The Politicized Worker Under the Labor-Management Reporting and Disclosure Act

Barry Sautman

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol5/iss2/2
ARTICLES

THE POLITICIZED WORKER UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Barry Sautman*

THE LANDRUM-GRIFFIN "BILL OF RIGHTS"

The "Bill of Rights of Members of Labor Organizations" was enacted as part of the Labor-Management Reporting and Disclosure Act (LMRDA)\(^1\) [commonly known as the Landrum-Griffin Act of 1959]. The "Bill of Rights" was designed to ensure that individual labor union members can exercise, within their union, many of the same democratic rights that the polity can exercise under the Bill of Rights to the United States Constitution.\(^2\) Title I of the LMRDA

---

* B.A., M.L.S., J.D., University of California at Los Angeles; L.L.M., New York University; PHD Candidate in Political Science, Columbia University; Associate, Shea & Gould, New York, New York.


2. In many respects, Title I is not as broad as the United States Constitution's Bill of Rights. For example, there is no equivalent of the Sixth Amendment right to counsel incorporated in Section 101(a)(5), which essentially provides that discipline may be imposed only if certain procedural safeguards are observed. See 29 U.S.C. § 411(a)(5). In fact, it has been stated that "a union member need not necessarily be provided with the full panoply of procedural safeguards found in criminal proceedings." Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975). While there is no right to counsel, Frye v. United Steelworkers of America, 767 F.2d 1216, 1224 (7th Cir. 1985), it has been held that a member facing discipline should have roughly the same access to counsel as his accusers, Buresch v. Electrical Workers Local 24,
was not intended to be an arm of the courts, to reach in and interfere with internal union affairs, or to be a mechanism for the disruption of legitimate union undertakings by dissidents. It was intended, however, to protect union members from over-reaching by entrenched leaderships and from arbitrary or despotic control.

Perhaps the most significant rights guaranteed by the "Bill of Rights" are those enunciated in Section 101(a)(2) of Landrum-Griffin:

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.

Thus, now the very liberal rights of speech and assembly afforded in the first part of Section 101(a)(2) are sharply qualified in the proviso. As Judge Mulligan of the 2nd Circuit put it, this is "language of Congress which both giveth and taketh away the rights of the parties". The question to be considered herein is where that which has been given by Congress may also be taken away on purely political grounds; that is, whether a union may expel one of its mem-

343 F. Supp. 183, 192, aff'd, 460 F.2d 1405 (4th Cir. 1972). (D. Md. 1971). The Supreme Court has held that Title I cannot be read as incorporating the entire body of First Amendment law so as to require that the scope of the protections afforded union members by the statute coincide with protections afforded by the Constitution as to a political candidate's freedom to receive campaign contributions, United Steelworkers of America v. Sadolowski, 457 U.S. 102, 108-111, Reh'g denied, 459 U.S. 899 (1982).

3. Dolan v. Transport Workers Union, 746 F.2d 733, 740 (11th Cir. 1984); Smith v. Sheet Metal Workers International Ass'n, 500 F.2d 741, 750 (5th Cir. 1974); Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964).


bers for having political views or political affiliations with which the union leadership or membership disagrees.

**SPEECH RELATED UNION DISCIPLINE**

Most unions believe that they may refuse to admit to membership or expel a current member, a person who is sympathetic to or affiliated with certain political organizations solely on that ground. Major labor organizations have constitutions that expressly forbid individuals of (vaguely) specified political persuasions from joining or maintaining membership in their union. Some of these provisions

9. The law with respect to admission to membership differs somewhat from that which pertains to expulsion from membership. There is no legal requirement that a labor union accept a person for membership solely because he is qualified to be a member. Moynahan v. Pari-Mutual Employees Guild of Cal., Local 280, 317 F.2d 209, 210 (9th Cir.) *cert. denied*, 375 U.S. 911 (1963), Stone v. Local 29, Intern. Broth. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, 262 F. Supp. 961, 963 (D. Ma. 1967). California courts seem to stand alone in objecting to assertions of absolute privilege and generally hold that a union must admit to membership all those for whom it bargains. See Directors' Guild of America, Inc. v. Superior Court of Los Angeles County, 64 Cal. 2d 42, 409 P.2d 934, 940 (1966); Thorman v. Theatrical Stage Employees Union, 49 Cal. 2d 629, 320 P.2d 494 (1958), *Rev'd, on other grounds*, Consolidated Theatres, Inc., v. Theatrical Stage Employees Union, Local 16, 73 Cal Rptr. 213, 447 P.2d 325 (1968); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329, 337 (1944). Of course, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16 (1986), forbids any "labor organization" of 15 or more members from excluding any individual from membership because of race, color, sex, religion or national origin. 42 U.S.C. § 2000e-2 of the Labor Management Relations Act, 29 U.S.C. §§ 141-188, Sections 8(b)(5) and 8(b)(3) also limit a union's ability to discriminatorily deny membership. The question of the legality of denying admission to membership in a union on political grounds of one otherwise qualified has not been frequently litigated because unions generally do not ask and applicants generally do not volunteer the sort of information from which a union could conclude that the applicant is "politically undesirable". However, many unions require that prospective members swear an oath that proscribes certain political views and failure to do so could lead to a denial of membership. The Laborer's Union has such a political oath. See n. 10 infra. The United Brotherhood of Carpenters and Joiners of America's oath—"I am not now affiliated with and never will join or give aid, comfort or support to any Revolutionary Organization"—was challenged on First and Fourteenth Amendment grounds in Hovan v. United Bhd. of Carpenters and Joiners, 704 F.2d 641 (1st Cir. 1983). While the court rejected the challenge on the ground that no state action was involved, the court made it clear that it was not considering the issue of whether the LMRDA Bill of Rights would afford protection to one denied membership because of a refusal to take such an oath. 704 F.2d at 645. These individuals were already members under Section 3(o) of Landrum-Griffin and therefore were covered by Title I. *Id.* In Stanchan v. Weber, 535 F.2d 1202 (9th Cir. 1976), the Ninth Circuit affirmed the grant of a preliminary injunction against a union's exclusion of members who refused to salute the United States flag. A union has the right to choose its members, Axelrod v. Stoltz, 264 F. Supp. 536, 539 (E.D. Pa. 1967), *aff'd*, 391 F.2d 549 (3d Cir. 1968) and may even choose to make election to membership by a fixed percentage of those already initiated as a requirement for joining, Moynahan v. Pari-Mutual Employees Guild, 317 F.2d 209, 211 (9th Cir.), *cert. denied*, 375 U.S. 911 (1963). Obviously, such a procedure must be contained in the union's constitution or by-laws. Otherwise, only failure to meet membership requirements (e.g. not being in the craft or trade that the union represents) or failure to tender dues would render
are antiquated and sweep before them the ghosts of no longer extant political organizations or trends.¹⁰ Most, however, are fairly explicit

