimate interest in suspending or expelling the members of the Mitchell-Carr faction, nor does it have a legitimate interest in removing Mitchell-Carr and Vaughan from their elected offices. Thus, the Union's conduct fails to meet another of the *Scofield* factors. The Board and courts have long held that unions do not have a legitimate interest in punishing members for expressing dissident views.[118] Although many of these cases involved fining members rather than suspending or expelling them, expulsion and suspension from union membership are at least as coercive as fining.[119] In fact, the Supreme Court itself has found a violation of Section 8(b)(1)(A) based on expulsion from membership when that discipline ran counter to national labor policy.[120] Thus, the two types of discipline can be equated for purposes of finding a violation in the present case based on the Union's suspension and expulsion of the members of the Mitchell-Carr faction.

Additionally, the type of dissident conduct at issue here is not the kind that should lead the Board to find a legitimate union interest in expelling members. The Board has found legitimate union interests in expelling dissident members "who attack the very existence of the union as an institution."[121] This situation, however, has been limited to expulsions from membership of members who have filed decertification petitions with the Board.[122] The determination that expulsion is legitimate in such a situation is based on the notion that members who have filed decertification petitions "have resorted to the Board for the purpose of attacking the very existence of their union" and that, therefore, it is not "beyond the competence of the Union to protect itself in this situation by the application of reasonable membership rules and discipline."[123] Such is not the case here where the members of the Mitchell-Carr faction were in no way "attacking the very existence" of the Union but instead were merely attempting to exercise their Section 7 right to express disagreement and concern with the way in which the Union President was performing his duties. Their

[115] 29 U.S.C. § 411(a)(2). This section of the LMRDA continues with a proviso that is not relevant here where the section is being considered purely for the policy to which it relates. That proviso states:

> 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. [Id.]

[116] *Salzhandler v. Caputo*, 316 F.2d 445, 448–49 (2d Cir. 1963), cert. denied 375 U.S. 946 (1963), quoted in *Hilde Construction*, 225 NLRB at 602.

[117] As explained supra, the Board and the D.C. Circuit have both found it appropriate to consider statutes other than the NLRA when determining whether a union's conduct impairs a policy that Congress has imbedded in the national labor laws and have specifically looked to the LMRDA. For a detailed discussion of these cases, see supra text accompanying fns. 87–103.

As previously noted, in laying out the 8(b)(1)(A) analysis, the *Scofield* Court stated that union conduct that impairs "policy Congress has imbedded in the *labor laws*" violates the Act. 394 U.S. at 430 (emphasis added). My colleagues acknowledge this statement but discount it because, in the circumstances of that case, the *Scofield* Court considered only policy imbedded in the NLRA. The fact that in that particular case it was not necessary to look to labor laws other than the NLRA, however, does not mean that the Court used the term "labor law*s*" inadvertently. The Court's test allows for consideration of labor laws other than the NLRA in appropriate cases, such as the present one, although in the particular circumstances of *Scofield* it was not necessary to consider such other laws.

[118] *See, e.g., Helton*, 656 F.2d at 894 (holding that union's removal of dissident material posted by member "does not reflect a legitimate union interest"); *Janesville Auto Transport*, 310 NLRB at 975 ("The Board has interpreted . . . decisions of the Supreme Court to mean that internal union discipline, imposed in retaliation for a member's exercise of the right to engage in intraunion activities in opposition to the incumbent leadership of the union, violates Sec. 8(b)(1)(A) because it *does not reflect a legitimate union interest* and, instead, impairs a policy which Congress has imbedded in the labor laws . . . ."[) (emphasis added); *Graziano*, 195 NLRB at 2 (finding that a fine imposed for the purpose of silencing a dissident member "fails to reflect a legitimate union interest").

[119] The coercive nature of expelling a union member should not be understated. Once expelled from membership, the individual is still, to a large extent, affected by the union's actions. The union remains as bargaining representative and thus continues to wield great power over the expelled employee's terms and conditions of employment. The only thing that has changed for the employee is that he or she no longer has any meaningful opportunity to attempt to change the union's direction or administration from the inside. In *Pattern Makers*, the Supreme Court laid out some of the effects that *resignation* from a union can have on an employee. An employee who is *expelled* from his or her union would suffer these same consequences, but the results would be even more harsh because such an employee would not have *chosen* to leave the union. The *Pattern Makers* Court explained:

> In making his resignation decision, the dissident must remember that the union whose policies he finds distasteful will continue to hold substantial economic power over him as exclusive bargaining agent. By resigning, the worker surrenders his right to vote for union officials, to express himself at union meetings, and even to participate in determining the amount or use of dues he may be forced to pay under a union security clause.

473 U.S. at 107 fn.18 (quoting Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1046 (1976)).

[120] *Shipbuilders*, 391 U.S. at 418 (holding that union violated Sec. 8(b)(1)(A) when it expelled member for filing unfair labor practice charges). See also *Scofield*, 394 U.S. at 37 (equating fines and expulsions for purposes of an 8(b)(1)(A) analysis).

[121] *Tawas Tube Products,* 151 NLRB 46, 48 (1965) (footnote omitted).

[122] See *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208, 209 (1969) (noting that the Board has upheld the expulsion of union members who file decertification petitions, but holding that the fining of such members violates Sec. 8(b)(1)(A)); *Tawas Tube*, 151 NLRB 46.

[123] Id. at 48–49.

conduct falls squarely within the precedent outlined above.

Finally, the Union cannot point to any legitimate interest in removing Mitchell-Carr and Vaughan from office that would support that form of discipline separate from the expulsions and suspensions. Although, in some situations, a union may have a legitimate interest in removing a dissident member from an office, this is not such a situation, and therefore the removal from office of Mitchell-Carr and Vaughan, like the expulsions and suspensions, violates Section 8(b)(1)(A). The Board's decision in *Shenango Inc.*[124] does not compel a different result. There, a union member, who served as chairman of the union's plant safety committee, supported one of the candidates for union president, although the other union agents and officers supported the other candidate.[125] When the latter candidate was elected president, the union member was removed from the safety committee because he had supported the new president's opponent.[126] The Board found that the union's conduct did reflect a legitimate union interest and that therefore that interest would have to be balanced against the union member's Section 7 rights.[127] The Board explained the union interest at stake in *Shenango* as follows:

> [T]he Union [has] a legitimate interest in placing in offices such as chairman of the safety committee those people it considers can best serve the Union and its membership. Retention of a plant safety committee chairman who is hostile to or in disagreement with the leadership may be undesirable or ineffective for a host of valid reasons. . . . The union is legitimately entitled to hostility or displeasure toward dissidence in such positions where teamwork, loyalty, and cooperation are necessary to enable the union to administer the contract and carry out its side of the relationship with the employer.[128]

In *Shenango*, the Board held that this union interest outweighed the member's interest in retaining his office and that therefore the union had not violated Section 8(b)(1)(A) by removing the member from his appointed office.[129] The union did, however, violate the Act by making other general threats of reprisal toward the member in response to his dissident activity.[130]

The instant case is distinguishable from *Shenango*, however. Here, not only should the expulsions and suspensions from membership result in a finding of 8(b)(1)(A) violations, but so too should the removal from office of Mitchell-Carr and Vaughan. Any interest that a union may have in allowing its incumbent administration to remove *appointed* officers and replace them with officers who are aligned with its views dwindles markedly, if not completely, when the focus turns to *elected* officers. Here, the Union removed two elected officers when they challenged the actions of another elected official, the union president. Not only, as explained below, is any interest that the Union has in being able to remove dissident elected officials outweighed by the interests of its members who are elected to office in exercising their Section 7 rights, but the Union itself has competing interests here that outweigh any legitimate interest it may have in removing these elected officers.

