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THE NATIONAL LABOR RELATIONS ACT AND RACIAL DISCRIMINATION

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I. INTRODUCTION

When the United States Commission on Civil Rights completed its recent study of discrimination in employment, its findings began on the same depressing note sounded by virtually every student of the problem since the end of slavery:

[N]egro workers are still disproportionately concentrated in the ranks of the unskilled and semiskilled in both private and public employment. They are also disproportionately represented among the unemployed because of their concentration in unskilled and semi-skilled jobs—those most severely affected by both cyclical and structural unemployment—and because Negro workers often have relatively low seniority. These difficulties are due in some degree to present or past discrimination in employment practices, in educational and training opportunities, or both.¹

In short, we are reminded once again that past and continuing discrimination still means disproportionately high unemployment and disproportionately low earnings for Negroes.²

To be sure, and as the Commission freely admits, matters are not so bad as they once were.³ Considerable effort has been expended at many

* Professor of Law, Columbia University. I am grateful to the Twentieth Century Fund for supporting my inquiry into legal restraints on racial discrimination in employment. This article is the first fruit of that inquiry, which will ultimately yield a volume on the subject.

1. U.S. COMM'N ON CIVIL RIGHTS, REPORT ON EMPLOYMENT 157 (1961) [hereinafter cited as 1961 COMM'N REP.]. The vast literature on the subject of racial discrimination in employment includes a number of other outstanding contributions. Only a few can be noted here. See, e.g., GINZBERG, THE NEGRO POTENTIAL 92-138 (1956); GREENBERG, RACE RELATIONS AND AMERICAN LAW 154-207 (1959); NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944); RUCHAMES, RACE, JOBS & POLITICS: THE STORY OF FEPC (1953); SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH (National Planning Ass'n ed. 1955); Summers, *Admission Policies of Labor Unions*, 61 Q.J. ECON. 66 (1946); Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33 (1947); Note, 74 HARV. L. REV. 526 (1961).

2. For recent documentation of this point see e.g., Fortune, March, 1959, p. 191; N.Y. Times, Feb. 18, 1961, p. 7, col. 1.

Of course, other races suffer too, but Negroes are by far the most numerous victims.

3. 1961 COMM'N REP. 153. See also GINZBERG, *op. cit. supra* note 1, at 3-6; GREENBERG, *op. cit. supra* note 1, at 206.

levels to give Negroes a better chance in the labor market and some gains have been made.⁴

But while a comparison of "what is" with "what was" dispels a bit of the gloom, a comparison of "what is" with "what ought to be" is hardly cheering. Thus, during the last recession, fourteen per cent of the Negro male work force was unemployed.⁵ The comparable figure for whites was six per cent.⁶ On another level of deprivation, the results of a nine-city survey of the offices of four federal agencies revealed, among other things, that the percentage of whites serving in supervisory posts was almost three times the comparable figure for Negroes.⁷ And Negroes are rarely to be found in apprenticeship programs,⁸ the paths to skills that ultimately mean higher pay and greater job security.

We can not realistically expect Congress to enact a comprehensive program in the near future to deal with the discriminatory practices these statistics reflect. As in the recent past, it will be state and local governments that enact fair employment practices legislation, while the federal government works with a collection of makeshifts. These range all the way from the dramatic and probably significant President's Committee on Equal Employment Opportunity⁹ to the unexciting and almost certainly insignificant requirement that all new apprenticeship programs registered with the Bureau of Apprenticeship and Training contain a no-discrimination statement.¹⁰

4. The history of federal fair employment policy is summarized in 1961 COMM'N REP. 6-17. See also RUCHAMES, *op. cit. supra* note 1, at 3-164. For examples of state and municipal action see, e.g., CAL. LAB. CODE §§ 1410-31 (Supp. 1961); ILL. ANN. STAT. ch. 48, §§ 851-66 (Smith-Hurd 1961); N.Y. EXECUTIVE LAW §§ 290-301; PA. STAT. ANN. tit. 43, §§ 951-63 (Supp. 1961); PHILADELPHIA, PA., CODE OF GEN. ORDINANCES § 9-104 (1956). Additional authorities are collected in Note, 74 HARV. L. REV. 526, 528-29 nn. 16-22. For reports of company policies aimed at improving opportunities for Negroes see, e.g., HOPE, *Negro Employment in 3 Southern Plants of International Harvester Company*, in SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 11, 49-69 (National Planning Ass'n ed. 1955); Hartt, *It Can Be Done*, 5 COMMON GROUND 49 (1945). For reports of union attempts to do the same see, e.g., HOPE, *EQUALITY OF OPPORTUNITY* 109-36 (1956); Bailer, *The Automobile Unions and Negro Labor*, 59 POL. SCI. Q. 548 (1944); Winn, *Labor Tackles the Race Question*, 3 ANTIOCH REV. 341 (1943). For reports of efforts by Negro organizations to obtain equality of employment opportunity see, e.g., PROGRESS AND PORTENTS, 1958 NAACP ANN. REP. 22-23, 49-55; CIVIL RIGHTS CRISIS OF 1957, 1957 NAACP ANN. REP. 19, 28, 30, 46-57.

5. Fortune, March, 1959, p. 191.

6. *Ibid.*

7. The actual figures were 20.9% for whites, 7.7% for Negroes. 1961 COMM'N REP. 35. The cities involved were Atlanta, Baltimore, Chicago, Dallas-Fort Worth, Detroit, Los Angeles, New York, St. Louis, and Washington, D.C. The agencies involved were identified only as "two relatively large and two relatively small." *Id.* at 31.

8. For example, 1,760 whites and 7 Negroes are participating in 27 federally registered apprenticeship programs in the St. Louis area. 1961 COMM'N REP. 106. "Of some 750 registered apprentices in the construction crafts in Baltimore, only 20 are Negro" *Id.* at 107. 14 out of 3,973 apprentices enrolled in the New Jersey program in 1960 were Negroes. *Id.* at 107-08. Additional statistics to the same effect are collected in *id.* at 106-08.

9. See Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961). The Committee's mission is to combat discriminatory employment practices by federal agencies and contractors doing business with them.

10. See 48 LAB. REL. REP. 515 (1961); 1961 COMM'N REP. 110.

The National Labor Relations Act,¹¹ although primarily concerned with other problems, must be reckoned among the significant elements in the variegated federal effort. It is important mainly for its impact, actual and potential, upon racial discrimination by unions.¹² Although the power of labor unions to maintain or end discrimination is no rival for that of employers, it is considerable nevertheless. Indeed, in some sectors of the economy unions have more to say about who gets what jobs than employers do.¹³ And those exercising this power have not always been color-blind. It is not merely that some unions have refused, either explicitly or tacitly, to admit Negroes to membership and that others have relegated them to segregated locals.¹⁴ These are not insignificant handicaps and affronts, but they are obviously secondary in importance to the use of union power to confine Negroes to the lowest job classifications of some enterprises¹⁵ and to exclude them from others altogether.¹⁶ Refusals to resist employer discrimination must also be counted among the serious faults of the irresponsible in the labor movement.¹⁷

To avoid any misunderstanding, I want to emphasize at this point that I do not intend to convey the impression that job discrimination is chiefly the work of labor unions. This article is part of a larger study that will also deal at length with the more pervasive discriminatory practices of employers.

11. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-60 (Supp. II, 1961), amending 49 Stat. 449 (1935).

12. However, not all unions are within the ambit of the NLRA. Those representing government employees, the employees of nonprofit hospitals, railroad and airline employees, supervisors, and employees of businesses not affecting commerce are beyond the reach of the statute. §§ 2(2), 2(7), 9(c)(1), 10(a), 61 Stat. 137, 138, 144, 146 (1947), 29 U.S.C. §§ 152(2), 152(7), 159(c)(1), 160(a) (1958). But these exclusions are relatively insignificant for purposes of the present discussion. Unions representing railroads and airlines are subject to the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1958), which imposes an important restriction on racial discrimination by unions just like one imposed by the NLRA. See text accompanying notes 54-58 *infra*. Unions representing the other excluded groups can claim only a small proportion of the total unionized work force.

Still other unions are excluded from the jurisdiction of the National Labor Relations Board by jurisdictional standards originated by the Board itself. See 21 NLRB ANN. REP. 7-10 (1957); *cf.* NLRA § 14(c), added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c) (Supp. II, 1961). However, these unions presumably remain subject to judicial enforcement of the duty of fair representation, a key restraint on racial discrimination, discussed in text accompanying notes 54-91 *infra*.

13. See, *e.g.*, 1961 COMM'N REP. 127-31; Fenton, *The Taft-Hartley Act and Union Control of Hiring—A Critical Examination*, 4 VILL. L. REV. 339, 341-46 (1959).

14. See, *e.g.*, 1961 COMM'N REP. 128-33; Dewey, 4 *Studies of Negro Employment in the Upper South*, in SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 175 (National Planning Ass'n ed. 1955); N.Y. Times, Jan. 21, 1960, p. 21, col. 7.

15. See, *e.g.*, 1961 COMM'N REP. 131, 135-39; GINZBERG, *op. cit. supra* note 1, at 27; *cf.* SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 164-67, 175-78, 211-12, 313-14 (National Planning Ass'n ed. 1955).

16. See, *e.g.*, *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); Complaint, Case No. A-123, Cleveland, Ohio, Community Relations Bd., 38 L.R.R.M. 129 (1956); 1961 COMM'N REP. 128-33; Hawley, *Negro Employment in the Birmingham Metropolitan Area*, in SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 317 (National Planning Ass'n ed. 1955).

17. See, *e.g.*, Case No. K-311, 37 L.R.R.M. 1457 (1956); *cf.* Wesson, *Negro Employment Practices in the Chattanooga Area*, in SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 385, 462-63 (National Planning Ass'n ed. 1955).

Nor do I mean to suggest that all or even most unions are hostile to the interests of Negroes. Some have fought hard against racial discrimination.¹⁸

But there are still those that exclude Negroes or accept them only as second-class members and those that will not allow them the same opportunities afforded white workingmen.

In some circumstances the National Labor Relations Act currently inhibits such discriminatory practices; in others it could but does not because of limiting interpretations. This article will explore both the present and the potential use of the NLRA to prevent unions with the will to engage in racial discrimination from doing so. A number of restraints will be considered, with principal emphasis on section 8(b)(2) and the duty of fair representation.

Section 8(b)(2) limits the power of unions to cause employers to discriminate against nonunion workers.¹⁹ Although in terms concerned only with discrimination based on union membership or the lack of it, 8(b)(2) is pertinent to the needs of Negroes because union unwillingness to have them as members often forces them to be nonunion workers. Consequently, to the extent that 8(b)(2) succeeds in preventing unions from denying work to those they deny membership, it eliminates one obstacle to Negro employment.

The duty of fair representation reaches still further. It commands unions to represent workers "without hostile discrimination, fairly, impartially, and in good faith."²⁰ As a result, whether or not they are admitted to membership, Negroes must be treated just like whites in the negotiation of collective agreements and the processing of grievances. This duty even requires unions to bargain for the elimination of discriminatory practices originating with employers.

Enforcement of both of these safeguards is, however, beset by a number of practical difficulties, most of which have yet to be overcome.

For simplicity's sake, section 8(b)(2) will be considered before the wider ranging, more complex duty of fair representation. When we turn to that duty, we will dwell first on its rationale and scope. Next will follow a discussion of how that duty is and can be implemented. Administrative as well as judicial enforcement will be considered. The section on administrative enforcement will deal not only with the possibility of enforcement via unfair labor practice proceedings, but, in addition, with the advisability of refusing to compel employers to bargain with unions that represent unfairly.

The last matter to be considered is racial appeals in organizational campaigns. The willingness of unions to abandon discriminatory practices themselves and to resist them when practiced by employers is likely to be

18. See note 4 *supra*. See also BARKIN, *THE DECLINE OF THE LABOR MOVEMENT* 50-51 (1961); Fleischman, *Labor and the Civil Rights Revolution*, *The New Leader*, April 18, 1960, p. 17-18.

19. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958). This provision is quoted in text accompanying note 27 *infra*.

20. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944).

affected by the impact of such a policy on their organizational efforts. If employers are free to inflame southern white workers against unions that pursue a nondiscriminatory policy, union zeal for equality of opportunity may well be dampened. Accordingly, the final section is devoted to a consideration of possible restraints upon appeals to bigotry in organizational campaigns.

II. SECTION 8(b)(2)—AN IMPEDIMENT TO UNION DISCRIMINATION AGAINST NONMEMBERS

A. *Exclusion From the Job*

The most potent form of discrimination against nonunion workers is, of course, to keep them off the job altogether. When unions have been powerful enough to accomplish this, the means typically used have been closed shop and exclusive hiring hall agreements.²¹ The closed shop agreement expressly bars nonunion workers from the job; the exclusive hiring hall agreement has traditionally done so implicitly by virtue of its requirement that only applicants referred by the union be allowed to work. And, obviously, absent legal compulsion, union hiring halls refer only union men.

These arrangements, whatever their merit in general, plainly spell disaster for any group excluded from the unions controlling them, and Negroes have regularly been excluded from a number of the unions powerful enough to obtain closed shop and exclusive hiring hall agreements.²² In many of the construction trades and in portions of the maritime industry in particular, the barring of Negroes from union membership has made it impossible for them to get work.²³

Since its amendment by the Taft-Hartley Act in 1947,²⁴ the NLRA has outlawed the closed shop. In addition, although a union and an employer may still agree that the employer is to hire exclusively through the union's hiring hall, the union may not discriminate against nonunion men in job referrals. The relevant provisions are sections 8(a)(3) and 8(b)(2).²⁵

21. See 1961 COMM'N REP. 129. For detailed discussion of these devices see, e.g., Craig, *Hiring Hall Arrangements and Practices*, 9 LAB. L.J. 939 (1958); Fenton, *The Taft-Hartley Act and Union Control of Hiring—A Critical Examination*, 4 VILL. L. REV. 339 (1959); Fenton, *Union Hiring Halls under the Taft-Hartley Act*, 9 LAB. L.J. 505 (1958); Toner, *The Closed Shop and the Taft Act*, 56 J. POL. ECON. 258 (1948); Note, *Maritime Hiring Halls and Labor Disputes*, 1 STAN. L. REV. 272 (1949); Note, *Unilateral Union Control of Hiring Halls: The Wrong and the Remedy*, 70 YALE L.J. 661 (1961).

22. See, e.g., 1961 COMM'N REP. 129; NATIONAL URBAN LEAGUE, *NEGROES AND THE BUILDING TRADES UNIONS* (1957); REPORTS OF THE STATE ADVISORY COMMITTEES TO THE COMMISSION ON CIVIL RIGHTS 208 (1961).

23. See, e.g., *NLRB v. Pacific Am. Shipowners Ass'n*, 218 F.2d 913, 916-17 (9th Cir.), cert. denied, 349 U.S. 930 (1955); 1961 COMM'N REP. 129-31.

24. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-60 (Supp. II, 1961).

25. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. II, 1961); 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958).