an applicant excludable. Note also that the definition of 'member' within the Act is not limited to those persons who are recognized as members by the organization but instead requires that equal rights and privileges be provided to any person who has fulfilled the requirements of membership, i.e. those who are members in substance, despite the fact that union officials have not performed the ministerial acts that are necessary to give formal recognition to a person's status as a member. Basilicato v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U.S. and Canada, 479 F. Supp. 1232, 1242 (D. Conn.) aff'd, 628 F.2d 1344 (2d. Cir. 1979). See also Woods v. Local Union 613 of International Bhd. of Elec. Workers, 404 F. Supp. 110 (N.D. Ga. 1975) (If applicant has met union constitutional requirements for membership, court could order local to afford applicant the rights accorded to other members under the LMRDA).

¹⁰. The pertinent constitutional provisions are quite varied: No person shall be eligible for membership in the Brotherhood of Locomotive Engineers who is a member of a subversive group which shall advocate the overthrow of the United States and/or Canadian governments by force. International Brotherhood of Locomotive Engineers, § 27(a) at 34 (1976). No person shall be eligible to become or remain a member of this Brotherhood who is a member or associates himself with, or lends support to, any organization or group that expounds or promotes any doctrine of philosophy inimical to or subversive of the fundamental principles of [the United States]. United Painters Union § 9(b) at 51 (1980).

Any person who is a member or subscribes to, or supports the principles of a Communist or Fascist party or similar organization having as its purpose to overthrow the government of the United States or Canada, by force or violence, or to deny to citizens the guarantee of the Bill of Rights, or to throttle or eliminate a free trade labor movement, shall not be eligible for admission to membership in this International Union, nor shall any person hold membership therein. Any member charged as stated above shall be tried in accordance with the procedure set forth in this International Constitution and laws and if found guilty shall be forever barred from membership in this International Union. Any individual who has obtained membership by false statements as to the above shall be expelled after proper trial in accordance with the Constitution and laws of this International Union. Retail Clerk Union, Section 5(k) at 3 (1977).

No person shall be admitted to membership in any Local Union of the International Union who advocates principles or lends support to organizations or movements whose purposes and objectives are contrary to the fundamental principles of the established governments of the United States, Canada and the Commonwealth of Puerto Rico, or are in conflict with the policies of this International Union. Office and Professional Employees Union, Article IV at 3 (1976).

And I further declare that I am not now a member of nor sympathizer with any organization that has for its purpose the overthrow of this organization or of the Government of the United States of America or of the Dominion of Canada by force or violence. All this I solemnly promise on my honor, so help me God. Laborers’ International Union of North America, Article XXIV at 55 (1976).

[N]or shall any member of any [Local Lodge] hold membership in any other organization inimical to the interests of the I.A.M. International Association of Machinists, Article X at 32 (1977).

It shall be unlawful for any member of the International Typographical Union to belong to any secret organization, oathbound or otherwise, the intent or purpose of which shall be to influence or control the legislation or the business of such local union or of the International Typographical Union, the selection or election of officers of such local or International Union, or the preferred or other situations under jurisdiction. Any member guilty of a violation of this section shall, upon conviction of a first offense, be deprived of the right to hold office in the local or International Union; and upon conviction of a second offense, shall be expelled. Inter-

http://scholarlycommons.law.hofstra.edu/hlelj/vol5/iss2/2
The Politicized Worker Under the LMRDA attempts to exclude from the ranks of the union movement communists and, occasionally, those of other affiliations. Alternatively, a few major unions either explicitly guarantee political nondiscrimination\(^\text{11}\) or say nothing about political tests for membership.\(^\text{12}\)

The asserted authority for these exclusionary constitutional provisions are the two exceptions to the general rule of Section 191(a)(2) of the NLRA: that political affiliation may preclude mem-

national Typographical Union, Article VII, Section 2 (1980).
No person shall be eligible for membership; or for nomination or appointment to, or to hold
any office, or position, or to serve on any Committee in the International Union or a local
Union or to serve as a delegate therefrom who is a member, consistent supporter or who ac-
tively participates in the activities of the Communist Party, Ku Klux Klan, or any fascist,
totalitarian or other subversive organization which opposes the democratic principles to which
the United States and Canada and our union are dedicated. United Steelworkers Union of
America, Article III, Section 4 (1976).

