

Local 254, Service Employees International Union, AFL-CIO (Brandeis University) and Jorge Luis Santana. Case 1-CB-8835

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On August 29, 1997, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent Union violated Section 8(b)(1)(A) of the Act when it removed Jorge Luis Santana from his union representative position on the contractually created labor-management committee. He dismissed a similar 8(b)(1)(A) allegation involving the Respondent Union's removal of Santana from his shop steward position. For the reasons discussed below, consistent with the principles set out in our recent decision in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB No. 193 (2000), we find that the Respondent did not violate Section 8(b)(1)(A) in either situation.

A. Facts

Jorge Luis Santana is a custodian employed by Brandeis University (Employer) in Waltham, Massachusetts, and is represented by Local 254, Service Employees International Union, AFL-CIO (Union). On August 8, 1994, he became shop steward when 1 of 2 custodian stewards resigned and Santana alone expressed a desire to fill the position by submitting a nominating petition, signed by fellow custodians, for the shop steward position. In the absence of opposition to his candidacy, Cathy Conway, the Union's business agent, selected Santana to be shop steward without conducting an election among the custodians.

While its constitution and bylaws are silent on the procedures for selecting shop stewards, the Union has historically filled the shop steward position by either election or appointment. When several employees are interested in the position, the business agent will hold an election among the custodians and designate the election

winner as the shop steward. When an employee's candidacy is unopposed, like Santana's was in 1994, the business agent will simply appoint that individual to the position and forgo the formality of an election. The shop steward position has no fixed term of office.

In 1995, while serving as shop steward for the custodians, Santana submitted a nominating petition, signed by fellow custodians, for a vacant union representative position on the contractually created labor-management committee (Committee). Since no other employee expressed a similar interest, Business Agent Conway designated Santana to serve on the committee.

Article XXX of the applicable collective-bargaining agreement between the Employer and the Union details the purpose and functions of the committee as follows:

The Committee shall meet a minimum of once every month for the purpose of discussing and attempting in good faith, through mutual cooperation and creativity, to solve problems that interfere with the ability of the bargaining unit to remain a viable, competitive source of custodial, grounds and trade services for the University. . . .The Committee shall attempt to explore new ways of working together effectively, including but not limited to techniques of performing and evaluating work, new methods of maximizing quality and efficiency, and new ways of joint problem-solving. The University may, at its discretion, provide training and/or other support for the Committee to enhance its work. The Committee shall attempt to use techniques such as brainstorming, quality initiatives, experimentation and incentives to generate new and better ways of serving the University.

The parties agree that the Committee shall not be a substitute for collective bargaining, but it will serve as a new approach to the parties' relationship, designed to make it more productive. Nothing in this agreement shall limit the University from using other quality-enhancing training and development techniques.

The committee consists of five representatives of the Employer and five representatives of the Union. Pursuant to article XXX, the "[u]nion representatives" on the committee are "elected for three year periods by secret ballot" and bargaining unit members on the committee are entitled to "compensatory time at time and one half when such Committee work, as directed by the University, occurs outside their regularly scheduled hours."

On January 17, 1996, Santana filed a grievance over the Employer's failure to pay those custodians who had not reported for work on several snow days. The Em-

ployer settled the grievance to the apparent satisfaction of the union leadership, with the exception of Santana. Without consulting either Business Agent Conway or Jack O'Malley, the chief steward, Santana unsuccessfully sought to reopen certain issues with the Employer that had been resolved by the grievance settlement endorsed by the Union. Shortly thereafter, on May 6, 1996, Santana presented to Conway two signed petitions—one seeking the selection of unit employee Ricardo Vasquez as the shop steward for the custodians and the other nominating Santana for the position of chief steward, then occupied by O'Malley, and requesting that an early election for that position be held. However, there was no opening in the chief steward position at the time. As found by the judge, the chief steward position had traditionally been an appointed position, and the Union did not intend to remove Jack O'Malley, the incumbent chief steward, who was considered to be doing a good job by the Union.

By letter dated May 8, 1996, Conway removed Santana from his positions as shop steward for the custodians and union representative to the committee. Conway cited “inappropriate handling of grievances” as the reason for the steward removal. She cited Santana’s “failure to work cooperatively with the other Custodian [Committee] representative” and his “failure to disclose information about [Committee] business with [Committee] team and Business Agent” as the reasons for the representative removal. Santana vigorously protested his removal from the shop steward and committee representative positions, and he later filed a timely unfair labor practice charge against the Union. Thereafter, the Regional Director issued a complaint alleging that Santana’s removal from both union positions separately violated Section 8(b)(1)(A) of the Act.

B. The Judge’s Decision

The starting point of the judge’s analysis was that, under Section 7 of the Act, union members have a right to question their union’s representation of them and to seek to redirect their union’s policies or strategies for dealing with their employer. The judge found that Santana was dissatisfied with his Union’s handling of the snow day grievances, and was engaged in protected activity both when he complained about the Union’s resolution of those grievances and, shortly thereafter, when he presented his superiors with two petitions, signed by over 30 employees, seeking Santana’s election to the position of chief steward and the selection of another employee to replace Santana as shop steward. The judge found that Santana’s running for the position of chief steward was “a major factor” in the Union’s removing him from the two union positions held. On the other hand, the judge

also found that Santana’s efforts to reopen issues that the Union had resolved in the snow day grievances were undertaken without consulting his superiors, and had the effect of severely undercutting the authority of Union Business Agent Conway in her dealings with the Employer over grievances.

In determining the propriety of the Union’s conduct towards Santana, the judge drew a distinction based on whether Santana was an *appointed* or an *elected* union official. Based on his review of the Union’s constitution, bylaws, and past practice and the selection process used in October 1995, the judge found that Santana had been *appointed* to the shop steward position. He found, however, that Santana’s position on the committee was an elected position given the terms of article XXX of the contract between the Employer and the Union.

Based on a comparison between *Finnegan v. Leu*, 456 U.S. 431 (1982), and *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), the judge believed that a union has wide discretion to remove *appointed*, as opposed to *elected*, union officials. Relying on the principles of *Shenango, Inc.*, 237 NLRB 1355 (1978), the judge therefore found that the union properly exercised its discretion in removing Santana from the appointed shop steward position because the “union leadership, did not feel, rightly or wrongly, that Santana was a team player, loyal and cooperative.” In contrast, the judge found that the Union could not remove Santana from his job as elected committee representative “because of his protected activity taking positions contrary to the union leadership on the disposition of grievances and his candidacy for the chief steward’s position.”

