UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

INTERNATIONAL UNION OF JOURNEYMEN HORSESHOERS AND ALLIED TRADES and STEVEN RICHARD ELLIOTT, its President,	:	03-CV-6070 (ARR) (KAM)
Plaintiffs,	:	
-against-	:	OPINION AND ORDER
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and JOHN J. SWEENEY, its President,	:	
Defendants.	:	

ROSS, United States District Judge:

Plaintiffs, a labor union and its president, brought this lawsuit under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that the defendant American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") acted in violation of its own constitution when its president, defendant John Sweeney, refused to recognize the plaintiff union as a chartered AFL-CIO member following plaintiffs' affiliation with a larger union. Plaintiffs also claim that defendants expelled them in violation of their rights under § 101(a)(5) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5). The parties have cross-moved for summary judgment on both claims. For the reasons stated below, plaintiffs' motion for summary judgment is denied and defendants' cross-motion is granted.

BACKGROUND

Though the parties sharply dispute the legal significance that attaches to the events described below, there are few actual disputes regarding the underlying facts.[1]

1. *The AFL-CIO Constitution*

Defendant American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO" or "the Federation") is a federation of sixty-one national and international unions. (Decl. of Jonathan P. Hiatt, Apr. 15, 2004 ("2004 Hiatt Decl.") ¶ 6.) The Federation's structure and operations are governed by its constitution ("the constitution."). (2004 Hiatt Decl. ¶ 7; "AFL-CIO Constitution," Def. Ex. A.) Under the constitution, the sixty-one chartered affiliate national and international unions are "affiliated with, but are not subordinate to, or subject to the general direction or control of, the Federation." (Art. III § 1.)[2]

The Federation's highest governing body is the convention, convening every four years or in special conventions at the behest of the Executive Council or a majority of the chartered affiliate unions. (Art. IV §§ 1, 3.) The next regularly scheduled convention will take place in 2005. (2004 Hiatt Decl. ¶ 7.) Affiliates are represented at the convention by delegates allotted on a sliding scale based on the affiliate union's size. (Art. IV § 4.) The convention elects the Federation's executive officers (a president, a secretary-treasurer and an executive vice president), and fifty-one vice presidents (Art. V § 1; Art. VI § 1.) Together these fifty-four officers comprise the Executive Council. (Art. X § 1.) The Executive Council meets at least

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[1] As noted in the margins, the court has disregarded claims in the parties' Local Rule 56.1 statements that are not supported by citation to competent evidence in the record.

[2] This and future citations in this format refer to the AFL-CIO constitution. (Def. Ex. A.)

twice annually at the instigation of the President. (Art. VII § 1.) It serves as the Federation's governing body between conventions and is

> authorized and empowered to take such action and render such decisions as may be necessary to carry out fully and adequately the decisions and instructions of the conventions[,] . . . to enforce the provisions contained in th[e] Constitution[, and] . . . . to safeguard and promote the best interests of the Federation and its affiliated unions . . . .

(Art. X. § 2.) No affiliated international or national union may change its name without the Executive Council's approval. (Art. X § 14.) The Council also has general authority "to make rules to govern matters consistent with this Constitution." (Art. X § 7.) The constitution also establishes a five-member Appeals Committee of the Executive Council, drawn from the Council's membership by the president with the Executive Council's approval. (Art X § 17.) The Appeals Committee "shall hear and decide such matters as are designated in this Constitution and as the Executive Council directs." Id.

The president, defendant John Sweeney, is the Federation's chief executive officer, and presides over meetings of the convention and the Executive Council. (Art. VII § 1.) Article VII, section 2 of the constitution provides that "[t]he President shall have the authority to interpret the Constitution between meetings of the Executive Council, and his interpretation shall be conclusive and in full force and effect unless reversed or changed by the Executive Council or a convention."

The Federation is composed only of duly chartered or affiliated unions and certain other designated subordinate bodies subject to direct Federation control, such as state and local labor councils. (Art. III § 1.) Unions that are not themselves chartered affiliates of the Federation but that are affiliated as subordinate organizations to a directly chartered AFL-CIO affiliate enjoy the

privileges of the parent union's AFL-CIO membership. (2004 Hiatt Decl. ¶ 20.) Section 4(a) of Article III provides, in relevant part:

> The Executive Council may issue additional charters or certificates of affiliation to other organizations desiring to affiliate with this Federation. This power may be delegated to the President. Charters or certificates of affiliation shall not be issued to national or international unions, organizing committees, or directly affiliated local unions in conflict with the jurisdiction of affiliated local or national unions, except with the written consent of such unions, and shall be based upon a strict recognition that . . . each affiliated national and international union is entitled to have its autonomy, integrity and jurisdiction protected and preserved.

Section 4(b) of Article III of the constitution gives the Executive Council the power to issue a provisional charter subject to a future condition or conditions; after the passing of a specified period the charter may then become permanent unless the Council votes to revoke it.

The parties agree that affiliation with the AFL-CIO is an extremely valuable benefit for a labor organization. (Decl. of R. Thomas Buffenbarger, Mar. 24, 2004, ¶ 30.) Section 8 of Article III provides that affiliates "shall be encouraged to eliminate conflicts and duplication in organization and jurisdiction" through voluntary agreement or merger. Under Article XX, affiliates are required to respect the existing collective bargaining agreements of all other affiliates and are prohibited from attempting to secure work for their own members at a given plant or worksite where another affiliate already represents those performing similar work. (Art. XX §§ 2, 3.) Affiliates are also broadly prohibited from attacking or maligning each other in the conduct of organizing drives. (Art. XX § 5.) Affiliates undertaking an organizing effort in non-building-trade industries may also petition under Article XXI to keep other affiliates from competing with them. (Art. XXI §§ 1, 2.)

On May 2, 2001, the Executive Council adopted a statement "delineat[ing] the criteria and the process which it believes should normally be employed in the consideration of future charter applications." (Def. Ex. B, at 1.) The statement articulates both broad principles and specific criteria to guide the exercise of the Executive Council's discretion to issue charters. One of the broad principles is a preference for encouraging merger of an organization with a "like-minded" existing affiliate rather than issuing a new charter; nonetheless the statement recognizes that "direct chartering may be an appropriate action in some limited circumstances." Id. at 2. The criteria, which are not to be "rigidly applied" in all cases, include a presumption against chartering particularly small unions (20,000 members or fewer) and in favor of chartering large ones (100,000 members or more). The criteria emphasize that unions seeking affiliation primarily in order to obtain "Article XX/XXI coverage or other defensive protections" will receive less favorable consideration than those that are deemed to have a genuine desire and intent to "work cooperatively with and actively participate in the labor movement's shared goals, such as organizing, legislative lobbying, and political mobilization." Id. at 3.

Section 5 of Article III governs the suspension and revocation of charters in general. Section 5(b) provides, in relevant part:

> [N]o national or international union shall have its charter or certificate of affiliation with the Federation revoked except by a two-thirds roll call vote at the convention. A revoked charter or certificate of affiliation may be restored by either a two-thirds roll call vote of the convention or a two-thirds vote of the Executive Council if it is determined that the organization is conducting its affairs in a manner consistent with the obligations of an AFL-CIO affiliate.

Suspended and unaffiliated organizations are barred by section 6 from representation or recognition in the Federation and its subordinate bodies, and affiliates that allow such representation or recognition are themselves required to be suspended.

Although an affiliate's charter may not be revoked except through the procedure set forth in section 5, affiliate unions may otherwise cease to function as affiliates. In 1963, the secretary-treasurer ministerially removed the Broom and Whisk Makers Union from the list of affiliates after its membership and assets had dwindled and the Federation lost contact with its leadership. (2004 Hiatt Decl. ¶ 105.) Other unions have voluntarily dissolved and relinquished their charters because of financial difficulties or loss of membership. Id. When two affiliates merge, the charter of one of the unions is deemed to lapse by operation of the merger. Id. ¶ 106.

2. *The Horseshoers Union and the United Service Workers*

The International Union of Journeymen Horseshoers ("the IUJH") was established in 1874, and became a chartered member of the American Federation of Labor in 1893. (2004 Hiatt Decl. ¶ 23.) When the AFL and CIO merged in 1955 to form the defendant AFL-CIO, the IUJH became a chartered affiliate of the new organization, as did the other existing AFL affiliates. Id.; see also Art. III § 2. As a craft union, the IUJH's mission, in the words of its constitution,[3] was "to organize under one banner all workmen engaged in horseshoeing"; its jurisdiction was defined in the same document as encompassing "all workers . . . performing any service as horseshoers." (Def. Ex. I, Tab 4, at 2.)

The parties do not dispute that in recent years the IUJH was a union of extremely limited membership and resources, and that it was in decline. Annual reports submitted to the Department of Labor show that in 1996, the union paid a salary of $7,000 to only one of its seven officers, its secretary-treasurer Paul Brooker, and listed 110 members and $12,246 in net assets at

[3] Though this document is undated, plaintiffs concede that it was operative prior to February 20, 2002. See Pls.' Response to Defs.' Stmt. of Undisputed Fact ("Pls.' R. 56.1 Resp."), May 7, 2004, at ¶ 30.

year's end. In 1997 it listed 104 members and $4,801 in assets; in 1998, 104 members and $7,338 in net assets; in 1999, 100 members and $6,804 in assets; in 2000, 100 members and $6,809 in assets; and at the end of 2001, 55 members and $2,160 in assets.[4] (Decl. of Barbara Stevenson, May 7, 2004 ("Stevenson Decl."), Exs. 2–7.) During this period its total annual disbursements declined from $28,145 in 1996 to $965 in 2000, rising again to $14,792 in 2001. Id. By 2000, the union paid no salary to any of its five officers. From 1995 on, the union sent no delegates to the AFL-CIO's quadrennial convention. Id. In November of 1998, the IUJH stopped paying its required per capita AFL-CIO dues and it listed no such payments for 1999 or 2000. (Hiatt Decl. ¶ 28–29; Stevenson Decl. Exs. 5, 6.) It came current on its per capita payments with one lump-sum payment to the AFL-CIO in February 2001. (2004 Hiatt Decl. ¶ 29–30.) The union's listed national headquarters address throughout this period was Secretary-Treasurer Brooker's home in Massachusetts. (2004 Hiatt Decl. ¶ 34.)[5]

The United Service Workers (USW) was formed from a predecessor independent union in or about 1990. (Def. Ex. I, Tab 14, at 48.) It has sixteen local union affiliates made up of employees of various industries, concentrated in New York, New Jersey and Connecticut. (Decl. of Lori Ann Ames, Mar. 26, 2004 ("Ames Decl.") ¶ 1.) In early 2002 the membership of the local affiliates totaled roughly 28,000. (Decl. of Steven Richard Elliott, Dec. 1, 2003, ¶ 15.) The union reported 32,214 total members to the Department of Labor as of September of 2002. (Def.