No member shall be discriminated against either in their Union activities or employment be-
cause of creed, color, nationality, religion, political beliefs, or sex. Provided that any member
accepting membership in the Industrial Workers of the World, the Working Class Union,
National Chamber of Commerce, National Association of Manufacturers, or the Ku Klux
Klan, or the Communist Party, or Fascist, Nazi or Bund organizations shall be expelled from
the United Mine Workers of America, and is permanently debarred from holding office in the
United Mine Workers of America, and no members of any such organization shall be permitted
to have membership in our Union unless they forfeit their membership immediately upon
securing membership in the United Mine Workers of America. United Mine Workers of
America, Article XII, Section 3 at 69-70 (1979).

Any person eligible to become a member of the International Union who is not affiliated with
any organization whose principles and philosophy are contrary to those of the International
Union as outlined in the preamble of this Constitution may apply for membership. United
Auto Workers, Article 6, Section 2(a) at 5. [Excerpts from Preamble at 3:

We believe that organized labor and organized management possess the ability and
owe the duty to society of maintaining, through cooperative effort, a mutually satis-
factory and beneficial employer-employee relationship based upon understanding
through the medium of conference . . . . The worker does not seek to usurp man-
agement's functions or ask for a place on the Board of Directors of concerns where
organized. The worker merely asks for his rights.]

No member of any Local Union shall be eligible to hold any elective or appointed position in
this International Union or any local union in the International Union, if he is a member of or
subservient to any political organization, such as the Communist, Fascist or Nazi Organization
which owes its allegiance to any government other than the United States or Canada, directly
or indirectly. United Auto Workers, Article 10 § 8 at 17.

11. See, e.g., the provision of the United Mine Workers constitution quoted in n. 10, supra.

12. See, e.g., the constitution of the American Federation of Teachers, Article 3, Section
8 at 2 (1980), which states that “No discrimination shall ever be shown toward individual
members or applicants for membership because of . . . political or economic status . . . Locals
may establish procedures for admission of new members except that no discrimination shall
ever be shown toward individual members or applicants for membership because of . . . politi-
cal or economic status,” and the constitution of the United Electrical, Radio and Machine
Workers of America, Article 4, Section A at 4, which states that “All persons whose normal
occupation is in the Electrical, Radio and Machine Industry, and in conformity with Article 3
‘Jurisdiction’ are eligible for membership [regardless of] political belief or affiliation.”
bership where the political beliefs or affiliations of a member are said to violate “the responsibility of every member toward the organization as an institution” or where they are said to “interfere with the union’s legal or contractual obligations.”

The Second Circuit, in its renowned *Salzhandler v. Caputo* decision,\(^\text{13}\) held that these are the only intended exceptions to the general rule. As the court said, the legislative purpose for the rule was “that unions be democratically governed and toward that end that discussion be free and untrammeled and that reprisals within the union for the expression of views should be prohibited.”\(^*\) [Since *Salzhandler*, the only other exception to the rule of freedom of belief and expression that has been added by any court is the prohibition against a member threatening physical harm against a union officer.\(^\text{15}\)] Whether a particular union rule that expresses one or more of these exceptions is “reasonable” is “a matter for the balancing of the institutional interests and individual rights by the trial judge.”\(^\text{16}\)

There have been several important cases involving this balance that have resulted in victories for the individual rights of members. These have included speech cases involving distributions of leaflets which contained supposedly false statements about another union member;\(^\text{17}\) the urging of non-payment of dues when accompanied by a good faith belief that the by-law requiring such payment was illegal;\(^\text{18}\) complaints about job assignments;\(^\text{19}\) and complaints to other members about the progress of negotiations for a strike settlement.\(^\text{20}\)

\(^{13}\) See, e.g., the constitutions of the International Longshoremen’s and Warehousemen’s Union (1979), Brotherhood of Maintenance of Way Employees (1980), Industrial Union of Marine and Shipbuilding Workers of America (1976), International Clothing Workers Union (1976), International Ladies’ Garment Workers Union (1980) and Communication Workers of America (1981).


\(^{17}\) *International Bhd. of Boilermakers, etc. v. Rafferty*, 348 F.2d 307, 310 (9th Cir. 1965).


\(^{20}\) *Kuebler v. Cleveland Lithographers & Photoengravers Union Local 2410*, 473 F.2d
There have also been several cases involving the assembly of union members, to wit: meetings by members outside of the regular union meeting to discuss union business; assemblages to petition for a local charter or to discuss strike settlement negotiations; and assemblage, with non-union members, to organize meetings and distribute leaflets about the dangers of low-level radiation. The courts have even read Section 101(a)(2) as including within its protection libelous or malicious statements uttered by union members, although the LMRDA does not protect libelous statements made toward the organization as an institution, the conduct of a union member "that would interfere with the union in its performance of its legal or contractual obligations."