C. Positions of the Parties

The Union excepts to the judge’s findings pertaining to the removal of Santana from the committee representative position. In its exceptions, the Union argues that it does not matter whether Santana was appointed or elected to the committee representative position. The Union further contends that its removal of Santana was lawful under the provision of Section 8(b)(1)(A) that allows a labor organization the right “to prescribe its own rules with respect to the acquisition or retention of membership.” In this connection, the Union contends that Santana had no protected right to undercut the grievance authority of its business agent and no protected right to create his own rules for conducting an election for the then-occupied chief steward position. The Union also asserts that it acted lawfully, pursuant to the dictates of *Shenango*, in removing Santana from the committee representative position, because “his actions cut to the quick of two of the most fundamental internal rights a union has: (1) orderly administration of the process of repre-

senting members; [and] (2) the conduct and control of its various elective and appointive processes.” The Union finally argues that the judge’s reliance on the Supreme Court’s decisions in *Finnegan v. Leu* and *Sheet Metal Workers v. Lynn* is misplaced because those cases arose under a different statute, Title I of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411 et seq.

The General Counsel excepts to the judge’s dismissal of the 8(b)(1)(A) allegation pertaining to the shop steward position. In his cross-exceptions, the General Counsel urges that the judge’s distinction between elected and appointed officials, distilled from *Finnegan v. Leu*, supra, and *Sheet Metal Workers v. Lynn*, supra, is valid but that he erred in finding the steward position to be an appointed position, notwithstanding that the business agent selected Santana to be steward in the absence of a contested election. The General Counsel argues that the business agent has no discretion in choosing stewards under the Union’s system because if only one individual is interested and nominated for the position, that individual automatically becomes the steward. The General Counsel also points out that the judge incorrectly relied on the lack of a definite term of office to find the shop steward position to be an appointed one.

D. Discussion

This case presents the question whether the scope of Section 8(b)(1)(A)¹ extends to the union sanctions of removing an employee from the positions of shop steward and union representative on the contractually created Labor-Management Committee because of his dissident activities. It is, therefore, within the universe of union discipline cases the Board recently reexamined in *Office Employees Local 251 (Sandia National Laboratories)*, supra. There, the Board reviewed Section 8(b)(1)(A) and its proviso, its legislative history, and the seminal Board and Supreme Court cases pertaining to union discipline of union members. As a result of that exhaustive re-

view, the Board held that Section 8(b)(1)(A)’s proper scope in union discipline cases is to proscribe union conduct against union members that falls within several discrete areas. Thus, a union’s discipline of a member is within the reach of Section 8(b)(1)(A) if it impacts on the members’ relationship with their employer,² impairs access to the Board’s processes,³ pertains to unacceptable methods of union coercion such as violence,⁴ or otherwise impairs policies embedded in the Act.⁵ If union discipline of members falls within any one of these areas, it falls within the scope of Section 8(b)(1)(A) and its lawfulness will be determined by application of Board precedent. If the discipline does not fall within any of these areas, it falls outside the regulation of the NLRA and there will be no violation of Section 8(b)(1)(A).

Consistent with *Sandia*’s holding, we overruled *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972), and its progeny, which had expanded the reach of Section 8(b)(1)(A) by making the Board a forum for vindicating policies that Congress intended to be enforced through the procedures of the Landrum Griffin Act. *Sandia*, supra, slip op. at 8.

In view of our decision in *Sandia*, we do not agree with the judge or our dissenting colleague that the question whether the Union violated Section 8(b)(1)(A) by removing Santana from positions as a union representative turns on the Supreme Court’s decisions in *Finnegan v. Leu*, supra, and *Sheet Metal Workers v. Lynn*, supra. Those cases were decided under Title I of the LMRDA, 29 U.S.C. § 411(a)(1) and (2) (1976). As we noted in

² *Teamsters Local 823 (Roadway Express, Inc.)*, 108 NLRB 874 (1954).

³ *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679 (1964).

⁴ *Typographical Union (American Newspaper Publishers Assn.)*, 86 NLRB 951 (1949).

⁵ *Mine Workers Local 12419 (National Grinding Wheel Co.)*, 176 NLRB 628 (1969). The dissent in *Sandia* argued that the intraunion discipline there impaired a policy of the Act because it interfered with the Sec. 7 right to concertedly oppose the policies of union officials. The Board rejected this argument and held, instead:

[T]he 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, . . . 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. [*Sandia*, supra, slip op. at 8 (italics in original).]

¹ Sec. 8(b)(1)(A) states in relevant part:

(b) it shall be an unfair labor practice for a labor organization or its agents—to restrain or coerce (A) 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.

Sec. 7 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.

Sandia, supra, slip. op. at 7, 10, Congress gave to the federal district courts, not to the Board, authority to hear and decide suits brought to enforce rights under Title I of the LMRDA. See *Boilermakers v. Hardeman*, 401 U.S. 233, 239 (1971) (in enacting Title I, Congress explicitly referred claims “not to the NLRB but to the federal district courts”).⁶ Under *Sandia*, whether the union violated the Act must be determined by reference to the impact on the members’ relationship with their employer, the impairing of access to the Board’s processes, the use of unacceptable methods of union coercion such as violence, or the impairing of policies imbedded in the Act.⁷

1. The Union’s actions toward Santana do not impair access to the Board’s processes, involve such unacceptable forms of coercion as violence, or clash with a statutory policy imbedded in the Act

Applying these principles to the case at bar, we find first that the removal of Santana from the positions of shop steward and union representative on the Labor-Management Committee (committee) does not impede access to Board processes. Nor does it involve threats or acts of violence to force a dissident employee to take certain actions desired by the union. There is no contention or evidence to the contrary.

The removals also do not clash with a statutory policy imbedded in the Act. Although the position of union representative to the committee is created by contract, we find that removal from that position does not offend the basic statutory policy, favoring adherence to the terms of a collective-bargaining agreement.⁸ Article XXX does not prohibit the Union from removing its committee representatives for cause during the 3-year term. Accordingly, by removing Santana as its committee representative, the Union was not trying to change the structure of the committee or otherwise nullify its agreement with

⁶ As we noted in *Sandia*, supra, slip op. at 7 fn. 11, Congress also specifically rejected proposals that would have allowed Title I suits to be brought by the government. Rather, it determined that those suits should be brought to court by the aggrieved individual members themselves. *Id.* at 7, 10.

⁷ As we explained in *Sandia*, supra, slip op. at 4–6, we reject the claim, advanced by our dissenting colleague here, that we are free to base violations of Sec. 8(b)(1)(A) on violations of other labor laws because of the statement in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), that a union does not violate Sec. 8(b)(1)(A) if its discipline of an employee member “impairs no policy that Congress had imbedded in the labor laws.” Reading *Scofield* in its entirety, it is clear “that the statutory policies to which it was referring are those set forth in the Act.” *Sandia*, supra, slip op. at 6.