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[4] The union reported to the AFL-CIO that at the beginning of 2002 it had only forty-eight members. (Decl. of Barbara Stevenson, Mar. 26, 2004 ("Mar. 26 Stevenson Decl.") Ex. 28.) The discrepancy is immaterial, but suggests that the numbers in the DOL reports may be inexact.

[5] Plaintiffs purport to dispute this fact but point to no contrary evidence. (Pls.' R. 56.1 Resp. ¶ 20.)

Ex. I, Tab 5.) The union listed net assets between $1.28 and $3.72 million for the fiscal years 1999–2000 to 2001–2002 and total disbursements for those years of between $8.25 and $14.82 million. Id. The USW has never been a directly chartered affiliate of the AFL-CIO, but has come under the AFL-CIO umbrella by affiliation with other chartered affiliates since at least 1993. (Hiatt Decl. ¶ 21–22.) From 1993 to 1999, the USW was affiliated as a subordinate national union with the Service Employees Industrial Union (SEIU); from 1999 to 2002 it was an affiliate national union of the Transportation Communications International Union (TCU). (Id. ¶ 22; Ames Decl. ¶ 7.)

At the times material to this suit, USW had a tightly integrated leadership. Steven Richard Elliott was president of USW from its founding in 1990 until January 1 of 2001, when Lori Ann Ames, who had been a trustee, became president. (Def. Ex. I, Tab 5; id. Tab 14, at 48, 52; Ames Decl. ¶ 1.) Elliott thereafter continued to hold the position of president emeritus. (Def. Ex. I, Tab 9.) He was also listed with the Department of Labor as the president during 2001 of USW locals 355 and 955. Ames was a vice president and trustee of these locals. J. Scott Ames, a trustee of the national USW, was also vice president and trustee of the same two locals.[6] (2004 Hiatt Decl. ¶ 39 & n.4; Decl. of Jonathan P. Hiatt, Dec. 5, 2003 ("2003 Hiatt Decl."), Ex. 5.) In the years preceding this suit the USW was headquartered at 138-50 Queens Boulevard in Briarwood, New York. (Def. Ex. I, Tab 5.)

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[6] Defendants allege that Lori Ames is Elliott's daughter and that J. Scott Ames is Lori Ames' husband and Elliott's son-in-law. (2004 Hiatt Decl. ¶¶ 39, 40; Mar. 26 Stevenson Decl. Ex. 33 (Letter of Hiatt to Ames of 1/20/04 identifying Elliott as "your father.")) In support, defendants cite to the affidavit of Jonathan Hiatt, general counsel to defendant AFL-CIO, who, while familiar with Ames and Elliott, does not explain his precise basis of knowledge for this belief. Plaintiffs do not dispute the assertion.

3. *Elliott's Move to IUJH and the affiliation with USW*

In February of 2001, the month that IUJH came current on its long-delinquent per capita dues to the AFL-CIO, representatives of the USW and the IUJH began to talk about affiliation. (2004 Hiatt Decl. ¶ 42; 2003 Hiatt Decl. Ex. 3.) Brooker, the IUJH's longtime secretary-treasurer, states in an affidavit that he was first introduced to Steven Elliott through Mark Reader, a USW "member" who was "a fellow horseshoer," and that Brooker and other IUJH members, impressed by Elliott's wealth of knowledge about union affairs, solicited his assistance in revitalizing their union. (Declaration of Paul Brooker, Mar. 24, 2004 ("Brooker Decl.") ¶ 8.) USW's annual DOL reports show that in the fiscal years 1999–2000 through 2001–2002 Reader held the staff position of "organizer" in USW and was paid a salary of between $194,142 and $201,720. (Def. Ex. I, Tab 5.) As noted above, Elliott had stepped down the month before as National President of the USW, but remained president emeritus and president of several USW locals. (2004 Hiatt Decl. ¶ 39 & n.4; 2003 Hiatt Decl. Ex. 5.)

On February 20, 2002, the IUJH held a "Special Convention" at the USW offices in Briarwood. (Def. Ex. I, Tab 6.) The stated purpose of the convention was to consider changes to IUJH's constitution, bylaws and structure and to elect a new slate of officers. Id.[7] In attendance from the IUJH were Brooker and International President Herman Elliott, and Herbert Stradley, John Green, John Belanger and Frank Izzi, all of whom were serving or had served in the preceding six years as vice presidents of the International. (2003 Hiatt Decl. Ex. 3; Def. Ex. I, Tab 4.) Attending as "[i]nvited [g]uests" were Steven Elliott, Lori Ames, Mark Reader, Bill

[7] An undated notice from Brooker to all executive board members and delegates of the IUJH gave notice of the convention and its goals. Id. There is no evidence in the record indicating when or to whom it was sent out.

Sweeney, Barbara Dunleavy, Troy Anderson, and Robert Roviello, all officers or employees of USW. (2003 Hiatt Decl. Ex. 3; Def. Ex. I, Tab 5.) Richard Greenspan, an attorney who was "retained to assist at the Convention"—by whom is not clear—led the meeting and recommended all of the constitutional changes that were adopted. (2003 Hiatt Decl. Ex. 3.) Herman Elliott, the IUJH president, stated that he had been discussing the changes with Steven Elliott for over a year. Id. The convention unanimously adopted the proposed changes to the International's constitution and its model local union constitution; the IUJH's name was provisionally changed to the International Union of Journeymen Horseshoers and United Service and Allied Trades (abbreviated "IUJHT"). Id.

The incumbent International Executive Board of the union then resigned en masse. Id. Brooker nominated a new slate of officers, consisting entirely of salaried USW officers or employees, who were unanimously elected. Id. The new officers became eligible to hold office in the IUJHT only by virtue of an amendment to the constitution, effected the same day at Greenberg's recommendation, which allowed a member of any labor organization to become an IUJHT officer. (Def. Ex. I, Tab 8.) Steven Elliott became the new president; William Sweeney, who was USW's controller, became secretary-treasurer; Robert Roviello, a USW organizer, became vice president; and Troy Anderson, another organizer, became trustee. (2003 Hiatt Decl. Ex. 3; Def. Ex. I, Tab 5.) The new constitution allowed the four officers to maintain officer or staff positions in other unions and, as the only members of the International Executive Board, gave them plenary control over the International, including the ability to determine their own compensation, further amend the constitution, and merge or affiliate with other labor organizations. (Def. Ex. I, Tab 8, 15–18.) Mark Reader, the USW organizer who originally

spoke to Brooker, became Director of Organization for a new United Service and Allied Division of the reconstituted union, and Brooker became Director of Organization for a new Horseshoers Division. (2003 Hiatt Decl. Ex. 3.)

The reconstituted union's offices were moved to 2070 Jericho Turnpike in Commack, NY, which was also the address of the Security Officers Independent Union, a body of which Steven Elliott was president. (2003 Hiatt Decl. Exs. 3, 12.) On May 13, 2002, the new Executive Board agreed to affiliate the 55-member IUJHT with the 386-member Service Professionals Independent Union Local 726. (Def. Ex. I, Tab 9.) Although the newly-affiliated Local 726 apparently had no national affiliation, the president of Local 726, James Mack, was a staff bookkeeper for USW. (Def. Ex. I, Tab 5.) Local 726 members participated by special arrangement in a USW welfare fund. Id. At the same Executive Board meeting, IUJHT Secretary-Treasurer William Sweeney resigned and Mack was nominated and appointed to take his place. (Def. Ex. I, Tab 9.) The union affiliated with two other existing independent locals over the course of 2002 so that by December 2002 its membership stood at 1,504. Id. At least one of these locals, Local 947, already had a relationship with USW, allowing USW members to participate in its welfare fund. Id. During this time, as other independent locals affiliated with IUJHT, the Horseshoers Division added no members.[8] Id.

At the December 2002 meeting, the IUJHT resolved to drop any reference to horseshoers in its title and to change its name, subject to AFL-CIO approval, to "United Service and Allied Trades International Union" (USAT), and subsequent board minutes through April of 2003 use

[8] Plaintiffs purport to dispute this fact but cite to no contrary evidence. (Pls.' R. 56.1 Resp. ¶ 35.)

this name. Id. In February of 2003, the Executive Board added five new members, again all present or recent USW officers or employees. Id.; Def. Ex. I, Tab 5. In April of 2003 the board determined to retain Richard Greenspan as counsel. (Def. Ex. I, Tab 9.) No former IUJH member attended the Executive Board meetings at which these changes were discussed and ratified. Id. In April of 2003, the union wrote to AFL-CIO Secretary-Treasurer Richard Trumka requesting a name change to USAT. (Mar. 26 Stevenson Decl. Ex. 43.) In June of 2003, the union again wrote to Trumka, requesting a superseding name change to "International Union for Democracy and Freedom," and listing alternative names including "International Union of Journeymen and Allied Trades." (Mar. 26 Stevenson Decl. Ex. 6.) The letter identified the IUJH president as "S. Richard Elliott." Id. President Sweeney responded by letter on June 20 that he would recommend to the Executive Council a name change to "International Union of Journeymen Horseshoers and Allied Trades." (Mar. 26 Stevenson Decl. Ex. 9.) On August 6, 2003, the Executive Council approved the change. (Mar. 26 Stevenson Decl. Ex. 7.)