First, the Union has an interest in insuring that its members are free to question actions taken by their elected officials when such actions have the potential to harm the Union as an institution. Here, the allegations that the Mitchell-Carr faction made related to charges of misconduct by a high-ranking union officer. If union members believe that even their elected officers cannot question the actions of other elected officers, they almost certainly will feel restrained in their own ability to do so, and if no member feels that he or she can question possibly illegal or inappropriate actions by officers, the Union itself could suffer.

Second, the Union has an interest in maintaining an administration that is responsive to the will of its electorate, because without such responsiveness, the Union as an institution suffers. If the union administration can freely remove from office elected officials who question the actions of other elected officials, the Union deprives its own members of the representatives whom they chose through the election process. A union, as a democratic entity, certainly has an interest in maintaining its democratic values through retaining in office those people whom its membership elected.[131] Both of these union

[124] 237 NLRB 1355 (1978).
[125] Id.
[126] Id.
[127] Id.
[128] Id.
[129] Id. at 1355–1356.
[130] Id. at 1356.

[131] The important role that democracy plays in the existence of unions has been vividly explained by Archibald Cox:

> The first function of labor unions is to substitute the economic power of group action for individual weakness in negotiating wages, hours, and other conditions of employment. Second, unions serve to secure a measure of job security. . . . Third, unions aid in extending the rule of law to industrial establishments. A collective-bargaining agreement defines rights and duties. It substitutes rule for arbitrary power. A grievance procedure terminating in arbitration provides a fair and impartial forum for administering the law of the plant. A fourth function of labor unions is to enable workers to participate jointly with management in the government of their industrial lives through chosen representatives even as all of us may participate, through elected representatives, in political government.
>
> A union governed by dictatorial officials might be able to perform the first two functions as long as the members remained loyal and the public was tolerant. But an undemocratic union could not fulfill the third and fourth functions. An individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss. Only a democratic union, sensitive to the rights of minorities, can help men to achieve the ideals of individual responsibility, equality of opportunity, and self-determination.

Archibald Cox, *The Role of Law In Preserving Union Democracy*, 72 Harv. L. Rev. 609, 609–610 (1959) (footnote omitted). Cox went on to

interests, the interest in freedom of expression and in democratic principles, are interests shared by each individual member of the union as well and in that sense too outweigh any small interest that the Union, as represented by the incumbent officials, may have in removing these dissident, but elected, officers.

In addition to these interests of the Union as an organization and of the individual members, the interests of these elected officials themselves in exercising their Section 7 and LMRDA rights similarly outweigh any interest the Union may have in removing them from office. An elected officer is more likely to be in a position to discover misconduct or the possibility of misconduct on the part of another elected official and is also perhaps more likely to develop opinions regarding the direction the Union takes on various issues. If a union can remove from office an elected official who speaks out and attempts to remedy what he or she sees as misconduct or misdirection on the part of the incumbent administration, the Union is likely to chill the free speech of other elected officers. It is of paramount importance that elected officers feel able to speak out against what they view to be problems with the administration of the union. If those in a position to discover problems are fearful of speaking out, the individual members may never learn of the problems, and certainly, if individual members see that the officers whom they elect can be ousted for voicing differing views, the members themselves will be even less likely than the elected officials to speak out.[132]

Moreover, with regard to the interests at stake here, this case is markedly different from *Allis-Chalmers* in which, as explained, the Supreme Court refused to find a violation and on which my colleagues so heavily rely. In the present case, the Union has no legitimate interest in disciplining these officer-members, while the individual officers, the union electorate, and the Union as an institution all have a great interest in maintaining the free-speech rights of members. Obviously, the balance weighs heavily in favor of the individual right to question the incumbent union administration. In a case like *Allis-Chalmers*, on the other hand, the individual interest in returning to work is outweighed by the collective interest in preserving labor's most valuable, and historically recognized, economic weapon—the collective action embodied in a lawful strike. There is no such legitimate union interest here that can even be weighed against the right of individual members to speak out and to challenge their representative's course of action.

The conduct of the Union in the present case, both in expelling or suspending and in removing from office members of the Mitchell-Carr faction, clearly violates Section 8(b)(1)(A). The Union's actions impair policy that Congress has imbedded in the national labor laws—both in Section 7 of the NLRA and in Section 101(a)(2) of the LMRDA. Additionally, the Union has no legitimate interest in expelling or suspending dissident members,[133] and any minute interest that it might have in removing from office elected officials who oppose the incumbent administration's actions is outweighed by the

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stress the importance of protecting this democratic aspect of union governance:

> Under the National Labor Relations Act a union which acts as the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and other conditions of employment without his assent. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. As a matter of practice, if not in legal theory, the union also controls the grievance procedure through which a man's contract rights are enforced. The government which gives unions this power has the concomitant obligation to provide safeguards against abuse. *The most effective safeguard is legal assurance that unions will be responsive to the desires of the men and women whom they represent.* [Emphasis added.]

Id. at 610–611.

[132] The appropriateness of treating elected and appointed officers differently for purposes of the right of free expression has been examined by the Supreme Court in the context of the LMRDA. Much of its reasoning in those cases is relevant to the issue at hand. In *Finnegan v. Leu*, 456 U.S. 431 (1982), the Court held that the LMRDA was not violated when the union president discharged appointed business agents who had supported his opponent in the union presidential election. The Court held that the LMRDA does not restrict an elected leader's ability to maintain a staff who support his or her views. *Id.* at 441. As the Court explained:

> [The LMRDA's] overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election. [Id., citation omitted.]

In *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), however, the Court was presented with a situation in which an *elected* agent was removed from office because he made statements opposing a dues increase at a union meeting. Id. at 348. There, the Court found a violation of the LMRDA. The Court first noted that, because the elected officer was removed as a direct result of exercising his LMRDA right of free expression and because such removal was likely to discourage him from speaking out in the future, the elected officer had "paid a price" for exercising his rights. Id. at 354. Of course, the same could be said for the appointed officers in *Finnegan*; the Court, however, explained the difference by reference to the LMRDA's purpose of "ensur[ing] that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." Id. (quoting *Finnegan*, 456 U.S. at 441). Whereas in *Finnegan* the removal of the appointed officers had furthered democratic governance, in *Lynn* the removal of an elected officer had the opposite effect, as in the present case. The Court's explanation of the difference is quite relevant to the instant case:

> The consequences of the removal of an elected official are much different. To begin with, when an elected official like Lynn is removed from his post, the union members are denied the representative of their choice. Indeed, Lynn's removal deprived the membership of his leadership, knowledge, and advice . . . . His removal, therefore, hardly was "an integral part of ensuring a union administration's responsiveness to the mandate of the union election."

Furthermore, the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him.

Id. at 355 (quoting *Finnegan*, 456 U.S. at 441) (citations omitted).

[133] For an explanation of the coercive effect of expulsion from union membership, see supra fn. 119.

competing interests of the Union itself, the individual Union members, and the ousted elected officials.