⁸ Cf. *Mine Workers Local 12419 (National Grinding Wheel Co.)*, supra (union offended such policy by imposing a penalty on members who had refused to strike in violation of the no-strike clause in the collective-bargaining agreement).

respect to article XXX of the contract.⁹ Furthermore, in removing Santana, the Union never intimated that it was not going to follow the contract’s procedure to select Santana’s replacement by holding an election. We, therefore, find that the removals did not fall within three of the areas *Sandia* identified as being within the scope of Section 8(b)(1)(A).

2. It is not necessary to determine whether, under *Sandia*, the Union’s actions toward Santana impaired his relationship with the employer, because even assuming such impairment, there is no violation under longstanding Board precedent

Whether the removals fall within the fourth area identified in *Sandia*—the impact on the employees’ relationship with their employer—is a more difficult question, particularly with respect to the position on the committee. Unlike the steward position, which is solely a union-created position, the collective-bargaining process creates the position on the committee. As such, it could be considered a term and condition of employment.¹⁰ Arguably, by removing Santana from this position, the Union adversely affected his conditions of employment.

Alternatively, removal from the committee arguably affects Santana only as a union member and does not affect his relationship with the employer. As noted earlier, article XXX of the contract describes the position as a representative of the “Union” as opposed to an “employee” representative. It could be argued that this description indicates that the individual elected to that position is subject to the union’s direction and approval and does not act as an employee in carrying out his committee duties and responsibilities.

Clearly, if we were to find that the removals did not affect Santana’s relationship with the employer, we would dismiss the 8(b)(1)(A) allegations under *Sandia* because the union’s action would not have fallen within any of the areas *Sandia* identifies as being within the scope of Section 8(b)(1)(A). We need not decide this issue, however, because even assuming that the removals impacted Santana’s employment relationship and were therefore within the scope of Section 8(b)(1)(A), we would still find no violation of Section 8(b)(1)(A) under Board precedent, which has not been affected by *Sandia*.

⁹ Cf. *Shell Oil Co.*, 93 NLRB 161, 164 (1951) (no unlawful employer refusal to bargain when union sought to nullify its agreement with employer when it insisted that the latter negotiate grievances with persons other than those previously agreed-upon members of workmen’s committees).

¹⁰ See, e.g., *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 206 (1991) (agreed-upon terms of collective-bargaining agreement become terms and conditions of employment).

3. The application of the Board's balancing test results in the finding that the removals do not violate Section 8(b)(1)(A)

If we assume that there is a clear nexus to the employee-employer relationship under *Sandia*, then the Union's removals come within the scope of Section 8(b)(1)(A). We must then determine whether the removals violated Section 8(b)(1)(A), by balancing the employees' Section 7 rights against the legitimacy of the union interest at stake in the particular case in accord with longstanding precedent.¹¹ To apply this test, we begin by analyzing the Section 7 rights that are affected by the Union's removing Santana from his positions both as shop steward and union representative on the contractually created Labor-Management Committee. In serving in these two positions, Santana was exercising his own Section 7 right to "assist labor organizations."¹² Additionally, to the extent he was elected to these positions by his fellow employees, Santana's service as a union representative implicated the Section 7 right of his fellow employees "to bargain collectively through representatives of their own choosing." Finally, as the judge found, in complaining about the Union's handling of the snow day grievance and in submitting a petition, signed by over 30 employees, seeking to have himself elected to the position of chief steward, Santana was exercising his Section 7 right to question the adequacy of his Union's representation of the bargaining unit and to seek to redirect his Union's policies and strategies for dealing with the Employer.¹³

¹¹ See *Shenango, Inc.*, 237 NLRB 1355 (1978). We note that *Shenango* relied in part on *Carpenters Local 22 (Graziano Construction)*, supra, a case that, as discussed above, we overruled in *Sandia*, supra, slip op. at 3, 4-5, 8. Our overruling of *Graziano*, however, was predicated on its use of Sec. 8(b)(1)(A) to enforce policies of the LMRDA. Id. We did not overrule *Graziano* insofar as it applies the general principle that a proper application of Sec. 8(b)(1)(A) requires balancing the employees' Sec. 7 right to engage in or refrain from concerted activity against the legitimacy of the union interest at stake. *Sandia* expressly reaffirmed several Board decisions in which the 8(b)(1)(A) issue turned on a weighing of the union interest in disciplining an employee and the policies and prohibitions incorporated in the Act. *Sandia*, slip op. at 8, citing *Mine Workers Local 12419 (National Grinding Wheel Co.)*, supra; *Molders Local 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208 (1969); and *Plumbers Local 444 (Hanson Plumbing)*, 277 NLRB 1231 (1985).

¹² See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983) ("Holding union office clearly falls within activities protected by §7. . ."). We note that in some cases, but apparently not this one, service in a shop steward position may carry with it valuable employment benefits, such as superseniority for purposes of layoff and recall. See *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), enf. 531 F.2d 1162 (2d Cir. 1976); *Gulton Electro-Voice, Inc.*, 266 NLRB 406, 409 (1983), enf. 727 F.2d 1184 (D.C. Cir. 1984).

¹³ See *Sandia*, supra, slip op. at 3, 8-9, discussing the longstanding principle that Sec. 7 encompasses the right of employees to persuade

To the extent that Santana's exercise of his Section 7 right to petition to become chief steward and to bring about a change in the Union's grievance handling ended up costing him his union positions as shop steward and committee representative, it is arguable that his Section 7 rights, and those of the employees who supported him, were restrained within the meaning of Section 8(b)(1)(A).¹⁴ But that is only the beginning of our analysis. We must balance the employees' legitimate right to engage in Section 7 activity against the legitimacy of the union interest at stake in the particular case.

In the present case, we find that, to the extent that the removal of Santana from his union positions may be deemed a restraint on Section 7 rights, that restraint is more than counterbalanced by the Union's legitimate interest in speaking with one voice, through trusted representatives, in dealing with the Employer about the bargaining unit employee's terms and conditions of employment. That point is most self-evident with respect to the Union's removal of Santana from his position as shop steward. A shop steward with grievance processing responsibilities "is the union *vis-à-vis* the employees as well as the employer" and as such "epitomizes the concerted activity of employees in organizing a union and regularizing their labor relations with their employer through a collective-bargaining agreement. . . ." *General Motors Corp.*, 218 NLRB 472, 477 (1975) (italics in original). In the performance of that important representational function, a union is entitled to have as its agents only those persons whom it trusts to act with an undivided loyalty. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 704-705 fn. 9 (1983).

For the foregoing reasons, the Board has previously held that a union does not violate Section 8(b)(1)(A) if it removes from positions with representational responsibility dissident employees who are hostile to and in disagreement with the policies of the current union leadership.¹⁵ To call such removals "reprisals" for the dissidents' Section 7 activities misses the point. As the Board explained in *Shenango, Inc.*, supra, 237 NLRB at 1355, a "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

their union representative to change its bargaining policies and to pursue changes in their working conditions.