At a meeting in July of 2003, Elliott reported to the other board members present (Mack, Reader, and vice president Barbara Stevenson,[9] who replaced Roviello) that many of the former IUJH's chartered horseshoeing locals had been determined no longer to exist and that the charters of all but five of them had accordingly been revoked. Id. The remaining locals, pursuant to a change adopted at the 2002 convention, were merged and chartered as the East Coast Council, a single body on a par with each of the other newly-added local unions for purposes of

[9] Defendants have submitted evidence suggesting that Barbara Stevenson is the same person as Barbara Dunleavy, who was staff assistant to Elliott when he was USW president, the treasurer of Local 726, the formerly independent body of which Mack was president, and a relative of Elliott's. See 2003 Hiatt Decl. Ex. 3; Def. Ex. I, Tab 5; Def. Ex. H at 16. Again, plaintiffs do not deny the assertion.

representation at International conventions. Id. The minutes of this meeting also reflect that Elliott reported to the other members present—all of whom were current or recent USW employees—that the IUJHT had been in informal discussions with USW about affiliation. The minutes describe the USW and Elliott's relationship with it and recite that USW was dissatisfied with its current affiliation with the TCU and would like to affiliate with IUJHT. Id. The minutes reflect that Elliott told the group that because he was president emeritus of USW, "the compatibility extends to the highest level with this Union." Id. The board resolved to hold a convention of the International on September 2, 2003, so that necessary structural changes could be made to allow the IUJHT to affiliate national, as opposed to local, unions. Id. The board agreed that in order to permit "the utmost democracy," most of the IUJHT constitution's requirements for credentialing delegates to the convention, including length of affiliation, would be waived. Id. This waiver had the effect of allowing the locals that had been affiliated under Elliott's tenure in the previous year to send participating delegates to the convention.

On September 2, 2003, the Executive Board of the union now known as IUJHAT[10] pursuant to the AFL-CIO Executive Council's decision met again; no former IUJH member was in attendance. Elliott described the affiliation agreement that had been reached with the USW, which would involve USW's amicable disaffiliation from TCU upon thirty days' notice. Id. One large USW local, Local 424, would not affiliate via USW but instead through a newly-formed national union, the National Public Employees Union (NPEU), which would become a national

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[10] The parties and others concerned with the dispute have referred to the post-August 2003 body variously as "IUJAT," "IUJHT," and "IUJHAT." The court adopts the last of these acronyms, but quoted material in the balance of the opinion using the other two variants refer to the same body.

union affiliate of IUJHAT on a par with USW. The minutes reflect that Elliott explained that "[i]t is anticipated that both USW and NPEU would seek to affiliate existing local unions that are independent of the AFL-CIO . . . ." Id. The Board also reviewed the changes that would be proposed to IUJHAT's constitution and approved them; the goals of the changes were characterized in part as "to assure our affiliates that we believe that affiliates should be permitted to develop and work towards fulfilling their own agendas as determined by the officers and members of those organizations." Id.

The special convention took place later the same day. (Def. Ex. I, Tab 14, at 1.) The minutes reflect that as of this date, the IUJHAT Executive Board membership consisted of Steven Elliott, President; Steven Elliott, Jr., a former USW employee, Secretary-Treasurer; Lori Ames, then USW president, Vice President; and Barbara Stevenson, Trustee. Id. Stevenson was also the delegate from IUJHAT Local 726. NPEU was represented by Kevin Boyle, a USW employee. Representatives of Locals 714 and 924 were also present, and Joseph Pecora, a USW employee and the treasurer of the Security Officers, the union that shared the Jericho Turnpike address with IUJHAT, was present in an unspecified capacity. (Id.; Def. Ex. I, Tab 5; 2003 Hiatt Decl. Ex. 12.) Paul Brooker represented the East Coast Council and was the only person in attendance whose name is reflected in records of the original IUJH's operations. (Def. Ex. I, Tab 14, at 2.) The convention reviewed and adopted without objection the changes that the Executive Board had discussed that morning allowing for the affiliation of national unions. Id. at 11–48. Immediately afterwards, Elliott moved without opposition to affiliate USW and NPEU, effective November 1, 2003 upon USW's disaffiliation from TCU. Id. at 50–53. In describing USW to the assembly Elliott said that USW currently had "about thirty-five thousand members." Id. at

49. Elliott asked for and received approval of the modified Executive Board membership described above and of IUJHAT's negotiation with USW to use its office space. Id. at 57–60. He also announced that Reader, then a USW staffperson and organizing director of the IUJHAT's United Service and Allied Trades division, would become the organizing director for the International as a whole and that Brooker would remain organizing director for the subordinate Horseshoeing Division. Id. at 61.

After the convention, a letter from Steven Elliott, Jr. in his capacity as secretary-treasurer of IUJHAT to Lori Ames as USW president on November 11 memorialized that the affiliation was complete.[11] (Def. Ex. I, Tab 16.) Similar letters confirmed the affiliation of IUJHAT with NPEU and the10,000-member National Organization of Industrial Trade Unions (NOITU). (Def. Ex. I, Tab 16; Brooker Decl. ¶ 30.) The affiliation agreement recited that "[i]t is the judgment of IUJAT and USW that the goals of affiliation will best be served by permitting USW and its affiliates to maintain control over their own agendas and operations and that of USW affiliates" except as otherwise specifically agreed. (2003 Hiatt Decl. Ex. 6, at 3.) The agreement specifically excepted many powers that an international often holds over subordinate bodies,

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[11] Several features of this letter are noteworthy. The letter to Ames is written on "IUJAT" letterhead identifying the International's address as 138-50 Queens Boulevard, Briarwood, New York. The address block of the letter indicates that it was sent to Ames as USW President, at the same address, "[b]y Facsimile and Overnight Delivery." (Def. Ex. I, Tab 15.) Elliott, Jr., who had held staff positions in USW for at least three years previous, was a Business Agent of USW during 2002 at a salary of $123,000, and according to an uncontradicted affidavit of John Hiatt was Ames' brother and Steven Elliott Sr.'s son, nowhere acknowledged any of these relationships. He also advised Ames that the IUJAT Executive Board had approved the affiliation and "all of the terms and conditions negotiated by Mr. Elliott [Sr.] with your organization," without acknowledging that Ames was a voting member on the Board that took that action or that he himself was a signatory to the negotiated agreement. Id.

such as the power to impose trusteeships on problematic locals, to merge locals, to veto strikes, and to interpret subordinate bodies' bylaws and constitutions. Id. at 3, 5.

4. *Contact with the AFL-CIO*

During the time in which IUJH became IUJHT, then USAT, then IUJHAT and added members to its United Service and Allied Trades division,[12] the union paid correspondingly increasing per capita contributions to the AFL-CIO, and IUJHT officials Mack and Stevenson sent several letters to Sweeney documenting its growth. (Mar. 26 Stevenson Decl. Exs. 10, 44, 45.) The letters implied that in addition to affiliating with existing bodies, the union was organizing in non-unionized workplaces. (Mar. 26 Stevenson Decl. Ex. 10 ("[T]he IUJHAT has grown from a mere 50 members to over 400 active union members. Through grassroots organizing and affiliations of independent unions, IUJHT should soon fully take its place in the House of Labor."); id. Ex. 44 ("We . . . have grown through new organization to over 1500 members.").)[13] On September 11, 2003, Elliott wrote to Sweeney advising him that IUJHAT had grown to nearly 2,000 members and would soon add 45,000, but did not state how that growth would come about. (Mar. 26 Stevenson Decl. Ex. 9.) On October 30, 2003, Elliott wrote a similar letter noting their growth to roughly 40,000 members as of November 1, giving the names

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[12] Plaintiffs purport to dispute defendant's assertion that the Horseshoers Division added no members, but cite to no evidence. (Pls.' R. 56.1 Resp. ¶ 35.) With the exception of one collective bargaining agreement apparently re-negotiated with an existing employer in October 2002, the record is devoid of any evidence of horseshoer-related organizing. (May 7 Stevenson Decl. Ex. 9.)

[13] Plaintiffs dispute defendant's allegation that all of IUJH's post-2002 growth was achieved through affiliation rather than organizing. Plaintiffs point to record evidence showing that in August of 2002, Local 726 won an NLRB election involving a bargaining unit of three workers. (May 7 Stevenson Decl. Ex. 10.)

of the new officers, and requesting a meeting. (Mar. 26 Stevenson Decl. Ex. 38.) In all of this correspondence, Elliott referred to himself or was referred to as "S. Richard Elliott" or "Richard Elliott."

On November 5, 2003, Edwin Hill, president of the International Brotherhood of Electrical Workers (IBEW), an affiliate international of the AFL-CIO, wrote to Sweeney objecting to what he characterized as "the sham attempt of the 40,000 member . . . USW . . . to 'affiliate with' the . . . IUJAT . . . and thereby to obtain the status of an AFL-CIO affiliate." (Mar. 26 Stevenson Decl. Ex. 12.) He accused the USW of attempting to undercut the work of AFL-CIO unions in the New York area and of seeking to shield itself from their protests by its series of affiliations with chartered AFL-CIO unions. Id. Pointing to the two bodies' disparate sizes and the fact that Elliott was formerly the USW's president, Hill characterized the merger as "an attempted fraud" and urged Sweeney "not [to] accept at face value the claim of Mr. Elliott that this newly-combined union is entitled to retain the IUJAT's status as an AFL-CIO affiliate." Id. Instead, he urged, the AFL-CIO "should treat the announcement of the USW/IUJAT affiliation/merger as a new charter request by a newly-formed union" under Article III, section 4 of the constitution, and should deny the request because of the new body's jurisdictional conflicts with IBEW and other existing affiliate unions. Id. On November 14 and 17, the presidents of the AFL-CIO-affiliate Service Employees International Union (SEIU) and of the AFL-CIO's Building and Construction Trades Department wrote letters to Sweeney agreeing with Hill about USW's practice of undermining other unions and the "sham" nature of the affiliation and objecting, in the words of SEIU president Andrew Stern, that the affiliation "destroys the

integrity of the charter process . . . ." Id. Both of these bodies had, like IBEW, had jurisdictional disputes with USW. (Decl. of Steven Richard Elliott, Mar. 26, 2004 ("Elliott Decl.") ¶ 13.)