Section 8(a)(3) prohibits employers from discriminating "to encourage or discourage membership in any labor organization" By itself, this language would have outlawed not only the closed shop, but the union shop, maintenance of membership agreements, and all other union security arrangements as well. Consequently, 8(a)(3) relents to the extent of permitting agreements to require as a condition of employment that employees join the union thirty days after being hired or thirty days after the agreement is made, whichever is later.²⁶ However, this does not mean that after thirty days the union can get rid of those workers it will not have as members, for 8(a)(3) goes on to provide:

That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

Section 8(b)(2) applies the restraints of 8(a)(3) to unions by making it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" In addition, 8(b)(2) forbids unions "to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initia-

The proscriptions embodied in these sections are enforceable via unfair labor practice proceedings. NLRA § 10, 61 Stat. 146 (1947), 29 U.S.C. § 160 (1958), as amended, 29 U.S.C. § 160(l)-(m) (Supp. II, 1961). An unfair labor practice proceeding is initiated by the filing of a charge with the regional director of the region in which the alleged violation has occurred. 29 C.F.R. § 101.2 (Supp. 1961). The case is then investigated by a member of the field staff. 29 C.F.R. § 101.4 (Supp. 1961). If investigation reveals no violation, the regional director recommends withdrawal of the charge. If the complainant accedes, it is withdrawn. 29 C.F.R. § 101.5 (Supp. 1961). If the complainant refuses, the regional director dismisses the charge. An appeal can then be taken to the General Counsel, who may sustain the dismissal, thus closing the case, or direct the regional director to take further action. 29 C.F.R. § 101.6 (Supp. 1961).

If, however, the investigation reveals that "the charge appears to have merit," and if a settlement can not be agreed upon, a complaint issues. 29 C.F.R. § 101.8 (Supp. 1961). A public hearing is held before a trial examiner, at which the government's case is presented by one of its attorneys and all parties have the right "to call, examine, and cross-examine witnesses and to introduce evidence into the record." 29 C.F.R. § 101.10 (Supp. 1961). At the conclusion of the hearing the trial examiner prepares an intermediate report containing findings of fact, conclusions, reasons therefor, and recommendations for action. If the parties accept and comply with this decision, the case is concluded. 29 C.F.R. § 101.11 (Supp. 1961). A dissatisfied party may appeal from the intermediate report to the NLRB, which reviews the record and issues a decision and order that may adopt, modify, or reject the findings of the trial examiner. 29 C.F.R. § 101.12 (Supp. 1961). Compliance with the Board's order is considered in note 50 *infra*.

26. In the building and construction industry, employees may be required to join the union after seven days. NLRA § 8(f), added by 73 Stat. 545 (1959), 29 U.S.C. § 158(f) (Supp. II, 1961).

tion fees uniformly required as a condition of acquiring or retaining membership"²⁷

Although sections 8(a)(3) and 8(b)(2) are hardly models of clarity, at least this much is certain: the law is violated if workers denied union membership because of their race are then denied employment because they are not union members.²⁸ As the late Senator Taft put it during the debate on the bill that bore his name:

Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say 'You have got to fire this man because he is not a member of our union.'²⁹

No case has yet decided whether a union remains free to oppose a Negro nonmember's employment when it assigns as its reason for doing so not his lack of membership but his race. Nevertheless, the answer should be that on these facts too an unfair labor practice has been committed.³⁰ It is hard to

27. Section 14(b) of the NLRA, 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958), permits the states to go still further and completely outlaw agreements conditioning employment on union membership. In states that have taken advantage of this option by enacting so-called "right-to-work" laws (see 62 COLUM. L. REV. 539 nn. 15 & 16 (1962) for a compilation), even agreements that give employees thirty days to join are invalid. This more stringent limitation has little to do with ensuring that union power is not used arbitrarily to exclude people from jobs. The federal provisions, if effectively enforced, are sufficient to accomplish this objective, since under those provisions only a failure to pay union dues and fees can cost a man his job.

28. *El Diario Publishing Co.*, 114 N.L.R.B. 965 (1955); see *Peerless Quarries, Inc.*, 92 N.L.R.B. 1194 (1951), *enforced*, 193 F.2d 419 (10th Cir. 1951). In *NLRB v. Pacific Shipowner's Ass'n*, 218 F.2d 913, 917 (9th Cir. 1955), Judge Pope, concurring in the court's refusal to interfere with a unit determination made by the NLRB, said:

If these negro seamen are denied employment in consequence of their inability to obtain membership in a union 'for reasons other than the failure of the employee to tender the periodic dues,' the employer may be proceeded against for an unfair labor practice under § 8(a)(3) and the union would be subject to a like charge under § 8(b)(2). The applicant asserts that the constituent units of SIU have previously refused to dispatch for employment negro seamen and that negro employees may be excluded in the future because of a previously existing method of hiring whereby employers who are members of PMA have hired their employees exclusively from maritime union hiring halls. Applicant says that that procedure will exclude the negro employees.

If such procedure is adopted it will constitute an unfair labor practice

29. 93 CONG. REC. 4193 (1947).

30. *Accord*, *International Ass'n of Bridge Workers*, 128 N.L.R.B. 1379 (1960), involving a worker expelled from his union and discharged at the union's instigation for negotiating his own terms of employment. Even though it apparently proceeded on the assumption that the employee's personal negotiations rather than his loss of union membership was the reason for the discharge, the Board held that the union had violated § 8(b)(2). Thus, it said: "[W]e do not hold that a union is powerless to protect its bargaining position when confronted with dissident employees who seek working conditions different from those arrived at by collective bargaining; we hold only that it cannot protect that position by causing the discharge of those dissident employees for that reason." *Id.* at 1380. (Emphasis added.) But cf. Statement of George J. Bott, then NLRB General Counsel in *Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947 Before the Senate Committee on Labor and Public Welfare*, 83d Cong., 1st Sess. 2150 n.5 (1953):

[S]ome people have thought that a union could not obtain an employee's discharge on the ground that the employee was a Communist, a dope peddler, or for some similar reason was a disruptive factor in the plant. In one case a charge

believe that in the passage just quoted Senator Taft was merely maintaining that lily-white unions had been phrasing their requests for discharge improperly, that he wanted them to say not, "You have got to fire this man because he is not a member of our union," but, "You have got to fire this man because he is a Negro." Such a view would run counter to still other expressions in the Taft-Hartley Act's legislative history. For example, the Senate committee report said this about 8(a)(3):

The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.³¹

Moreover, the language of the statute itself seems fully applicable. Whatever the reason given, whenever a union causes nonmembers to be discriminated against on the job, membership in the union is encouraged.³² Those adversely affected will surely assume that they would not have suffered had they belonged to the union, and the fact that they can not get in does not prevent the discrimination from falling under 8(a)(3)'s ban on "discrimination . . . to encourage or discourage membership in any labor organization . . ."³³ Other workers will also be influenced. When a Negro nonmember is discriminated against, the white worker is likely to conclude that it is best to be both white and a member. Again, we then have discrimination that encourages union membership.

When a union bars Negroes from both its rolls and the job, the requisite encouragement may be lacking only in the rare situation in which white nonmembers are allowed to work on the same basis as members. Only then can it be clear to the whites that they need not belong to the union in order to work. Even then, though, the Negro workers are likely to assume that if they could only join the union, they would be allowed to work. And sec-

was filed with my office alleging the commission of an unfair labor practice because an employee was discharged, at the request of the union, because he had signed the Stockholm peace petition. I felt that the employer on his own initiative could have discharged the employee for this reason, since it did not pertain to union membership or activity, and therefore should be allowed to discharge him for the same reason even though at the request of the union. The request was not made pursuant to any union-security agreement, or on the ground that the employee had been expelled from the union. Accordingly, I refused to issue a complaint. But if Congress meant that the only discharges which an employer could properly make at the request or insistence of a union are those pursuant to a valid union shop contract even though the reasons for the discharge have nothing to do with union membership, then I was wrong in not issuing a complaint in the Stockholm peace petition case.

Senator Taft apparently thought that this sort of approach was wrong. See 97 CONG. REC. 6062 (1951). In any event, Mr. Bott's affirmation of the right of unions to obtain "an employee's discharge on the ground that the employee was a Communist, a dope peddler, or for some similar reason was a disruptive factor in the plant" presumably does not include the right to seek the discharge of Negroes.

31. S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947).

32. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 46 (1954).

33. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

tion 8(b)(2) would still be literally applicable, for, it will be recalled, that provision forbids unions "to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" ³⁴

The NLRA's efforts to minimize union control over hiring have been only partially successful. Closed shops still exist in industries subject to the act,³⁵ some hiring halls continue to treat job openings as plums to be bestowed on deserving union men,³⁶ and Negroes unable to gain admission to membership remain severely handicapped in their efforts to work at their trades.³⁷

Two factors account for a considerable part of the statute's failure to accomplish more: some unions have resorted to lawful standards that achieve the same purpose as those that have been rendered unlawful; and others have proceeded in defiance of the NLRA.

Consider an example of a "law-abiding" union first. Its hiring hall must now refer nonmembers on the same basis as members. The union does, however, have considerable freedom in deciding what nondiscriminatory basis to employ. Among the lawful options open to it is length of service with the employer or employers the hiring hall serves.³⁸ In theory this is nondis-

34. Nor can a union accomplish the forbidden end by professing that its rolls are open to all who wish to join while at the same time setting discriminatory or exorbitant initiation fees that in fact keep the union closed to the unwanted. Section 8(b)(5) supplements the protection described in the text by making it an unfair labor practice for a union:

to require of employees covered by [a union shop agreement] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected

61 Stat. 142 (1947), 29 U.S.C. § 158(b)(5) (1958).

35. See, e.g., *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961); *NLRB v. United States Steel Corp.*, 278 F.2d 896 (3d Cir. 1960), *cert. denied*, 366 U.S. 908, 909 (1961); *NLRB v. Millwrights*, 277 F.2d 217 (5th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961); *NLRB v. American Dredging Co.*, 276 F.2d 286 (3d Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

36. See, e.g., *NLRB v. International Union of Operating Eng'rs*, 279 F.2d 951 (8th Cir. 1960); *Morris-Knudsen Co. v. NLRB*, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); Address by [then] Member Jenkins Before the Contracting Plasterers and Lathers International Association, Mountain Pacific—Yesterday and Today, *Employees Also Have Rights*, June 3, 1959, p. 2.

37. See, e.g., *El Diario Publishing Co.*, 114 N.L.R.B. 965 (1955); *Peerless Quarries, Inc.*, 92 N.L.R.B. 1194, *enforced*, 193 F.2d 419 (10th Cir. 1951); 1961 COMM'N REP. 128-31.

38. NLRA § 8(f), added by 73 Stat. 545 (1959), 29 U.S.C. § 158(f) (Supp. II, 1961) provides:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because . . . (4) such agreement specifies minimum training or experience qualifications for employment or provides

criminy, since if a nonunion man has longer service than a union man, the nonunion man gets the job. In fact, since only union men have been given a chance to work for the employers in question in the past, those who have belonged in the past will continue to get first crack at the available jobs. The passage of time will, of course, make arrangements of this sort less effective barriers against nonunion workers.

Other unions have chosen to continue their illegal arrangements.³⁹ The fact is that they can often count on such arrangements going undisturbed for a long while and hurting them only slightly, if at all, when someone is finally moved to do something about them. Let us take the hiring hall as our example again.

To begin with, whatever the law may provide, those excluded from union membership are hardly likely to regard the union hall as their most promising source of employment. As a result, unless directed to a hiring hall by an employer or engaged in a trade in a locality where the hiring hall is known to be virtually the only means of gaining employment, the worker denied union membership will normally not look to the hiring hall for help. Occasions for discriminating against nonmembers will, then, be presented only infrequently.

When such an occasion does arise, the union can often be expected to offer some reason other than discrimination as the basis for its refusal to provide a job. There will as a rule be more job-seekers than jobs and, since any of a number of ways of legitimately allocating work might cause the non-union man not to get any for a while, persistence will be necessary if the true basis for the union's action is to emerge clearly. Even when it does emerge, legal action can not ensue unless the disappointed applicant knows that the NLRA provides a remedy. At this juncture it still does not necessarily follow that the discriminatory scheme is doomed. If the worker makes his awareness of his legal rights known to the union's officials, they may have the good sense to drop the barrier for him, thereby preserving it against all but the dogged and knowledgeable.⁴⁰

Finally, if a worker does call upon the National Labor Relations Board,

for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area This merely confirms what the NLRB had held before this enactment. *Daugherty Co.*, 112 N.L.R.B. 986 (1955). Agreements making length of service a criterion for job referral have been held valid in other industries too. See *e.g.*, *Manhattan News Co.*, 121 N.L.R.B. 1287 (1958); *National Union of Marine Cooks*, 90 N.L.R.B. 1099 (1950). No negative implications about these other industries seem to have been intended by § 8(f)'s single-minded concern with the construction industry. *Cf.* *NLRB v. News Syndicate Co.*, 279 F.2d 323, 333-34 (2d Cir. 1960), *aff'd*, 365 U.S. 695 (1961): "availability, dependability and regularity of service, as well as mere competency, are valid nondiscriminatory considerations in determining the order of hire."

39. See, *e.g.*, authorities cited notes 35, 36 *supra*.

40. *Cf.* pupil placement plans, as in, *e.g.*, *Jones v. School Bd.*, 278 F.2d 72 (4th Cir. 1960), which allow token school integration in order to preserve segregation for the great mass of students.

the union will suffer only mild consequences if it moves quickly to avoid more serious harm. It will probably have to pay the complaining worker damages for the wages he failed to earn as a result of its discriminatory refusal to refer him to a job,⁴¹ but this will be a modest sum if the union acts promptly to find him work when it learns that the NLRB is conducting an investigation. This modest sum may well seem a small price to pay for having been able to continue a policy of discrimination long after it was unlawful to do so.

Beginning in 1956, the NLRB developed two new principles in an effort to prevent these realities from continuing to encourage defiance of the statute. The first of these—generally referred to as the *Brown-Olds* rule⁴²—required an employer and a union guilty of maintaining an arrangement exceeding the limits set by the statute to reimburse all employees for all dues, fees, and assessments paid to the union since six months before the date charges were filed with the NLRB. In most of the cases in which this rule was applied, it was apparent that its purpose was merely to deter further violations by making violators pay dearly for their infractions.⁴³ In effect, the Board was creating a system of fines. However, this it lacks the power to do,⁴⁴ as the Supreme Court made clear when the *Brown-Olds* rule ultimately came before it.⁴⁵ Although the Court's reversal of the Board was doctrinally sound, the result was a return to the state of affairs, already described, in which many unions could be expected to retain their closed shops and discriminatory hiring halls.

41. NLRA § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958); see *e.g.*, *Golden Valley Elec. Ass'n*, 109 N.L.R.B. 397 (1954); *Pacific Coast Marine Firemen*, 107 N.L.R.B. 593 (1953).

42. So called because of the case in which it was first enunciated, *Plumbers & Pipefitters (Brown-Olds Plumbing & Heating Co.)*, 115 N.L.R.B. 594 (1956).

43. See, *e.g.*, *NLRB v. Local 111, United Bhd. of Carpenters*, 278 F.2d 823 (1st Cir. 1960); *Houston Maritime Ass'n*, 121 N.L.R.B. 389 (1958). In other cases, in which workers were actually coerced into joining a union, the remedy could fairly be deemed compensatory. *Paul M. O'Neill Int'l Detective Agency, Inc., v. NLRB*, 280 F.2d 936 (3d Cir. 1960); *NLRB v. Revere Metal Art Co.*, 280 F.2d 96 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960); *NLRB v. Local 294, Int'l Bhd. of Teamsters*, 279 F.2d 83 (2d Cir. 1960). In these cases, guilty parties were simply restoring what should not have been taken initially. By contrast, in cases like those cited at the beginning of this note there was no evidence that the workers reimbursed would not have belonged to the union even in the absence of an illegal agreement; indeed, there was no showing of coercion in the *Brown-Olds* case itself. Although reimbursement in such cases has now been foreclosed, *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961), the Supreme Court excepted from its rejection of *Brown-Olds* those cases in which "the union 'was not the result of the employees' free choice.'" *Id.* at 654; see *Bear Creek Constr. Co.*, 49 L.R.R.M. 1674 (1962); *Lapeer Metal Prods. Co.*, 49 L.R.R.M. 1380 (1961); *cf. Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1943).