¹⁴ *Helton v. NLRB*, 656 F.2d 883, 887-889 (D.C. Cir. 1981), relied on by our dissenting colleague.

¹⁵ See *Longshoremen ILA Local 1294 (International Terminal)*, 298 NLRB 479 (1990), and cases cited therein.

its side of the relationship with the employer.” Accordingly, we find that the Union’s removal of Santana from the shop steward position did not violate Section 8(b)(1)(A).

Our dissenting colleague agrees that the Union did not violate Section 8(b)(1)(A) by removing Santana from his position as shop steward. However, like the judge, he would find a violation with respect to the Union’s removal of Santana from his elected position as union representative on the contractually created labor management committee. Our colleague reasons that, while the Union was entitled to remove Santana from the appointed position of shop steward on loyalty grounds, the Union does not have a legitimate interest in countermending the democratic choice of employees to place Santana on the Labor-Management Committee. We disagree. We accept the judge’s factual finding that the shop steward position was appointed, not elected as the General Counsel contends.¹⁶ But even if it were otherwise and both positions were elected ones, it is our judgment that Santana’s being elected to his union positions does not outweigh the Union’s legitimate interest in ensuring the undivided loyalty of those who represent it in dealing with the employer about working conditions.

In disagreeing with our colleague and the judge on this point, we are guided by the principle that the Section 7 rights at issue are qualified and limited by the principle of exclusive representation expressed in Section 9(a) of the Act. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62–64, 70 (1975); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 687, 683–685 (1944). As *Emporium* recognized, a union, as the exclusive representative of the employees in dealing with the employer, has a legitimate interest in speaking with one voice “and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.” 420 U.S. at 70. A corollary of that right is the union’s right, discussed above, to have as its representatives in dealing with the employer only those persons of whose undivided loyalty it is assured.

Nothing about the Labor Management Committee or the contractual provision calling for the election of the union representatives to the committee for a 3-year term convinces us that the committee was intended by the parties to operate outside the traditional rules in which the Union is the exclusive representative of the employ-

ees and, as such, entitled to insist on the undivided loyalty of its bargaining representatives. The mission of the committee contemplates regular meetings “to explore new ways of working together effectively, including but not limited to techniques of performing and evaluating work, new methods of maximizing quality and efficiency, and new ways of joint problem-solving.” These topics include mandatory subjects of bargaining. Furthermore, by the express terms of the contract, the employees elected to serve on the committee for 3 years are “Union representatives.” The contract does not address or specify how the Union’s representative may be removed from the committee during the elected 3-year term or under what conditions. Without more, we find it reasonable to conclude that the Union retains the same right to remove Santana from his position as union representative on the committee as our colleague concedes it has with respect to the steward position. As previously stated, with respect to both positions, the Union, as the exclusive bargaining representative, is entitled to speak with one voice through representatives with whom it has complete trust.

In reaching the result we do, we recognize that a union may, if it chooses, contractually waive its right to act as exclusive bargaining agent of unit employees. See *Toledo Typographical Union 63 v. NLRB*, 907 F.2d 1220, 1222–1223 (D.C. Cir. 1990). It follows that a union could, if it so desired, consent to having representatives whom it could not remove on the basis of concerns about their loyalty to the union officials ultimately responsible for representing the bargaining unit. However, we find no such waiver here, much less the requisite “clear and unmistakable” waiver. See *Metropolitan Edison Co. v. NLRB*, supra, 460 U.S. at 708. The contract language simply gives no indication that, in agreeing to the election of union representatives on the committee for a fixed term, the Union was licensing a subgroup of employees to deal with the employer independent of the Union’s ultimate supervision and control.

4. The Board’s decision in *Hilde* is distinguishable

The General Counsel and our dissenting colleague rely on *Operating Engineers Local 400 (Hilde Construction Co.)*, 225 NLRB 596, 600–602 (1976), enf. mem. 561 F.2d 1021 (D.C. Cir. 1977). In *Hilde*, the Board found that the union violated Section 8(b)(1)(A) by imposing internal union fines on members who engaged in dissident activity in an attempt to redirect their union’s bargaining strategy. There, as here, the aggrieved employee members were engaged in Section 7 activity aimed at altering their union’s relationship with their employer and improving their terms and conditions of employment. The Board found that their employment relation-

¹⁶ As noted by the judge, there is no term of office for this position, thereby no regular mechanism by which unit members can democratically “elect” a new candidate. The fact that the Union periodically solicited employee input to inform its decision on which individual to appoint does not alter the traditional, appointed nature of the position.

ship was affected because their activity was directed toward the process by which their terms and conditions of employment would be settled. The Board held that the union's fining of the dissident employees restrained the employees' Section 7 rights, contrary to the policy of the Act, without being counterbalanced by a legitimate and substantial union interest.¹⁷

Assuming, as we do, that the union's removals impaired Santana's relationship with the employer (see discussion *supra*), we find *Hilde* distinguishable because there, unlike here, the employee members were not acting as the union's representative in dealing with the employer. Santana, of course, was serving as such a union representative. In contrast to *Hilde*, any arguable restraint on the employees' Section 7 rights was justified by the Union's legitimate interest in the undivided loyalty of its own bargaining representatives. Furthermore, unlike *Hilde*, where the dissident employees were fined, the measures that the Union took—relieving Santana of his representational responsibilities—were narrowly tailored to serve that legitimate union interest, while leaving Santana free to work within the Union in pursuit of his goal of trying to bring about a change in the Union's bargaining strategy.¹⁸

5. Questions concerning the continued validity of *Hilde*

Although, for the foregoing reasons, we find *Hilde* distinguishable, we note that we also distinguished *Hilde* in *Sandia*, *supra*, slip op. at 9. We would be remiss if we failed to acknowledge that part of the impetus for treating *Hilde* as a distinguishable exception is that *Hilde* rests on certain assumptions about the intended scope of Section 8(b)(1)(A) that are in considerable tension with our analysis in *Sandia*. Specifically the overall legal analysis in *Sandia*, slip op. at 3–8, casts doubt on *Hilde*'s assumption that Congress intended Section 8(b)(1)(A) to be the vehicle for resolving internal union disputes involving the formulation of a union's negotiating strategy unless, as the Board held in one of the foundational Sec. 8(b)(1)(A) cases, those disputes involve either union violence or a union's causing or attempting to cause the employer to alter the dissident employee's job status. See *Teamsters Local 823 (Roadway Express*,

Inc.), 108 NLRB 874 (1954), discussed in *Sandia*, *supra*, slip op. at 3, 9.