On November 18, 2003, Elliott wrote to Sweeney in response to Hill's November 5 letter, arguing that Hill's protest was motivated by past jurisdictional disputes between IBEW Local 3 and USW Local 363 stemming from the latter's organizing among African-American and Latino workers whom IBEW Local 3 had neglected, and arguing that USW enjoyed constructive working relationships with other IBEW locals and with other AFL-CIO affiliates. (Mar. 26 Stevenson Decl. Ex. 13.) Elliott argued that USW had not "swallowed" and did not overwhelm IUJHAT.[14] He also argued that the fact that he was the former USW president was of no relevance and asserted that he had resigned from that position effective December 31, 1999.[15] He pointed to two past affiliations of large unions with smaller ones and argued that USW's size relative to that of IUJHAT had no bearing on the validity of the affiliation, which was, he asserted, accomplished in accordance with both bodies' constitutions and bylaws. Elliott again requested a meeting with Sweeney and with general counsel Jonathan Hiatt. Robert Scardelletti,

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[14] In support of this argument Elliott stated that prior to affiliation the IUJHAT represented "several thousand members." He sketched the current structure of IUJHAT, noting that it was composed of seven directly affiliated local unions; the USW, consisting of 28,000 members in fifteen locals; the NPEU, consisting of 10,000 members in two locals; and NOITU, consisting of 10,000 members in eight locals. Id. Elliott did not explain that NPEU was an entity formed out of a USW local at the time of its affiliation or that a number of the directly-affiliated locals were headed by USW staff or had other ties to USW. Nor did he explain that the IUJHT/USAT board that oversaw all of the expansion, including its expansion from roughly fifty-five members to several thousand prior to the affiliation, was composed entirely of USW officers and employees. Id.

[15] This assertion is in conflict with USW's DOL filings, which state that during the fiscal year from October of 2000 to September of 2001, Elliott was president of USW for an unspecified part of the year with a salary of $541,650, and that he was succeeded by Lori Ames. (Def. Ex. I, Tab 5.)

the president of TCU, wrote to Sweeney on November 20 explaining that the disaffiliation with USW was amicable and opposing the complaining organizations' request to construe the affiliated IUJHAT/USW as a new organization seeking a charter. (Stevenson Mar. 26 Decl. Ex. 16.)

Sweeney replied to Elliott by letter dated November 24, 2003. (Def. Ex. C.) He explained that the presidents of IBEW, the BCTD and the SEIU had "raised concerns about the recently announced merger or affiliation" of "a presently independent organization," USW, with the AFL-affiliated IUJHAT. Sweeney noted that the objectors "question the legitimacy of such a merger or affiliation, where the pre-existing AFL-CIO affiliate (IUJAT) constituted but a small fraction of the independent organization (USW) into which it has been absorbed" and where "the officers of the formerly independent organization . . . now present themselves as the officers of IUJAT." Id. Sweeney noted that IUJHAT had been relocated to USW's address.

Sweeney informed Elliott that he shared the concerns of the complaining bodies. He acknowledged that an "affiliation/merger" of disproportionately-sized entities could, "depending on how it was effectuated," be perfectly lawful and beyond the purview of the AFL-CIO to manage, but then stated, in language that is at the heart of this dispute and is therefore quoted at length:

> Nonetheless, when an affiliate of IUJAT's size is joined with an independent union some 20 times[16] its own size, and where the affiliate is thereupon brought under the direction and control of the independent union's officers, I do not interpret the AFL-CIO's Constitution to require that such an arrangement be recognized by the Federation itself, as

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[16] This figure is based on of the membership size of IUJHAT at the time of its affiliation with USW, NPEU and NOITU. As the letter elsewhere noted, the post-merger IUJHAT was roughly 300 times the size of the original IUJH.

> a bona fide affiliation or merger, that would entitle the new entity to automatic status as an AFL-CIO chartered affiliate.
>
> Rather, I believe under these circumstances, your organization's request should be treated as a petition by an independent union for a new AFL-CIO charter under Article III, section 4. . . . Furthermore, consistent with my constitutional interpretation, the Federation will consider the former AFL-CIO affiliate International Union of Journeymen Horseshoers and Allied Trades . . . to have disaffiliated from the AFL-CIO upon its affiliation with or merger into the independent USW, and thereby to have relinquished its AFL-CIO charter at that time.

The letter informed Elliott that the AFL-CIO would consider a petition for a charter under its usual procedures. Id.

4. *The IUJHAT's Lawsuit*

On December 2, 2003, plaintiffs filed the instant action and sought a temporary restraining order and preliminary injunction. At a telephonic hearing on December 5, the court denied the motion for a temporary restraining order and set a date for a hearing of plaintiffs' motion for a preliminary injunction. (Mar. 26 Stevenson Decl. Ex. 20 at 5, 18–19.) Hiatt represented to the court at that hearing that defendants regarded the chartered IUJH as having gone out of existence but that upon a showing that this was not the case, defendants would recognize it as continuing to exist, "albeit a 48 member union o[r] something like that." Id. at 12. Hiatt argued that under the constitution it would be appropriate to put the issue of Sweeney's interpretation of what had occurred to the Executive Council. The court told the parties that if that process could happen quickly it "might shed light on everything" but that if it could not, the court would proceed to adjudicate the preliminary injunction motion without waiting for the Executive Council's determination. Id. at 13.

At a further hearing on December 15, 2003, defendants reported that the Executive Council had been polled and had agreed to refer the matter to its standing Appeals Committee. (Mar. 26 Stevenson Decl. Ex. 21 at 3; see also Buffenbarger Decl. ¶ 12.) In line with plaintiffs' view (discussed infra) that Sweeney had improperly revoked their charter, plaintiffs objected that the appeal process was "ultra vires." (Mar. 26 Stevenson Decl. Ex. 21 at 5, 6.) The court noted that, while it was entirely up to the plaintiffs whether to participate in the internal review, their refusal to do so could conceivably compromise plaintiffs' position if the court were to find that exhaustion of internal remedies were required. Id. at 11, 18. On the parties' request, the court cancelled the scheduled hearing on a preliminary injunction and allowed the parties instead to agree on a schedule for briefing the instant motions after any required discovery. Id. at 22, 35, 39.

The Appeals Committee was chaired at that time by AFL-CIO Vice President James Hoffa, and included Patricia Friend, president of the Association of Flight Attendants, Clayola Brown, a vice president of the Union of Needletrades, Industrial and Textile Employees, and Edward L. Fire, president of the International Union of Electronic, Electrical, Salaried, Machine, Furniture Workers-Communications Workers of America. (Def. Ex. K, L.) The committee set a deadline of December 19, 2003 for initial submissions and December 23, 2003 for replies. (Def. Ex. L.) On December 18, Hoffa recused himself from the proceeding and Friend thereafter acted as chair. (Mar. 26 Stevenson Decl. Ex. 14; Def. Ex. L.) Defendants submitted an extensive brief and evidentiary material supporting their position. (Def. Exs. G–K.) Plaintiffs protested by letter that they had not been furnished with a copy of whatever procedures governed the Appeals

Committee's review process and stated that as a result "we don't recognize the legitimacy of the committee." (Def. Ex. J.)

By letter dated January 9 and sent by regular mail, Friend informed the parties that the committee would conduct a hearing at AFL-CIO headquarters on January 20, 2004. (Def. Ex. L.) Elliott replied by letter dated January 15, requesting an adjournment and protesting that he had only that day received the notice and had not received formal charges or a copy of the rules governing the proceeding. (Def. Ex. N.) Elliott also objected that Friend and Fire were both linked to CWA, which had recently joined with IBEW in a proposed organizing initiative. Id. He argued that since IBEW was one of the organizations that had called on Sweeney to act against the IUJHAT/USW affiliation, Friend and Fine should recuse themselves and appoint replacements. Id. Elliott also argued that a scheduled January 30 meeting with Sweeney and the complaining organizations held out hope for an amicable settlement and eliminated any need for the hearing. Id.[17] Thomas Buffenbarger, president of the AFL-CIO affiliate International Association of Machinists and Aerospace Workers (IAM), wrote to Sweeney on January 16 similarly urging that the appeal process be abandoned in favor of informal resolution. (Buffenbarger Decl. ¶ 15.)

Friend continued the hearing until January 29, but otherwise rejected Elliott's objections. (Def. Ex. P.) On January 26, 2004, Elliott wrote again to protest that he had received no direct notice of the rescheduled date and that the committee already knew that IUJHAT's counsel was

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[17] By letter dated December 19, 2003, SEIU President Stern informed Sweeney that SEIU withdrew its objection and that IUJHAT and SEIU were working constructively on their jurisdictional differences. (Def. Ex. S.) Stern recommended that he, Sweeney, Elliott, Hill, and Buffenbarger meet to resolve the situation. Id.

unavailable to participate then. (Def Ex. Q; see also Elliott Decl. ¶ 68; Stevenson Mar. 26 Decl. Ex. 33 (Jan. 20 email of Hiatt indicating that defendants were unwilling to adjourn Appeals Committee meeting until plaintiffs' counsel's return).) Elliott did not attend the hearing because he did not believe IUJHAT could be adequately represented by counsel appearing only by telephone. Id. ¶ 49. Buffenbarger attended in his stead with the IAM's general counsel, and presented a 45-page written submission on behalf of IUJHAT. (Buffenbarger Decl. ¶ 16; Def. Exs. R, S.) Friend did not allow a court reporter hired by IUJHAT to record the proceedings. (Buffenbarger Decl. ¶ 17.)