44. NLRA § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958); see *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). This is not to deny that the Board has considerable discretion to devise suitable remedies for various violations. It may, for example, order back pay computed on a quarterly basis so that a guilty party is not encouraged to continue his violation because an employee's substitute job offers higher pay and procrastination would diminish liability. *NLRB v. Seven-up Bottling Co.*, 344 U.S. 344 (1953); *F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950). But there are limits and the Board exceeded them in its applications of the *Brown-Olds* rule.

45. *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961).

The Board's other recent effort—known during its short life as the *Mountain Pacific* doctrine⁴⁶—was directed at hiring halls. In 1958, the Board decided that an agreement requiring an employer to hire only through a union hiring hall constitutes an unfair labor practice unless the agreement specifically provides that:

(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis [it is discrimination against nonunion workers, not Negroes, that is meant here] and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.⁴⁷

The Supreme Court rejected the *Mountain Pacific* doctrine in *Local 357, International Bhd. of Teamsters v. NLRB*.⁴⁸ According to the Court, the Board can strike down an exclusive hiring hall agreement only when evidence is adduced to support the conclusion that the hall has been or will be used to prefer union members over nonmembers. The mere entrusting of the hiring function to the union hall does not by itself constitute such evidence.

Even the *Mountain Pacific* safeguards would not, of course, have guaranteed Negroes equal treatment in union hiring halls, but they would have improved the prospects. At the very least, the requirement that "the parties to the agreement post . . . all provisions relating to the functioning of the hiring agreement" would have made it easier for Negroes to detect refusals to refer because of their race, which would in turn have facilitated remedial action by other agencies.⁴⁹ Moreover, by diminishing the chances of discrimination against nonunion workers, the *Mountain Pacific* safeguards would have increased the chances that Negroes excluded from union membership would nevertheless have been referred to jobs.

Although sections 8(a)(3) and 8(b)(2) must be rated somewhat ineffectual as attempts to prevent job opportunities from depending upon union favor, they are useful nevertheless. For one thing, over the years the NLRB, upon complaint, has specifically held a great many arrangements illegal and

46. This doctrine was named after the case in which it originated, *Mountain Pac. Chapter of the Associated Gen. Contractors*, 119 N.L.R.B. 883 (1957), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959).

47. *Id.* at 897.

48. 365 U.S. 667 (1961).

49. By a fair employment practices commission, for example, in a state having one, see note 4 *supra*, or by the President's Committee on Equal Employment Opportunity in appropriate circumstances, see note 9 *supra*.

ordered them abandoned. The parties to at least some of these are now presumably obeying the law.⁵⁰ For another, many unions undoubtedly abide by the law simply because it is the law.

In addition, as the preceding discussion of the reasons why the statute has not been fully effective suggests, much of the difficulty can be obviated if workers are informed of their rights and press hard for them. And pressing hard here offers a special advantage not to be found on many of the fronts on which Negroes are fighting for equality—it imposes no drain on the limited financial resources of Negro workers and Negro organizations. Under the NLRA, the complaining worker need not bear the cost of litigating his claim. Once he complains, the burden of investigating and, if the results of the investigation warrant it, the burden of prosecuting his claim are borne by subordinates of the General Counsel of the NLRB.⁵¹

Finally, the statute provides helpful support for employers willing to resist illegal union demands. Employers are, of course, free to resort to the NLRB when unions seek to cause them to discriminate in violation of 8(a)(3).⁵²

50. See 29 C.F.R. § 101.13 (Supp. 1961):

Compliance with Board decision and order.

(a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent elects full compliance with the terms of the order, the regional director submits a report to that effect to Washington, D.C., after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

If a party elects not to comply, the Board will normally seek a judicial decree compelling compliance. See NLRA § 10(e), 61 Stat. 147 (1947), as amended, 29 U.S.C. § 160(e) (1958); 29 C.F.R. § 101.15 (Supp. 1961):

Compliance with court decree.

After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the regional office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's decree, the general counsel may, on behalf of the Board, petition the court to hold him in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

51. The duties of the General Counsel are set forth in NLRA § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153(d) (Supp. II, 1961). See also note 25 *supra*.

52. "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person." 29 C.F.R. § 102.9 (Supp. 1961).

Not only does a union violate § 8(b)(2) in such a case, but if it insists upon its illegal demand, it also violates § 8(b)(3)'s proscription of refusals to bargain. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958); see text accompanying notes 97-100 *infra*.

Moreover, if a union strikes or pickets to oust nonunion men and replace them with union members, it has probably violated § 8(b)(4)(D) of the NLRA as well. This provision, aimed primarily at strikes over jurisdictional disputes, makes it an unfair labor practice for a union to strike or picket for the purpose of "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organiza-

In sum, the National Labor Relations Act, by making it more difficult for unions to deny work to those they deny membership, has taken some of the economic sting out of exclusionary membership policies. In this respect the statute represents a significant advance for the Negro worker, for he has frequently suffered and rarely, if ever, benefitted from the exercise of union power to keep nonmembers off the job.

B. *Discrimination on the Job*

Sections 8(a)(3) and 8(b)(2) are not aimed only at discriminatory hiring. They are also relevant to on-the-job discrimination. But in this respect they are less important. It is not merely that discrimination on the job is less devastating than total exclusion; in addition, Negroes have a much better chance of being admitted to union membership once they are hired.⁵³ This may not prevent them from suffering from racial discrimination, as, for example, by being confined to janitorial work, but it does prevent them from relying on sections 8(a)(3) and 8(b)(2) for relief. The fact that the union rolls are open to them makes it clear that any discrimination suffered is based on race rather than union membership or the lack thereof, and so the requisite "discrimination . . . to encourage or discourage membership" is lacking. It is only when a union both denies a Negro membership and causes him to be discriminated against by an employer that he can hope to find solace in 8(a)(3) and 8(b)(2).

To a considerable extent, then, protection from union-caused racial discrimination on the job must be sought in safeguards other than 8(a)(3) and 8(b)(2). And it is to the duty of fair representation that we must look.

III. THE DUTY OF FAIR REPRESENTATION

A. *The Rationale and Scope of the Duty*

1. *The Steele case.* Under both the National Labor Relations and Railway Labor Acts a union selected by a majority of the employees in a unit appropriate for collective bargaining becomes the exclusive representative of all the employees in the unit, and not only of those who wish to be represented by that union.⁵⁴ Once the choice is made, all are bound by collective

tion or in another trade, craft, or class . . ." 61 Stat. 142 (1947), as amended, 29 U.S.C. § 153(b)(4)(D) (Supp. II, 1961). The NLRB has consistently held that union workers and nonunion workers each constitute a class within the meaning of this provision. See, e.g., *International Union of Operating Eng'rs*, 120 N.L.R.B. 809 (1958); *International Union of Operating Eng'rs*, 118 N.L.R.B. 978 (1957); *William Fargo*, 91 N.L.R.B. 1003 (1950). In the Board's view, then, a union violates § 8(b)(4)(D) if it strikes or pickets to compel an employer to take work from nonunion workers and give it to union members. This view was accepted in, e.g., *Vincent v. Steamfitters*, 288 F.2d 276 (2d Cir. 1961). *Contra*, *Cuneo v. Local 472, Int'l Hod Carriers Union*, 175 F. Supp. 131 (D.N.J. 1959).

53. See 1961 COMM'N REP. 134-35.

54. "Representatives designated or selected for the purposes of collective bargaining

agreements negotiated by the representative selected and none may elect to have another union bargain for him or even to bargain for himself.⁵⁵ Because the majority's choice is imposed upon everyone in this way, the Supreme Court has consistently held that these statutes require the union chosen to represent everyone in the unit fairly.⁵⁶

The leading case is *Steele v. Louisville & N.R.R.*,⁵⁷ a suit under the Railway Labor Act by a Negro locomotive fireman against the railroad that employed him and the all-white union that represented him. Steele alleged that the union, which he was compelled to accept as his collective bargaining representative because it was the choice of a majority of the firemen in the railroad's employ, had sought and obtained from the railroad a collective agreement that discriminated against Negroes. Holding that if the allegations were proved, Steele and his fellow Negro firemen would be entitled to judicial relief, the Supreme Court said:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in

by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." NLRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act." Railway Labor Act § 2, Fourth, 48 Stat. 1187 (1934), 45 U.S.C. § 152, Fourth (1958).

55. See *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). However, § 9(a) of the NLRA expressly preserves to "any individual employee or a group of employees . . . the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment." 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958). Not much importance can be attached to this "right." For one thing, as can be seen, § 9(a) explicitly limits the "right" by allowing only adjustments "not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." For another, the General Counsel of the NLRB has on several occasions ruled that the "right" to present grievances does not give an employee the right to compel an employer to discuss his grievance with him. Case No. 418, 31 L.R.R.M. 1039 (1952); Case No. 317, 30 L.R.R.M. 1103 (1952); Case No. 255, 29 L.R.R.M. 1330 (1952). In addition, the NLRB has stated that if an employer allows a union other than the exclusive representative to aid individuals in the presentation of their grievances, he violates §§ 8(a)(5) and 8(a)(1) of the NLRA. Federal Tel. & Radio Co. 107 N.L.R.B. 649 (1953). *Contra*, *Douds v. Local 1250*, 173 F.2d 764 (2d Cir. 1949).

The leading authority on the rights of individuals in grievance processing under the Railway Labor Act is *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945).

56. *E.g.*, *Conley v. Gibson*, 355 U.S. 41 (1957) (Railway Labor Act); *Syres v. Oil Workers*, 350 U.S. 892 (1956) (National Labor Relations Act); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949) (Railway Labor Act); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944) (Railway Labor Act).

57. 323 U.S. 192 (1944).

collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.⁵⁸

If the statute were not so interpreted, the Court indicated, it might well be unconstitutional.⁵⁹

A union obviously violates the duty to represent everyone in the unit "without hostile discrimination, fairly, impartially, and in good faith" whenever it causes an employer to discriminate against an employee in the unit because of his race. A union would, for example, be derelict in its duty if it caused an employer to discriminate against Negroes with respect to discharges,⁶⁰ layoffs,⁶¹ or job classifications.⁶² Even insistence upon segregated washing or eating facilities would probably constitute a violation.

Discriminatory treatment of the grievances of Negro employees would be equally objectionable.⁶³ A breach of duty would be found whether the union completely refused to handle the grievances of Negroes, regularly traded them off to gain concessions for white grievants, or merely exerted less effort for Negroes than for whites.

2. *The duty to resist.* Perhaps the most troublesome question arising out of the duty of fair representation is whether unions are obliged to resist the discriminatory practices of employers. Of course, when an employer's discrimination is claimed to violate an existing collective agreement, the union's duty to give equal treatment to the grievances of Negroes requires the union to take whatever steps in protest it would take in support of a white worker's complaint.⁶⁴ But what are the limits of a union's duty when it is negotiating an agreement? If it seeks for all workers a benefit that the employer is willing to confer only on whites, to what extent, if at all, is the union bound to insist upon equal treatment for Negroes? To what extent, if at all, is it obliged to urge the elimination of discriminatory practices that preceded its appearance on the scene? Must it seek an agreement to bar all racial discrimination? These questions are vital, perhaps more important than any others that can be asked about the duty of fair representation, for unions probably accept discrimination far more often than they instigate it.

In an otherwise excellent article, Professor (now Solicitor General) Cox took the position that the duty of fair representation does not impose upon unions "the affirmative obligation of making reasonable efforts to abolish racial discrimination."⁶⁵ In his judgment, a union's "statutory duty would

58. *Id.* at 204.

59. See *id.* at 198.

60. See *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1950).

61. The *Steele* case itself involved discrimination of this sort.

62. See *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952).

63. *Conley v. Gibson*, 355 U.S. 41 (1957).

64. *Ibid.*

65. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 156 (1957).

seem to be limited to an obligation not to use its power to negotiate invidious distinctions"⁶⁶ He offered in support only the proposition that "nearly all the adjudicated cases in which the union was held to have violated its duty involved contracts which altered pre-existing rights under an earlier agreement or established arrangement."⁶⁷

Even at the time he wrote, Cox's position seemed ill-founded for at least three reasons. First, the adjudicated cases to which he referred did not suggest that they were probing the outer limits of the duty. On the contrary, the rationale of that line of decisions and much of the language used to support them suggested that some sort of affirmative obligation is imposed upon unions by the duty of fair representation. I shall return to this point presently.⁶⁸ Second, Cox cited no authority that either held or said that the duty is as narrow as he would have it. Third, as he recognized, in *Central of Georgia Ry. v. Jones*,⁶⁹ the Court of Appeals for the Fifth Circuit affirmed the granting of relief against a discriminatory contract that did not involve a deprivation of "pre-existing rights under an earlier agreement or established arrangement." Even though the discriminatory practices complained of had been in effect and included in agreements for more than thirty years, the court, in a per curiam opinion, approved an injunction barring enforcement of the contract and requiring both railroad and union "to grant the same seniority rights, training privileges, assignments and opportunities to these jobs as white persons of similar continuous service would enjoy."⁷⁰ Judge Brown dissented in part, but he did not quarrel with the holding that the union had breached its duty.⁷¹ And his concession on this point, which may well have reflected the view of the majority of the court too, defined the duty of fair representation in terms flatly inconsistent with Cox's position. Judge Brown said: "The Brotherhood had, to be sure, the profound obligation fully and earnestly to bargain to prevent, and, where necessary, remove, discriminations."⁷²

Within a year after Cox noted his disagreement with this decision and

66. *Id.* at 176.

67. *Ibid.*

68. See text accompanying note 75 *infra*.

69. 229 F.2d 648 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956).

70. *Id.* at 650.

71. Judge Brown disagreed with so much of the decree as compelled the railroad to pay damages and to refrain from discriminating against Negroes. He maintained that the railroad had not violated any duty; no law forbade it to discriminate and it was under no obligation to ensure that the union fulfilled its duty of fair representation.

72. 229 F.2d at 650. See also Case No. K-311, 37 L.R.R.M. 1457 (1956), in which the General Counsel ruled that a union's failure to resist racial discrimination does not violate NLRA § 8(b)(1), 61 Stat. 141 (1947) 29 U.S.C. § 158(b)(1) (1958), but "might properly be the basis for a petition for revocation of certification (Hughes Tool Co., 104 NLRB 318)." If a union's certification is to be revoked because of its failure to resist racial discrimination, it must be because such failure constitutes a breach of the duty of fair representation. See text at notes 118-21 *infra*.

Judge Brown's concession, the Supreme Court decided *Conley v. Gibson*.⁷³ In this case the union charged with discriminating was the Brotherhood of Railway and Steamship Clerks. The discrimination claimed was that the union, acting according to plan, failed to protect forty-five Negroes from demotions and discharges that were allegedly in violation of a collective agreement; almost all of the Negroes in question had been replaced by whites. The Court held that if these allegations were substantiated, the plaintiffs would be entitled to relief. The case holds only that Negroes are entitled to the same treatment as whites in the processing of grievances, a principle already discussed. Indeed, if the plan referred to in the plaintiff's allegations had been a collaborative venture between railroad and union, the case would be virtually indistinguishable from *Steele* itself. But the opinion, written for a unanimous Court, contained this significant passage:

The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that *once it undertook to bargain* or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.⁷⁴

The Court seems to have been saying that with respect to both the negotiation of agreements and the processing of grievances, Negroes are entitled to the same kind of representation as whites. This is surely more consistent with the theory of *Steele* and its progeny than is Cox's view that a union satisfies its duty of fair representation by refraining from using its power "to negotiate invidious distinctions." After all, if the minority were not encumbered with the majority's choice as their representative, they would not be limited to trying to maintain their present position. They would be free, either individually or through another union, to seek to better their lot. If the duty of fair representation is to make up for this loss of freedom, as *Steele* says, the compensating duty should be as commensurate

73. 355 U.S. 41 (1957). See also *Richardson v. Texas & N.O.R.R.*, 242 F.2d 230, 234 (5th Cir. 1957):

[J]urisdiction over such a controversy exists, irrespective of whether the representatives' [sic] breach of its statutory duty involves a deprivation of so-called 'vested employment rights' under a bargaining agreement discriminatory in express terms, as in *Steele*, or results, as here, from perpetuation prospectively by a bargaining agreement possibly valid upon its face of a pre-existing discriminatory employment practice. In either event, an actionable breach of the bargaining union's statutory duty rendered the complaint justiciable under the *Steele* case results, the particular form of enforcement of such discrimination being only a matter of proof.