Overall, "Congress has struck the balance of interest in favor of protecting the democratic process within unions by insuring freedom for every union member to enter into debate or activities." The "power of unions to adopt rules of conduct is construed narrowly, and the members' rights of free speech are given expansive protection." Moreover, in determining whether a union may discipline a member for violating the union's constitution, any ambiguity or uncertainty in the constitution is to be construed against the union and in favor of the union members.

359 (6th Cir. 1973).
It shall be unlawful for any labor organization, or any officer agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to
In addition to enumerating the varied situations in which a union member may exercise rights under Title I, the courts have concomitantly enunciated the grounds on which a union may discipline a member. The Supreme Court has held that the provision of the National Labor Relations Act which permits unions to adopt their own rules respecting the acquisition or retention of membership is not so broad as to give the union the power to penalize a member who invokes the protection of the Act for a matter in the public domain and beyond the internal affairs of the union. If a union rule invades or frustrates an overriding policy of the labor law, the rule may not be enforced by fine or expulsion.

A union may fine a member for teaching an open shop apprenticeship class in violation of the international union's constitution which prohibits members from committing any act which is seriously detrimental to the interests of the international union. Strike-breaking members who did not resign from the union before or during the strike may be fined, but only if the union constitution permits such discipline and only if the basis is not the "unwritten and unarticulated observances of 'all good union men'." A union may also discipline a member for dual unionism, for non-payment of dues, or for engaging in a wildcat strike.

A union may not discipline a member, however, for bringing which he is entitled under the provisions of this [Act].

The provisions of Section 412 shall be applicable in the enforcement of this section. Section 102 allows a union member to bring suit in District Court for appropriate relief whenever a Title I right has been violated.

34. Local Lodge No. 455, International Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. Terry, 398 F.2d 491, 496 (5th Cir. 1968).
35. See, generally, Airline Maintenance Lodge 702 v. Loudermilk, 444 F.2d 719, 722 (5th Cir. 1971).
suit against the union. This prohibition is important not only in its own right, but also because bringing suit is a type of action involving free speech. At least one Court of Appeals has theorized that while it is beyond a court’s province to scrutinize whether unions may punish members for particular behavior, the same inhibitions do not apply to actions involving free speech. The same court held that a union’s conduct in expelling a member for causing the union to be charged with discriminatorily barring a non-union worker from employment is not entitled to the protection that is accorded a union’s discipline of a member for crossing the union’s lawful picket line.

EXPRESSLY POLITICAL DISCIPLINE

It was once assumed that a union could expel a member, if not for any “outside” political affiliation, at least for being a member of the Communist Party. The California Supreme Court said as much in Allen v. Los Angeles County District Council of Carpenters. The court based its conclusion in part on the assertion that “federal legislation” made clear “that a union could properly provide in its constitution and laws for excluding such persons.” The “federal legislation” cited as the “Finding of Fact” for this proposition was the Communist Control Act of 1954. This McCarthy-era Act was promulgated “to outlaw the Communist Party, to prohibit members of Communist organizations from serving in certain representative capacities, and for other purposes.” This act, however, contains no express or implied authorization for labor unions to expel communists. Similarly, in Ames v. Dubinsky, a Manhattan trial court assumed that the Communist affiliation of suspended union dissidents was to be considered in determining whether suspensions that were

42. Allen v. Los Angeles County, District Council of Carpenters, 51 C.2d at 807.
44. 68 U.S. Stats. at 775.
ostensibly for libeling the union leadership had a legal foundation. The court stated that “The issue [of Communism] is unimportant except that the statements and demands of plaintiffs appear to be explainable as Communist-motivated strategy, tactics, and propaganda.”

Apart from these few state court decisions handed down at the height of the Cold War, there are a few federal court cases decided during the early 1960s that involve prohibitions against Communists attaining or maintaining union membership. In *Rosen v. District Council No. 9 of Brotherhood of Painters,* Judge Levet upheld the action of a union in disciplining one of its members who had associated with and given support to the Communist Party. As in *Ames v. Dubinsky,* the District Court sanctioned the union’s action on the ground that “The Communist Party is not merely a political party but is a foreign conspiracy and . . . therefore, participation in, or association with it is not within the protected area of political action.” *Rosen* was decided fifteen years after *American Communications Association v. Douds,* which upheld the validity of Section 9(h) of the Labor-Management Relations Act (the Taft-Hartley Act). Section 9(h) requires, as a condition of a union’s utilizing the mechanism of the National Labor Relations Act, that each union officer file an affidavit with the National Labor Relations Board affirming that he is not a member of the Communist Party or affiliated with that Party and that he does not believe in, and is not a member

---

46. Id. at 399. This statement is followed by an eight page discourse on the need to acknowledge “The Fatherhood of God” and insure a “vigilant and prepared posture of alerted defense of our own ideology and the principles and ideals of our America democracy and way of life.” Id. at 406. Interspersed are numerous “quotations”, all without exact citations, to alleged writings of Communist leaders. The trial judge concluded, at 407, that “The real issue here, however, is not communism. It is whether the accused were deprived of due process.”