On February 5, the Appeals Committee forwarded a report and recommendation to Sweeney. (Def. Ex. D.) In brief, the Committee concluded that

> [i]t is abundantly clear that the USW, NPEU and NOITU now dominate and control the Horseshoers Union and that IUJHAT bears no resemblance to the Horseshoers Union as it existed prior to the merger/affiliation. The original Horseshoers Union has been totally subsumed . . . . To recognize this affiliation as bona fide and allow the independent to continue as an AFL-CIO affiliate with the Horseshoers charter under these circumstances would circumvent and defeat Article III of the Constitution and the procedures and criteria set forth by the Executive Council in 2001 for the issuance of AFL-CIO charters.

Id. at 12. In response to IUJHAT's argument that the effect of the November 24 letter was to revoke its charter in contravention of Article III section 5, the Appeals Committee reported:

> We do not agree. The Horseshoers Union has simply ceased to exist as an entity recognizable as the Horseshoers union. In these circumstances we agree with President Sweeney that the Horseshoers Union must be deemed to have voluntarily relinquished its AFL-CIO charter upon its merger with the independents USW, NOITU and NPEU.
>
> This affiliation is also vastly different from the typical affiliation or merger by unions. Many formerly independent unions have come under the umbrella of the AFL-CIO through merger with AFL-CIO affiliates. These affiliations or mergers typically involve a smaller independent merging or affiliating with a larger AFL-CIO union. And while the independent may receive a seat or seats on the governing body of the AFL-CIO union, its leadership does not dominate or control the merged organization.

Id. at 12–13. On February 18, 2004, the Executive Council voted 43 to 2 to adopt the Report and Recommendation and stated that the IUJHAT "is not a recognized affiliate of the AFL-CIO." (Def. Ex. E; 2004 Hiatt Decl. ¶ 98.) The briefing of these motions followed.

DISCUSSION

Plaintiffs move for summary judgment on their claim for a declaration that Sweeney's conduct violated the terms of the AFL-CIO constitution and is null and void and that IUJHAT remains a chartered AFL-CIO affiliate. Plaintiffs also move for summary judgment on their claim that defendants violated § 101(a)(5) of the Labor Management Disclosure and Reporting Act ("LMRDA"), 29 U.S.C. § 411(a)(5). Defendants cross-move for summary judgment against both claims. Jurisdiction is founded on 28 U.S.C. § 1331 and 29 U.S.C. §§ 185(a) and 412.

A. *Summary Judgment Standard*

When a party moves for summary judgment, judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists," Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). "On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion," United States v. Diebold, Inc., 369 U.S. 654,

655 (1962), but the non-moving party "must do more than show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In making the necessary showing, "[c]onclusory allegations [by the non-moving party] will not suffice to create a genuine issue." Delaware & Hudson Ry. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990). A "genuine" issue is one that could be decided in favor of the non-moving party based on the evidence by a reasonable jury. See Liberty Lobby, 477 U.S. at 248. The role of the court in deciding a motion for summary judgment is not to decide issues of fact, but only to determine whether or not they exist. See Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991).

B. *Claim under LMRA § 301(a)*

1. *Standard of Review*

Plaintiffs' first claim is based on § 301(a) of the Labor Management Relations Act ("LMRA"), which provides that suit may be brought in federal district court "for violation of contracts . . . between any . . . labor organizations." 29 U.S.C. § 185(a). The AFL-CIO constitution is a "contract[] . . . between . . . labor organizations" within the meaning of § 301(a). Santos v. District Council of New York City and Vicinity of United Bhd. of Carpenters and Joiners of America, AFL-CIO, 547 F.2d 197, 199 n.1 (2d Cir. 1977). See also United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indust. of United States and Canada, AFL CIO v. Local 334, United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indust. of United States and Canada, 452 U.S. 615, 622 (1981) (union constitutions are "contracts" within the meaning of § 301(a)). Where a party to the constitution-contract alleges that another labor organization acted in violation of the constitution, both the union and

the union official whose act is alleged to violate the constitution are proper defendants under § 301(a). Shea v. McCarthy, 953 F.2d 29, 32–33 (2d Cir. 1992).

When adjudicating a claim under § 301(a) that a union has acted contrary to its own constitution, the "[u]nion's interpretation of its own constitution is entitled to great deference in order to avoid interference with internal union affairs and therefore . . . will be upheld unless patently unreasonable." Sim v. New York Mailers Union Number 6, 166 F.3d 465, 470 (2d Cir. 1999) (internal quotation and alteration marks omitted). While a court may set aside an action taken pursuant to an "interpretation[] made by union officials which run[s] adverse to the plain meaning of contract language," any interpretation which is not patently unreasonable must be upheld. Id. See also Ford v. Airline Pilots Ass'n Int'l, 268 F. Supp. 2d 271, 294 (E.D.N.Y. 2003) (citing Sim, 166 F.3d at 470); Weiss v. Torpey, 987 F. Supp. 212, 220 (E.D.N.Y. 1997). This policy flows from a general and longstanding reluctance on the part of the federal courts to interfere in internal union affairs: "'Courts have no special expertise in the operation of unions which would justify a broad power to interfere . . . . General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.'" Weiss, 987 F. Supp. at 220 (quoting Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964)). See also Int'l Bhd. of Teamsters v. Local Union Number 810, 19 F.3d 786, 788 (2d Cir. 1994) ("[F]ederal courts should be slow to rush into what is essentially a matter of internal union governance."). Because the AFL-CIO constitution is a contract among labor organizations and their members just as an international union constitution is a contract among its constituent bodies and members, Santos, 547 F.2d at 199 n.1, the same standard of review is applicable here.

2. *Sweeney's Interpretation*

Plaintiffs argue that although Sweeney purported to consider IUJHAT to have voluntarily disaffiliated from the AFL-CIO upon its affiliation with USW, in fact his action constituted a revocation of IUJHAT's charter against its will, and thus was manifestly contrary to the procedure for revocation spelled out in section 5(b) of Article III. Although defendants' litigation posture regarding IUJHAT's status was somewhat fluid in the context of plaintiffs' request for preliminary injunctive relief, it is undisputed that at this time IUJHAT does not enjoy the status of an AFL-CIO affiliate, at least to the extent that it insists on the validity of its affiliation with USW. (Defs.' Reply Mem. at 7.) It is further undisputed that neither Sweeney's November 24 letter nor the Executive Council's February 18, 2004, pronouncement was premised on a vote of the convention revoking the charter, as provided in section 5(b). Plaintiffs contend, and defendants do not dispute, that section 5(b) "is the only manner permitted by the parties' contract for revoking a member's charter." (Pls.' Mem. at 7.)

Plaintiffs further argue that in light of the existence of that provision and the constitution's silence elsewhere as to disaffiliation,[18] the constitution does not provide that a single officer "can be the unilateral arbiter of [a] . . . union's right to exist within the AFL-CIO." Id. It is a significant logical leap, however, from the fact that revocation of a charter requires certain procedures under the constitution to the conclusion that no other constitutional means exist for a charter to cease to be effective. To disprove this negative, defendants point to

[18] The constitution provides for suspension of member organizations upon a finding by the Executive Council or a designated committee that the organization is substantially influenced by "any corrupt influence" or that its policies are directed toward achievement of "authoritarianism, totalitarianism, terrorism" or other undemocratic principles. This finding may be appealed to the convention. (Art. X § 8.) The parties agree this provision is irrelevant.

undisputed evidence in the record that other unions have ceased to exist as AFL-CIO affiliates without revocation of their charters pursuant to section 5(b). (Hiatt Decl. ¶ 105.) As noted above, this has occurred at the instigation of the AFL-CIO secretary-treasurer when a union's assets and membership have diminished and the Federation has lost contact with the leadership. Charters of affiliation have also disappeared without revocation proceedings upon the merger of existing affiliates into other existing affiliates. Id.

Where a contract is ambiguous, "[t]he practical interpretation of a contract by the parties, manifested by their conduct subsequent to its formation for any considerable length of time before it becomes a subject of controversy, is entitled to great, if not controlling, weight in the construction of the contract." Viacom Int'l v. Lorimar Productions, 486 F. Supp. 95, 98 n.3 (S.D.N.Y. 1980) (collecting cases). See also Perry v. Int'l Longshoremen's Ass'n, AFL-CIO, 638 F. Supp. 1441, 1447 (S.D.N.Y. 1986) (noting relevance of past practice under ambiguous provision of union constitution). As plaintiffs note, none of the examples proffered by defendants involves an AFL-CIO officer's decision that a charter has become ineffective over the opposition of the affiliate in question, but they are evidence that, under the constitution as it has been put into practice, it is possible for a charter to cease to have effect without revocation under section 5(b). In light of this undisputed evidence, no reasonable finder of fact could say that it was patently unreasonable for Sweeney or the Executive Council to maintain that under the constitution a charter could be abandoned by a method other than section 5(b) revocation.[19]

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[19] In its reply brief, plaintiff argues alternatively that Sweeney's interpretation is due no deference because he cited no constitutional authority for his action in his November 24 letter and thus cannot have been interpreting the constitution. This argument is specious. The determination that Article III section 4 was applicable to IUJHAT—which necessarily included the implicit determination that section 5(b) as well as any other provision operating over an

This leaves the question of whether, in these circumstances, it was patently unreasonable for defendants to regard IUJHAT as having voluntarily relinquished its charter in favor of a new organization. Plaintiffs point out that the constitution contains no prerequisites for affiliations or mergers. Thus, they argue, IUJHAT was free to take the steps it took under the constitution without danger of losing its charter. Plaintiffs further argue that it is unreasonable to view their actions as a relinquishment because IUJHAT had no good reason to relinquish Article XX/XXI protection and other benefits of AFL-CIO membership and could not have attracted the locals and national unions who affiliated with it or maintained those affiliations without such protections. (Pls.' Mem. at 13–15.) The first part of this argument, at least, has considerable force.[20] Plaintiffs never purported to relinquish their charter and with the exception of the IUJH's lapse in per capita payments, later rectified, complied with the obligations of an affiliate. The constitution does not explicitly vest the president or the Executive Council with power to approve or disapprove mergers or affiliations between existing affiliates and other bodies, does not provide that merged or affiliated bodies must re-apply for a charter, and generally provides that affiliates are "not subordinate to, or subject to the general direction and control of, the Federation." (Art. III § 1.)