The underlying assumption in *Hilde* is that because a union is the employees' exclusive bargaining representative in dealing with their employer, disputes over the union's negotiating and grievance policy are not merely internal union affairs. Instead, *Hilde* assumed that fining union members for questioning the union's negotiating strategy has an impact on the employees' terms and conditions of employment that is sufficiently analogous to that in *Roadway Express*, *supra*—where the dissident employees actually lost their jobs with their employer—to warrant similar treatment. We doubt whether that analogy is sound. Cf. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 365 U.S. 342, 349–350 (1958) (whether unit employees have an opportunity to vote to accept employer's last contract offer before union calls a strike “settles no term and condition of employment” but “deals only with relations between the employees and their unions”).

Furthermore, even assuming the correctness of *Hilde*'s employment nexus assumptions, extending *Roadway Express* to regulate purely internal union sanctions, as the Board did in *Hilde*, raises the specter of the Board's becoming the regulator of a wide variety of internal union political controversies that Congress anticipated would be resolved within the framework of the LMRDA. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 187–197 (1967); *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 109–113 (1982). That is so because unions exist in large part to deal with employers about working conditions, and thus a large number of internal union disputes could fairly be characterized as disputes about how best to deal with employers. If the open textured language of Section 7, together with the term “restraint,” as broadly read by some courts,¹⁹ were intended by Congress to play the role they did in *Hilde*, the improbable consequence would be, as the Supreme Court observed in a related context, that “Congress preceded the Landrum-Griffin amendments with an even more pervasive regulation of the internal affairs of unions.” *Allis-Chalmers*, *supra*, 388 U.S. at 183. It is settled that Congress did not intend that Section 8(b)(1)(A) should have the scope that a purely literal reading of its terms might suggest. See *Pattern Makers League v. NLRB*, 473 U.S. 95, 101–102 (1985); *NLRB v. Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274, 280–292 (1960).

In sum, while it is unnecessary to our decision to finally decide whether *Hilde* was correctly decided, there is a number of reasons for questioning its continued va-

¹⁷ Our dissenting colleague notes that the judge's decision in *Hilde*, 225 NLRB at 601–602, also relied on policies expressed in the LMRDA. However, as we pointed out in *Sandia*, *supra*, slip op. at 9, that discussion in *Hilde* was unnecessary to the decision, which rested squarely on the Sec. 7 right of employees to question their union's representation of them and to seek to redirect their union's policies or strategies for dealing with their employer.

¹⁸ If the Union had fined or expelled Santana in response to his Sec. 7 activities, we would be presented with different issues than those we decide today.

¹⁹ See *Helton v. NLRB*, *supra*, 656 F.2d at 887–889.

lidity. It is clear that *Hilde* broadly protects against internal union sanctions that restrain union members' Section 7 rights to participate in formulating their union's strategy for dealing with the employer. It is less clear that *Hilde* adequately considers that, in enacting Section 8(b)(1)(A), Congress specified that that section's protection against restraints on Section 7 rights "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." See *Pattern Makers League v. NLRB*, supra, at 109 fns. 21–22; *Machinists v. Gonzales*, 356 U.S. 617, 620 (1958).

E. Conclusion

Regardless of questions about the continuing validity of *Hilde*, it is not controlling here. We have assumed that the removals of Santana from both union positions impaired Santana's relationship with the employer. We nevertheless find that the removals are not unlawful because the Union's legitimate interest in ensuring the undivided loyalty of union representatives who deal with the Employer about working conditions outweighs Santana's Section 7 rights and thus the removals do not constitute an unlawful restraint on those rights. Accordingly, we shall dismiss the complaint in its entirety.²⁰

ORDER

The complaint is dismissed.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues, I conclude that the Respondent violated Section 8(b)(1)(A) by removing Jorge Luis Santana from the *elected* position of representative on the Labor-Management Committee (LMC).

At the outset, it is important to distinguish between the alleged Section 7 activities of Santana and the alleged 8(b)(1)(A) response of the Union. The alleged Section 7

²⁰ While it is not decisive, we are not persuaded that the result we reach is inconsistent with *Sheet Metal Workers v. Lynn*, supra, relied on by the judge and our dissenting colleague. We note that no issue of the union's right, as exclusive bargaining representative, to the undivided loyalty of its agents for dealing with the employer was before the Court in *Lynn*. Also, in contrast to this case, where the judge found that Santana's activities had severely undercut the Union's authority in its dealings with the Employer over grievances, *Lynn* explicitly relied on the fact that there was no suggestion that the union officer there had "contravened any obligation properly imposed upon him." 488 U.S. at 355 fn. 6. The dispute in *Lynn* was purely an internal affair—the expenditures and financing of the union—and *Lynn's* removal from office frustrated the electorate that had put him in office for the purpose of reducing union expenditures. *Id.* at 349–350. Here, by contrast, the dispute involves the Union's representational role vis-à-vis the Employer, and the relevant elected officials are Santana's union superiors who, unless and until displaced by candidate Santana, have the right of the exclusive bargaining representative to exercise ultimate supervision and control over members dealing with the employer over working conditions.

activities were Santana's actions of protesting the resolution of a grievance, and his running for the position of chief steward. The alleged 8(b)(1)(A) responses were the Union's removal of Santana from the appointed position of shop steward, and the Union's removal of him from the elected position of LMC representative. As set forth below, I conclude that Santana's running for the position of chief steward was protected by Section 7, and that the Union's removal of him as LMC representative was unlawful under Section 8(b)(1)(A).

It is clear and uncontested by my colleagues that Santana was engaged in Section 7 activity when he announced that he would run for the position of chief steward. It is equally clear that, as the judge found, this Section 7 activity was a "major factor" in the Respondent's removal of Santana from the LMC.¹

I assume *arguendo* that Santana's continued advocacy of the "snow day" grievance was another reason for the Respondent's action. I further assume *arguendo* that this advocacy, which may have undercut the business agent's position, was unprotected.

Viewed in the foregoing light, I conclude that the General Counsel has shown that the Respondent's action was motivated, at least in substantial part, by protected activity. Further, the Respondent has not shown that it would have taken the same action for the unprotected activity standing alone.

I recognize that the Respondent's actions here were internal, i.e., they did not affect the terms and conditions of Santana's employment. I also recognize that a union can take some internal actions against an employee, even if these actions are prompted by Section 7 activity.² The test for determining the legality of a union's action is set forth in *Scofield*.³ The Supreme Court there said that the union's action is privileged if it: (1) "reflects a legitimate union interest," (2) "impairs no policy Congress has imbedded in the labor laws" (emphasis added), and (3) "is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 430.

In the instant case, the Union's action fails two of the three tests. First, it impairs a policy that Congress has imbedded in the labor laws. More specifically, Santana's quest for Union office was protected by the Labor-Management Reporting and Disclosure Act (LMRDA), and the Respondent punished him for making that quest. In making this point, I recognize that recent Board law holds that the "labor laws" mentioned in *Scofield* do not

¹ Santana was removed only 2 days after the announcement that he would be a candidate for chief steward.