B. My Colleagues' Approach

Rather than find a violation under this well-established approach to Section 8(b)(1)(A), my colleagues choose to create a new 8(b)(1)(A) analysis and hold that the Union did not violate the Act by disciplining its members for exercising their Section 7 right to question the wisdom of the incumbent president's actions. According to my colleagues, their new approach to Section 8(b)(1)(A) leads to three situations in which a union may violate the Act. First, a union will violate Section 8(b)(1)(A) when it engages in "unacceptable methods of union coercion in the employment context, such as threats of loss of employment or physical violence to force a dissenting employee to join a union or to participate in a strike." Second, a union may violate Section 8(b)(1)(A) when it takes action "against union members that directly impedes access to the Board's processes." Third, a union's discipline of a member may violate Section 8(b)(1)(A) "when intra-union discipline clashes directly with statutory policy interests and prohibitions incorporated in the Act."

My colleagues assert that this analysis is found in the decisions of the Supreme Court that I have analyzed above. However, in their discussion of those cases, my colleagues admit that *Scofield* provides that a union rule is only proper under Section 8(b)(1)(A) if it is "properly adopted," "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." *Scofield*, 394 U.S. at 430. Here, the union's discipline of the Mitchell-Carr faction not only contravened a statutory policy found in both Section 7 of the NLRA and in the LMRDA, but also reflected no legitimate union interest, a separate and sufficient ground under *Scofield* to find a violation of Section 8(b)(1)(A).[134] Thus, even under my colleagues' reading of *Scofield*, the instant case requires that the Board find a violation.

Furthermore, even considering my colleagues' addition of an employment-nexus requirement, the Union's discipline of the Mitchell-Carr faction requires a finding of a violation of Section 8(b)(1)(A). The Union's conduct here *does* have an effect on its members' employment relationship and certainly affects them as employees. The conduct that resulted in the Union disciplining the elected officers in this case consisted of their attempts to inform others of problems they saw with the Union's president and their attempt to have that president impeached. The charges that they made against their president included such things as the mishandling of Union funds and circumventing the Union's collective bargaining agreement with the employer. In attempting to stop such behavior, the members of the Mitchell-Carr faction were clearly attempting to change what they viewed as the misguided direction of their bargaining representative. When a union member attempts to change the direction of his or her representative, especially when that change in direction apparently involves the representative's treatment of the collective-bargaining agreement, he or she is, at the very least, indirectly attempting to change terms and conditions of employment. After all, it is through their bargaining representative that employees negotiate their terms and conditions and maintain or change those terms and conditions. By altering the course that that representative is taking, one is quite likely to alter how that representative approaches its dealings with the employer and thus the terms and conditions of its members' employment.[135]

[134] My colleagues refuse to find a violation in the present case in which the Union has impaired "policy interests" found in Sec. 7 of the NLRA, although they do "reaffirm the principle that Sec. 7 encompasses the right of employees to concertedly oppose the policies of their union." Rather, they insist, despite the clear teachings of *Scofield*, that, at least when the policy at issue is this well-recognized Sec. 7 policy, a union will only violate Sec. 8(b)(1)(A) if the union's impairment of that policy involves union violence or threats, impedes access to the Board's processes, or has an employment nexus. There is no plausible rationale for imposing these additional requirements under Sec. 8(b)(1)(A) when the policy at issue is the Sec. 7 right of union members to engage in dissident conduct.

[135] One cannot overstate the power of the bargaining representative in this regard and thus, by extension, the effect that changes in the way in which that representative operates can have on the employment relationship of its members. Initially, a brief look at the NLRA itself demonstrates the point. Sec. 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Sec. 8(a)(5). The term "bargain collectively" is then defined as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.

Sec. 8(d).

These basic terms within the province of the exclusive representative include, to a somewhat lesser degree, grievances that employees have with their employer:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 9(a).

Thus, when employees are represented by such an exclusive agent, the most basic and important terms of their employment are in that agent's hands; any time that an employee-member attempts to change how that agent goes about its representation of its members, therefore, he or she is engaged in conduct that affects the employment relationship.

The Supreme Court itself, in *Allis-Chalmers*, explained the power that exclusive bargaining representatives wield over a bargaining unit's terms and conditions of employment:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely

The idea that union discipline of dissident activity, such as that involved here, is not "unlawful because the instant case neither impacts the participants' relationship with their employer nor impairs a policy of the National Labor relations Act," cannot stand. Thus, even if my colleagues were correct in requiring this connection to the employment relationship, the actions of the dissident employees here certainly at least had significant potential to affect the relationship between employer and unit employees. This fact combined with the fact that the Union's actions did not reflect a legitimate interest and impaired policy imbedded in the national labor laws lead inexorably to the conclusion that the Union violated Section 8(b)(1)(A), even under my colleagues' new approach.

My colleagues also assert that the forum in which this case should be resolved is the United States district courts under the LMRDA, because, under my colleagues' approach to Section 8(b)(1)(A), when the Board considers whether a union's actions impair national labor policy, it must look only to the NLRA. My colleagues specifically overrule the approach taken in *Graziano* and other cases under which the Board, in assessing national labor policy, would look to statutes other than the NLRA. My colleagues abandon this approach despite the fact that the Board has followed it for more than 20 years and that the D.C. Circuit has specifically approved it.[136]

In addressing the issue of the LMRDA, my colleagues explain that "Congress gave to the federal district courts, not to the Board, authority to hear and decide suits brought by union members to enforce rights under the LMRDA." My colleagues ignore the fact that no one is asserting that the Board should consider suits brought to enforce rights under the LMRDA. Rather, the General Counsel here is attempting to enforce employees' Section 7 rights to choose to oppose the direction that their union is taking; the mere fact that such rights may from time to time overlap with the individual rights protected by the LMRDA is of no consequence.[137] The provision

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chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy."

388 U.S. at 180 (quoting *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202 (1944) and Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 Yale L.J. 1327, 1333 (1958)) (footnotes omitted). Commentators have also laid out the extent of a union's power over the employment conditions of a bargaining unit. As Clyde Summers has explained:

> A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making those laws, the union acts as the workers' economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the worker's policeman and judge. *The union is, in short, the employee's economic government. Only if we fully appreciate this cardinal fact and keep it clearly in mind can we critically evaluate the rights which an individual should have within the union.* [Emphasis added.]

Clyde W. Summers, *Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805, 815–816 (1951). See also Cox, *supra* note 131, at 610–611.

Clearly then, when they attempt to change the incumbent administration of their collective-bargaining representative or the policies of that representative, dissident members are, at the very least, *attempting* to affect the employment relationship.

My colleagues, however, argue that this is not enough. Rather, they would find that a union does not violate Sec. 8(b)(1)(A) unless the union's enforcement of its rule "impacts the participants' relationship with their employer." Of course, such a requirement would seem to limit the class of discipline that would violate Sec. 8(b)(1)(A) to situations in which the union causes the employer to discharge or otherwise adversely affect the employee in his or her employment. Clearly, my colleagues do not mean to go so far as they uphold the findings of 8(b)(1)(A) violations in cases in which the union's conduct denied the employee-member access to Board processes. Such conduct on the part of the union does not have an employment nexus and yet my colleagues clearly affirm an approach that would find a violation under such circumstances.

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[136] *Helton*, 656 F.2d 883. For a discussion of *Helton*, see supra text accompanying fns. 98–103.

[137] In fact, the LMRDA itself makes this idea explicit:

> (a) Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, *nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law* or law of any State.
>
> (b) Nothing contained in this chapter and section 186(a)–(c) of this title shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act . . . *nor shall anything contained in this chapter be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act.* [29 U.S.C. § 523 (emphasis added).]

Additionally, the NLRA itself supports a reading of the law that allows for finding an 8(b)(1)(A) violation regardless of whether the affected individuals may have other remedies under another statute. Sec. 10(a) of the Act provides, in relevant part, "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. *This power shall not be affected by any other means of adjustment or prevention* that has been or may be established by agreement, law or otherwise." 29 U.S.C. § 160 (emphasis added).

