This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) of the Act by prohibiting nonmember objectors from attending a meeting where it sought input from members on bargaining proposals for upcoming contract negotiations. We initially conclude that, under extant law, the Union did not breach its duty of fair representation because it did not use the meeting as a substitute for the process of negotiating with the Employer. However, the Region should issue complaint, absent settlement, and (b) (5)

FACTS

In 2009, County Concrete Corp. (“the Employer”) recognized Teamsters Local 863 (“the Union”) as the exclusive bargaining representative for the employees at its six facilities in New Jersey. In 2016, the parties entered into five separate collective-bargaining agreements covering the six facilities, each of which included a union-security clause and expired around the same time in early 2019. There are

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1 See Letter Carriers Branch 6000, 232 NLRB 263, 263 & n.1 (1977), enforced, 595 F.2d 808 (D.C. Cir. 1979); Boilermakers Local 202 (Henders Boiler & Tank Co.), 300 NLRB 28, 28 n.2 (1990); American Postal Workers Union (Postal Service), 300 NLRB 34, 35 (1990) (hereinafter “APWU”).
about 135 represented employees across the facilities, and about 25% of them are nonmember objectors who have opted out of full Union membership and pay reduced dues only for the Union’s representational activities. In 2018, nonmember objectors paid roughly $46.00 per month in dues compared with $49.00 per month for full members.²

In early 2019, the Union posted flyers at the facilities announcing a “Contract Proposal Meeting . . . for all full members” to be held on January 13 at a local VFW hall in anticipation of successor contract negotiations with the Employer. The Charging Party and two other employees, all nonmember objectors, attempted to attend the meeting but were informed by a Union official that the meeting was for full members only. The Charging Party argued that  was entitled to attend as a member of the bargaining unit and asked why  could not attend a meeting discussing the next contract. The Union official told  was paying the Union to work. At the meeting, the Union provided full members the opportunity to select employee-members of the bargaining committee. In addition, the Union discussed bargaining strategy and solicited contract proposals. Some of those proposals were ultimately brought to the bargaining table, while others were rejected at the meeting.

**ACTIONS**

We initially conclude that, under extant law, the Union did not breach its duty of fair representation because it did not use the meeting as a substitute for the process of negotiating with the Employer. However, the Region should issue complaint absent settlement for purposes of

A. The Union Did Not Violate Section 8(b)(1)(A) Under Current Board Precedent by Excluding Nonmember Objectors from the Bargaining Strategy Meeting.

In workplaces where an applicable collective-bargaining agreement includes a union-security clause, employees have the right to choose between becoming a full member of the union, a financial core nonmember, or a nonmember objector.³

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² For ease of reference, we refer to these employees as “nonmember objectors.” Because they pay reduced dues and fees, it appears that they are *Beck* objectors who are unwilling to pay for the Union’s nonrepresentational expenses rather than financial core nonmembers. This distinction is further explained below.
Financial core nonmembers fully support the union financially but neither have the right to participate in internal union matters nor are subject to internal union discipline.\(^4\) Nonmember objectors go the additional step of objecting to pay dues for the union’s nonrepresentational expenses, but remain obligated to pay those that are related to “collective bargaining, contract administration, and grievance adjustment.”\(^5\) Regardless of an employee’s membership status, a union serving as an exclusive bargaining representative is obligated to represent the interests of all unit employees “without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”\(^6\) A union’s actions are considered arbitrary and breach the duty of fair representation “only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.”\(^7\) The wide range of reasonableness affords a union discretion to account for conflicting interests of the employees it represents.\(^8\) However, the duty of fair representation applies only to matters affecting the terms and conditions of employment.\(^9\) The Board has found that union procedures relating to the adoption, ratification, or acceptance of collective-bargaining agreements do not fall within the scope of Section 8(d)’s “wages, hours, and other terms and conditions of employment,” but rather are matters

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\(^4\) See, e.g., *Food & Commercial Workers Local 700 (Kroger Limited Partnership)*, 361 NLRB at 421, n.6.

\(^5\) *Beck*, 487 U.S. at 745.


“exclusively within the internal domain of the [u]nion.” Accordingly, a designated collective-bargaining representative is under no statutory obligation to obtain the formal consent or ratification of unit employees before negotiating and entering into binding agreements with an employer.