² See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (union was privileged to fine employee-member for crossing a picket line).

³ *Scofield v. NLRB*, 394 U.S. 423 (1969).

embrace the LMRDA.⁴ I have set forth my contrary view in *Sandia*, supra, slip op. at 11, i.e., that the LMRDA is one of our nation's labor laws. Under that view, the Respondent's actions fail this aspect of the *Scofield* test.⁵

Contrary to the argument of the majority, I am not suggesting that the NLRB is obligated to "enforce" Title I of the LMRDA. Rather, I simply observe that, under Supreme Court precedent, the NLRB is to consider all of our nations labor laws in deciding cases under the NLRA.⁶

But even accepting current Board law, the Respondent fails to satisfy another of the *Scofield* tests. The Respondent had no legitimate interest in removing Santana from his elected position. In this regard, I distinguish between appointed positions and elected positions. This precise distinction is made in *Finnegan v. Leu*, 456 U.S. 431 (1982), and *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989). If a union official appoints an employee to a position of authority, the official can revoke that appointment if he/she believes that the employee can no longer be trusted for loyalty.⁷ However, if the position is an elected one, the *employee-membership* has vested the employee with authority. The union (acting through one official) does not have a *legitimate* interest in countermanning the democratic choice of the employees.⁸ As the Supreme Court said in *Sheet Metal Workers*, supra, 488 U.S. at 645: "when an elected official . . . is removed from his post, the union members are denied the representative of their choice."

My colleagues say that "the issue here involves removal and not selection" of a union official. To be sure, the allegedly unlawful act was the removal of the official. However, as discussed above, there is a vital difference between selection by appointment and selection by election. Thus, although the alleged unfair labor practice was the removal from office, the manner of selection (elected vs. appointed) is a relevant factor in determining whether the allegation has merit.

My colleagues argue that Santana was undermining the union's role as the exclusive bargaining representative.

⁴ *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB No. 193 (2000).

⁵ See also *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981). See also *Operating Engineers Local 400 (Hilde Construction Co.)*, 225 NLRB 596, 602 (1976). In *Hilde* (not overruled by my colleagues), the Board relied, in part, on the violation of Sec. 101(a)(2) of the LMRDA.

⁶ See *Scofield*, supra. See also *Southern Steamship v. NLRB*, 316 U.S. 31, 46 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives").

⁷ *Finnegan*, supra.

⁸ *Sheet Metal Workers*, supra.

As discussed above, I assume arguendo that Santana's opposition to the Union regarding the grievance resolution was unprotected because it was contrary to the position taken by the Union regarding the grievance.⁹ However, Santana's desire to run for a union office stands on a different footing. To say that this activity undercuts the Union's role is to undermine the whole concept of intra-union democracy.

Finally, I believe that my colleagues have confused employee exercise of rights under Section 7 and the union's response under Section 8(b)(1)(A). In *Hilde*, the Section 7 activity was the holding of an employee meeting relating to employment conditions. The union's response was a union fine, i.e., it was wholly internal. As discussed above, an internal fine is unlawful if it fails to meet *Scofield* criteria. On that basis, the Board found a violation.

Similarly, in the instant case, the Section 7 activity was Santana's running for union office.¹⁰ The fact that this activity was intraunion did not take it out of Section 7. It was simply a different kind of Section 7 activity, as compared to the one in *Hilde*. The Union's response, as in *Hilde*, was wholly internal. Applying *Scofield* principles, that response was unlawful under Section 8(b)(1)(A).

Based on the above, I conclude that the Respondent violated Section 8(b)(1)(A) by removing Santana from his elected position in retaliation for his Section 7 activity. I therefore dissent.¹¹

Robert J. DeBonis, Esq., for the General Counsel.

Peter J. O'Neill, Esq., of Boston, Massachusetts, for Respondent Union.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On June 24, 1996, Jorge Luis Santana, an individual, filed a charge against Local 254, SEIU, Respondent Union.

On January 24, 1997, the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint alleging that Respondent Union violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act), when on May 8,

⁹ See *Emporium Capwell v. Waco*, 420 U.S. 50 (1975) (employees' activity was unprotected where they sought to bypass the union-employer grievance procedure and to bargain directly with the employer).

¹⁰ As indicated supra, Santana's protest of the Union's handling of the "snow day" grievance may have been unprotected under *Emporium*.

¹¹ In *Sandia*, I concluded that the controversy should be adjudicated under the LMRDA. By contrast, in the instant case, there is a strong nexus to NLRA concerns. The LMC position and the terms governing it are set forth in the collective-bargaining agreement.

1996, it removed the Charging Party, Jorge Luis Santana, a custodian at Brandeis University, from his position as a steward and from his position as a representative to the Labor-Management Committee.

Respondent Union filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Boston, Massachusetts, on May 27, 1997.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Brandeis University, the Employer, a corporation, with an office and place of business in Waltham, Massachusetts, has been engaged in the operation of a nonprofit private educational institution.

Respondent Union admits, and I find, that at all material times, the employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Union admits, and I find, that Local 254, SEIU, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Section 8(b)(1)(A) of the Act provides that “[i]t 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 the Act].”

Section 7 of the Act provides that “[e]mployees 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 such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).”

Under Section 7 of the Act, union members have a right to participate in internal union affairs, to question the wisdom of their representation, and to attempt to redirect its policies or negotiating strategies.

It appears clear, however, that a union can demand teamwork, loyalty, and cooperation from its *appointed* officials, to include shop stewards and representatives to labor management

committees, and that this power to demand teamwork, loyalty, and cooperation is such that a union can remove an appointed union official from his position without violating the Act if the union determines that the *appointed* union official is not a team player or isn’t loyal, or is not cooperative.

A comparison between the Supreme Court decisions in *Finnegan v. Leu*, 456 U.S. 431 (1982), which dealt with an *appointed* union official and *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), which dealt with an *elected* union official, makes this clear.

The Board has also addressed this issue, maybe most notably, in *Shenago, Inc.*, 237 NLRB 1355 (1978), where one of the issues was whether the union violated Section 8(b)(1)(A) of the Act when it removed a member from his *appointed* position as safety committee chairman because of his activities in connection with an internal union election, i.e., he supported the candidacy of the losing candidate for union President.

The Board found no violation of the Act in *Shenago, Inc.*, supra, and held:

The issue is one of balancing the employee’s Section 7 right to engage in internal union affairs against the legitimacy of the union interest at stake in the particular case. Thus, in *Carpenters Local Union No. 22, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (William Graziano, d/b/a Graziano Construction Company)*, 195 NLRB 1 (1972), the union had no legitimate interest in fining a member for opposing the incumbent union officers, so the balance was properly struck in favor of the employee and the violation was found. Similarly, in *General American Transportation Corporation*, 227 NLRB 1695 (1977), the Board found an 8(b)(1)(A) violation where the union removed the steward from office because he filed an unfair labor practice charge with the Board. There, the union had no legitimate interest in defeating employee access to the Board. See, generally, *Scofield, et al. v. NLRB*, 394 U.S. 423, 428–430 (1969).