Finally, the approach my colleagues endorse is contrary to the Board's own application of the law in the analogous situation of employers who restrain or coerce employees in the exercise of their Section 7 rights and thus violate Sec. 8(a)(1). As explained supra, fn. 101, the D.C. Circuit has found that Sec. 8(b)(1)(A) is to be applied in a manner consistent with the application of Sec. 8(a)(1). See *Helton*, 656 F.2d at 888–889. When finding violations of Sec. 8(a)(1) by employers who restrain or coerce employees in the exercise of Sec. 7 rights, the Board certainly does not stay its hand whenever an employer's conduct might also be considered a violation of another

at issue in this case is Section 8(b)(1)(A) of the NLRA. The fact that it may protect policies found in the LMRDA as well as policies found in Section 7 of the NLRA itself does not mean that this case can only be brought under the LMRDA and in Federal court.

The injustice of requiring union members to file LMRDA suits in Federal court when their right to express dissident views is clearly protected by Section 8(b)(1)(A) and Section 7 of the NLRA cannot be overlooked. When an individual believes that his or her Section 7 rights have been violated, the process of bringing a charge and rectifying the situation is relatively simple and inexpensive for that individual. An unfair labor practice charge may be filed by any person at a regional office in the region in which the alleged unfair labor practice has occurred.[138] At that point, the Board then takes the initiative in protecting employees' Section 7 rights. After an investigation, the Regional Director decides whether to issue a complaint.[139] If the case goes to hearing before an administrative law judge, it is prosecuted by an attorney acting on behalf of the General Counsel.[140] Following the hearing, the General Counsel and other parties can file exceptions to the administrative law judge's decision with the Board, and the Board will review the decision.[141] The entire process, however, because it relates to vindicating employees' Section 7 rights, is conducted by the agency with the authority and obligation to enforce the Act, the NLRB.

If an individual union member, however, files suit under the LMRDA in lieu of pursuing his or her Section 7 rights under the NLRA, the process is much different. The case, including the expenses of an attorney and the costs of suit and the time delays of the federal courts, remains the responsibility of the individual. These costs in both time and money can be extremely high. Thus, an individual union member who finds himself or herself disciplined for speaking out against what he or she views as misconduct on the part of the incumbent union administration may be unwilling or unable to bear the costs of a LMRDA lawsuit. If the Board declines to use its expertise in protecting and explicating Section 7 rights against the union in such a situation, as my colleagues do here, a union that unlawfully disciplines its members for exercising protected rights is much more likely to find that there are no repercussions for such conduct, despite the fact that the NLRA protects union members from such actions.[142]

federal statute, such as Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. There is absolutely no logical reason for the Board to do so here where a *union* has restrained and coerced its members in the protected exercise of their Sec. 7 rights merely because the union's conduct might also violate the LMRDA.

My colleagues assert that their interpretation of Sec. 8(b)(1)(A) is not inconsistent with that of Sec. 8(a)(1) because "[t]he issue . . . is not whether certain conduct might happen to violate another statute, but rather, as in *Graziano*, and the present case, the reach of Sec. 8(b)(1)(A) when the alleged unfair labor practice turns entirely on the interpretation of another statute." As I have explained at length supra and infra, however, not only does the Board, with the D.C. Circuit's approval, have a long history of looking to whether union discipline of members impairs labor policies imbedded in statutes other than the NLRA in conducting an 8(b)(1)(A) analysis, but also the present case does not even require a finding that the Union's discipline of its dissident members impairs policies imbedded in the LMRDA. Thus, this is not a case in which "the alleged unfair labor practice *turns entirely* on the interpretation of another statute." (Emphasis added.) It is quite clear that the Union's actions here impaired policies imbedded in Sec. 7 of the NLRA; that is enough to support a finding that the Union violated Sec. 8(b)(1)(A) under *Scofield*. When the fact that the Union's conduct did not reflect a legitimate union interest and the fact that policies imbedded in a second federal labor-law statute, the LMRDA, are considered as well, a finding of a violation just becomes that much more imperative.

[138] Board's Rules and Regulations, Sec. 102.9–102.10.

[139] Id. Sec. 102.15.

[140] Board's Statements of Procedure, Sec. 101.10(a).

[141] Board's Rules and Regulations, Sec. 102.46.

[142] In his concurring opinion, Member Hurtgen accepts that *Scofield* provides the proper analysis for this case but nonetheless agrees with the Board's decision to stay its hand on the ground that the dissident conduct and the Union's actions in this case were "wholly internal." This approach is unjustified. First, once one accepts that *Scofield* provides the proper test, one must apply it. As explained at length supra, a proper application of the *Scofield* test to the facts of this case quite clearly results in the finding of an 8(b)(1)(A) violation. There is nothing in *Scofield* that allows the Board then to step back and find that the Act has not been violated because the conduct at issue is of an "internal" nature. Once one has determined that *Scofield* should be applied, one cannot then evade its result by returning to this newly created internal vs. external dichotomy.

Second, in an attempt to justify joining the majority's decision to deny these individual union members the Board's processes, Member Hurtgen points to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Siemons Mailing Service*, 122 NLRB 81 (1958), supplemented by 124 NLRB 594 (1959), as representing "other contexts [in which] the Board has chosen to withhold its processes and allow other tribunals to proceed." The situations at issue in those two cases are not, however, analogous to the present one for purposes of justifying the Board's decision to stay its hand when a union has disciplined members in direct retaliation for their exercise of Sec. 7 rights. *Collyer*, unlike the instant case, involved disputes between a union and employer that were directly tied to the collective bargaining agreement and were covered by that agreement's arbitration clause. Thus, the Board, having balanced the Act's policy of encouraging "the fullest use of collective bargaining and the arbitral process" against Congress's "grant to the Board of exclusive jurisdiction to prevent unfair labor practices," determined that the most prudent course in the circumstances at issue was to stay its hand and allow the dispute to be resolved through the arbitral means for which the parties themselves had provided in their collective bargaining agreement. 192 NLRB at 841–842. The Board's decision in *Collyer* to stay its hand was based on the policies of the NLRA and other federal labor statutes that strongly encourage the use of voluntary arbitration in the resolution of labor disputes. Id. at 840–841. Because the case involved "a set of facts [that] present[ed] not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration," it was an appropriate case to balance the interests of encouraging the use of arbitration against the Board's grant of exclusive jurisdiction over unfair labor practices. Id. at 841.

The situation at issue in the instant case is most unlike that in *Collyer*. The NLRA evinces no policy that competes with the Board's exercise of jurisdiction in this case—rather, the policies of the NLRA point in only one direction, that of vindicating the statutory rights of individual union members who have been wronged by their collective representative. Pointing the injured parties to the Federal courts and instructing them that they may bring their complaint only in that forum and under an entirely different statute is not a solution with a long history of Congressional support imbedded in the federal labor statutes as is the use of voluntary arbitration. Additionally, the NLRA policy in favor of arbitration and Congress's long-standing support of that policy are based in large part on the voluntary nature of arbitral proc-

esses in the labor relations area. The parties in *Collyer* had voluntarily agreed to arbitrate the very issues in dispute in that case. In the present case, the Charging Parties certainly did not voluntarily agree to limit themselves to their possible remedies in federal court under the LMRDA. Member Hurtgen's reliance on *Collyer* is misplaced and does not support his determination that, despite the fact that application of the NLRA as set forth in *Scofield* would result in a finding that the Union has violated Sec. 8(b)(1)(A), the Board should nonetheless decline to exercise jurisdiction in the present case.