Consistent with those principles, currently a union is typically permitted to exclude nonmembers, whether financial core nonmembers or nonmember objectors, from participating in matters related to bargaining. However, where it has delegated its exclusive bargaining authority to the unit employees such that their participation, i.e., in a vote, constitutes a “substitute for negotiation,” it effectively loses its ability to claim the matter as an internal union one from which it can exclude non-members. In *Letter Carriers Branch 6000*, the Board held that the union violated Section 8(b)(1)(A) by excluding nonmembers from voting on whether bargained-for days off would be on a fixed or rotating basis over the course of the following year. The Board held that the vote was not an internal union matter from which nonmembers could be excluded because the union had delegated its exclusive representational authority to determine work schedules for the year to the unit employees. By delegating to unit employees the choice of how an already bargained-for term would be implemented, the union took that decision out of its internal domain as the exclusive bargaining representative and, as a result, limited its ability to exclude any group of its represented employees. Thus, unlike purely internal matters from which the union could lawfully bar nonmember participation, such as advisory votes on contract ratification or choosing bargaining committee members, the vote operated

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10 *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB at 1336 (quoting *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967)).

11 *Id.* (citing *North Country Motors, Ltd.*, 146 NLRB 671, 674 (1964)). See also *Laborers Local 652 (Professional Community Management)*, 237 NLRB 442, 442 n.2 (1978) (finding union did not violate Section 8(b)(1)(A) by deliberately denying an employee the opportunity to vote on ratifying a proposed collective-bargaining agreement; “[t]he ratification vote was not even a condition precedent to arriving at a contract and, since it did not affect employment conditions but only involved the employee-union relationship, was strictly an internal union matter”).

12 See *Letter Carriers Branch 6000*, 232 NLRB at 263, n.1; *APWU*, 300 NLRB at 35.

13 232 NLRB at 263 & n.1.

14 *Id.* at 263, n.1.
as a “substitute for negotiation.” In this context, where the union was not acting in its representative capacity, its allowing only full members to make a determination on a working condition important to all unit employees “necessarily discriminates against nonunion unit employees” and encourages them to support the union.

Conversely, in APWU, the Board applied the “substitute for negotiations” rationale and held that the union did not violate Section 8(b)(1)(A) when it excluded nonmembers from a meeting where potential responses to planned changes in working conditions were discussed. There, the union called a meeting in response to a group of employees, both members and nonmembers, who approached union officials with questions on how to respond to the employer’s plan to eliminate special delivery routes, which would result in the loss of shifts and jobs. At the start of the meeting, the union president asked nonmembers to leave and refused to answer their questions unless they joined the union. The union then discussed the route changes, the applicability of contract provisions, possible positions it could take regarding the route changes, and announced it would follow the collective-bargaining agreement. The union subsequently met with the employer about the changes. The Board held that the exclusion of nonmembers from the internal union meeting did not violate Section 8(b)(1)(A) because there was no evidence that participation in the meeting “was a substitute for negotiations or that the [union] had turned over to the majority vote of members its decision-making power as the representative of all employees.” In reaching this conclusion, the Board found that attendance at a meeting to consider possible responses to workplace issues is not a fundamental right of union

15 Id. See also NLRB v. Financial Institution Employees Local 1182 (Seattle-First National Bank), 475 U.S. 192, 205 (1986) (noting that “[n]on-union employees have no voice in the affairs of the union” including whether “to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives” or vote on union affiliation).

16 Letter Carriers Branch 6000, 232 NLRB at 263. See also Boilermakers Local 202 (Henders Boiler), 300 NLRB at 28 n.2, 30 (applying the “substitute for negotiations” rationale in finding that the union had violated Section 8(b)(1)(A) by refusing to count the votes of nonmembers where it had delegated to the unit employees its role of selecting the date of a floating holiday).

17 APWU, 300 NLRB at 34.

18 Id. at 34.

19 Id. at 35.

20 Id.
representation, such as access to grievance procedures and exclusive union hiring halls. It also noted that no evidence showed the union either had ignored the interest of nonmembers or had foreclosed access for employees with a divergent view, because nonmembers could have conveyed their views to the union officials after the meeting.

The current case is controlled by APWU because, as in that case, there is no evidence here that the Union delegated its bargaining authority to the unit employees or intended the January 13 meeting to serve as a substitute for upcoming successor contract negotiations with the Employer. Rather, the Union called the meeting to discuss bargaining strategy and to allow members to offer suggestions for proposals and elect bargaining committee members. While the Union did raise some proposals from this meeting during subsequent negotiations with the Employer, it rejected several others and explained at the meeting why those demands would be untenable. Thus, unlike in Branch 6000 and Henders Boiler, supra, the Union did not give full members either the ability to decide how an already bargained-for term would be implemented or the authority to make a final decision about any employment term. Because the Union retained its representational authority on how to best represent the unit employees, it did not violate Section 8(b)(1)(A) by excluding nonmember objectors from the meeting.