Here, however, the Union does have 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. That this may add up to union hostility toward having a dissident in such positions and make his dismissal a reprisal, as it did here, does not alter the case. *The union is legitimately entitled to hostility or displeasure toward dissidence in such positions were 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.* In the circumstances of this case, the Union’s interest outweighs the interest of Ligashesky in retaining his office, and therefore, we do not find a violation in his removal from office or in the March 8 statement to Ligashesky informing him that his removal was caused by his support for Sadlowski.” (Emphasis added.)

In order to decide the instant case, it is imperative to determine if Santana was an appointed or an elected union official and to determine why he was removed as shop steward and as a representative to the labor-management committee.

B. Shop Steward

Jorge Luis Santana is a custodian at Brandeis University and represented by the Respondent Union.

On August 8, 1994, he became one of two shop stewards for the custodians when one of the two custodian shop stewards resigned and Santana took his place. It is my opinion that Santana was *appointed* rather than *elected* to this position.

The constitution and bylaws of both the SEIU International and Local 254, Respondent Union, are silent on the issue of shop stewards. There are a number of officer positions in the Respondent Union spelled out in the constitution and bylaws which are filled for a term of years following an election. Shop steward is not among them. The practice within Respondent Union, which represents a large number of bargaining units, to include the 120 or so employees in the bargaining unit at Brandeis University, approximately 73 of whom are custodians, is for the union business agent to decide who is to be shop steward and for how long he or she serves. Sometimes the business agent will appoint one or more shop stewards for a particular group of employees or conduct an election between two or more employees who want to be a shop steward. There is no term of office if the person becomes a steward.

In the case of Santana one of two shop stewards for the custodians resigned his post. Union Business Agent Cathy Conway asked who among the custodians wanted to be a shop steward and only Santana expressed an interest in becoming a shop steward. Since only Santana expressed an interest in becoming shop steward, Conway said there would be no need for an election and Santana was named shop steward. In light of the above I find that Santana was *appointed* to the position of shop steward. Again, the union business agent selects the steward and in deciding who to give the position to either selects someone outright or selects the winner of an election among those interested in becoming steward. There is no term of office for shop steward and shop stewards serve at the pleasure of the business agent.

C. Representative to Labor-Management Committee

In October 1995 Santana became a representative to the Labor Management Committee. The collective-bargaining agreement between Respondent Union and Brandeis University called for the establishment of a Labor-Management Committee. There was to be five representatives on the Committee from management and five from Respondent Union. The contract specifically provided that the union representatives to the Committee would be *elected* for 3-year terms.

Union Business Agent Conway asked the custodians who among them wanted to be on the labor-management committee.

The only one expressing an interest was Santana who submitted a nominating petition signed by some fellow custodians supporting his candidacy. Since only Santana expressed an interest he was designated one of the union representatives to the labor-management committee. The committee meets to discuss matters of mutual concern to management and workers so that operations run more smoothly, more efficiently, and more fairly at Brandeis.¹ I find that Santana's position as a member of the labor-management committee was an *elected* rather than an *appointed* union position because the contract between the Union and Brandeis University called for the union representatives to the committee to be *elected* and once elected they held office for a term of 3 years.

D. Removal of Jorge Luis Santana as Shop Steward and Representative to Labor-Management Committee

The next issue to decide is why was Santana removed as shop steward and representative to the labor-management committee.

¹ ARTICLE XXX LABOR-MANAGEMENT COMMITTEE

Effective upon execution of this Agreement, a joint Labor-Management Committee (the "Committee") shall be formed, consisting of 5 representatives of the Union and 5 representatives of the University.

Union representatives shall be elected for three year periods by secret ballot from each of the following areas:

Grounds	1 representative
Crafts	2 representatives
Custodians	2 representatives

The University shall designate its representatives. In addition, the committee can call upon other individuals and resources as necessary. The committee may also decide to perform its work through the use of subcommittees or other combinations.

The committee shall meet a minimum of once every month for the purpose of discussing and attempting in good faith, through mutual cooperation and creativity, to solve problems that interfere with the ability of the bargaining unit to remain a viable, competitive source of custodial, grounds and trade services for the University. The parties knowledge that in light of competitive pressures in the marketplace, they face a joint challenge to provide the best possible service to the University in the most efficient manner. The committee shall attempt to explore new ways of working together effectively, including but not limited to techniques of performing and evaluating work, new methods of maximizing quality and efficiency, and new ways of joint problem-solving. The University may, at its discretion, provide training and/or other support for the Committee to enhance its work. The committee shall attempt to use techniques such as brainstorming, quality initiatives, experimentation and incentives to generate new and better ways of serving the University.

The parties agree that the committee shall not be a substitute for collective bargaining, but it will serve as a new approach to the parties' relationship, designed to make it more productive. Nothing in this agreement shall limit the University from using other quality-enhancing training and development techniques.

Bargaining unit members of the committee will be given release time to perform Committee work when it arises during their regular work hours, and shall be given compensatory time at time and one half when such committee work, as directed by the University, occurs outside their regularly scheduled hours.

In December 1995, a number of custodians were docked a day's pay for not showing up for work on a snow day when the University had shut down because of the snow.

Apparently, in the past, if the University was shut down because of the weather, and custodians who were supposed to report to work, even if the University was closed, couldn't get to work because of the weather conditions they would still be paid. The 1995–1996 winter was a particularly harsh winter in the northeast as many of us remember and some custodians couldn't get to work on several different days when the University was otherwise shut down due to weather conditions.

On January 17, 1996, Santana filed a grievance over the failure of the University to pay custodians for these days missed. The grievance was resolved with the input of Business Agent Cathy Conway with all the grievants being made whole by getting paid the moneys they had been docked and an agreement in the future that if an *essential* employee couldn't get to work because of weather conditions the particulars of each incident would be examined on a case-by-case basis and if the absent employee had a good excuse the employee would be paid even though the employee never made it to work.

Unsatisfied with the handling of the grievance by his union superiors, Santana encouraged a number of custodians to file a class action grievance on March 18, 1996, which was resolved as noted above but Santana complained about that disposition on April 26, 1996. Santana sought to reopen the entire question of who is an essential employee and what are the effects of that designation on issues such as overtime. This was done without consulting with his union superiors. In short, Santana's complaints and actions severely undercut the authority of Business Agent Conway.