Similarly, Member Hurtgen's citation of *Consolidated Freightways Corp.*, 288 NLRB 1252 (1988), enfd. sub nom. *Hammontree v. NLRB*, 894 F.2d 438 (D.C. Cir. 1990), to support his assertion that the Board properly defers cases involving individuals asserting individual rights is misleading. In that case, charges were indeed brought by individual employees/union members against the employer. The Board deferred to the arbitration process, just as it did in *Collyer*, because the claims were covered by the arbitration procedures provided in the collective-bargaining agreement by which the employees were governed in their relations with their employer. Id. at 1256. In doing so, the Board noted that, if it were to hold otherwise, unions could "circumvent the contractual grievance procedure by the simple expedient of having the individual employee, instead of the union, file the charge with the Board," an outcome that "would seriously impair, if not defeat altogether, the well-established policy favoring private dispute resolution mechanisms." Id. at 1255. Again, in the present case, we are not faced with such a well-established policy as the claims involved in no way fall under a voluntarily selected dispute-resolution mechanism. While the employees' claims in *Consolidated Freightways* were deferred to the procedures voluntarily selected through collective bargaining by the employees' voluntarily elected representative, the employees in the present case have made no voluntary choices with regard to ceding their right to have the Board consider their claims of union misconduct.

Finally, Member Hurtgen's reliance on *Siemons* does not support his conclusion that the Board should stay its hand in the instant case and, in fact, lends credence to the idea that it is inappropriate for the Board to decline to decide whether the Union violated Sec. 8(b)(1)(A). In *Siemons*, the Board applied a new jurisdictional standard, thereby asserting jurisdiction over a greater number of cases than it had previously done. Prior to the Board's change in the jurisdictional standard, the Supreme Court, in *Guss v. Utah Labor Relations Board*, had noted that the NLRA does not allow for state action regarding "labor disputes over which the Board, in the exercise of its discretionary authority declines to assert jurisdiction." 122 NLRB at 82 (citing *Guss*, 353 U.S. 1 (1957). The Supreme Court had explained that when the Board so declines to assert jurisdiction, it thereby creates "a vast no-man's-land subject to regulation by no agency or court" and that the Board could reduce this "no-man's-land" by asserting broader jurisdiction. Id. Thereafter, the Board, after receiving an increased appropriation from Congress, published proposed changes in its jurisdictional standards, considered the comments and briefs that those proposals engendered, and then published its revised jurisdictional standards. Id. *Siemons* then provided the Board with its first opportunity to apply those new standards. Id. at 81–82.

Thus, although Member Hurtgen is correct that *Siemons* does demonstrate that the Board applies discretionary jurisdictional limits, his reliance on the case is misplaced as *Siemons* clearly demonstrates the importance of applying considered and previously announced jurisdictional standards as opposed to creating ad hoc standards on a case-by-case basis. As the Board explained in *Siemons*, "an ad hoc or case-by-case approach inevitably leads in practice to the establishment of roughly drawn standards or tests" that "are extremely time and energy consuming to apply, and result in confusion and uncertainty as to exactly where the dividing line will be drawn in particular cases." Id. at 83. As this language demonstrates, the very case that Member Hurtgen has cited to support his analogy between the present case and those in which the Board has set discretionary jurisdictional limits belies his argument as it expressly denounces the use of ad hoc, case-by-case standards with regard to decisions whether to withhold Board processes.

Member Hurtgen's acceptance of the application of *Scofield* in the instant case should result in a finding of an 8(b)(1)(A) violation regardless of whether the Union's discipline of the members of the Mitchell-Carr faction can be considered "internal." His determination that, regardless of the result under *Scofield*, the Board should nonetheless stay its hand is inappropriate and not supported by the Board's past practice, the Supreme Court precedent, or the NLRA itself.

It is also of paramount importance to point out here that reliance on the LMRDA is not even necessary in this case, and thus the argument that the Board should not rely on statutes other than the NLRA when conducting the *Scofield* analysis is moot. As explained in detail above, the NLRA itself protects the right of union members to express disagreement with their incumbent administration and the direction that the union is taking as well as their right to attempt to change that direction. The Board has so held since at least 1950.[143] The Union's actions in the instant case certainly impair this right that Congress has imbedded in Section 7 of the NLRA. Thus, again, even under my colleagues' own test, the conduct at issue in this case violated Section 8(b)(1)(A) because the conduct of the members of the Mitchell-Carr faction bears "a clear nexus to the employer-employee relationship."

IV.

I would find that the Respondent Union has violated Section 8(b)(1)(A) of the Act. The Supreme Court has provided the Board with a clear test to apply in 8(b)(1)(A) cases, and the Union's conduct in the present case does not meet that test. The Union can point to no legitimate union interest reflected in its discipline of members and elected officials in retaliation for their exercise of the Section 7 right to question the wisdom of their representative. Additionally, the Union's conduct here impairs national labor policy that Congress has imbedded in the NLRA itself in Section 7 and in the LMRDA's right of free expression.

My colleagues' approach in the present case is misguided both because they alter the analysis endorsed by the Supreme Court and because, even under their new approach, the conduct at issue here violates Section 8(b)(1)(A). Instead of following the *Scofield* analysis, which the Board has consistently applied to find violations in cases like the present one, my colleagues impose a new requirement—that the discipline imposed by a union have an employment nexus. Although this requirement is not part of the *Scofield* test, it is met in the case of dissident union members, like those involved here, because such members are attempting to change the direction of their representative, the entity responsible for negotiating the terms and conditions of their employment.

Under either the traditional *Scofield* approach or under my colleagues' new approach, the conduct at issue here violates Section 8(b)(1)(A). Because the *Scofield* approach has been endorsed by the Supreme Court and because it has been shown to work well for many years, however, I do not join in my colleagues' decision to alter it. Rather, I would

[143] See *Nu-Car Carriers*, 88 NLRB at 77 (stating that "inherent in th[e] right [to self-organization] is the privilege of protest and persuasion of others. Without this, effective employee representation becomes a nullity"). For additional cases setting forth this right of dissident union members, see supra fn. 12.

apply the Supreme Court's *Scofield* analysis, under which the Union's conduct reflects no legitimate interest and instead impairs policies of both the NLRA and the LMRDA. I would therefore find a Section 8(b)(1)(A) violation in the present case.

Lewis S. Harris, Esq., for the General Counsel.
Janine M. Ames and *James E. Youngdahl, Esqs. (Youngdahl & Sadin),* of Albuquerque, New Mexico, for the Respondent.
Mary Ann Mitchell-Carr and *Mildred G. Smith, Esqs.,* of Albuquerque, New Mexico, pro se.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. The General Counsel of the National Labor Relations Board (NLRB or the Board) alleges that Local 251 of the Office and Professional Employees International Union, AFL–CIO (Respondent or the Union)[1] has violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA or the Act), by retaliating against four union officials who contested the policies of the Union's president.

Former Union Officials Mary Ann Mitchell-Carr and Mildred G. Smith initiated this proceeding by filing three unfair labor practice charges in March, April, and May 1993[2] each of which was later amended.[3] On June 30 the Board's Regional Director for Region 28, acting on behalf of the General Counsel, issued a consolidated complaint and notice of hearing. On July 14, Respondent timely answered the complaint by denying the unfair labor practice allegations.

I heard this case on May 4, 1994, at Albuquerque, New Mexico. Having carefully considered the contentions, the record and the parties' posthearing briefs, I must recommend that the complaint be dismissed in its entirety for lack of subject matter jurisdiction.