74. 355 U.S. at 47. (Emphasis added.)

with the loss as possible. The majority's choice should, therefore, as *Conley v. Gibson* suggests, be under a duty to do more than refrain from harming Negro workers; it should be required to treat their needs with as much consideration as those of whites.

Although this issue was not before the Court in *Steele*, much of its opinion seems pertinent nevertheless. Consider, for example:

We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.⁷⁵

A union would hardly be using its power "in behalf of all those for whom it acts, without hostile discrimination against them" if it ignored the fact that one group of workers it represented was being arbitrarily treated by the employer.

This is not to say that a union violates its duty of fair representation if it refuses to strike for a no-discrimination clause as soon as it has obtained majority support in a southern plant. The duty does not require unions to commit suicide. It is to say that Negroes are entitled to an impartial consideration of their needs and interests and a fair determination of how far to press for equal treatment.

The core of that requirement is easy to see. If, for example, a union demanded a wage increase for Negro and white employees doing essentially the same work, it could not accept a counter-offer of an increase for whites alone. Indeed, unions probably must insist virtually to the point of striking that negotiated benefits be available without regard to race. They would normally fight that hard if an employer sought to condition the benefits of a collective agreement on any blatantly arbitrary standard other than race. Imagine a union's response if an employer sought to exclude bald-headed men from a general wage increase. A failure to respond in the same way in behalf of Negroes would be a rather clear indication that the interests of the minority had not been impartially considered.

To be sure, in many cases it will be impossible to say whether an agreement discriminates against Negroes. Since Negroes and whites often do different work, some differences in their compensation and job perquisites are to be expected. How shall a reviewing tribunal determine whether the differences between a Negro janitor and a white carpenter are based on race? But this problem is not peculiar to cases in which unions accede to employer demands; the very same problem exists when the union itself seeks benefits for the white carpenter that differ from those for the Negro janitor. This

75. 323 U.S. at 202-03.

problem perhaps more than any other factor allows unions to accomplish and accept much discrimination with impunity.⁷⁶ Parital solutions are suggested below.⁷⁷ In any event, the fact that many agreements with differing benefits may not be discriminatory should not bar relief from those that plainly are.

The practical impact of the duty to resist employer discrimination is harder to see when we turn to long-standing discriminatory practices. In theory, the courts could review a union's bargaining decisions upon complaint by a Negro worker and decide whether the union had been guilty of bad faith in failing to press for the elimination of some traditional discriminatory practice. In practice, the task would be nearly impossible. When a union negotiates a collective agreement, it must make, either consciously or by default, countless decisions about what to demand, what to trade, what to press for, and the like. Many of these decisions involve legitimate choices to pursue the interests of one group of employees rather than another. If a union chooses not to press for the elimination of racial discrimination, how is a tribunal looking over its shoulder to decide whether that choice was governed by the proscribed indifference to the interests of Negro workers rather than a judgment that the employer would not yield on this point or would do so only in exchange for exorbitant concessions?

The difficulty might be eased a bit in some cases by recourse to the realistic assumption that a union that excludes Negroes from membership does not consider their needs impartially. Therefore, when a court reviews the failure of a lily-white union to press for the elimination of employer discriminatory practices, the union should have the burden of justifying its inaction. By the same token, when a Negro claims that a union has accepted discriminatory benefits, and the union maintains that the differences are justified by differences in jobs or other factors, the burden of proving justification should be on the union if it excludes Negroes from membership.

The alternative or complement to this sort of review as a means of implementing the duty to make reasonable efforts to abolish racial discrimination would guarantee Negroes an opportunity to participate in union decision-making processes. In this way, hopefully, they could influence unions to further their interests. The Supreme Court plainly had this in mind in *Steele*, for, after stating that a union must represent all in the bargaining unit "without hostile discrimination, fairly, impartially, and in good faith," it said:

Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.⁷⁸

76. This point is discussed further in text accompanying notes 129-33 *infra*.

77. See text accompanying notes 78-82 & 113-67 *infra*.

78. 323 U.S. at 204.

However, as many have noted, union leaders will not often take seriously the views of workers who, by virtue of their exclusion from membership, can not vote in union elections.⁷⁹ Fair treatment is not, of course, guaranteed by the right to vote, but it is made more likely. Consequently, if minority participation in union decision making is to provide some measure of assurance that the minority's needs and interests will be considered fairly, that participation must include the franchise on matters, including the choice of officers, affecting collective bargaining.

Unfortunately, Congress has indicated in unmistakable terms its intent to leave unions free to set their own rules concerning eligibility for membership.⁸⁰ It presumably did not intend to give those excluded from membership the right to vote in union elections. Nevertheless, a serious constitutional question is presented if Congress is taken to have required workers to yield their freedom to deal with their employer individually or through a union

79. No collective bargaining agent can possibly accord equal treatment to nonmembers in the day-to-day activities of the union. Nonmembers cannot attend meetings or participate in the decisional processes of the union; they cannot vote for those who will represent them. The elected officials of a union . . . can hardly be expected to devote themselves as wholeheartedly to the interests of those who cannot vote as they do to the interests of those who can. A union leader could hardly be blind or indifferent to the interests of Negro workers in the bargaining unit if they could vote for the bargaining representatives and otherwise express themselves.

Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874, 875 (1957). See also Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425, 436 (1949); Lipset, *The Law and Trade Union Democracy*, 47 VA. L. REV. 1, 21 (1961); Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 49 & n.109 (1947); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1342 (1958).

80. It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

NLRA § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958). The sponsors of the legislation apparently regarded the quoted proviso as superfluous. See 93 CONG. REC. 4272 (1947).

"The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership." S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947).

"It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except in the two situations described." *Id.* at 21.

"Mr. TAFT. . . . Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say 'You have got to fire this man because he is not a member of our union.'" 93 CONG. REC. 4193 (1947).

"Mr. SMITH of Virginia. . . . [The language of the bill] does not compel the union to accept any person into membership if the union does not wish to do so. . . .

"It does not compel the union to admit anyone to membership or to exclude anyone from membership. . . .

"It gives the union the freedom to select its own membership and exclude those employees that it prefers not to extend its membership to." *Id.* at app. 2955.

And even Steele recognized that unions governed by the Railway Labor Act may exclude whom they wish. See the passage quoted in text accompanying note 58 *supra*.

of their own choice to a union that arbitrarily denies them the right to participate meaningfully in matters of vital concern to them.⁸¹ To avoid this constitutional problem, perhaps even to keep from holding a portion of the NLRA unconstitutional, the Supreme Court may have to hold that members of a bargaining unit arbitrarily excluded from the union representing that unit must be given the right to participate fully both in the union's deliberations on matters affecting collective bargaining and in its choice of officers.⁸²

To sum up, unions do have a duty to resist employer discrimination. That duty has three major aspects. First, unions must insist virtually to the point of striking that the benefits they obtain be made available without regard to race. Second, unions must decide fairly how far to press for the elimination of existing discriminatory practices. A union that excludes Negroes from membership should be presumed, until it proves otherwise, to have decided unfairly. Third, when Negroes are excluded from membership, they may nevertheless have to be accorded the right to participate in union deliberations on matters affecting collective bargaining with their employer; this would include the right to vote in union elections affecting collective bargaining.

3. *Job applicants.* The duty of fair representation originated and has

81. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring); *Givens, Federal Protection of Employee Rights Within Trade Unions*, 29 *FORDHAM L. REV.* 259, 283-84 (1961); *Summers, The Right to Join a Union*, 47 *COLUM. L. REV.* 33, 57-58 (1947). See generally *Wellington, The Constitution, The Labor Union, and "Governmental Action,"* 70 *YALE L.J.* 345 (1961). The constitutional argument was accepted by a state court, *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946), but rejected by a federal court, *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959). Cf. *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957).

82. *Givens, The Enfranchisement of Employees Arbitrarily Rejected for Union Membership*, 11 *LAB. L.J.* 809, 813 (1960), argues that such a holding would be supported by the definition of "member" contained in § 3(o) of the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 521 (1959), 29 U.S.C. § 402(o) (Supp. II, 1961). Section 3(o) provides:

'Member' or 'member in good standing,' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

Givens points out that "this definition does not state that that [*sic*] the term 'member' as used in the act is limited to those *admitted* to membership by the union, but expands the term to include those who have fulfilled the *requirements* for membership." *Givens, supra* at 813. He goes on to argue that the term "requirements" should be construed to mean only requirements "having some relation to legitimate union purposes." *Id.* at 815. Under this analysis, a worker excluded from a union solely because of his race is a "member" of the union for purposes of the statute, since he meets all requirements "having some relation to legitimate union purposes." He is therefore entitled to all rights that the Labor-Management Reporting and Disclosure Act confers on members. See, *e.g.*, § 101(a)(1), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(1) (Supp. II, 1961):

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitutions and by-laws.

been most frequently applied in a context of discrimination against workers on the job. Whether it also bars union discrimination against those applying for jobs has not yet been definitely resolved, but the philosophy of the NLRA, the rationale of the *Steele* case, and a Supreme Court decision on a related problem all suggest that applicants are protected too.

Other rights conferred on "employees" by the NLRA have regularly been held to extend to those seeking work.⁸³ Thus, the right of "employees" to be free from employer restraint in choosing whether to belong to a union means that an employer may neither fire an employee nor reject an applicant because of union membership.⁸⁴ The right to be free from unfair representation would seem to deserve an equally unrestricting interpretation.

Protection for applicants seems especially appropriate under the rationale of the *Steele* case. In essence, that decision rests on the premise that when Congress withdrew the individual's right to bargain for himself or to choose a representative other than that selected by the majority, it gave him in exchange the right to be represented fairly by the majority's choice. Since the applicant as well as the employee already working is disabled from negotiating his own terms or having some other union do it for him, the theory of *Steele* dictates that both receive the same protection from unfairness.

Finally, the Supreme Court's decision in *Brotherhood of R.R. Trainmen v. Howard*⁸⁵ and some of the Court's language in support of that decision suggest protection for applicants. The discriminating union was the Brotherhood of Railroad Trainmen, representative of the railroad's brakemen, all of whom were white. The victims were the railroad's train porters, all of whom were Negroes. The train porters did essentially the same work as the white brakemen but were foreclosed from becoming brakemen because of their race. In response to pressure from the union, the railroad agreed that train porters would no longer be permitted to do the work of brakemen, an agreement that meant that the train porters would be laid off.

The Court held that "the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs"⁸⁶ In support of its decision the Court said:

As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason The end result of these transactions is not in doubt; for precisely the same reasons as in the *Steele* case 'discriminations based on race

83. See, e.g., *NLRB v. Stratford Furniture Corp.*, 202 F.2d 884 (5th Cir. 1953); *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483 (D.C. Cir. 1951); *Kanmak Mills*, 93 N.L.R.B. 490 (1951), *partially enforced*, 200 F.2d 542 (3d Cir. 1952).

84. See, e.g., *NLRB v. Nevada Consol. Copper Co.*, 316 U.S. 105 (1942); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *NLRB v. George D. Auchter Co.*, 209 F.2d 273 (5th Cir. 1954).

85. 343 U.S. 768 (1952).

86. *Id.* at 775.

alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.' *Steele v. L. & N.R. Co.* . . . The Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers . . .⁸⁷

The Court thus found a breach of the duty of fair representation even though the train porters were not members of the bargaining unit represented by the Trainmen. In fact, the train porters had their own union. And the justification offered for the decision in the passage just quoted appears to be that a collective bargaining agent violates its duty whenever it deprives people of jobs because of their race. It would seem to follow that racial discrimination against job applicants is objectionable.

To be sure, the fact that train porters and brakemen did essentially the same work might have led the Court to conclude that both should be in a single bargaining unit and that the Brotherhood of Railroad Trainmen was therefore doing precisely what the union in *Steele* had done—discriminating against a racial minority in the unit. But for the Court to have merged the established units in this way would have been to usurp the function of the National Mediation Board, for it is to that agency and not the Court that the Railway Labor Act entrusts the resolution of disputes over the scope of bargaining units,⁸⁸ a proposition of which the Court was aware.⁸⁹ Moreover, the Court appears to have regarded the scope of the bargaining unit as irrelevant, for it said:

Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board . . . For the contention here with which we agree is that the racial discrimination practiced is unlawful, whether colored employees are classified as 'train porters,' 'brakemen,' or something else . . .⁹⁰

It seems likely, then, that job applicants are protected by the duty of fair representation.⁹¹

The duty to represent fairly has generally been assumed to be judicially enforceable whether arising under the Railway Labor Act or the

87. *Id.* at 773-74.

88. Railway Labor Act § 2, Ninth, 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth (1958); see *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943).

89. See 343 U.S. at 774.

90. *Ibid.*

91. Also relevant here is *Dillard v. Chesapeake & O. Ry.*, 199 F.2d 948 (4th Cir. 1952), in which unorganized and unrepresented Negro laborers alleged that because of their race defendant union had them barred from promotion to machinists' helpers, positions in the unit represented by the union. The court extended *Howard's* ban on racially discriminatory destruction of existing jobs to comprehend racially discriminatory denial of potential employment opportunities. "It is the unlawful use of power vested in the unions by the Railway Labor Act which gives rise to the jurisdiction of the court to afford relief, not the particular form which such abuse of power takes." *Id.* at 951.

National Labor Relations Act.⁹² There is, however, some reason to question this assumption with respect to the NLRA. The reasons for doubt—which have to do with possible exclusive jurisdiction in the National Labor Relations Board—can best be understood in light of the role the NLRB plays, or should play, in the enforcement of the duty of fair representation.

Accordingly, we turn now to explore the extent to which the duty of fair representation is and should be enforced by the National Labor Relations Board. A discussion of the role of the courts will follow.

B. *The Role of the NLRB*

Since the duty of fair representation is implicit, not expressed, in the National Labor Relations Act, the statute is, of course, silent on how that duty is to be enforced. Nevertheless, the possibilities for the NLRB are fairly obvious. They fall into two basic categories; unfair labor practice proceedings, and refusal by the Board to aid unions to become or remain exclusive representatives when they can be expected to abuse the power that this position entails. The discussion begins, then, by considering whether a union commits an unfair labor practice if it fails in its duty of fair representation. It continues with a consideration of the Board's handling of the argument that it should refuse to assist to the status of exclusive representative a union that can not be expected to discharge its duty.