47. There were two other New York state court decisions involving expulsions of Communist Party members in the early 1950s. In *Weinstock v. Ladisky,* 197 Misc. 859 (N.Y. Sup. Ct. 1950), the court held that the Painters’ Union expulsion of three members for their membership in the Communist Party was not an abridgment of the First Amendment nor was the provision authorizing the expulsion a bill of attainder. In *Daikchoylus v. Ernst,* 203 Misc. 277, 283 aff’d 282 App. Div. 1101 (1952), the court merely stated that there was some evidence that the expelled member had supported a communist organization and that the court would not substitute its judgment for the union tribunal on that matter.


of or support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods. A criminal penalty could be imposed for willfully or knowingly making any false statement in such an affidavit.

In Douds, five Justices of the Supreme Court held that § 9(h) did not exceed Congress’ power to regulate interstate commerce merely because, as a consequence thereof, Communists might have lost their positions as union officers. The Douds majority averred that Congress could rationally find that the Communist Party, unlike other political parties, could use union leadership positions to bring about strikes and other obstructions of commerce for purposes of political advantage. They further held that many persons who believe in the overthrow of the government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.52 Douds thus provided the theoretical framework for Rosen.53

There are two vital differences, however, between Douds and Rosen. Douds involved the question of whether union officers whose politics the United States government found objectionable might have the constitutional right to continue to occupy offices to which they had been democratically elected. Rosen, however, involved mere membership, as opposed to holding office in a labor union. Also, Douds was decided with reference to a proffered right that was unsupported by statute. Rosen, unlike Ames and Allen (which were both decided before passage of the LMRDA in 1959), was decided after the enactment of the Landrum-Griffin “Bill of Rights” for union members, which contained broad guarantees of political freedom from union discipline.54

§ 504, LMRDA, “Prohibition against certain persons holding office”, stated in pertinent part that

No person who is or has been a member of the Communist Party... shall serve... as an officer, director, trustee member of any executive board, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization... during or for five years after the termination of his membership in the Communist Party.

§ 504 of the LMRDA further limited the ability of Communists

52. American Communications Ass’n v. Douds, 339 U.S. at 390-391.
to hold leadership positions in unions. Willful violators of this part of Section 504 could have been fined up to ten thousand dollars, imprisoned for as much as one year, or both. However, this part of Section 504 was held to be an unconstitutional bill of attainder by the Supreme Court in its United States v. Brown. 55

In Rosen II, the court also found support in the legislative history of Section 101(a)(2) for the proposition that nothing in that section was intended to prohibit the unions from expelling Communists. In this non-precedential decision, District Judge Tenney stated that

[I]t seems clear that the drafters of the Act never contemplated that the rights to be protected embraced Communist activity or association. Senator Aiken noted that it had been 'necessary to change the language [of Section 101] so as to enable the unions to expel the known Communists and criminals, who would otherwise have been frozen in a position of equality with all other union members'. Senator Clark noted that the amendment to Section 101, which added the proviso contained in subdivision (a)(2) 'does not permit any Communist infiltration into unions (citation omitted). 56

Between the first Rosen decision, denying a temporary restraining order and the decision on the merits in 1964, the Second Circuit had dismissed plaintiff's appeal on the grounds that the record was incomplete and that the Court had issued its decision in Salzhandler v. Caputo subsequent to the first Rosen decision. Accordingly, in Rosen II, where plaintiff sought an injunction against the union's interference with his membership rights, the District Court considered the relevancy of Salzhandler. The Rosen II court concluded that while in Salzhandler

the acts of the union member which were grounds for disciplinary action were acts in connection with union affairs, to hold that the act was intended to furnish protection for non-union activities and which are contrary to reasonable rules of the union, is to disregard the purpose of the Act as set forth herein. Nor have the Courts so held.

The Court cited four other District Court cases 57 which upheld

the rights of union members to slander, libel or picket the offices of union officials. None of these cases contrasted rights accorded when speech or association involves fellow union members vis-a-vis rights when the union member carries out these activities in conjunction with non-union members. Thus, the second Rosen decision rests largely on some legislative history and on the authority of several decisions by New York state trial courts dating from the late 1940s and early 1950s. No case squarely dealing with the expulsion of a union member because of the member’s political views or activities reached any court again until Turner v. Air Transport Lodge 1894 was decided in the Eastern District of New York in the mid-1970s.

**TURNER v. AIR TRANSPORT LODGE 1894**

William Turner was expelled from Local 1894 of the International Association of Machinists “because of his expression of certain views and opinions”. Turner was a long-standing member of the union who was involved in a campaign for Shop Steward. The union alleged that, during the campaign, he advocated communist ideas and incorporated these ideas into his campaign. They therefore sought to expel him under Article L of the Union constitution, which specified activities deemed to warrant expulsion, including