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existing affiliate was not—was unquestionably an interpretation of the constitution. The Sim court itself did not defer to an explicit pre-litigation invocation of a constitutional interpretation, but to the union's interpretation of its governing documents in defending the legality of its conduct in the litigation. See Sim, 166 F.3d at 470–71.

[20] The assertion that IUJHAT cannot have voluntarily disaffiliated because it intended (and fought) to retain its chartered status and used that status as an inducement to affiliate other organizations begs the critical question, since defendants deny that the original chartered organization, IUJH, was the same as the successor entity that had that goal.

The constitution also, however, vests the Executive Council with a power to "enforce the provisions contained in th[e] Constitution" and to "safeguard and promote the best interests of the Federation and its affiliated unions." (Art. X § 2.) The president also has an independent constitutional mandate to interpret the constitution between meetings of the Executive Council. (Art. VII § 2.) Sweeney and the Executive Council regarded his action as upholding and enforcing Article III section 4, which gives the Executive Council the power (delegable to the president) to grant charters to "organizations desiring to affiliate with th[e] Federation," but requires them to do so in a specified manner in order to protect the jurisdiction of existing affiliates. Defendants argue that Sweeney "rightfully looked at the substance, rather than the form, of the USW's attempt to join the Federation through commandeering the charter of a moribund affiliate." (Defs.' Mem. at 14.)

Reviewing the undisputed evidence surveyed above, any reasonable finder of fact would have to conclude that USW's officers and employees were ceded plenary control of IUJH in February of 2002 and that over the next year and a half, with elaborate formality but with no overt recognition of the now-total overlap between the two bodies' governance, they affiliated it with USW and with independent, non-AFL-CIO local and national organizations, a number of which were led by USW officers and employees. The new organization dwarfed the original IUJH. The original IUJH's membership and the successor Horseshoers Division lost any control over the International's Executive Board and all but token representation at its convention. The new body almost immediately attempted to change its name to drop any reference to horseshoeing and to substitute the words "United Service." Brooker, the sole common thread between the old and new unions, remained present in a subordinate staff position. It is also undisputed that USW remained

a structurally autonomous organization under the shelter of IUJHAT's AFL-CIO charter and subject to no control by or accountability to the minuscule portion of the International that had been IUJH. In all of the IUJH's post-February 2002 correspondence with defendants, Elliott identified himself or was identified as "Richard Elliott" or "S. Richard Elliott," and not as "Steven Elliott," the name by which he was known to defendants as USW president and president emeritus. Only the November 5 letter of President Hill identified Elliott as USW's former president. Under these circumstances, no finder of fact could conclude that it was patently unreasonable to regard the charter as having changed hands in a manner intended to defeat the requirements of Article III section 4.[21]

In their reply memorandum plaintiffs point to the Ninth Circuit's remark in Stelling v. Int'l Bhd. of Elec. Workers Local Union No. 1547, 587 F.2d 1379, 1389 n.10 (9th Cir. 1978) that "the proper inquiry . . . [is] 'whether there was arguable authority for the officer's act from the officer's viewpoint at that time, not from a court's more sophisticated hindsight.'" Id. at 1389 n.10 (quoting D. Leslie, Federal Courts and Union Fiduciaries, 76 Colum. L. Rev. 1314, 1319 (1976)). Plaintiffs argue that many of the facts recited above were not known to Sweeney until well after his November 24 letter, and that at the time he wrote the letter he did not have before him enough facts to make his interpretation of the situation reasonable. (Pls.' Reply Mem. at 2–6.) This argument misapprehends the policy underlying the Ninth Circuit's remark in Stelling. The courts

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[21] Sweeney's determination that the USW was attempting an end-run around Article III section 4 gains force from the Executive Council's standing criteria for the issuance of charters, under which organizations primarily seeking to obtain defensive protections under Articles XX and XXI are disfavored. (Def. Ex. B.) Plaintiffs concede that the affiliation of USW and other bodies with IUJHT was motivated by their desire to obtain Article XX and Article XXI protections, and that absent those protections the newly-joined bodies will "withdraw and terminate their affiliation with IUJHAT and seek protection elsewhere." (Pls.' Mem. at 15.)

defer to a union's interpretation of its constitution because of a general reluctance to disturb internal union affairs, and it was this policy that underlay the quoted language. See id. at 1388 ("'Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable.'" (quoting Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971)); see also Leslie, supra, at 1319 ("[C]ourts must be sensitive to the fact that union officers are not skilled lawyers or judges, practiced in the art of construing documents; the inquiry should be whether there was arguable authority for the officer's act from the officer's viewpoint at the time, not from a court's more sophisticated hindsight view."). The court clearly meant to indicate that a judgment should not be disturbed simply because it was made under the press of events and with less legal sophistication than the court itself possesses. While it is true, as noted above, that the "hindsight view" available to this court and the Appeals Committee includes facts showing that USW's control of IUJHAT before the affiliation with USW was far more complete than Sweeney understood when he first acted, it perverts logic, and vitiates the policy underlying the Ninth Circuit's remark, to argue that his conclusion about the nature of the affiliation is due less deference because it is now known that a stronger case for that action could be made.

In any event, it is undisputed that Sweeney understood at the time he wrote that a chartered union formerly composed of at most two thousand members had affiliated with one roughly twenty times that size, and that the newly-affiliated union's officers now composed the leadership of the chartered union. Sweeney also learned on November 5 that the "S. Richard Elliott" who had been in communication with his office in the past as the pre-November 1 IUJHAT president was the Steven Elliott he knew as the USW president. This constitutes ample evidence before him

at the time he wrote his letter to compel a finding that his determination that Article III, section 4 was being undermined was not patently unreasonable.[22]

Plaintiffs also argue that defendants' actions were taken in "bad faith" and may be set aside on that basis even if not patently unreasonable. The two district court cases cited by plaintiff for that proposition predate Sim and rely on International Brotherhood of Teamsters v. Local 810, 19 F.3d 786 (2d Cir. 1994). See Mason Tenders Local Union 59 v. Laborers' Int'l Union of North America, 924 F. Supp. 528, 544 (S.D.N.Y. 1996) (noting Local 810's adoption of "bad faith" standard elaborated in Local No. 48, Bhd. of Carpenters and Joiners of America v. United Bhd. of Carpenters and Joiners of America, 920 F.2d 1047 (1st Cir. 1990)); Weiss, 987 F. Supp. at 220–21 (citing Mason Tenders and Local 810). In Local 810, the Second Circuit held that a union's decision to impose a trusteeship on a local by the international union could be set aside if undertaken in bad faith, and that this showing could be made by demonstrating that the union officer who imposed the trusteeship "acted contrary to the union's best interests, acted in his own self-interest, or that his actions were so outrageous and unconscionable that even if they were in the best interests of the union, they would constitute bad faith." Id. at 794 (citing Local 48, 920 F.2d at 1054). This ruling, however, was based on a statutory provision which provided

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[22] Plaintiffs also contend that under Article III, section 8, Sweeney was required to but did not encourage the complaining bodies to settle their jurisdictional disputes with IUJHAT through voluntary agreement. If that did not work, they assert, the complaining bodies should have instituted Article XX proceedings. They argue that Sweeney's actions read these controlling provisions out of the constitution. (Pls.' Mem. at 8–10.) This argument simply assumes what is in dispute—that after the affiliation with USW, IUJHAT was still entitled to these constitutional protections. Article III, section 8 and Article XX in terms apply to "affiliates." Neither addresses the issue of when a given labor organization is properly considered an affiliate Sweeney's judgment that IUJHAT was not the same body as the affiliate IUJH was not patently unreasonable and thus may not be disturbed.

that the imposition of a trusteeship must be presumed valid for eighteen months and is not subject to attack "'except upon clear and convincing proof that the trusteeship was not established or maintained in good faith'" for a purpose allowable under the LMRDA. Id. at 790 (quoting 29 U.S.C. § 464(c)). The court held that this statute limited the availability of injunctive relief from the district court, and accordingly reviewed its action in granting a preliminary injunction for abuse of discretion under that standard. Id. It is not clear that the "bad faith" gloss on Sim's general "patently unreasonable" standard is applicable outside of this narrow statutory context.

Even supposing arguendo that these cases are applicable and continue to correctly state the law of the circuit after Sim, however, plaintiffs point to no evidence that could suffice to make such a showing here. The record is entirely devoid of any indication that Sweeney acted in his own self-interest as distinct from that of the AFL-CIO. Neither is there any indication that Sweeney's actions were contrary to the AFL-CIO's interest or "so outrageous and unconscionable that even if they were in the best interest of the [Federation], they would constitute bad faith." Weiss, 987 F. Supp. at 212. Plaintiffs argue that Sweeney knew of and tolerated IUJHAT's growth and accepted per capita payments until the complaining organizations lodged a protest, and therefore that his November 2003 decision without further inquiry constituted "blatant pandering." (Pls.' Mem. at 11.) As the First Circuit noted in Local 48, "[p]ejorative characterizations alone do not show bad faith." 920 F.2d at 1990. Once alerted to IUJHAT's status and Elliott's identity, Sweeney had before him ample evidence to make the decision that he did on the grounds asserted in his letter.