1. *Unfair labor practice proceedings.* Three unfair labor practice provisions merit attention as arguable checks on union violation of the duty of fair representation. One—section 8(b)(2)—we have already considered and its additional relevance here will be noted briefly. Another—section 8(b)(3)—is available to redress some violations. The third—section 8(b)(1)—would be the most useful, but only one case has thus far found it pertinent.

a. *Section 8(b)(2).* We have seen that the duty to represent fairly precludes a union from, among other things, instigating employer discrimination against those denied union membership because of race. We have also seen that section 8(b)(2) outlaws the very same conduct. To a limited extent, then, section 8(b)(2) fosters the duty of fair representation. However, the two are not coextensive. As was noted above, no aid is afforded by 8(b)(2) to the Negro who is admitted to union membership but nevertheless discriminated against on the job because of his race. Nor is 8(b)(2) useful unless a union causes or attempts to cause an employer to discriminate. If, for example, a union does no more than unreasonably refuse to resist employer discrimination, it violates its duty of fair representation but not

92. See, e.g., Givens, *Federal Protection of Employee Rights Within Trade Unions*, 29 *FORDHAM L. REV.* 259, 268 (1961); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 *YALE L.J.* 1327, 1334-35 (1958).

8(b)(2). In short, 8(b)(2) offers significant, but by no means complete, support for the duty of fair representation.

b. *Section 8(b)(3)*. Section 8(b)(3) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)."⁹³ Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith* with respect to wages, hours and other terms and conditions of employment"⁹⁴ The first question to be answered thus becomes: does the duty to "confer in good faith" run only to the employer with whom the union must bargain or does it extend as well to the employees represented by the union. Put another way, is the duty to represent fairly one of the components of the duty to "confer in good faith"?

Cox has suggested that the statute leaves the question open. He said:

The statutory language hardly answers the question, although the reference to 'the mutual obligation of the employer and the representative of the employees' suggests that other duties are excluded. 'To bargain collectively with an employer' may imply bargaining *fairly* on behalf of all the employees. The legislative history is not revealing.⁹⁵

Cox went on to conclude that a breach of the duty to represent fairly should be held a violation of section 8(b)(3).

The difficulty with this view is that the context in which the words "confer in good faith" appear gives repeated evidence of concern with the duties of employer and union to each other, but no evidence at all of concern with the duty of unions to those they represent. For one thing, as Cox himself noted, the statute speaks of the "mutual obligation of the employer and the representative of the employees," thereby implying that obligations to others are not the subject of this provision. For another, the duty to "confer in good faith" is imposed upon employers and unions alike. On its face, then, it imports comparable obligations and, of course, an employer can have no obligation comparable to the duty of fair representation. That the duty of unions to bargain collectively was intended merely to parallel that of employers is also suggested by the fact that 8(b)(3), which imposes the duty on unions, was added to the National Labor Relations Act as an obvious counterpart to section 8(a)(5), which imposes it on employers.⁹⁶ The duty

93. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

94. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958). (Emphasis added.)

95. Cox, *supra* note 65, at 172.

96. "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." NLRA § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958).

to bargain collectively, then, probably does not include the duty to represent fairly.

It does not follow, however, that 8(b)(3) is of no value here. Although the section seems not to afford workers any direct protection, the duty it imposes on unions in favor of employers has aspects that support the duty of fair representation. In fact, a union plainly violates the duty it owes to an employer under 8(b)(3) if it makes and insists upon a racially discriminatory demand.

Suppose, for example, that a union demanded that certain lines of promotion remain closed to Negroes, a fairly common form of discrimination. If the union struck in support of that demand or refused to conclude a collective agreement without assurances on the subject, the employer would be entitled to an order from the NLRB commanding the union to cease and desist from its insistence upon the discriminatory promotion system.

Two theories offer solid support for this proposition. The first is based on *NLRB v. Borg-Warner Corp.*,⁹⁷ in which the Supreme Court accepted the NLRB's view that if one party to collective negotiations may lawfully refuse to bargain about a particular demand, the other may not insist upon it as a condition of reaching agreement. Such insistence itself constitutes a refusal to bargain. Although there is no authority on the point, employers are surely free to refuse to bargain about racially discriminatory demands. Otherwise, the NLRB would be in the absurd position of having to compel employers to engage in negotiations the purpose of which is to violate the act. Since an employer may refuse to bargain about a racially discriminatory demand, it follows from *Borg-Warner* that a union is guilty of a refusal to bargain if it insists upon such a demand.

The other theory rests on Mr. Justice Harlan's concession, made in the course of dissenting in *Borg-Warner*, that, "Of course an employer or union cannot insist upon a clause which would be illegal under the Act's provisions . . . or conduct itself so as to contravene specific requirements of the Act."⁹⁸ Although the authorities cited⁹⁹ suggest that Mr. Justice Harlan may not have had demands in breach of the duty of fair representation specifically in mind, they seem indistinguishable from demands for unfair labor practices. In both cases the union is seeking to subvert the policy of the statute; in both the employer would be exposing himself to liability if he acceded to the demand. Consequently, since insistence upon a demand that an employer commit an unfair labor practice constitutes a refusal to bargain, so, presumably, would insistence upon a demand made in breach of the duty of fair representation.

97. 356 U.S. 342 (1958).

98. *Id.* at 360.

99. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *NLRB v. National Maritime Union*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950).

The difficulty with the protection afforded to Negroes by 8(b)(3) is that only employers can bring it into play. A party to collective negotiations does not violate 8(b)(3) merely by making an illicit demand; the violation consists of adhering to that demand, in the face of resistance, as a condition of entering into a collective agreement. Unfortunately, the absence of even a single case applying 8(b)(3) to strike down a racially discriminatory demand suggests that employers rarely offer the requisite resistance. This is not particularly surprising; many discriminatory demands cost a company nothing to grant, whereas resistance may lead to its having to yield on something expensive. Consequently, section 8(b)(3), although potentially useful, has yet to be put to work against racial discrimination.¹⁰⁰

c. *Section 8(b)(1)*. Section 8(b)(1) makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in Section 7"¹⁰¹ Section 7, in essence, guarantees employees the right to engage or, if they prefer, to refrain from engaging in union activities.¹⁰² Unhappily, section 7 says nothing about the right to be represented fairly.

Nevertheless, on one recent occasion, the NLRB appears to have provided some support for the proposition that a union violates 8(b)(1) when it defaults on its duty of fair representation. The case is *Local 229, United Textile Workers*.¹⁰³ The breach of duty was the union's exclusion of non-

100. Can the refusal to bargain argument be invoked against employers when they insist upon racial discrimination? Although the NLRA does not prohibit employers from engaging in racial discrimination, an employer would nevertheless be guilty of a refusal to bargain if he insisted that a union agree to a discriminatory provision when the NLRA barred it from doing so. The answer to the question turns, then, on whether a union violates its duty of fair representation by yielding to a demand for discrimination. As the discussion at notes 64-82 *supra* indicated, the limits of a union's duty to resist an employer's discriminatory demands are not yet clear. Apparently, though, a union would be free to accept a discriminatory demand if it could not induce the employer to abandon it. If that is so, an employer would not be refusing to bargain by insisting that the union give in.

What if the employer's demand is for a provision that would be illegal under a state fair employment practices law? In view of the Supreme Court's unwillingness to let the states interfere with the administration of the NLRA, see text accompanying note 178 *infra*, it almost certainly would not allow them to define even in part the scope of permissible bargaining under that statute. Cf. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959). Therefore, if an employer makes a demand that is illegal under a state antidiscrimination law, the union must look to whatever remedy the state affords and hope that the Supreme Court will not say that even this constitutes an unwarranted interference with the federal labor legislation. Cf. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 49 L.R.R.M. 2818 (Colo. 1962), holding that the Colorado antidiscrimination law may not be applied to the flight personnel of an interstate carrier.

101. 61 Stat. 141 (1947), 29 U.S.C. § 168(b)(1) (1958).

102. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

NLRA § 7. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

103. 120 N.L.R.B. 1700 (1958).

union workers in the bargaining unit from the benefits of a "Health Trust Fund" supported by their employer's contributions and administered by the union. The trial examiner concluded:

In administering the Health Trust Fund, the Respondent purported to act as the exclusive bargaining representative of all employees in the unit. It therefore could not lawfully betray the trust of nonunion members by operating the fund for the benefit of its members only, thus leaving the nonmembers without any means of equalizing the situation. It is accordingly found that, by maintaining, operating and administering the Health Trust Fund since on or about March 18, 1957, only for the benefit of its members, the Respondent restrained and coerced employees of the Company, in violation of Section 8(b)(1)(A) of the Act.¹⁰⁴

Under this approach, if the victims of the discrimination had been Negro members of the union rather than nonunion workers, the same result should have been reached. Indeed, under this approach, any breach of the duty of fair representation would seem to violate 8(b)(1).

The Board probably did not intend to go so far. The outcome can easily be explained without recourse to the duty of fair representation. The precedents clearly establish that when a union withholds from nonunion employees benefits financed by their employer, it restrains those employees in their right, guaranteed by section 7, to refrain from becoming union members.¹⁰⁵ And the cases cited by the examiner in support of his opinion so held.¹⁰⁶ In those cases, as in the one under discussion, racial discrimination was not involved.

Nevertheless, the examiner chose to support his decision with the language of fair representation and the Board did not correct him. Without further comment on this subject, it adopted his findings, conclusions, and recommendations.¹⁰⁷

104. *Id.* at 1708.

105. See, e.g., *Indiana Gas & Chem. Corp.*, 130 N.L.R.B. 1488 (1961); *Progressive Kitchen Equip. Co.*, 123 N.L.R.B. 992 (1959); *Local 140, United Furniture Workers*, 109 N.L.R.B. 326 (1954).

106. These were *Gaynor News Co. v. NLRB*, 347 U.S. 17, 38-39 (1954); *Carty Heating Corp.*, 117 N.L.R.B. 1417 (1957).

107. Also relevant is Case No. K-311, 37 L.R.R.M. 1457 (1956), in which the General Counsel of the NLRB was asked to issue unfair labor practice complaints against several employers and unions on the ground that the "employers had discriminated against [employees] on a racial basis upon demand by or in conspiracy with [the] unions." He refused because there was no "evidence of attempts by the unions to cause discrimination by the companies," and a mere failure to move to eliminate employer discrimination does not violate § 8(b)(1). Perhaps, then, if evidence of union instigation had been present, the General Counsel would have issued an unfair labor practice complaint. *But see* Rauh, *supra* note 79, at 877:

[T]he General Counsel determined a number of years ago in an unpublished decision that no violation of the act occurred when a labor union obtained the dismissal of a Negro from his job on racial grounds. In 1952, the General Counsel took the position that despite the Supreme Court's decision in the *Steele* case, and the application of that same doctrine to the National Labor Relations Act in *Wallace Corporation v. NLRB* [323 U.S. 248 (1944)], he could find

Is there any theory upon which the use of 8(b)(1) to enforce the duty of fair representation can be justified? One line of cases provides a possible beginning, at least when the breach of duty goes beyond mere acquiescence in an employer's discriminatory practices. On a number of occasions the Board has held union conduct not otherwise violative of 8(b)(1) objectionable because employees learning of that conduct might be intimidated by it. As a result, they would be restrained or coerced "in the exercise of the rights guaranteed in section 7. . . ."¹⁰⁸

The classic example is an assault on an employer in order to force him to recognize a union. If a union assaulted a worker to force him to join, it would, of course violate 8(b)(1), but that section does not proscribe coercion of employers. Nevertheless, since employees learning of the union's assault on the employer might well conclude that a similar fate awaited them if they refused to join, the NLRB has held that a union violates 8(b)(1) when it threatens or uses strong-arm tactics on an employer under circumstances likely to come to the attention of employees.¹⁰⁹

Section 8(b)(1) can, then, be violated in what might be called a derivative way. Even though the person directly affected by the union's action has not been deprived of any right protected by 8(b)(1), if what happened to him is likely to deter others from exercising their section 7 rights, 8(b)(1) may have been violated.

This approach has not been limited to cases of violence. The Board has sometimes applied it when unions have flexed their economic muscles as well. More particularly, when unions without valid union security agreements have obtained the discharge or prevented the promotion of nonmembers, the Board has sometimes found an 8(b)(1) violation, on the ground that the action "had the effect of coercing and restraining other employees to join or retain membership in the Respondent Union by evidencing the

nothing in the Taft-Hartley Act which made it an *unfair labor practice* to bargain discriminatorily and unfairly against excluded minorities. In the memorandum for the NLRB filed in 1952 with the Supreme Court in the case of *Ford Motor Company v. Huffman* [345 U.S. 330 (1953)], the Board and its counsel took the position that the right to equal representation, in view of the absence of affirmative legislative history, could not be found implicit in Section 7 of the act so as to render violations of that right an unfair labor practice within the terms of the act. Other than the power to refuse certification, which the Board has failed to exercise, it could find no provision in the act which would provide an administrative remedy against discrimination by labor unions.

108. *E.g.*, *United Packinghouse Workers*, 123 N.L.R.B. 464 (1959), *enforced*, 274 F.2d 816 (5th Cir. 1960); *Communications Workers*, 120 N.L.R.B. 684 (1958), *enforced*, 266 F.2d 823 (6th Cir. 1959), *aff'd*, 362 U.S. 479 (1960); *International Woodworkers*, 116 N.L.R.B. 507 (1956), *enforced*, 243 F.2d 745 (5th Cir. 1957); *Local 140, United Furniture Workers*, 113 N.L.R.B. 815 (1955), *enforced*, 233 F.2d 539 (2d Cir. 1956); *Local 1150, United Elec. Workers*, 84 N.L.R.B. 972 (1949); *United Furniture Workers*, 81 N.L.R.B. 886 (1949).

109. See, *e.g.*, *Central Mass. Joint Bd.*, 123 N.L.R.B. 590 (1959); *Local 140, United Furniture Workers*, *supra* note 108.

Respondent's power to have the Company discharge employees upon mere request."¹¹⁰

This theory would, of course, have to be extended in order to be useful in behalf of Negroes. The 8(b)(1) violation consists of making workers fear that the union will jeopardize their job rights if they refrain from union activities. That a union frequently accomplishes this when it obtains the discharge or prevents the promotion of a nonmember is clear. The workers can easily perceive that lack of union membership puts their jobs in jeopardy. The lesson is not so clear when the union uses its power against Negroes. Indeed, perhaps the only lesson white workers learn from such a show of strength is that lack of white skin can put one's job in jeopardy. But it is at least arguable that the whites will also note that the union decides who works and who does not, or who is promoted and who is not, and will conclude that it is best to be on good terms with the holder of that power. In short, their choice of whether to engage in collective activities may be governed by the fear that the very same power that ousted the Negroes will be used on those who fail to support the union.

The crucial inference has; to be sure, changed and, concededly, become more attenuated in the process. The inference that employees will fear union reprisal for failure to engage in collective activities is obviously stronger if the union has had workers disciplined for that failure than if it has had workers disciplined for some other illicit reason. But the new inference is hardly farfetched. If employees know that the union has the power to damage their job rights in violation of law, at least some are likely to expect the union to use that power to punish those who oppose it.

Is this enough to support a finding of an 8(b)(1) violation? The argument has never been put to the Board. It does require a stretching of existing doctrine. If racial discrimination were not involved, we could be confident that the Board would not push 8(b)(1) any further. It would certainly be right to refuse to do so in light of the recent Supreme Court decisions holding that an employer and a union do not commit an unfair labor practice merely by entrusting the hiring function to the union.¹¹¹ But when racial discrimination is involved, the Board, hopefully, starts with a sense of outrage, a recognition of the complete lack of social and economic utility in such practices,¹¹² and an awareness that a union violates the National Labor Re-

110. *Coal, Gasoline & Fuel Oil Teamsters*, 113 N.L.R.B. 111 (1955); *accord*, *Northwestern Mont. Dist. Council*, 126 N.L.R.B. 889 (1960); *Local 450, Int'l Union of Operating Eng'rs*, 122 N.L.R.B. 564 (1958), *enforced*, 281 F.2d 313 (5th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961).

111. *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961).