B. (b) (6), (b) (7)(C)

The Region should issue complaint, absent settlement. (b) (5)

Initially, APWU and other cases relying on the “substitute for negotiations” rationale rest on the faulty premise that unions will consider nonmembers’ views about contract negotiations even if they are excluded from bargaining strategy meetings. In finding no violation in APWU, the Board justified its decision, in part, by

\[\text{\textsuperscript{21 Id. at 34.}}\]

\[\text{\textsuperscript{22 Id. at 35, n.6.}}\]
noting “there is no evidence that the [union] ignored the interest of nonmember employees or . . . that nonmembers could not have communicated their views to the [union’s] representatives after the meeting.” But the facts of that case clearly refute those findings. The union’s president and vice-president refused to allow nonmembers to attend a meeting they had called to discuss the employer’s route changes, and then they refused to answer questions from a nonmember about that topic unless he immediately agreed to join the union. Further, the union president testified that nonmembers “have no voice in the formation of bargaining policies” and that the dues of members should not go towards providing services for nonmembers that are not required to be provided to them. In short, the facts in *APWU* do not support the Board’s assumption that unions will provide nonmembers, who are excluded from bargaining strategy meetings, with an opportunity to make their views about bargaining proposals known to union officials or coworkers. And this applies to the current case where nonmembers are obligated by a union-security clause to pay a union for its collective-bargaining services.

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23 *300 NLRB* at 35, n.6.

24 The Board held in *APWU* that the union president’s refusal to answer a nonmember’s question unless he immediately joined the union violated Section 8(b)(1)(A). *Id.* at 35.

25 *Id.* at 39.


27 *See Teamsters Local 671 (Airborne Freight Corp.*), 199 NLRB 994, 999-1000 (1972) (finding union breached its duty of fair representation toward nonmember, part-time unit employees by, among other things, not inviting them to meeting called to discuss contract proposals for an initial contract; had the part-time employees been present, they could have raised options other than the contract proposal adopted by the union.
Significantly, requiring the Union to include nonmembers in meetings where bargaining proposals are discussed also would impose no undue burden on unions. Initially, the requirement would not affect the exclusive domain of unions over their collective-bargaining process, specifically, their privilege to serve as exclusive bargaining representatives without requesting input from unit employees before or during contract negotiations. It is only when a union schedules a meeting to solicit input about upcoming contract negotiations and restricts access to full members should it be found to have breached its duty of fair representation. Second, members, which required the part-timers to become full-time employees or be discharged.

28 Cf. Letters Carriers Branch 6000, 232 NLRB at 263 (“For the subject of the vote was the specific work schedule for the next year, a matter which directly concerned each employee in the unit and one of which all were entitled to express their wishes”).

29 See, e.g., Boilermakers Local 202 (Henders Boiler), 300 NLRB at 32 (noting that the respondent-union’s “exclusion of nonunion employees from the voting process [to select the date of a floating holiday] had the natural tendency of persuading them to become union members in order to have a voice in their working conditions”); Letters Carriers Branch 6000, 232 NLRB at 263.

30 See Longshoremen ILA Local 1575 (Navieras, NPR), 332 NLRB at 1336.

31 The Board recognizes a distinction between contract ratification procedures that unions impose on themselves to serve a purely advisory function and those agreed to by the parties as a condition precedent to a binding contract. See, e.g., Beatrice/Hunt-Wesson, 302 NLRB 224, 224 n.1 (1991). When the former is involved, unions should remain free to determine which unit employees are eligible to vote because the procedure involves a purely internal matter to which the duty of fair representation does not apply. See, e.g., Longshoremen ILA Local 1575 (Navieras, NPR), 332 NLRB at 1336-37 (citing NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 350 (1958)). However, when dealing with the latter, the duty of fair representation applies, and unions may violate Section 8(b)(1)(A) by excluding any unit employee from the process. See Western Conference of Teamsters (California Cartage Co.), 251
Such matters have a significantly more attenuated relationship to employment conditions than having the opportunity to have a voice in what proposals will be brought to the bargaining table.

Accordingly, though the Union did not violate the Act under extant law, the Region should issue complaint, absent settlement, and

/s/
R.A.B.


In situations where, as here, a union holds a pre-negotiation meeting both to discuss bargaining proposals and select bargaining committee members, it should be free to structure its event so that only full members are involved in the latter activity or the other purely internal matters noted above.

There is no inconsistency in advocating for a rule requiring unions to grant all unit employees access to pre-negotiation meetings while not requesting the same for advisory contract ratification votes. In the former situation, employee discussions occur before the union has begun negotiating with the employer, so the union remains completely free to alter its bargaining proposals to incorporate employee views. In the latter, the union already has bargained with the employer and obtained during that process the best terms likely for the unit employees. At that point, it would not serve the interests of unit employees to require unions to fully consider divergent views about contract terms.