The conclusion reached by Sweeney and ratified by the Executive Council was by no means inevitable. Each party to this suit advances a plausible interpretation of the constitution,

and on each party's view, the application of what it regards as the controlling provision to these facts threatens to obviate another arguably applicable constitutional provision. On plaintiffs' view, Sweeney's decision to regard the charter as having been relinquished creates an end-run around the established procedures for formal revocation. On defendants' view, recognizing the IUJHAT as the same entity as the chartered IUJH creates an end-run around the established procedures for an organization seeking affiliation and leaves AFL-CIO membership open to anyone able to accomplish a legal takeover, subject only to the sole check of revocation through the quadrennial convention. Neither interpretation accounts for the conflict motivating the other. See Shepley v. New Coleman Holdings Inc., 174 F.3d 65, 72 (2d Cir. 1999) ("An interpretation of a contract that affords a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect.") (internal quotation omitted). As noted above, plaintiffs are correct that the constitution generally provides that the Federation does not have authority to manage the internal affairs of its affiliates. Even if the court were to find that the plaintiffs have the sounder view overall, however, "'to uphold the union's action in interpreting the contract as it did it is not necessary that [the court] find on the merits that such an interpretation was correct.'" Sim, 166 F.3d at 469 (quoting Spellacy v. Airline Pilots Ass'n Int'l, 156 F.3d 120, 127 (2d Cir. 1998) (further internal quotation omitted)). The question instead is whether plaintiffs can show that the interpretation was patently unreasonable. Id. Because plaintiffs have failed to make that difficult showing, their motion for summary judgment on their claim for relief under § 301(a) is denied and the defendant's cross-motion is granted.

C. *Claim Under LMRDA § 101(a)(5)*

Plaintiffs' second cause of action arises under the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401–531. Chapter II of the LMRDA is titled "Bill of Rights of Members of Labor Organizations," see 29 U.S.C. § 401, and "was the product of congressional concern with wide-spread abuses of power by union leadership." Finnegan v. Leu, 456 U.S. 431, 435 (1982). Section 101(a) of the LMRDA, 29 U.S.C. § 411, specifies the protected rights, which are "addressed to the regulation of the internal affairs of the union, insuring to members equal rights and freedom of speech in the conduct of union affairs, and due process in disciplinary proceedings." Abrams v. Carrier Corp., 434 F.2d 1234, 1250 (2d Cir. 1970). The relevant provision here is § 101(a)(5), 29 U.S.C. § 411(a)(5), which provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

The LMRDA also provides in § 101(b) that any bylaws or constitutional provisions of a labor organization that do not comport with these protections are without force or effect. 29 U.S.C. § 411(b). Section 102 of LMRDA, 29 U.S.C. § 412, provides in part that

> [a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

Plaintiffs argue that the Appeals Committee process set in motion in response to the instant litigation violated the requirements of § 101(a)(5) in that IUJHAT was "expelled . . . or otherwise disciplined" without the specified protections.[23]

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[23] Defendants object that the claim is nowhere pled in the complaint. Plaintiffs respond that they pled no LMRDA claim because the facts giving rise to the claim occurred only after the complaint was filed. (Pls.' Reply Mem. at 18.) This response is not wholly satisfactory, since by

Defendants do not dispute plaintiffs' contention that the appeals committee process fell short of LMRDA's requirements, but instead argue that IUJHAT itself, as an international union, has no right to bring an action against it under this provision. There is a split of authority on this question. A number of district courts, including one court in this circuit, have considered sections 101 and 102 together to confer standing upon a local union to bring suit as a member of an international. Most of these cases advert to the LMRDA's definitions section, which defines a "person" to include a labor organization and in turn defines a "member" as a "person" who has fulfilled the requirements of membership. See 29 U.S.C. § 402(d), (o); Local Union No. 575 of the United Ass'n of Journeymen Apprentices of the Plumbing and Pipe Fitting Indust., 995 F. Supp. 1151, 1158 (D. Colo. 1998); Nelson v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, 680 F. Supp. 16, (D.D.C. 1988); Perry v. Int'l Longshoremen's Ass'n, 638 F. Supp. 1441, 1448–49 (S.D.N.Y. 1986); Local No. 1 (ACA) Broadcast Employees of the Int'l Bhd. of

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its terms the LMRDA imposes on a labor organization a duty to provide due process protections before the imposition of "discipline[]," not a process to challenge it afterward. 29 U.S.C. § 411(a)(5); Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U., 605 F.2d 1228, 1238 (2d Cir.1979) ("Subsection (a)(5) . . . guards against abusive and unjust exercise of union authority by prohibiting a union from disciplining a member *without first* affording him certain procedural safeguards against unwarranted or inaccurate adjudication.") (emphasis added). See also, e.g., Collison v. Int'l Chemical Workers Union, Local 217, 34 F.3d 233, 239 (4th Cir. 1994) (holding that union constitution provision allowing for suspension of member pending a later disciplinary hearing violates § 101(a)(5)). Plaintiffs insist that Sweeney's November 24 letter itself worked a revocation (Pls.' Mem. at 6, 8–10; Pls.' Reply Mem. at 17, 18, 20), so presumably if the LMRDA is applicable to the instant situation at all, see infra, the claim accrued when Sweeney acted without first meeting the statute's requirements. In any event, if the court were to decline to consider plaintiffs' claim on the ground that it was not raised in the complaint, it would give plaintiffs leave to amend the complaint. See, e.g., Gill v. City of New York, No. 02-CV-10201, 2004 WL 816449, *8 (S.D.N.Y. Apr. 16, 2004). Defendants do not argue that they were prejudiced by the claim being raised in this motion, so the court will address the claim notwithstanding the failure to plead it in the complaint.

Teamsters v. Int'l Bhd. of Teamsters, 419 F. Supp. 263, 271–72 (E.D. Pa. 1976).[24] Plaintiffs argue that the IUJHAT international is, analogously, a "member" of the defendant Federation and a "person" entitled to bring suit under § 102.

A number of other courts, also including a district court in this circuit, have found that § 101(a)(5) creates no enforceable rights in local unions themselves. See Teamsters Joint Council No. 42 v. Int'l Bhd. of Teamsters, 82 F.3d 303, 305 (9th Cir. 1996) (so holding for § 101 generally); United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund, 926 F.2d 550, 556 (6th Cir. 1991) (same); Commission House Drivers Union, Local 400 v. Teamsters Joint Council, 595 F. Supp. 574, 577 (N.D. Ohio 1984) (local union not a "member" within § 101(a)(5)); Laborers' Local Union 56 v. Laborers' Int'l Union, 93 L.R.R.M. 2895, 2896 (D. Conn. 1975) (same); Local Union No. 853, United Bhd. of Carpenters and Joiners, 83 L.R.R.M. 2759, 2765 (D.N.J. 1972) (holding that § 101(a)(5) not "meant to vest rights in locals as such").[25] To the extent these cases address the definitional

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[24] Other courts have allowed individual members (including officers) to sue where an action affecting the status of their local union has a practical effect upon the individual members' protected rights. See, e.g., Parks v. Int'l Brotherhood of Electrical Workers, 314 F.2d 886, 921 (4th Cir. 1963); Pittman v. United Bhd. of Carpenters and Joiners of America, 251 F. Supp. 323 (M.D. Fla. 1966); Calabrese v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indust. of the United States and Canada, 211 F. Supp. 609 (D.N.J. 1962); cf. Navarro v. Gannon, 385 F.2d 512, 515 n.3 (2d Cir. 1967) (union president, as individual member, may sue international to enforce rights of the local as a body under § 101(a)(2)).

[25] As plaintiffs correctly note, another decision cited by defendants as belonging in this category relates only to § 101(a)(2), concerning members' free speech rights, and is strictly speaking inapposite because the court's reasoning was particular to the language of that subsection. See United Bhd. of Carpenters and Joiners of America, Lathers Local 42-L v. United Bhd. of Carpenters and Joiners of America, 73 F.3d 958, 964 (9th Cir. 1996) (§ 101(a)(2) free speech right defined in terms of member's right to express "his" views and therefore belongs only to individual member). However, as noted above, the Ninth Circuit has elsewhere embraced the Sixth Circuit's more general conclusion that § 101 creates no rights in local unions or other labor

argument at all, they reject it in favor of the broader policy judgment that the LMRDA was intended to protect the rights of individual rank-and-file members against their leadership, rather than inferior labor bodies against superior ones. See, e.g., Teamsters Joint Council No. 42, 82 F.3d at 305; Local No. 267, 926 F.2d at 556. Cf. Franza v. Int'l Bhd. of Teamsters, Local 671, 869 F.2d 41, 44 (2d Cir. 1989) (noting generally that § 101 "evinces an interest in assuring union democracy by protecting *individual union members'* rights") (emphasis added). These cases would suggest, by the same analogy proposed by plaintiffs, that an international union cannot maintain an action under § 101(a)(5) to hold the defendants to the section's due process requirements.

The court does not need to resolve this question. Even supposing that IUJHAT is a "member" within the meaning of § 101(a)(5), the LMRDA would afford no relief because plaintiffs were not "fined, suspended, expelled or otherwise disciplined" within the meaning of the provision. "Section 101(a)(5) is not meant as a catch-all mechanism to draw every ill complained of by a [union] within the ambit of the Union Bill of Rights." Local 575, 995 F. Supp. at 1151. The LMRDA is an exception to the general rule that federal courts will hesitate to interfere in internal union affairs, and as noted above was enacted to assure the responsiveness of unions to their membership and to prevent autocratic union governance from improperly using its authority to stifle dissent. See generally Finnegan, 456 U.S. at 435; Franza, 869 F.2d at 44, 45 (noting that LMRDA was adopted to curb "abusive or coercive leadership practices"). Section 101(a)(5), in particular, was meant to "impos[e] restrictions and procedural safeguards on union

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organizations. See Teamsters Joint Council No. 42, 82 F.3d at 305 (citing with approval Local No. 267, 926 F.2d at 526).

disciplinary actions . . . which previously had been used improperly as devices to enforce incumbents' control." United States v. Int'l Bhd. of Teamsters, 156 F.3d 354, 360 (2d Cir. 1998) ("IBT") (citing Finnegan, 456 U.S. at 435–36; Franza, 869 F.2d at 44).