112. As contrasted with hiring halls, which are generally conceded to be of great utility to worker, union, and employer alike when they are operated fairly. See, *e.g.*, Fenton, *The Taft-Hartley Act and Union Control of Hiring—A Critical Examination*, 4 VILL. L. REV. 339 (1959); Note, 1 STAN. L. REV. 272 (1949); Note, 70 YALE L.J. 661 (1961).

lations Act itself when it discriminates against workers it is supposed to be representing. If the present Board comes to consider against that background whether it can enforce the duty of fair representation in unfair labor practice proceedings, it may be willing to seize upon any plausible theory that will enable it to go ahead.

I said earlier that the NLRB has at its disposal two possible means of enforcing the duty of fair representation. The first of these—unfair labor practice proceedings—we have now seen has not been fully exploited. If the Board is willing to reach out, section 8(b)(1) could be of great importance in preventing racial discrimination on the job. If individual Negro workers and Negro organizations press diligently for the rights afforded by section 8(b)(2), something more can be accomplished under that provision. And, finally, if employers are willing to resist discriminatory demands, 8(b)(3) promises helpful support.

We turn now to the NLRB's other possible means of enforcing the duty of fair representation—refusing to help unions gain the status of exclusive representative when they can be expected to ignore the duty of fair representation.

2. *Board refusal to help a union become or remain an exclusive representative.* By certifying a union¹¹³ or ordering an employer to bargain with it,¹¹⁴ the NLRB places its imprimatur upon that union as exclusive representative of all the workers in the bargaining unit. Without that imprimatur,

113. A petition for investigation of the question whether a union represents a majority of employees in an appropriate unit may be filed by an individual, labor organization, or employer. 29 C.F.R. § 101.17 (Supp. 1961). Thereafter, the employer and the union or unions claiming to represent his employees may, with the approval of the regional director, enter into a "consent-election" agreement concerning the appropriate unit, the time and place of the election, and the employees eligible to vote; the regional director will then conduct an election. 29 C.F.R. § 101.19 (Supp. 1961). Absent such an agreement, the regional director will have a hearing held to determine whether a question concerning representation actually exists and, if it does, what the appropriate unit for bargaining should be. He will then order an election, dismiss the petition, or make some other disposition, as appropriate. 29 C.F.R. §§ 101.20, 101.21(a) (Supp. 1961). Review by the NLRB will be granted only for "compelling reasons." 29 C.F.R. § 102.67 (Supp. 1961).

If an election is held, whether by consent or order, it will usually be supervised by the regional director. Any party may file objections "to the conduct of the election or conduct affecting the results of the election." 29 C.F.R. § 102.69(a) (Supp. 1961). If no objections are filed and no other reason not to certify appears, "the regional director shall forthwith issue to the parties a certification of . . . representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed." 29 C.F.R. § 102.69(b) (Supp. 1961). If objections are filed, procedures for their consideration by the regional director and/or the Board are provided; these may end with certification, the holding of a new election, or other appropriate action. 29 C.F.R. §§ 102.69(c)-(e) (Supp. 1961).

114. An order to bargain issues pursuant to NLRA § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958), when an employer has refused to bargain in violation of § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958). If a union's majority support is not in serious doubt, an employer may be ordered to bargain with it even though its majority has not been demonstrated in a certification election. See, e.g., *Sheridan, d.b.a. Royal Fleet Service*, 111 N.L.R.B. 1180 (1955); *Dismuke Tire & Rubber Co.*, 93 N.L.R.B. 479 (1951); *Everett Van Kleeck & Co.*, 88 N.L.R.B. 785 (1950), *enforced*, 189 F.2d 516 (2d Cir. 1951).

a union may be unable to get an employer even to begin negotiations;¹¹⁵ with it the union is likely to meet considerably less resistance and can ultimately call upon the aid of the federal courts if the employer fails to bargain in good faith.¹¹⁶ On a number of occasions the Board has been asked to withhold its imprimatur from unions likely to default on their obligation to represent fairly.¹¹⁷

a. *Rescission of certification.* The Board has indicated that it will rescind the certification of a union shown to have represented unfairly. It has, for example, regarded rescission as appropriate when a union refused "to process and present grievances of all members of the bargaining unit on a nondiscriminatory basis";¹¹⁸ when a union bargained for its members only, leaving the other workers in the bargaining unit unrepresented;¹¹⁹ and when a union compelled Negro workers in the unit to continue membership in a separate colored local that was uncertified and not a party to the collective agreement negotiated by the offending union.¹²⁰

The Board's position is a sensible one. Although it is not expressly authorized by the NLRA, the necessary authority can fairly be implied; if a union has demonstrated that it will not use the power conferred by its certification as the statute contemplates, the certifying agency should be free to take back the power granted. This may be the only remedy available to

115. An employer with a good faith doubt concerning the majority status of a labor organization demanding recognition does not violate the statute by refusing to bargain with the union until it demonstrates its majority support in a certification election. See, e.g., *American Rubber Prods. Corp. v. NLRB*, 214 F.2d 47, 54 (7th Cir. 1954); *Davis, d.b.a. The Walmac Co.*, 106 N.L.R.B. 1355 (1953). Indeed, an employer would normally be well advised to insist upon an election when he has such a doubt, lest he commit an unfair labor practice by accepting as exclusive representative a union that does not have majority support. See, e.g., *ILGWU v. NLRB*, 366 U.S. 731 (1961). The NLRB's help can be important to a union even when it plainly has majority support, because many employers, in an effort to avoid their statutory obligation, have refused to bargain until explicitly commanded by the Board to do so. See cases cited note 114 *supra*.

116. The procedure would be to seek an order from the Board commanding the employer to cease and desist from refusing to bargain. The Board will issue such an order if it finds that the employer has violated § 8(a)(5). If the employer fails to obey this order, the NLRB will normally petition a court of appeals to enforce it. Although enforcement is not automatic, the Board's findings of fact are conclusive if supported by substantial evidence. NLRA § 10(e), 61 Stat. 147 (1947), as amended, 29 U.S.C.A. § 160(e) (1958). For additional information on how the Board proceeds to obtain compliance with its orders see note 50 *supra*.

117. See, e.g., *Pacific Maritime Ass'n*, 112 N.L.R.B. 1280 (1955); *Fawcett-Dearing Printing Co.*, 106 N.L.R.B. 21 (1953); *Coleman Co.*, 101 N.L.R.B. 120 (1952).

118. *Hughes Tool Co.*, 104 N.L.R.B. 318, 319 (1953). Although it indicated that rescission would have been appropriate, the Board nevertheless refrained from rescinding the certification because it regarded the matter as one of first impression and because a joint holder of the certification had not been guilty of any misconduct. Consequently, the offending union was held entitled to an opportunity to correct its conduct. *Id.* at 329.

119. *Pittsburgh Plate Glass Co.*, 111 N.L.R.B. 1210 (1955).

120. *Larus & Brother Co.*, 62 N.L.R.B. 1075 (1945). However, as in *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953), rescission was not in fact ordered. Here the objectionable contract had expired, more than one year had elapsed since certification, and the offending union had voluntarily relinquished its certification and requested a new election.

Rescission was ordered in *A. O. Smith Corp.*, 119 N.L.R.B. 621 (1957), in which a union had entered into contracts that did not cover part of the unit that the union was certified to represent.

the workers discriminated against, for judicial relief is costly and the NLRB may not be able to help in any other way. Moreover, that racial discrimination has occurred in collective bargaining is extraordinarily difficult to prove; if it can be proved once to the satisfaction of the NLRB, the abused workers should be relieved of the otherwise continuing threat the union represents.¹²¹

b. *Refusal to certify.* Whether the Board would go further and refuse to certify in the first place when it appears probable that a union will violate the duty of fair representation is not entirely clear. On the one hand, it has never done so. Allegations of past discriminatory representation offered to support the probability of future unfairness have not moved it,¹²² nor have allegations of discriminatory denials of membership.¹²³ Indeed, even when past violation of the duty of fair representation has made rescission of certification appropriate, the Board has usually not prevented the offending union from immediately participating in a new representation election in which victory would mean certification all over again.¹²⁴

On the other hand, in none of these cases has the Board excluded the possibility that it would disqualify a union likely to disregard the duty of fair representation if an appropriate case were presented to it. Its usual response is merely to find the proof offered insufficient. Thus, it has said again and again that "there is no showing in the record before us that the Petitioner will not accord adequate representation to all employees included within the unit found appropriate . . ."¹²⁵ Although one must wonder what sort of showing would satisfy the Board, there is a related line of authority that suggests that satisfaction on this score is not out of the question. The

121. However, this need not be a permanent disqualification. The circumstances under which a union that has had its certification revoked should be entitled to a new certification are discussed in text following note 152 *infra*.

122. *Coleman Co.*, 101 N.L.R.B. 120 (1952); *accord*, *Pacific Maritime Ass'n*, 112 N.L.R.B. 1280 (1955), in which job applicants rather than those already in the unit were claimed to have been discriminated against in the past. This argument, which was made to the court of appeals in a collateral attack on the Board's unit determination, see *NLRB v. Pacific Shipowners Ass'n*, 218 F.2d 913, 917 (9th Cir.) (concurring opinion), *cert. denied*, 349 U.S. 930 (1955), was presumably advanced in the proceedings before the Board as well.

123. See, e.g., *Pacific Maritime Ass'n*, *supra* note 122; *Stickless Corp.*, 110 N.L.R.B. 2202 (1954); *Texas & Pac. Motor Transp. Co.*, 77 N.L.R.B. 87 (1948).

124. *Pittsburgh Plate Glass Co.*, 111 N.L.R.B. 1210 (1955); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953); *Larus & Brother Corp.*, 62 N.L.R.B. 1075 (1945). In *Hughes*, a new election was not even required; "special circumstances" led the Board to allow the union to retain its certification on condition that the particular discrimination be corrected. See note 118 *supra*. Ironically enough, in *A. O. Smith Corp.*, 119 N.L.R.B. 621 (1957), in which the Board imposed a six-month disqualification, there appears to have been no reason to believe that the penalized union would not have acted fairly in the future. Nevertheless, the Board felt obliged to punish the union in order to demonstrate that it did not view lightly a disregard of the duty of fair representation.

125. *Norfolk So. Bus Corp.*, 83 N.L.R.B. 115-16 (1949); *accord*, *Comfort Slipper Corp.*, 111 N.L.R.B. 188, 190 (1955); *Fawcett-Dearing Printing Co.*, 106 N.L.R.B. 21 (1953); *Coleman Co.*, 101 N.L.R.B. 120, 122 (1952); *Mine Safety Appliances Co.*, 85 N.L.R.B. 290, 293 (1949); *Modern Upholstered Chair Co.*, 84 N.L.R.B. 95, 96 (1949); *George K. Garrett Co.*, 72 N.L.R.B. 1386 (1947); *Virginia Smelting Co.*, 60 N.L.R.B. 616, 617-18 (1945).

Board has persistently refused to recognize a petition for representation if, in the Board's language, "the petition proposes, either explicitly or implicitly, to exclude Negroes from the bargaining unit on the basis of race."¹²⁶ If the Board will not entertain a petition for a whites-only unit, it should presumably be loath to entertain a petition from a union that is likely to create such a unit *de facto* by failing to represent the Negroes in the unit established by the Board.

Furthermore, the Board has characterized rescission of certification as "an anticipatory curb on a variety of actions not compatible with the status of certified bargaining representatives."¹²⁷ When actions "not compatible with the status of certified bargaining representatives" can be foreseen before certification, application of the "anticipatory curb" would seem to be appropriate at that time. If, for example, a union is shown to have represented Negroes unfairly in other bargaining units and to exclude from membership Negroes working in the unit for which it seeks certification, the Board should refuse to certify it. The alternative is to leave the Negroes in the bargaining unit vulnerable to the suspect union's ministrations until a breach of duty sufficiently flagrant to be proved occurs. In the interim, subtler forms of discrimination can be practiced with impunity.

This last point is crucial. On its face the case for certifying a union and waiting to see whether it will represent fairly is quite plausible. It is, after all, difficult to predict whether a union will live up to its duty. The case for waiting to see loses its persuasive force when one remembers that even the most dutiful collective bargaining representative can not avoid choosing among the interests of its constituents. For example, if a plant must permanently reduce its work force, senior employees will naturally favor layoffs for their juniors, while their younger colleagues become impassioned spokesmen for the benefits of early retirement for older workers. Head-on clashes of interest of this sort are complemented by ever present indirect conflicts. An employer obviously can not be expected to give employees everything they want. A larger contribution to the pension fund, desired by older workers, means a smaller increase in take-home pay, a choice that may dissatisfy younger workers. If part of the wage package is allocated to maintaining or restoring wage differentials based on skill, there will be less for unskilled workers. And so on.

How is the unfair reconciliation of such conflicts to be distinguished from the fair? That a union regularly subordinates the interests of a particular disfavored group would become apparent only after a considerable period of time. This, then, is the main reason why the Board should not

126. *Larus & Brother Co.*, 62 N.L.R.B. 1075, 1081 (1945); *accord*, *Andrews Indus., Inc.*, 105 N.L.R.B. 946, 949 (1953); *Colorado Fuel & Iron Corp.*, 67 N.L.R.B. 100, 103 (1946); *Aetna Iron & Steel Co.*, 35 N.L.R.B. 136, 138 (1941).

127. *Hughes Tool Co.*, 104 N.L.R.B. 318, 322 (1953).

certify a union likely to represent unfairly. The alternative is to expose those likely to be misrepresented to substantial loss that can be stopped only when the union's conduct is particularly gross, as in the *Steele* case,¹²⁸ or amounts to oppression so systematic that it finally becomes discernible.

The subtler forms of discrimination, so hard to establish as such, find Negroes especially vulnerable. An individual white worker out of favor with the union leadership usually need not fear reprisal when the union negotiates its next collective bargaining agreement. The leadership will normally be unable to punish him by, say, rewriting lines of seniority to his disadvantage or seeking only small increases for his job classification without at the same time hurting other workers similarly situated whom the union leadership does not wish to harm. And although the union may be unenthusiastic about processing a grievance for our hypothetical white outcast, it may nevertheless do so with vigor if it thinks that failure to make its point in his case will hurt other workers similarly situated. Negroes, on the other hand, must often do without the comfort afforded by the leadership's wish to do no harm to workers similarly situated. One of the most common forms of discrimination is the division of work into "white jobs" and "Negro jobs," with Negroes getting the dirtier, less skilled, and lower paying work.¹²⁹ Under such circumstances, the union can easily ignore or subordinate the interests of Negroes without hurting white employees at all. And since whites and Negroes do different work—a state of affairs that can not be blamed on the union because it typically antedates unionization¹³⁰—a case of discrimination by the union can hardly be made out merely by proving that the wages and working conditions of Negroes are inferior.

A ruling of the General Counsel of the NLRB illustrates the problem.¹³¹ Negro employees filed an unfair labor practice charge, claiming that several employers and unions had conspired to discriminate against them because of their race. In dismissing the charge, the General Counsel seems to have been influenced by the absence of evidence "that these employees had performed work which was the same as that of an employee of a different race and had been paid at a lower rate."¹³² And yet, in this very case, the General Counsel found that "the employers had employed the charging parties and like employees in only the lowest classifications."¹³³ If, as may well have been

128. See text accompanying notes 57-59 *supra*.

129. See, e.g., 1961 COMM'N REP. 135-39 (1961); Hawley, *Negro Employment in the Birmingham Metropolitan Area*, in SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 265-66 (National Planning Ass'n ed. 1955).