---


58. Turner v. Air Transport Lodge 1894, 590 F.2d 409 (2d Cir. 1978). See, Hurwitz v. Directors Guild, 364 F.2d 67 (2d Cir. 1966), involved a union loyalty oath which required each member to swear that he does not believe in and is not a member of or a supporter of any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional method. The oath became important when the Directors’ Guild of America merged with the smaller Screen Directors International Guild and the members of the latter union were required to take the former union’s loyalty oath, over the objection of the majority of Screen Directors International Guild members. When some of those moved in the Southern District of New York for a preliminary injunction directing the Directors’ Guild to grant them membership without their taking the oath, Judge Levet denied the motion. The Second Circuit, per Lumbard, J., applied New York law in this diversity action and reversed, holding the oath to be so vague as to be unconstitutional. The opinion includes dicta to the effect that a union may exclude or expel a person from membership if it is established that he has engaged in subversive activity or if it is established that he is a member of the Communist Party. See, e.g., 364 F.2d at 76. Again, the basis for this dicta was that Congress had found that the Communist Party poses a threat to the U.S. labor movement. Id. at 74. The court added that it had decided that the union had an interest in excluding Communists from membership as a question of fact. Id. at 76. See also International Ass’n of Machinists v. Friedman, 252 F.2d 846 (D.D.C. 1958), where the union’s expulsion of an alleged Communist was challenged mainly on procedural grounds. The Court sustained the expulsion on the ground that the procedure had been adequate, but there is also dicta indicating the court’s agreement with the union that membership in a communist organization constitutes “dual unionism”. Id. at 851.

advocating or encouraging communism, fascism, nazism, or any other totalitarian philosophy or, by other actions, giving support to these ‘philosophies’ or ‘isms’ or to movements or organizations im- milical to the IAM or its established policies or laws.

Turner was compelled to appear before the union’s Trial Com- mittee and, although evidence was presented by both sides, there were apparently no issues of fact to be determined. The trial committee, basing its findings on Turner’s advocacy of communism, found Turner guilty of “improper conduct” and recommended his expulsion. He was voted “guilty” of “improper conduct” by the membership, expelled and notified that his expulsion was because of “misconduct” involving the advocacy of communist ideas. According to the Second Circuit, “The evidence indicated that the charge against Turner arose from statements by him in the course of an election of shop stewards, he being a candidate who, among other things, asked for the support of the rank and file as opposed to the ‘union leadership’. "60

Turner commenced an action under the LMRDA asking for a permanent injunction against the enforcement of his expulsion, a declaratory judgment that the expulsion was void, a permanent injunction against infringement of his rights under the LMRDA, a declaratory judgment that Article L § 3 of the Constitution of the IAM is void to a specified extent, and for attorney’s fees.61 He moved for a judgment on the pleadings,62 while the union moved for summary judgment.63

Judge Mark Constantino of the Eastern District of New York heard the motions and issued a “memorandum and order”. This “memorandum and order” was not issued as a separate document, as required by Federal Rule of Civil Procedure 58 and the terms of the decision were not specified in a judgment. Accordingly, the Second Circuit remanded for entry of the judgment embodying the decision, containing the terms of the injunction and declaring the rights of the parties to the extent of the relief granted. Jurisdiction was retained, and the District Court wrote an explanatory opinion64 granting summary judgment for the plaintiff. The case was then returned to the Second Circuit for disposition on the merits.

60. Id.
64. This opinion evidently remained unpublished.
The *per curiam* decision\(^\text{65}\) is initially unequivocal in its holding that the LMRDA's free speech guarantee could not be infringed upon by expelling a member for advocating communist ideas, "whether the word 'Communist' be spelled with a capital 'C' or with a small 'c'. The word, in either case, refers to the philosophy of communism. The plain words of the statute forbid the union's making it 'misconduct' to advocate 'communism' . . . or any other totalitarian philosophy . . . . since the statute gives union members the right to express any opinion.\(^\text{66}\) As in the remand of *Rosen*\(^\text{67}\) fourteen years earlier, the court cited *Salzhandler v. Caputo* for the proposition that "discussion should be free and untrammeled and—reprisals within the union for the expression of views should be prohibited."\(^\text{68}\)

The Court distinguished both *Rosen II* and *Hurwitz v. Directors Guild of America, Inc.*\(^\text{69}\) The court noted that in *Rosen II*, the plaintiff had been a member of the Communist Party. In *Turner*, however, the Court noted that

> [t]here was no evidence that Turner was, or ever had been, a member of the Communist Party, nor that he associated with or encouraged the Communist Party. He was never accused of any such things. The only accusation was that he had been 'advocating Communist ideas', that is, the philosophy of communism. There was evidence that Turner had explained his 'communist views' as 'a la Karl Marx, not Brezhnev, Mao or Castro.'\(^\text{70}\)

The Second Circuit further noted that

The *Rosen* decisions have never been reviewed by this Court and we need not now approve or disapprove them. An appeal from Judge Levet's denial of a temporary injunction was dismissed because of delay in prosecuting the appeal. In so doing, this Court noted that the *Rosen* case was one 'involving important questions of law' and noted that, after Judge Levet's decision, our opinion in *Salzhandler v. Caputo*, above cited, had been handed down.\(^\text{71}\)

This statement is misleading, however, in that it claims that the

---


66. *Id.* at 411.