On May 6, 1996, Santana presented two petitions to Conway. One petition, signed by 32 custodians, sought the selection of Ricardo Vasquez as shop steward and the second petition, signed by 38 custodians, nominated Santana for the position of chief steward and sought an early election for that position. The chief steward's position was one which had traditionally been an appointed position and for which there was no opening since, in the Union's opinion, the incumbent chief steward, Jack O'Malley, was doing a good job.

Two days later on May 8, 1996, Business Agent Cathy Conway sent a letter to Jorge Luis Santana advising him that he was being removed from his positions as shop steward and representative to labor management committee. The letter stated in pertinent part:

Pursuant to our recent telephone conversations and discussions, I am investigating several problems reported by our members involving the two (2) representational positions you hold on behalf of Local 254—i.e., Custodial Shop Steward and Custodial Labor-Management Committee representative.

As I explained to you in the those conversations, I want to provide you an opportunity to understand these problems by

way of a written outline of the complaints brought to my attention over the last few weeks.

First, with regard to your role and responsibilities as Shop Steward, the following issues have been raised:

- 1) inappropriate handling of grievances, including:
 - failure to consult with grievant about appeal to next level
 - unauthorized communications to the Director of FMD concerning grievances (two instances)
 - conducting unauthorized Union meetings with sub-groups of employees
 - failing to invite and include all Union members in said meetings
 - utilizing said meetings for activities that are injurious to Union members and cause dissension within the Union
 - failure to disclose information about grievances to Business Agent

With regard to your Labor-Management Committee position:

- failure to work cooperatively with the other Custodian LMC representative
- failure to disclose information about LMC business with LMC team and Business Agent

Please be advised that the problems cited above have been reported by members and/or directly observed or experienced by me.

The bottom line is simply this: We are a Union charged with working together to further the interests of our membership.

It has become increasingly clear that I cannot rely on your cooperation in carrying out our responsibilities to our membership.

Therefore, effective immediately:

- 1) I am removing you from the position of Shop Steward at Brandeis University;
- 2) I am removing you from the Labor-Management representative position at Brandeis University;
- 3) I am requesting that you turn over all Union records and materials, immediately. You may turn over these items to either Jack O'Malley or me at your earliest convenience.

This action is unfortunate, but necessary, in order to adequately protect the Union and its membership at Brandeis University.

As the hearing before me Conway testified, in pertinent part, as follows:

Q. Why did you remove Mr. Santana as a Shop Steward?

A. I removed Mr. Santana for several reasons. Over a period of roughly 2 months prior to my decision to remove him, I had received calls from members at Brandeis and

had several communications on site with members in the course of my visits and activities at Brandeis, complaining about Mr. Santana's activities as a Shop Steward.

There were at least two incidences where grievance handling became a specific problem, and Mr. Santana was also conducting meetings with different groups of the membership. And I specifically received complaints about the fact that he was meeting at the time and speaking in Spanish. Members were not invited and when they entered the meeting, they said that the conversation stopped. Those were some of the specific complaints received from the membership regarding his activities as Shop Steward, and were the reason I began to really look at the execution of his duties during that time period.

Q. Did this conduct violate the Constitution of Local 254?

A. Yes, it did.

Q. Did you remove Mr. Santana because he was nominated for the position of Chief Steward?

A. No, I did not.

Q. Was Mr. Santana, in fact, nominated for the position of Chief Steward?

A. Well, Mr. Santana certainly submitted a nomination form. The position of Chief Steward was in no way under consideration for the purposes of nomination or election at Brandeis. Chief Steward is a position that has always historically been appointed, one that carries with it, pursuant to the collective bargaining unit, certain responsibilities at the higher levels of other grievance process. So the Chief Steward is always served at the discretion of the business agent at Brandeis University.

Q. Do you need a reason to remove a Shop Steward?

A. Certainly not any type of formal or technical reason, but in this case I had several.

Q. Was there a vacancy for the position of Chief Steward?

A. No, there was not.

Santana is fluent in both English and Spanish. Over 50 percent of the custodians speak Spanish and have little or no facility in English. Santana admits he held meetings with Spanish only speaking custodians but all custodians were welcome and he was not aware he was not supposed to do so.

Santana concedes he filed a second-step grievance on behalf of member Michael Dinnuno who lost his grievance at step one but didn't want his grievance appealed to step two. However, Santana believed as a shop steward he could appeal to step two and thought, inaccurately, that Dinnuno, who lost at step one, would want him to do so.

When all is said and done it is obvious that the union leadership, did not feel, rightly or wrongly, that Santana was a team player, loyal, and cooperative and, accordingly, Respondent Union was within its rights to remove Santana from his *appointed* union position as shop steward without violating the Act. Santana's removal did not affect his job at Brandeis University nor the pay and benefits associated with that job.

Santana's removal as elected representative to the Labor-Management Committee is a different matter.

The Labor-Management Committee post is a 3-year elected position under the collective-bargaining agreement and Santana was removed for the two reasons stated in Conway's letter to Santana of May 8, 1996, which is set out above. Suffice it to say, Santana denied before me, that he failed to work cooperatively with the other custodian committee representative or failed to disclose information about committee business with the committee team and business agent. No evidence other than Conway's conclusions on these allegations was presented by the Respondent Union. Conway testified that Santana's running for chief steward was not the reason he was removed from his union positions; however, she didn't say it wasn't a factor and the juxtaposition of events is such that I find, as a practical matter, that it was a major factor in Santana's removal from the two union positions he held.

Indeed I find that Respondent Union perceived Santana as a "pain [in] the neck" mainly because of his actions surrounding the snow day grievances and his running for chief steward. These are not valid reasons to remove a member from an *elected* union position because they are protected employee activity. There is no evidence that the custodians were dissatisfied with Santana's representation of them on the Labor-Management Committee and since it was an *elected* position Respondent Union was without authority to remove him from that elected position because of his protected activity taking positions contrary to the union leadership on the disposition of grievances and his candidacy for the chief steward's position. Accordingly, the removal of Santana from his position as representative to the labor-management committee violated Section 8(b)(1)(A) of the Act.²

REMEDY

The remedy in this case should be a cease-and-desist order, the reinstatement of Santana to his elected position as representative to the labor-management committee for the remainder of his term, the payment of a sum of money by Respondent Union to Santana that equals the amount of money Santana lost because of his unlawful removal from office, with interest, and removal from Santana's union file of any reference to his unlawful removal from his position as representative to the labor-management committee.

CONCLUSIONS OF LAW

1. Brandeis University is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

² Santana vigorously protested his removal from both positions in many correspondences with Respondent Union leadership and clearly exhausted his internal union remedies. See GC Exhs. 18-22.

3. Respondent Union violated Section 8(b)(1)(A) of the Act when it removed Jorge Luis Santana from his elected position as representative to the labor-management committee.

4. This unfair labor practice effects commerce within the meaning of Section 2(6) and (7) of the Act.
[Recommended Order omitted from publication.]