In Finnegan, the Court held that this and parallel language in § 609 of the LMRDA, 29 U.S.C. § 529, concerning fines, suspensions, expulsions or other "discipline" was "meant to refer only to punitive actions diminishing membership rights . . . ." 456 U.S. at 438. There is no question that Sweeney's action, however denominated, had the effect of leaving IUJHAT and its members without their former AFL-CIO affiliate status, such that it affected their "membership rights." See, e.g., Finnegan, 456 U.S. at 438. But that does not end the inquiry. The act must also be "punitive." In Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 91 n.15 (1989), in the context of distinguishing a particular officer's vituperative acts from acts taken with the union's imprimatur, the Court explained that the act complained of, whether an expulsion or some other act affecting membership rights, must be "imposed as a sentence . . . by a union in order to punish a violation of union rules." Id. at 92 n.15.

In IBT, the Second Circuit further elaborated on this requirement, noting that the act complained of must be "retaliatory in nature" and "retrospective in focus, administering penalties in relation to the gravity of the past wrong." IBT, 156 F.3d at 361 (citing, inter alia, Galke v. Duffy, 645 F.2d 118, 120 (2d Cir. 1981) (defining "discipline" as "official union conduct that has the purpose and effect of punishing a member.")). In IBT, the issue was whether an election officer appointed pursuant to a consent decree to police election-related corruption in the Teamsters union had violated the union president's rights under § 101(a)(5) when the election officer barred him from standing for office as a result of found violations of the election rules.

156 F.3d at 357, 360. Although the court acknowledged that the right to seek union office was a "membership right" protected by § 101 and thus could require pre-deprivation due process under § 101(a)(5) in some circumstances, id. at 361 & nn.7, 8; id. at 362, it found that the election officer's imposition of this disability lacked a "punitive dimension." Id. at 361. The court noted that the officer lacked disciplinary authority under the consent decree and was instead entrusted with taking "*remedial* action" to ensure fair elections. Id. at 361–62. It further noted that the Teamsters Independent Review Board could and did take similar action for expressly disciplinary purposes, expelling the president, and that this action was subject to the strictures of § 101(a)(5). Id. at 362 & n.11. Because the election officer's act had been undertaken for "expressly forward-looking and corrective purposes," however, it was not discipline and thus did not implicate § 101(a)(5). Id. at 362.

Here, as in IBT, the officials who took the acts complained of are not charged (as plaintiffs elsewhere vigorously agree) with disciplinary responsibilities, which reside elsewhere.[26] As in

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[26] Indeed, the fact that Sweeney and the Executive Council saw it as their role to address the situation in a procedurally novel way lends further support to the conclusion that they were acting within their powers to safeguard the AFL-CIO's future well-being rather than to vindicate its authority in retaliation for past wrongdoing. In general, in order to be considered "discipline," the complained-of act must be taken pursuant to a recognized disciplinary process. Breininger, 493 U.S. at 91–92 ("[T]he specifically enumerated types of discipline [in § 101(a)(5)]—fine, expulsion, and suspension—imply some sort of established disciplinary process rather than ad hoc retaliation."); Maddalone v. Local 17, United Bh'd of Carpenters and Joiners of America,152 F.3d 178, 185 (2d Cir. 1998) (in order to be "discipline" under the statute, alleged punishment must be "the result of an established union disciplinary process"). While the Supreme Court cautioned in Breininger that it did not hold that a union could "circumvent [§] 101(a)(5) . . . by developing novel forms of penalties different from fines, suspensions, or expulsions," it hastened to make clear that the challenged act must still be *punishment*—it must be "imposed as a sentence . . . by a union in order to punish a violation of union rules." 493 U.S. at 91 n.15. In the absence of other circumstantial indicia of a punitive motive, the fact that the act is not undertaken by a disciplinary body or official makes this conclusion less likely.

It is important to note, in this regard, that plaintiffs' argument under § 301 of the LMRA

IBT, defendants here also made clear that their action was based on a remedial goal: that of protecting the integrity of the procedures for affiliation laid out in Article III, section 5. (Def. Ex. C; Def. Ex. D at 12). Nor is there any indication that the action was undertaken to sanction the IUJHAT for the decision to change hands in a way that is "retrospective in focus": Sweeney has consistently maintained that if the affiliation were to be undone, the charter would be deemed to have survived. (Defs.' Reply Mem. at 7; Dec. 5 Tr. at 12; Mar. 26 Stevenson Decl. Ex. 22; 2004 Hiatt Decl. Ex. 1; see also Mar. 26 Stevenson Decl. Ex. 33 (email of Jonathan Hiatt indicating defendants are not opposed to USW affiliating with IAM). Defendants' actions thus do not come within § 101(a)(5)'s protections under the standard elaborated in IBT.

The cases relied on by plaintiffs in which revocation of a local's charter was found to implicate § 101(a)(5) do not dictate a contrary result. In Pittman v. United Bhd. of Carpenters and Joiners of America, 251 F. Supp. 323 (M.D. Fla. 1966), the district court enjoined a national union to restore the charter of a local that had been revoked. The court rejected the defendant's claim that the LMRDA was inapplicable because the revocation was "done solely for administrative reasons" rather than out of any attempt to punish the local. The court held that "[m]otive is irrelevant under § [101](a)(5). The purpose of the section is to provide procedural

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that defendants did not have authority under the constitution to do what they did is conceptually distinct from their LMRDA claim and, even if accepted, would not entail that § 101(a)(5)'s requirements apply. "This court has no power under the LMRDA to enforce the provisions of the union constitution and by-laws, but can only intervene when they are applied in such a way as to deprive union members of *rights guaranteed by that Act*." Mayes v. Messecola, 2000 WL 1499340, *4 (N.D.N.Y. Oct. 4, 2000) (emphasis added). See also Navarro, 385 F.2d at 516 n.6 ("No provision of the [union] constitution can define . . . the rights conferred by" the LMRDA; "[i]t is only when a claim is made that the constitution is being applied in such a way as to deprive members *of their secured rights* . . . that the [constitution] may be considered.") (emphasis added).

safeguards to union members when an action taken against them would result in the loss of some valuable membership right." Id. at 324. That holding is clearly not the law of this circuit after IBT, where the court noted that the same action the election officer took, if taken for other purposes or under color of other constitutional provisions, would give rise to an LMRDA claim. See IBT, 156 F.3d at 362.[27]

In Calabrese v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indust. of the United States and Canada, 211 F. Supp. 609 (D.N.J. 1962), another case relied on by plaintiffs, the issue was not the revocation of the local's charter (which was concededly lawful) but the union's subsequent action in refusing to allow certain members of the de-chartered local to join a new local formed as a successor. The court took a pragmatic view of the transaction, noting that revoking the charter and refusing membership in the new body had the "net effect" of rendering the members expelled from the new local without due process in contravention of § 101(a)(5). The court found that the new body engaged in a "scheme to discriminate" motivated by animus towards the excluded members and that the transaction thus

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[27] In support of its holding, the Pittman court cited Detory v. American Guild of Variety Artists, 286 F.2d 75, 81 (2d Cir. 1961), which held that the plaintiff performer was "disciplined" when, after plaintiff refused to comply with an arbitration award, the union placed him on a published "National Unfair List" prohibiting agents from booking him. Id. at 79. Although the court acknowledged that the union's act was one of "self-protection," it held that "[i]n thus furthering its own ends the union must abide by the rules set down for it by Congress in § 101(a)(5) . . . ." Id. at 81. Detory has been characterized as inconsistent with the rule in Breininger that ad hoc discipline through discriminatory denial of employment opportunities does not constitute discipline within the meaning of § 101(a)(5), see McQueen v. McGuire, No. 82-CV-8445, 1990 WL 515100, n.15 (S.D.N.Y. July 25, 1990), and otherwise was last cited (for a separate holding regarding exhaustion of remedies) over twenty years ago. See Johnson v. General Motors, 641 F.2d 1075, 1079 (2d Cir. 1981). To the extent Pittman correctly construes Detory's holding, the court finds the principle inconsistent with the circuit's more recent analysis in IBT.

represented "in substance, an attempt by one intra-local faction to eliminate from local affairs an opposing faction of the same local." Id. at 615. The court held that "if such an attempt were to [be upheld], the purpose and object of the [LMRDA] . . . to protect the plaintiffs in the enjoyment of their rights as union members would be completely and effectively thwarted." Id.

The court thus relied on the arbitrary and penal nature of the exclusion, which it labeled "adverse discrimination," to find that § 101(a)(5) had been transgressed. As noted above, while there is evidence that the complaining organizations in this case were motivated by a similar desire to prevent a rival from securing directly-chartered status (Mar. 26 Stevenson Decl. Ex. 12; see also Def. Ex. J (Letter of Elliott to Friend of 12/23/03 charging that "IUJHAT was the victim of a power play by a few large unions with jurisdictional disputes with IUJHAT")), there is a critical difference. Under Article III section 4, an affiliate's desire to prevent a competing organization from obtaining a charter is an entirely *legitimate* goal—the provision and the Executive Committee's guidelines are intended to guarantee that no charter may issue over such an objection. The desire to prevent a charter from changing hands in derogation of the constitution is simply not the same as a desire improperly to eliminate rival political factions by arbitrarily denying them membership. Cf. Parks v. Int'l Brotherhood of Electrical Workers, 314 F.2d 886 (4th Cir. 1963) (noting that a president does not act maliciously in disciplining members or "rid[ding] himself of troublesome leadership" when the union constitution grants him the power to do both).

Because § 101(a)(5) does not, as a matter of law, extend to the action taken by defendants in this case, plaintiffs' motion for summary judgment on this ground is denied and defendants' cross-motion is granted.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is granted and plaintiffs' cross-motion is denied. The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

Allyne R. Ross
United States District Judge

Dated: August 3, 2004
Brooklyn, New York

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is granted and plaintiffs' cross-motion is denied. The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

Allyne R. Ross
United States District Judge

Dated: August 2, 2004
Brooklyn, New York

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