I. BACKGROUND

This case involves the impeachment and/or expulsion from membership of four union officials, Vice President Mary Ann Mitchell-Carr, Trustee Robert Vaughan, Secretary-Treasurer Mildred G. Smith, and Trustee Bernardino Herrera in April and May. A short time earlier, on February 4, incumbents Mitchell-Carr and Vaughan had been reelected to serve terms through March 1996. Smith and Herrera had chosen not to run for reelection and their terms ended in March. All four held or had held the additional position of executive board member.

Several events led to the discipline involved here. At a special executive board meeting on February 1, 1993, Mitchell-Carr expressed concern that the Union's president, William McLendon, might have mishandled certain funds, specifically a check for $58,000, representing either a grant or a loan to the Local from its parent International Union to partially defray a legal settlement and pay its attorney fees. The International's check had not passed through Respondent's books or bank accounts; instead McLendon had caused the check to be directly endorsed to the attorney for processing without Treasurer Smith's knowledge. Following a motion made by Smith and Mitchell-Carr, the executive board voted to have an independent audit performed. At a regular executive board meeting on February 10, on a motion made by Smith and Herrera, it voted to have the United States Department of Labor (DOL) conduct the audit. Mitchell-Carr was assigned to arrange the audit, and on February 12, she contacted the DOL's Denver office. In mid-March, a DOL agent spent a week auditing Respondent's financial records.

At a regular executive board meeting on March 10, Mitchell-Carr presented that board, under article XIX of the Union's constitution and bylaws (Removal of Officials), with a petition to impeach Union President William McLendon on charges of misconduct, including "intimidation of members," circumventing the Sandia collective-bargaining contract, and mishandling the settlement check and appointing an unelected official to the "80–20" position. Other charges were made as well. The signatures of Mitchell-Carr, Vaughan, Smith, and Herrera were among the first five signatures on the petition. This group of four union officials was later referred to as "the Mitchell-Carr faction." At the next regular executive board meeting on April 7, McLendon, transparently in retaliation, induced and caused to be presented a petition to impeach Mitchell-Carr for having called a special executive board meeting without notifying McLendon, and a veritable laundry list of alleged infractions, some quite petty. Similar petitions for the impeachment of Vaughan, Smith, and Herrera soon followed. The verities of the underlying petitions against the four are suspect and may well have been improper.

On April 27, Respondent's trial board convened and voted to remove Mitchell-Carr from the elected office of vice president and permanently to expel her from the Union. On May 26, the trial board voted to remove Vaughan from the elected office of trustee and to suspend his membership for 5 years; to suspend Herrera from membership for 5 years, and permanently to expel Smith.[4] They were found to have been in breach of various articles of the Union's constitution. The General Counsel did adduce evidence, which I shall not detail here, that may give rise to the conclusion that these trials were caused and conducted in a fundamentally unfair and irregular manner. At the very least they were conducted in absentia.

II. THE ALLEGATIONS AND REQUESTED REMEDIES

The General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act by disciplining these four officials in retaliation for opposing the management policies of Respondent's president, William McLendon. He further alleges that Respondent committed multiple due process violations, including improperly gathering signatures for the impeachment petitions, summarily holding the proceedings in the absence of the charged members, denying or ignoring requests to reschedule the trial board proceedings, ignoring requests for information, failing properly to serve notice on one of the charged officials, and tainting the trial board.

To remedy this alleged violation of Section 8(b)(1)(A), the General Counsel has asked the Board, inter alia, to restore the

[1] It is uncontested that Respondent is a labor organization within the meaning of Sec. 2(5) of the Act. Its headquarters are in Albuquerque, New Mexico. Respondent also agrees that Sandia Corporation is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. This case does not involve the employer-employee relationship, however, and that employer has no connection to this case, except to the extent that it is incidentally the employer of most of the union officials and its members.

[2] All dates are 1993 unless otherwise indicated.

[3] Mitchell-Carr filed the charge in Case 28–CB–3902 on March 26, and the charge in Case 28–CB–3924 on May 5. Smith filed the charge in Case 28–CB–3902–2 on April 2. All three charges were amended on June 25.

[4] Respondent never acted on the petition to impeach McLendon.

status quo that existed before Respondent's retaliatory acts, i.e., reinstate Vice President Mitchell-Carr and Trustee Vaughan to their elected positions, extend their terms by the amount of time lost, and restore the membership status of Mitchell-Carr, Vaughan, Smith, and Herrera. By letter dated May 24, 1994, I specifically requested counsel to brief the issue of whether the Board has authority under the Act to order the reinstatement of union officials to elected office. The General Counsel has cited four cases, but none demonstrates that the Board has the authority to reinstate elected officials. Moreover, one of those, the Supreme Court's decision in *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), places the reinstatement to elected office remedy squarely within the jurisdiction of another act, the Labor-Management Reporting and Disclosure Act of 1959 (the LMRDA, sometimes known as the Landrum-Griffin Act). That law is enforced in part by private lawsuit and in part by the Secretary of Labor who has exclusive authority to regulate internal union elections. The NLRB plays no role under that law.

III. ANALYSIS AND CONCLUSIONS

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act. Section 8(b)(1)(A) states: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7: *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 . . . ."

The statute thus protects employees who exercise rights protected by Section 7. The first question, which must be posed is whether the former union officials here are employees as contemplated by Section 8(b)(1)(A). It is true that these individual union members are employed by Sandia Corporation, but that employment has nothing to do with this internal union dispute. It is strictly an internal union matter. Thus, there is significant doubt that these persons, for the purpose of this dispute, are employees within the meaning of Section 8(b)(1)(A).[5]

Second, the conduct in which they have engaged has generally been regarded as something outside the scope of Section 7. The Section 7 rights that are protected by the Act are set forth in that statute. It states: "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 . . . ."

The Board has held in a Section 8(a)(3) context that a union that discharges its hired business agents for opposing the incumbent officers elected by the membership does not interfere with a Section 7 right. The Board had jurisdiction in the case because, as it said, "it is the employer-employee relationship which is the essence of the instant case." *Retail Clerks Local 770*, 208 NLRB 356, 357 (1974). Even so, the Board did not find that the business-agent employees of the union were engaged in Section 7 activity, for they were trying to effect a change in their employer's top management. It said, ". . . [A]n employee of a union, like any other employee, has no protected right to engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy" Id.

See also *G & W Electric Specialty Co.,* 154 NLRB 1136, 1137 (1965), and *Autumn Manor,* 268 NLRB 239, 243 (1983). Those cases stand for the proposition that Section 7 protection extends only to employee activity that is "close enough in kind and character, and bears such a reasonable connection to matters affecting the general interest of *employees qua employees* as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect." (Emphasis added.) Therefore, it is clear that Section 7 is aimed at the mutual interests of employees in their capacity as employees, not in their capacity as union officers or members.[6] Section 7 does not undergo any metamorphosis simply because a complaint is brought under Section 8(b)(1)(A), rather than Section 8(a)(3). Thus, even if the ousted union officers here are regarded as statutory employees of Sandia, their effort to oust McLendon is not protected by Section 7.

Similarly, the U.S. Court of Appeals for the Second Circuit in an 8(a)(3) case, recently reaffirmed the principle that the Board may not broaden Section 7 to protect activities that have no bearing on the employment relationship. *Office Employees v. NLRB,* 981 F.2d 76 (2d Cir. 1992), denying enf. 307 NLRB 264 (1992). The case was much like *Retail Clerks Local 770*, except that it involved an individual running for elected office rather than a hired official. The court said, "The entire Act revolves around the protection of workers' efforts to better their working conditions through collective action. Nothing in the Act can be understood without keeping this central point in mind. But the Act does not protect any 'union activity' engaged in by an employee if it is unrelated to the terms and conditions of employment." Id. at 82.