67. Rosen v. District Council No. 9 of Brotherhood of Painters, 326 F.2d 400 (2d Cir. 1964).


70. Turner v. Air Transport Lodge 1894, 590 F.2d 409, 411 (2d Cir. 1978).

71. *Id.*, (citing 326 F.2d at 401.)
Rosen case was not decided in the trial court on its merits after Salzhandler. As was shown above, the second Rosen decision (by Judge Tenney) had indeed considered and attempted to distinguish Salzhandler, albeit rather unsuccessfully. The Turner court was, of course, free to disregard the second Rosen decision, yet the Court cited it twice and, as will be shown, squarely rejected the logic of that decision.

With respect to Hurwitz v. Directors Guild, the Turner court noted that there had been no opportunity to distinguish between

the Communist Party and its members on the one hand and on the other those who, like Turner, advocate the communist philosophy of Karl Marx but who are not members of the Communist Party.

It does appear, however, that this Court in Hurwitz was in fact concentrating its attention on the Communist party and on the dangers that party posed to labor unions in this country.

The Turner court also noted that the Hurwitz court had explicitly declined to discuss the rights of plaintiffs under the LMRDA.

Finally, the Turner court deal directly with the exceptions to the general rule in LMRDA Section 101(a)(2), finding "no evidence that anything Turner did or said caused any harm to the union or interfered in any way with its contractual obligations." It rejected any claim that the constitutional provision under which Turner was expelled could be justified as a "reasonable rule" permitted by the LMRDA and held that it is

in flat violation of the right of free speech in the LMRDA. It is so broad that it cannot possibly be found a reasonable means for preventing Communist party infiltration of the appellant unions.

The provision here is broader and more vague than the non-communist oath prescribed in the Hurwitz case.

Thus, the holding in Turner is not that the LMRDA forbids a union from expelling those whose political views or affiliations it finds objectionable, but instead that it forbids a union from expelling only communists or those who propagate communist ideas who are not actual members or supporters of the Communist Party. If a union were to draw a narrowly-fashioned provision prohibiting membership in the Communist Party and, perhaps, other organizations

73. Turner, 590 F.2d at 411.
74. Id.
75. Turner, at 412.
whose interests are said to be “inimical to trade unionism,” such a
provision might very well pass muster under the exceptions to the
general rule of the LMRDA.

Judge Mulligan’s concurring opinion in Turner is longer than
the per curiam opinion, and grapples with the language in Section
101(a)(2) that is “not so pellucid as a mountain lake in spring
time”. He first states that the provision used to expel Turner is un-
reasonable within the meaning of Section 101(a)(2) because it is
so broad, vague and indefinite that it provides completely inade-
quate guidance to union members as to just what is proscribed
[and] clearly goes beyond the scope of section 411(a)(2) by bar-
ing, for example, a member’s participation in movements or orga-
nizations inimical to the ‘established policies and laws’ of the
union.

He noted that the union role can be construed to prohibit precisely
what section 411(a)(2) is supposed to protect—the right of the mem-
ber to freely express his opposition to union policies and laws.76

Judge Mulligan would have affirmed in Turner solely on the ba-
sis that the rule used to expel the plaintiff was not a reasonable one. He would have permitted “reasonable rules” to be used to expel
those who engage in “the encouragement of activities or organiza-
tions which are fundamentally inimical to trade unionism. . . .”77

He then briefly described the aims of the Progressive Labor Party, to
which, he notes “Turner freely conceded his adherence”,79 and con-
cluded that “[t]his encouragement of the use of union power for
the primary objective of violent revolution seems clearly to me to be fun-
damentally inimical to the interests of the union as an institution and
would certainly jeopardize its legal obligations.”80

Judge Mulligan concluded that the goals of the Progressive La-
bor Party81 are substantially similar to those the Communist Party

76. Id. at 413 (Mulligan J., concurring) (citations omitted).
77. Id.
78. Id.
79. Id. at 413-414.
80. Id. at 414.
81. For other federal cases involving this Party, see, NLRB v. New York Univ. Medical
Center, 702 F.2d 284 (2d Cir. 1983), (hospital workers’ enunciation of radical political views
in leaflets dealing with conditions in hospital protected by NLRA), vacated and remanded on
other grounds, 464 U.S. 805 (1983), Fun Striders Inc. v. NLRB, 686 F.2d 659 (9th Cir.
1981) (shoe workers discharged for distributing leaflets urging strike, formation of union, and
armed revolution by the working class; Administrative Law Judge found violation of N.L.R.A.
had at the time of the decisions in *Hurwitz* and *Rosen*. The legislative history of Section 101(a)(2) “compels the conclusion that an important reason for the addition of the proviso to section 411(a)(2) was so that unions would not be prevented from expelling Communists from membership.” Had Turner been a Communist Party member charged with distributing “inflammatory Party literature”, the case law, i.e. *Douds* and *Hurwitz*, would have supported his expulsion. Since Turner was not a member of that Party “which has a demonstrated record of successful infiltration and subversion of trade unions”, but rather was a member of a party about which “the record is barren regarding size, influence or potential to accomplish its revolutionary goals,” the concurrence concluded that there is no indication that Turner presents a “real or serious threat to the integrity of the labor organization or its ability to perform its legal and contractual obligations”.