130. See, e.g., *Whitfield v. United Steelworkers*, 156 F. Supp. 430, 433 (S.D. Tex. 1957), *aff'd*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); Dewey, 4 *Studies of Negro Employment in the Upper South*, in SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH 145, 211 (National Planning Ass'n ed. 1955); Dewey, *Negro Employment in Southern Industry*, 60 J. POL. ECON. 279, 289 (1952).

131. Case No. K-311, 37 L.R.R.M. 1457 (1956).

132. *Id.* at 1457.

133. *Id.* at 1457.

true, there were no whites in those "lowest classifications," the Negroes could not possibly offer evidence that they had been paid less than whites for the same work.

Even when Negroes are no longer confined to "Negro jobs," the hard fact is that past, and sometimes continuing, patterns of discrimination often give Negroes special interests that differentiate them from whites. An obvious example is their interest in resistance to racial discrimination by their employer. Or imagine a plant in which some of the more attractive departments have recently been opened to Negroes; although only lately promoted to these jobs, the Negroes involved may well have been with the company far longer than the whites doing comparable work. In such circumstances, the Negroes obviously want seniority computed on the basis of over-all service with the company, while the whites want it computed on the basis of service in the particular department. Once again, then, an unsympathetic union can ignore or subordinate the Negroes' interest and still leave them hard put to prove that they have been the victims of racial discrimination. After all, many collective bargaining agreements provide for departmental seniority.

Given the considerable power of unions to represent Negroes unfairly without realistic fear of detection, the Board should not certify unions likely to transgress in this way.¹³⁴ It should, rather, withhold certification until the union appears likely to live up to its duty. To do less is to rob the duty of fair representation of much of its meaning.

Whether the Board will accept this view remains to be seen. The indications so far are that it will not, but the existing authority is far from definitive.

134. Section 9(c) (2) does not deny the Board the power to refuse to certify unions that will probably represent unfairly. That section provides:

In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

61 Stat. 144 (1947), 29 U.S.C. § 159(c) (2) (1958). Although on its face arguably pertinent to the issue here under discussion, the provision has a legislative history that clearly indicates its irrelevance. Section 9(c) (2) was "directed to the practice of the Board in denying employees the right to vote for independent labor organizations in respect of which orders had been issued by the Board under Section 8(1) or 8(2) finding employer domination where under similar circumstances it did not apply the same rule to unions affiliated with one of the national labor organizations." H.R. REP. NO. 510, 80th Cong., 1st Sess. 48 (1947). See also, *e.g.*, H.R. REP. NO. 245, 80th Cong., 1st Sess. 42 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. 12-13 (1947).

The Board has construed § 9(c) (2) as not requiring any more than this history suggests. Thus, it has denied certification or refused to order employers to bargain when to do otherwise would not effectuate the policies of the act. *E.g.*, Oregon Teamsters' Security Plan Office, 119 N.L.R.B. 207 (1957) (union was an affiliate of the employer); Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954) (representative was a business competitor of employer); Kennecott Copper Corp., 98 N.L.R.B. 75 (1952) (representative was a supervisor). In none of these cases was the potential limitation of § 9(c) (2) even considered.

c. *Proving that unfair representation is probable.* If, as has just been suggested, demonstrating that discrimination has occurred is difficult, will not demonstrating that discrimination is likely to occur be even more so? The answer is not always, if union membership policies are given their natural probative effect. The typical effort to prove that a union will not live up to its duty as bargaining agent consists of evidence that it excludes Negroes from membership even though the bargaining unit includes them.¹³⁵ A common variant has Negroes admitted to membership, but confined to a colored local.¹³⁶ Time after time the NLRB has refused to accept either of these as sufficient to make out a prima facie case that the Negroes will probably be represented unfairly.¹³⁷

The Board is in error here. A union's refusal to admit Negroes is highly probative evidence that it will be unwilling or unable to represent them fairly. In any conflict of interest between Negroes who have no voice in the selection of union officers or the management of union affairs and the whites who do, it is fair to assume that the Negroes' interests will be subordinated. Indeed, even in the absence of a conflict of interest, the union leadership has much less incentive to bestir itself in behalf of those excluded from membership. Consequently, once a union has been shown to exclude Negroes from membership, fair representation seems so improbable that the union should have the burden of adducing evidence that it will represent Negroes in the bargaining unit fairly. If the union fails to produce such evidence, the Board should conclude that it probably will violate the duty of fair representation.

The Board says, however, that it "has no express authority to remedy undemocratic practices within the structure of union organization,"¹³⁸ and that it lacks "authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights . . ."¹³⁹ In this it reads its mandate from Congress correctly.¹⁴⁰ But while the Board can not properly take steps merely to compel unions to admit Negroes, it can properly act to ensure that it validates as exclusive bargaining representatives only unions likely to discharge their statutory duties. And nothing in the statute requires the Board to ignore relevant evidence when it does so act. Since a union's admission policies are relevant in determining whether it will act fairly, the Board is free to consider them

135. See, e.g., *Pacific Maritime Ass'n*, 110 N.L.R.B. 1647, 1648 (1954); *Texas & Pac. Transp. Co.*, 77 N.L.R.B. 87, 89 (1948); *Carter Mfg. Co.*, 59 N.L.R.B. 804, 805 (1944).

136. See, e.g., *Veneer Prods., Inc.*, 81 N.L.R.B. 492, 493 (1949); *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973, 974 (1945); *Bethlehem-Alameda Shipyard, Inc.*, 53 N.L.R.B. 999, 1015-16 (1943).

137. See notes 135-36 *supra*.

138. *Larus & Brother Co.*, 62 N.L.R.B. 1075, 1082 (1945).

139. *Ibid.*

140. See note 80 *supra*.

and to give them their natural probative effect. To put the point another way, if a union is charged with unfair representation, its refusal to admit Negroes should be strong evidence against it; however, if, notwithstanding that evidence, the Board is persuaded that the union will represent fairly, it can not withhold certification merely to force the union to change its membership policies.

Recognition and application of this point would not, as the Board seems to fear, necessarily be indistinguishable in practice from the Board's simply arrogating to itself the power to police union membership policies. Although we might hope that a change of heart by the Board would cause lily-white unions to admit Negroes to membership, that would not be the only way for a union to convince the Board of its good intentions. Consider, for example, the proof favorable to the union in *Larus & Brother Co.*,¹⁴¹ in which the Board was asked to rescind a certification for failure to represent Negro workers. The certified union had shunted Negro workers into an auxiliary colored local that was neither certified nor a party to the agreement between the certified union and the employer. After reviewing the evidence, the Board found that, except in one narrow respect, the union had not violated its duty of fair representation.¹⁴² The evidence revealed, among other things, that contract negotiations were conducted by a committee of four whites and four Negroes, that the contract agreed upon by this committee was read "to the members of both locals at their respective meetings and its terms were approved,"¹⁴³ that a "Labor-Management Committee, provided for in the contract, has been established with three white and two colored employees serving upon it,"¹⁴⁴ and that "Negroes were permitted to speak freely and participate as members of committees working with white committees in meetings with the Company."¹⁴⁵

Whenever a union has been serving as collective representative, as in *Larus & Brother Co.*, if it has in fact represented Negroes fairly, even though it denies them membership, it should be able to produce evidence of that fact. But what of the newly established local that desires to exclude Negroes? It will obviously find proving its intention to represent fairly more difficult than an established local with a record to draw upon. But this is as it should be, for a new lily-white local is not likely to represent Negroes fairly. Nevertheless, the task is not a hopeless one. The union might be able to persuade

141. 62 N.L.R.B. 1075 (1945).

142. The union's one violation consisted of applying the collective agreement's maintenance of membership and check-off clauses to compel the Negroes to continue their membership in and pay dues to the colored local when that local had no standing under either the certification or the contract. If the union had permitted the Negroes to choose whether to belong to the colored local or to refrain from union membership altogether, it would have done no wrong.

143. 62 N.L.R.B. at 1079.

144. *Id.* at 1080.

145. *Id.* at 1080-81.

the Board with pledges about its future conduct. Mere general promises should not, of course, be enough, but a specific program of procedures to ensure that Negroes will be represented fairly (*Larus & Brother Co.* provides a possible model) or a statement of how Negro workers can be expected to share in the benefits sought by the union should be influential.

In short, to hold that a union's exclusion of Negroes is *prima facie* proof of probable unfair representation does not necessarily conflict with Congress' purpose to leave unions a free hand in their internal affairs. It merely seeks to ensure that the job rights of Negroes do not suffer as a result of that freedom. It thereby furthers another at least equally important purpose of Congress. That purpose, particularly apparent in sections 8(a)(3) and 8(b)(2) of the NLRA,¹⁴⁶ was stated most simply by the Senate committee's report on the bill that, with modifications not material here, was to become the Taft-Hartley Act:

The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. *But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.*¹⁴⁷

What has been said about exclusion from membership is also applicable to segregated locals. Too often a Negro is no better off for being allowed to join a colored local than he would be if he had been excluded from membership altogether. In most instances the segregated local offers some of the forms of union membership with little or none of the substance.¹⁴⁸ This is not always true, but when it is not, the union should be able to demonstrate that fact.¹⁴⁹ If it fails, the Board can reasonably conclude that the colored local is window dressing and that Negroes are no more likely to be represented fairly than if membership were completely denied them.

The Board is plainly of the opposite view. On a number of occasions, it has approved election petitions filed jointly by Negro and white locals.¹⁵⁰ And it has directed an election notwithstanding an offer of proof that the petitioning local admitted whites only and that a separate Negro local, not seeking certification, had been established in the plant.¹⁵¹ In response to this offer of proof, the Board merely reiterated the duty of a certified union to represent all employees in the unit fairly and warned that "if it is later shown, by appropriate motion, that equal representation has been denied to

146. See text accompanying notes 21-53 *supra*.

147. S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947). (Emphasis added.) See also note 80 *supra*.

148. See, e.g., *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946); *James v. Marinship Corp.*, 25 Cal. 2d 731, 155 P.2d 329 (1944); MYRDAL, *AN AMERICAN DILEMMA* 1299 (8th ed. 1944).

149. See *Larus & Brother Co.*, 62 N.L.R.B. 1075 (1945).

150. See, e.g., *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973 (1945); *Bethlehem-Alameda Shipyard, Inc.*, 53 N.L.R.B. 999 (1943).

151. *Veneer Prods., Inc.*, 81 N.L.R.B. 492 (1949).

any employee in the unit because of his color, the Board will consider rescinding any certification we may issue herein."¹⁵²

The preceding discussion also disposes of the problem of what a union that has once had certification denied or rescinded should be required to do when it wishes to make a fresh try for certification. Again, specific pledges of future conduct would be in order.

Lest there be any misunderstanding, the foregoing discussion does not mean that a union's exclusion from membership of, for example, strike-breakers, subversives, and felons should prevent it from being certified until it proves that it will represent fairly any such to be found in the unit. For one thing, the interest of unions in excluding their enemies and workers who are objectively undesirable is entitled to a measure of protection hardly deserved by their interest, if any, in excluding Negroes. It is arguable, then, that the law should not penalize the exercise of a justifiable power of exclusion by imposing a difficult condition—proof that the excluded will be represented fairly—upon obtaining certification. According to this view, the excluded will have to prove that they have actually been represented unfairly before they can obtain relief.

There is a better reason, though, for treating racial discrimination differently from other bases for exclusion. As we have already seen, the

152. *Id.* at 494. The only Board decision finding something wrong in connection with segregated locals is the already discussed *Larus & Brother Co.* case. See text accompanying notes 141-45 *supra*.

A fragment of legislative history tends to support the Board's unwillingness to hold segregated locals *prima facie* evidence of probable unfair representation. H.R. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947), in explaining the bill's limited approval of the union shop, stated:

As a protection to the individual worker against arbitrary action by the union, it is further provided that an employer is not justified in discriminating against an employee with respect to whom the employer has reason to believe membership in the union was not available on the same terms as those generally applicable to other members, or with respect to whom the employer has reason to believe membership was denied or terminated for reasons other than failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. In determining whether membership was available on the same terms as those generally applicable to other members, it must be borne in mind that in some unions the dues and initiation fees of persons who became members many years ago may have been more or less than those currently in effect, or their terms or conditions of membership may have been different. The conference agreement hence does not contemplate availability of membership on the same terms as those applicable to all of the members, nor does it disturb arrangements in the nature of those approved by the Board in *Larus & Brother Co.* (62 N.L.R.B. 1075 (1945)).

The passage is hardly dispositive. For one thing, the reference to *Larus* is singularly uninformative. Few Congressmen could have known that *Larus* dealt with segregated locals and the context is not such as to have enlightened them. On the contrary, it presumably led them to believe that *Larus* had something to do with changes over the years in terms or conditions of membership. For another, it will be recalled that *Larus* is the case in which the union adduced substantial evidence that Negro workers were represented fairly even though kept in a separate local. See text accompanying notes 141-45 *supra*. The conference report can be read, then, to mean no more than that segregated locals are unobjectionable when shown not to be accompanied by unfair representation. And that is entirely in accord with the position taken in the text.

worker excluded from a union on a ground other than race is usually not so vulnerable to unfair representation as the racially barred. Strikebreakers, for example, ordinarily do work similar to that done by local union men. As a result, a union must be wary about tinkering with their job rights lest it prejudice those of similarly situated union men. If a union does try to impose hardships on strikebreakers without hurting the faithful, its more favorable treatment of the faithful will make it easy for the strikebreakers to prove that they have been unfairly dealt with. Once again, though, Negroes lack similar protection whenever, as is often the case, they do work that is entirely different from that being done by their white fellow workers.¹⁵³

d. *Withholding orders to bargain.* It follows from what has been said so far that the Board should refuse to require an employer to bargain with a union that will probably be derelict in its duty to represent fairly. Rescinding or withholding offending unions' certifications would be of little importance if employers remained bound to deal with them. Once again it is fitting that the Board refuse to validate power—that of exclusive representative—if it will probably be used in violation of the statute.¹⁵⁴ Once again that refusal is necessary if the duty of fair representation is to have real meaning.

The preceding discussion also enables us to deal quickly with what should be the effect on an employer's duty to bargain of a union's refusal to admit Negroes to membership. According to that discussion, it will be recalled, a lily-white union must be regarded as likely to represent Negroes unfairly unless it introduces evidence to rebut the natural inference from its exclusionary policy. Since the Board should refuse to require an employer to bargain with a union likely to represent Negroes unfairly, it follows that a lily-white membership policy should bar an order to bargain unless the union rebuts the inference of probable unfair representation.

Part of this is plainly acceptable to the Board, part plainly unacceptable, and part yet to be considered by it. To take the unacceptable part first, a lily-white membership policy is no more a bar to an order to bargain than it is to a certification.¹⁵⁵ Given its refusal in certification cases to draw any inferences from a union's refusal to admit Negroes to membership,¹⁵⁶ the Board could hardly be expected to respond differently in refusal to bargain cases.

To turn next to the acceptable, the Board will certainly not compel an employer to bargain about obviously discriminatory demands.¹⁵⁷ In addition, since an employer need not bargain with a union that insists upon an inappro-

153. See note 129 *supra*.

154. In other contexts the Board has withheld an order to bargain or refused certification when to do otherwise would not effectuate the policies of the act. See note 134 *supra*.

155. *Norfolk So. Bus Corp.*, 83 N.L.R.B. 115 (1949).

156. See notes 135-36 *supra*.

157. See text accompanying notes 97-99 *supra*.

priate bargaining unit,¹⁵⁸ and since a whites-only unit would clearly be inappropriate,¹⁵⁹ employers are free to refuse to deal with unions that insist on bargaining for whites only.