Here, the impeached/expelled union officers have engaged in no activity whatsoever pertaining to employee mutual aid or protection. Their entire focus was upon another union officer's conduct in handling union money and other perceived misbehavior. They believed he was acting improperly and exposing them to both civil and criminal liability. They were concerned about themselves in their capacity as union officers. To protect themselves, they deemed it appropriate to register their concerns with the Department of Labor (DOL). That was a prophylactic act aimed at themselves and the Union's own coffers, not aimed at the mutual aid or protection of employees. It had no "qua employees" purpose.

The foregoing discussion of Section 7 and the scope of its protective mantle does not even touch upon the third issue of NLRA jurisdiction, the membership proviso of Section

[5] One should not be misled by the reference to Mitchell-Carr's removal on February 12 as the "80–20*''* person. The collective-bargaining contract (not in evidence) that Respondent has with Sandia Corporation is said to provide that the employer shall pay the salary of two employees whose duties are those of a union representative. One such person is the union president; the other is the "80–20" person. The contract gives the union president exclusive authority to appoint the "80–20" person. He had previously designated the Union Vice President Mitchell-Carr to that post. When the two began having problems, he appointed another in her stead. She simply returned to her full-time duties with Sandia, "person was a removal from a union post, something akin to a union steward, not a job with the employer." The action taken by the union president was to appoint someone he deemed more loyal to the Union. It had no impact on Mitchell-Carr's status or job with the Employer. It was, therefore, not part of the employer-employee relationship. She was not impeached and expelled until later.

[6] To a similar effect is the Supreme Court's discussion of the scope of Sec. 7 set forth in *Eastex v. NLRB*, 437 U.S. 556, 565–568 (1978).

8(b)(1)(A). That proviso, quoted above, is of direct interest here. In essence it leaves to individual unions the question of who may or may not be its constitutional members. The Supreme Court has reviewed Section 8(b)(1)(A) and its membership proviso in a trilogy of cases beginning with *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175 (1967). That was followed by *Scofield v. NLRB,* 394 U.S. 423 (1969), and then *NLRB v. Boeing Co*., 412 U.S. 67 (1973). In each of those cases the Court emphasized that the Board was empowered to act on membership issues only if the employer-employee relationship was affected by the union's discipline of its members. It also observed that there were distinctions between disciplining a member as opposed to expelling one from membership.

Allis-Chalmers held that a union did not violate the Act by fining members who had crossed a picket line during an authorized strike. The Court found that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195. "What legislative materials there are dealing with §8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions." 388 U.S. at 185–186.

In *Scofield*, after noting that *Allis-Chalmers* had distinguished between internal and external enforcement of union rules, the Court held that a union rule, permitting punishment by fine, and intended to enforce a contractual limit on employee production, did not violate the Act. The Court said, 394 U.S. at 430: "§8(b)(1)[(A)] leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy which 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." In making this determination, the Court framed its inquiry to specifically focus on "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated by the union-imposed production ceiling." 394 U.S. at 431. The Court concluded that the union's fines were lawful under Section 8(b)(1)(A) for the employees could always choose to cease being a constitutional member if they wished and avoid the rule. It found the rule not to be a departure from national labor policies:

> The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act. [394 U.S. at 436.]

In context, of course, that statement dealt with a union's enforcement of a work rule that was grounded in a collective-bargaining contract. It did not deal with a purely internal union dispute. Furthermore, the entire discussion relates to the NLRA, not Federal labor laws in general, despite language ("impairs no policy which Congress has imbedded in the labor laws") that could have been more precise.

In *Boeing*, the Supreme Court held that the Board did not have power under Section 8(b)(1)(A) to evaluate the reasonableness of a union's otherwise lawful fine of its members for crossing a picket line during an authorized strike. It explained its earlier decisions: "The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* was not that reasonable fines were noncoercive under the language of §8(b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act." 412 U.S. at 73. The Court said: "[W]e conclude that the Board was warranted in determining that when the union discipline does not interfere with the employer-employee relationship or otherwise violate a policy of the National Labor Relations Act, [fn. omitted] the Congress did not authorize it 'to evaluate the fairness of union discipline meted out to protect a legitimate union interest.'"412 U.S. at 78.

Not mentioning the above-cited Supreme Court decisions, the General Counsel relies heavily upon *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972), and a few cases that cite it,[7] as authority for the theory that the Union violated Section 8(b)(1)(A) by retaliating against Mitchell-Carr, Vaughan, Smith, and Herrera. In that regard, the General Counsel cites a quotation in the case in which the Board seemingly reaches into union membership issues that are not connected to the individual's employment. The Board stated in *Graziano* that it has been "charged by the Supreme Court with the duty of determining the overall legitimacy of union interests, and must therefore take into account *all* Federal policies and not limit ourselves to those embodied in our own Act." As a historical observation, I note that *Graziano* was decided before *Boeing,* but well after *Scofield* and *Allis-Chalmers*. The *Boeing* language, if the others were not clear, seems to have clarified any ambiguity that may have derived from *Scofield*.

As additional history, prior to the passage of the LMRDA in 1959, the enforcement of membership rights under a union constitution was regulated by state law, not the NLRA. *Machinists v. Gonzales*, 356 U.S. 617 (1958). Justice Frankfurter's majority opinion in dealing with the preemption argument with reference to Section 8(b)(1)(A) said: "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by [F]ederal law and indeed the assertion of any such power has been expressly denied [referencing the membership proviso to Section 8(b)(1)]." The majority went on to hold that state regulation of such matters was appropriate, not regulation by the NLRB.

Given the Court's pronouncement that state law governed internal union membership matters, it is no surprise that a year later Congress enacted the LMRDA, giving national uniformity to the issue. Even so, it did not at the same time change the Taft-Hartley Act to give the NLRB any new authority in the field. Congress put those matters squarely under the jurisdiction of the district courts instead. Therefore, reliance on *Graziano* for NLRB jurisdiction appears to be a risky proposition.

To begin with, *Graziano* is another union fine case; it is not a membership expulsion case. A fine arguably impacts a union member's income, and may be seen (incorrectly after *Boeing*) as affecting his livelihood. Furthermore, *Graziano* does not

[7] E.g., *Teamsters Local 579 (Janesville Auto Transport)*, 310 NLRB 975 (1993).

involve the impeachment of elected union officers. It is, in my opinion, a very thin reed to rely upon. Second, I am not certain that it is good law, for *Boeing* seems to have rendered it useless. The phrases that appear in the *Scofield* discussion of a union rule that "impairs no policy Congress has imbedded in the labor laws," and "invades or frustrates an overriding policy of the labor laws," have not been interpreted by the Supreme Court as implicating any labor policy beyond the bounds of our own Act, or extending to matters that do not affect the employee-employer relationship. Indeed, *Boeing* is a clear effort to limit the *Scofield* language to the NLRA. Moreover, there have been developments under the LMRDA that undercut the *Graziano*-based logic. In ignoring those developments, the General Counsel is disregarding an entire body of law telling the NLRB that it does not have jurisdiction.