Section 8(a)(1), Board affirmed; held: enforcement denied, employer had legitimate and substantial business justification for discharges; Phillips v. Lenox Hill Hosp., 673 F. Supp. 1207, 1216 (S.D.N.Y. 1987) (hospital worker asserts union retaliated against him by failing to adequately represent him in arbitration over his discharge; held: retaliatory action by union in undermining discharge grievance because of animus against member for exercise of LMRDA rights is probably not “discipline” under § 101(a)(5) of Act, but may be “infringement” under § 101(a)(2); Burns v. Rovaldi, 477 F. Supp. 270 (D. Conn. 1979) (tenured teacher discharged when, after he instituted pen-pal program, students received letters from teacher’s fiancee advocating communism; held: teacher’s discharge not based on activities protected by the First Amendment); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979) (Assistant professor not reappointed to faculty; held: professor’s public acknowledgment of communist beliefs is protected under the First and Fourteenth Amendments and where this was a substantial factor in employer’s refusal to reappoint, professor is entitled to reinstatement); Pearl v. Tarantola, 361 F. Supp. 288 (S.D.N.Y. 1973) (diamond setter charged by union with aiding in the publication of an article in the Progressive Labor Party newspaper that criticized union leadership and in leading wildcat strike, expelled from union; held: since impossible to say whether plaintiff expelled for article or for wildcat strike, reinstatement ordered); United States v. Laub, 253 F. Supp. 433 (E.D.N.Y. 1966) (agreement to induce, recruit and arrange for group of Americans to depart for Cuba and travel thereto not a crime under statute regarding travel control of citizens and aliens during national emergency).


To Judge Mulligan then, the question of whether an expulsion of a union member because of the member's advocacy of communism depends on two facts: first, whether the ideas advocated are those of the Communist Party or resemble those of the Communist Party or—at least at the time precedential case law developed (i.e. the 1940s through the early 1960s); and second, whether the organization with which the member is affiliated has any ability to pose a serious threat to the union leadership it criticizes. The *per curiam* decision is narrower in its holding that Communist Party members per se might be expelled, given a narrowly-tailored union constitution provision, but that communists who are not members of the Communist Party may not be. However, the *per curiam* decision contradicts itself by stating, as was previously noted, that "it is of no significance whether the word 'Communist' be spelled with a capital 'C' or with a small 'c'."8

Finally, the broader view of the rights of politicized workers within their unions enunciated in the only recent case based on an LMRDA challenge has left an ambiguous legacy. It can be read as seeking to protect the membership rights of all members, even those who are also members of the Communist Party; as well as protecting the rights of communists who are not affiliated with the Soviet-oriented Party; or as protecting the rights of those who are not members of the Communist Party insofar as they do not represent the "threat" that the CPUSA was thought to have been in the 1940s and the 1950s.

**CONCLUSION**

Despite the fact that many union constitutions prohibit membership by fascists, such as Nazis and Ku Klux Klan members,86 all the reported LMRDA challenges to political expulsions have involved communists. It is therefore difficult to predict how a court would react to a challenge, under the LMRDA or any other statute, of an expulsion of a non-communist or an anti-communist. One California appellate case, *Mitchell v. International Ass'n of Machinists*87 involved an attempt to expel a member who had worked for the passage of a state "right to work" statute. The court held that this measure (although universally opposed by trade unions) is a matter about which there could be reasonable disagreement among union

---

85. *Id.* at 411.
86. *See* note 10 *supra* for examples.
members and ordered reinstatement. Query, then what advocacy or affiliation, aside from communism, might trespass against "the responsibility of every member toward the union as an institution" or "interfere with the union's legal or contractual obligations."

One possibility is that advocacy of racist ideas or affiliation with an explicitly racist organization might be deemed to be so fundamentally violative of the member's responsibility toward his union as an institution so as to warrant expulsion, given the fact that most, if not all, unions now have explicit constitutional provisions proclaiming non-discrimination, in addition to the several federal statutes that forbid unions from practicing discrimination on racial grounds. There is evidence that active propagators of racism are present in some unions; apparently though, no case has been reported where a union sought to discipline such a member. There are cases, however, such as Rollison v. Hotel, Motel, Restaurant and Construction Camp Employees, Local 829, AFL-CIO, in which the court stated that "29 U.S.C. § 411(a)(2) protects the conduct of union members, no matter how offensive that conduct may be to other union members."

The question of whether a union may expel a member on political grounds cannot be answered as a generality. The case law on the subject indicates that such an expulsion might be upheld by the courts if the member is a Communist Party member of active supporter, but that all other political tendencies retain a right under Title I of the LMRDA to membership in unions. A further application of the provisions of Section 101(a)(2) to those who violate narrowly drawn exclusionary clauses of union constitution might be successful with regard to those, such as active racists, whose ideology is clearly inimical to the fundamental precepts of solidarity among workers.

88. See, e.g., International Ladies Garment Workers Union, Section 5(a) (1980), Communication Workers of America, Article V, Section 1(d) (1981).
89. See, e.g., Nelson v. Entex, 110 L.R.R.M. 2312 (S.D. Tex. 1981) (Oil, Chemical and Atomic Workers Union did not breach its duty of fair representation when it withdrew, prior to arbitration, grievance of former employee protesting his discharge for mailing racial, anti-Semitic literature to the homes of large numbers of employer officials and workers and for threatening and harassing officials after his discharge).
90. Rollison v. Hotel, Motel, Restaurant and Const. Camp Employees, Local 879, 677 F.2d 741 (9th Cir. 1982) (dissident's activities protected by LMRDA).