The former union officers here seek to vindicate rights that are described not in Section 7 of the NLRA, but which are set forth in the LMRDA. Title I of that Act, the "Bill of Rights of Members of Labor Organizations," sets forth the rights of union members with respect to the right to vote and participate in union elections [§101(a)(1)], and freedom of speech and assembly. [§101(a)(2)]. And, a union may not lawfully take reprisals against a member for exercising Title I rights. See §601. Those rights may be enforced by "any person" whose rights have been infringed by the union through a civil action brought in U.S. District Court. [§102]. Similarly, Title IV of the LMRDA governs internal union election procedures and sets forth the right of union members to run for and hold union office. If those rights are denied a member, the member under §402 may file a complaint with the Secretary of Labor (the DOL) who is obligated to investigate the circumstances. Subsection (b) empowers the Secretary to bring a civil action in the district court to obtain an appropriate remedy.

According to the Supreme Court, section 102 of the LMRDA was intended to give the courts wide latitude to tailor the relief to fit the facts and circumstances of each individual case. *Hall v. Cole,* 412 U.S. 1 (1973). Multiple remedies are available under section 102, including injunctive relief, compensatory damages, and damages for mental suffering, emotional distress, and loss of reputation, even punitive damages. See the cases collected in *Cupid v. Electronic Workers Local 116 IUE*, 142 LRRM 2458 (E.D.Pa. 1993). Even attorney's fees may be compensable. *Hall v. Cole,* supra. And, an elected union official who was removed from office after speaking out over a policy dispute may properly maintain a claim alleging that his removal from office violated the free speech rights provided by Section 101(a)(2) of LMRDA. *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989). The Court said, "Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him . . . . Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril." Accordingly, the Court held that Lynn's action under section 102 was sustainable. See also *Stroud v. Senese*, 832 F.Supp. 1206 (N.D.Ill. 1993) (elected union vice president's allegation that he was removed from office in retaliation for speaking out against union policy was a proper Sec. 101 claim). It is quite clear that the LMRDA offers the ousted union officials and members here a wide array of remedies that if successful will fully remedy the wrongs allegedly visited upon them and will best fulfill the Congressional purposes behind the LMRDA.

Moreover, the Supreme Court has reaffirmed the exclusivity provision of section 403 of LMRDA that gives the Secretary of Labor absolute authority over member challenges to union elections which have already been conducted. *Furniture Moving Drivers Local 82 v. Crowley*, 467 U.S. 526 (1984). Section 403 of the LMRDA provides in pertinent part: "The remedy provided by this subchapter [Title IV] for challenging an election already conducted shall be exclusive." The Court, in *Crowley*, looking at that language, said: "Congress clearly intended to lodge exclusive responsibility for post-election suits challenging the validity of a union election with the Secretary of Labor." Id. at 544.[8] Because the General Counsel here seeks a Board order reinstating both Mitchell-Carr and Vaughan to their elected positions, it is clear under *Crowley*, following Section 403, that it is without jurisdiction to do so. Similarly, in *McConnell v. Teamsters Local 445*, 606 F.Supp. 460 (S.D.N.Y. 1985), a district court has held that it, rather than the NLRB, has jurisdiction over a claim alleging retaliatory acts and due process violations by a union against a union member under section 101 of the LMRDA.[9]

IV. CONCLUSION

Based on the foregoing discussion, there is no alternative but to conclude that the Board does not have subject matter jurisdiction over this dispute. First, while the Board, under the doctrine of pendent jurisdiction may certainly determine whether persons are employees under the Act and may also determine whether those persons have engaged in conduct protected by the Act, it is quite clear that it has no stand-alone authority to resolve internal union conflicts. Its only jurisdiction to deal with union membership issues is based on a preliminary finding that the dispute is somehow connected to the employer-employee relationship. That has not been shown here.

Even if it were true that such a finding had been demonstrated, it is doubtful that the Board could find a violation of the NLRA. I have analyzed the fact pattern above and found that the individuals in question did not engage in any Section 7 conduct. Once that ultimate fact becomes apparent, the membership proviso to Section 8(b)(1)(A) prevents the Board from proceeding, because no employment connected discipline has occurred. Therefore, the proviso shields the Union from Board scrutiny.

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[8] Although the LMRDA does not provide an explicit definition of the term "election," the election procedures set out in the regulations of the Office of Labor-Management Standards state that "A prime requisite of elections regulated by Title IV [Terms of office and election procedures] and §402 [Enforcement], which in total comprise Subchapter V [Elections] is that they be held by secret ballot among the membership or in appropriate cases by representatives who themselves have been elected by secret ballot among the members." 29 CFR. § 452.97. Thus, a case can be made out here that the vote conducted by Respondent's trial board is an "election" within the meaning of Title IV of the LMRDA and subject to oversight by the Secretary of Labor.

[9] It has been said that the general purpose of the LMRDA is to provide guarantees of equal rights and fair treatment for union members in relation to those with whom they deal within the labor organization. *Wirtz v. Teamsters Industrial & Allied Employees Union Local 73*, 257 F.Supp. 784 (D.Ohio 1966). It has also been observed that the protections under the LMRDA were designed to afford remedies for conduct not proscribed in the NLRA. *Hinchman v. Electrical Workers Local. 130*, 299 So.2d 818 (La.Ct.App.), writ denied 302 So.2d 618 (1974).

Because this dispute involves reprisals allegedly take by the Union against its members/elected officers that stripped them of membership status, and their right to hold union elective office, the only Federal law that can protect them is the LMRDA. The Board does not have jurisdiction to provide remedies under that statute. It cannot order elected union officers reinstated to their office, nor can it provide injunctive relief or money damages to members who have been deprived of a right granted them under the LMRDA. The only body that can do that is a United States district court. The court can do that based on either a private lawsuit under section 102 of the LMRDA to vindicate a breach of the union membership bill of rights; it can also reach any internal union election irregularities under Section 402(b) upon the petition of the Secretary of Labor who has exclusive jurisdiction[10] over such matters under section 403.[11]

As the Board has no authority to decide matters which are exclusively within the sphere of internal union affairs, and are expressly regulated and adequately protected with remedies under the provisions of the LMRDA, I find that the Board has no authority over these claims as they in no way impact the employer-employee relationship. The complaint should therefore be dismissed for lack of subject matter jurisdiction.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. The dispute revolves around issues relating exclusively to the rights of union members under Titles I and IV of the LMRDA and not to their rights set forth under Section 7 of the Act.

3. The dispute described by the complaint and supported by the evidence is not a labor dispute involving an employer engaged in interstate commerce or in an industry affecting interstate commerce as required by Section 2(6) and (7) of the Act.

4. The General Counsel seeks remedies that Congress has reserved exclusively to the courts of the United States, and not to the National Labor Relations Board.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed

[10] It is true that in one case cited by the General Counsel, a court of appeals has characterized the Secretary's authority as "primary," rather than exclusive, despite the express language of sec. 403 that the Secretary's authority in postelection matters is "exclusive." That interpretation allows for some authority to reside with the Board. *NLRB v. Aeronautical Indus. District Lodge 91*, 934 F.2d 1288, 1299 (2d Cir. 1991). Factually, however, the unfair labor practice included penalizing a union officer for filing charges with the Board. That puts the case in a special category, for access to the Board's processes is a paramount right warranting protection, even in the face of countervailing policies. Clearly the Board has jurisdiction to protect such access. *District Lodge 91* is, therefore, not applicable here.

[11] Despite the explicit language of Sec. 403 giving the Secretary exclusive authority here, the Court will permit the complaining union members limited intervention rights in any suit brought by the Secretary under sec. 402(b). *Trbovich v. Mine Workers*, 404 U.S. 528 (1972).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.