How far this last can be pushed remains an open question. For example, the Board has never said how it would treat an employer's refusal to bargain with a union that demanded that certain jobs be reserved for whites. There is a sense in which this is bargaining for whites only. But what if at the same time the union seeks to have the other provisions of the collective agreement govern the terms of employment of both Negroes and whites? Does the fact that one or more of the terms sought by the union are unfairly discriminatory entitle the employer to refuse to bargain altogether or merely to refuse to bargain about the particular discriminatory demands? The Board has yet to speak to this question.

In other contexts, however, the Board, with court approval, has indicated that if one party is guilty of a refusal to bargain, the other is relieved of its duty to bargain.¹⁶⁰ Under this approach, since we have already seen that a union violates its duty to bargain if it refuses to enter into an agreement without the discriminatory provision,¹⁶¹ such a refusal would leave the employer free to break off negotiations.

The rule should be that an employer is free to refuse to bargain altogether with a union that has pressed a discriminatory demand, even if the pressure falls short of refusing to conclude an agreement without the discriminatory provision. The union's demand is ample evidence of its propensity for ignoring the duty of fair representation. Under the circumstances it must be reckoned likely to transgress again during its tenure as exclusive representative. The minority members of the bargaining unit should not be exposed to so substantial a risk, especially since, as we have seen, they may well be hard put to prove it when some other neglect of duty occurs.

There is another reason for allowing an employer faced with a discriminatory demand to refuse to bargain altogether. The ugly reality is that few employers bound to deal with a union about other matters would resist a demand for discrimination. Most discriminatory demands cost nothing to grant, whereas resistance may lead to costly concessions on other subjects. Thus, even though an employer may have a legal right to refuse to bargain

158. *Mandel Bros.*, 77 N.L.R.B. 512 (1948).

159. See note 126 *supra*.

160. *E.g.*, *United Elec. Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); *Boeing Airplane Co. v. NLRB*, 174 F.2d 988 (D.C. Cir. 1949); *Graham v. Boeing Airplane Co.*, 22 L.R.R.M. 2243 (W.D. Wash. 1948); *Valley City Furniture Co.*, 110 N.L.R.B. 1589 (1954), *enforced*, 230 F.2d 947 (6th Cir. 1956); *California Cotton Co-op. Ass'n*, 110 N.L.R.B. 1494 (1954); *Phelps Dodge Copper Prods. Corp.*, 101 N.L.R.B. 360 (1952); *Case No. SR-1099*, 47 L.R.R.M. 1228 (1961); *cf.* *Times Publishing Co.*, 72 N.L.R.B. 676 (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. 27 (1947).

161. See text accompanying notes 97-100 *supra*.

about a discriminatory demand, his self-interest dictates yielding if he must continue to deal with the union. If, on the other hand, a discriminatory demand relieves him altogether of the duty to bargain, his self-interest may well dictate a firm civil-liberties stand. That posture can, after all, eliminate any need to have anything more to do with the union, a state of affairs much desired by many employers. It may not be attractive to enlist the selfish aims of employers in this way, but the alternative is to leave Negroes largely at the mercy of racists. And all a union need do to retain its right to compel an employer to bargain is live up to the duty of fair representation enjoined upon it by the National Labor Relations Act.

But what of the nondiscriminatory union against which an unfounded claim of discrimination is made? Does not the suggestion advanced here risk long delays in collective bargaining, leading in some cases to dissipation of union majorities, while refusal to bargain charges are processed against employers that claim they are under no duty to bargain because of union discrimination?¹⁶² The possibility of such delays cannot be ignored, especially since they might involve bona fide but erroneous claims of discrimination as well as claims unconscionably made to mask a company's default on its duty to bargain. Ironically enough the claim made in bad faith need not trouble us much. Employers bent on stalling and evading their duty to bargain have plenty to work with now.¹⁶³ The addition of one more possible tactic would make little difference. On the other hand, the good faith but erroneous claim of racial discrimination could conceivably represent a fresh source of delay, but I doubt that it would, and, of course, we cannot tell until the Board decides to try the means suggested here. Eliminating racial discrimination by unions is an important enough objective to warrant making the try.

The withholding of certifications and orders to bargain would obviously not guarantee that all unions would thereafter observe the duty of fair representation in all cases. Some unions would not have to call for help from the Board because they have well established bargaining relationships

162. Cf. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 65 (1947), taking the position that the withholding of certifications from unions that discriminate contains dangers, for it opens the door to employer interference in the internal affairs of unions. If the union demands recognition, the employer can refuse on the grounds that the union excludes qualified workers. On being charged with refusal to bargain, he can litigate not merely his own actions, but the membership policies of the union. It is inevitably productive of serious confusion to inject into the collective bargaining process the collateral issue of the union's internal policies, and it is wholly improper to permit that issue to be raised by the employer and litigated by him as his own defense.

But see Professor Aaron's suggestion that the NLRA be amended to "forbid the recognition or certification as exclusive bargaining representative of any union that discriminates in the admission or representation of minority groups. That is the only practical way, it seems to me, in which unions can be compelled to conform to the national labor policy and to the constitution of the AFL-CIO." Letter to Editor, *New Leader*, May 2, 1960, p. 30. See also THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 150 (Comm. for Economic Development ed. 1961); Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs-II*, 44 ILL. L. REV. 631, 673 (1949).

163. See, e.g., THE PUBLIC INTEREST IN NATIONAL LABOR POLICY, *op. cit. supra* note 162, at 82.

that are not likely to be broken off. Others would be able to cow recalcitrant employers with the threat of a strike.¹⁶⁴

If, on the other hand, an employer remained firm in the face of a union's strike threat, Board refusal to order the employer to bargain might lead to labor unrest rather than to an end to discrimination. Nothing in the law would prevent the union from striking and picketing to force the employer to bargain with it.¹⁶⁵

But such action would probably be rare. On one side, many employers will knuckle under without a fight when the demand for recognition comes from a powerful union with majority support. On the other, given the choice between abandoning racist policies and risking their lives in recognition strikes, some unions will surely choose to cease discriminating. In almost all cases, this will be the choice urged by international unions, for few internationals now espouse racial discrimination.¹⁶⁶ In fact, where racism is opera-

164. Cf. *Business Week*, July 25, 1953, p. 41, recounting one of the ways in which the UMW managed to get employers to bargain with it even when it could not invoke the Board's protection because of noncompliance with NLRA, ch. 120, §§ 9(f)-(h), 61 Stat. 145 (1947), repealed by 73 Stat. 525 (1959).

165. The union would, however, be required to file a petition for certification within 30 days of the commencement of picketing. NLRA § 8(b)(7)(C), added by 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7)(C) (Supp. II, 1961). That section goes on to provide: "That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof"

This provision is not inconsistent with the remedy urged in this article. For one thing, it is at least arguable that § 8(b)(7)(C) does not require the holding of an election on petition of a union likely to violate the duty of fair representation implicit in § 9(a). The statute says that an election shall be held "without regard to . . . section 9(c)(1) or the absence of a showing of a substantial interest"; it says nothing about whether the election should go forward if § 9(a) will thereby be subverted. For another, even if an election is held, the statute requires only that the Board "certify the results thereof." This is not necessarily the same as certifying a union as exclusive representative. See 29 C.F.R. § 102.69(b) (Supp. 1961), which provides for the issuance of "a certification of the results of the election, including certification of representatives where appropriate" The Board could, then, merely certify the vote totals without certifying a victorious union as exclusive representative. The Supreme Court approved such a procedure in another context in which a union could not be certified as exclusive representative. *NLRB v. District 50, UMW*, 355 U.S. 453, 461 (1958) (dictum).

This procedure could also be followed when an employer petitions for an election. If the Board were to refuse to hold elections when employers asked for them, it might cause employers to commit unfair labor practices by recognizing unions that do not in fact command majority support. See note 115 *supra*. The Board should, then, hold an election when an employer petitions for it, but, whether the discriminatory union wins or loses, certify only the tally. If the union wins, the employer will be free to decide for himself whether to bargain with it.

One problem remains. If a union wins an election and the Board refrains from certifying it, continued picketing could conceivably be held to violate subdivision (B) of § 8(b)(7). This subdivision forbids picketing "where within the preceding twelve months a valid election . . . has been conducted" Nevertheless, Congress presumably did not intend to bar picketing by a victorious union and the Board could so hold. Cf. *Local 840, Hod Carriers' Union*, 135 N.L.R.B. No. 121, 49 L.R.R.M. 1638 (1962), indicating that a union does not violate 8(b)(7)(C) when it pickets to compel recognition from an employer against whom it has filed a meritorious refusal to bargain charge. In this situation, as in the problem under consideration, the literal meaning of the subsection involved need not control when it appears to conflict with the purpose of the statute read as a whole.

166. The only international still retaining an explicitly discriminatory provision in its

tive, it is frequently the choice of a local acting in defiance of a contrary policy stated but not vigorously enforced by its international.¹⁶⁷ The fresh handicap to organizational efforts that Board abstention would represent might well cause internationals to exert real pressure to get stray locals into line. The result might then be not new labor unrest but new nondiscriminatory policies for heretofore lily-white unions.

C. *The Role of the Courts*

Judicial enforceability of the NLRA's duty of fair representation can no longer be taken for granted. Doubt has been generated by a line of Supreme Court decisions holding that the NLRB has exclusive jurisdiction over conduct that is either arguably protected or arguably prohibited by the National Labor Relations Act.¹⁶⁸ As the Court put it in *San Diego Bldg. Trades Council v. Garmon*:

[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience¹⁶⁹

When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.¹⁷⁰

In short, both state and federal courts must keep their hands off controversies that arguably constitute grist for the NLRB's mill. The word "arguably" deserves emphasis. In many circumstances, it means, among other things, that a person injured by questionable conduct is without a remedy before either the Board or the courts.

Consider a hypothetical case of claimed unfair representation by way of

constitution is the Brotherhood of Locomotive Firemen and Enginemen. See 1961 COMM'N REP. 140 n.70, 215. However, many locals effectively discriminate by requiring that applicants be approved by the membership, see *id.* at 131, and others discriminate openly, see *id.* at 130; BARKIN, *THE DECLINE OF THE LABOR MOVEMENT* 50 (1961).

167. See, e.g., 1961 COMM'N REP. 141-42; MYRDAL, *AN AMERICAN DILEMMA* 402-03 & n.7 (8th ed. 1944); Fleischman, *Labor and the Civil Rights Revolution*, *New Leader*, April 18, 1960, p. 16, 17-18.

168. The line began with *Hill v. Florida*, 325 U.S. 538 (1945), and reached its zenith (or nadir, depending on one's point of view) in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). A number of the cases on the subject are collected in the latter opinion. See 359 U.S. at 243 n.1. Among the best of the commentary stimulated by this line of decisions are Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958); Hays, *State Courts and Federal Preemption*, 23 MO. L. REV. 373 (1958); Hays, *The Supreme Court and Labor Law: The October Term, 1959*, 60 COLUM. L. REV. 901 (1960); McCoid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959); Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations* (pts. 1-2), 59 COLUM. L. REV. 6, 269 (1959); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959).

169. 359 U.S. 236, 242 (1959).

170. *Id.* at 245.

illustration. Company has had two lines of job progression: Line 1, open only to whites, leading to highly skilled jobs; Line 2, open only to Negroes, leading to less demanding work. Company proposes to allow Negroes to transfer to Line 1. Union agrees but demands that any Negroes making the change start at the bottom of Line 1, regardless of how far along they may be on Line 2. Without experience on the beginning and intermediate jobs on Line 1, Union maintains, no one can do the advanced jobs on that line well. Consequently, Union argues, if Company merely transfers Negroes from the top of Line 2 to advanced jobs on Line 1, production will be hampered and all employees will suffer losses under Company's incentive compensation system. Company gives in to Union's demand.

If the adversely affected Negroes ask a court to enjoin enforcement of the agreement limiting them to the bottom of Line 1, the principle of exclusive NLRB jurisdiction would, if literally applied, require dismissal of the action. We saw earlier that a union violates section 8(b)(3)'s proscription of refusals to bargain if it insists upon an illicit demand as a condition of entering into a collective agreement.¹⁷¹ Union may, then, have violated 8(b)(3). Whether it did or not depends upon whether its demand constituted unfair representation and whether it insisted upon that demand as a condition of concluding a collective agreement. Union's conduct is thus arguably prohibited by the NLRA and so seemingly within *Garmon's* formula for exclusive NLRB jurisdiction.

Let us assume, then, that a refusal to bargain charge is filed with the Board, but the Board finds that Company gave in to Union's demand not because Union insisted upon it as a condition of agreement but because Union made an important concession in exchange. This would mean that Union had not been guilty of a refusal to bargain. Since no other unfair labor practice is arguable on these facts as the law is currently interpreted, Union's conduct is now established not to have been prohibited by the NLRA.

Suppose, then, that the Negro workers return to court for another try at vindicating their right to be represented fairly. Literally applied, *Garmon* would still seem to require dismissal. If Union is correct in its argument that advanced Line 1 jobs can not be performed properly by workers who have no experience in lower Line 1 classifications, its demand is a reasonable one and so not a breach of its duty of fair representation.¹⁷² In that event, its demand and even insistence upon it would be protected by the NLRA.¹⁷³ The Union's conduct is thus arguably protected, which brings

171. See text accompanying notes 97-100 *supra*.

172. See *Whitfield v. United Steelworkers*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959). In that case, from which the hypothetical situation discussed in the text was derived, the court refused to set aside an arrangement by which Negroes, previously confined to Line 2, were given an opportunity to begin at the bottom of Line 1. In *Whitfield*, the arrangement was suggested by management and accepted by the union.

173. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959).

the exclusive jurisdiction principle into play, *even though there is no way for the adversely affected workers to get an NLRB determination of the point*. The absence of a remedy has not, in the past, prevented the Supreme Court from adhering to its exclusive jurisdiction doctrine.¹⁷⁴ In *Garmon* itself the Court said: "To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity."¹⁷⁵

Notwithstanding the literal applicability of the exclusive jurisdiction principle to many, perhaps most, cases of unfair representation, present indications are that such cases constitute an exception to the principle. In *Syres v. Oil Workers*,¹⁷⁶ a likely case for exclusive NLRB jurisdiction if the principle is to apply to unfair representation cases, the Supreme Court held that the federal courts had jurisdiction over the workers' complaint. In addition, what lower court authority there is since *Syres* supports the jurisdiction of the courts, at least when the claim of unfair representation rests on alleged racial discrimination.¹⁷⁷

The matter nevertheless remains in doubt, principally because *Syres* was decided before the exclusive jurisdiction principle reached its fullest flower to date in *Garmon*. The uncertainty over whether the Supreme Court would decide *Syres* the same way today is aggravated by the fact that the Court wrote no opinion to accompany that decision. The lower court opinions since *Syres* have not been enlightening on this question.

That the courts should retain jurisdiction over cases involving unfair representation of racial minorities at least as long as the Board remains quiescent is clear. The exclusive jurisdiction principle's main purpose has been to prevent state authorities from interfering with the policies and administration of the federal labor legislation. Thus, in *Garmon* the Court said: "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."¹⁷⁸

If the exclusive jurisdiction principle is now extended to suits to enforce the duty of fair representation, it would itself interfere with the policies and administration of federal labor legislation. We have seen that if the courts are closed to those seeking enforcement of the duty, they will often have

174. See *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). Shortly thereafter, Congress made it possible for those denied a remedy as a result of this decision to obtain relief. See note 184 *infra* and accompanying text. This amendment would not, however, have any direct bearing on the case under discussion.

175. 359 U.S. at 245.

176. 350 U.S. 892 (1956) (per curiam).

177. *Whitfield v. United Steelworkers*, 156 F. Supp. 430 (S.D. Tex. 1957), *aff'd*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); *Durandetti v. Chrysler Corp.*, 195 F. Supp. 653, 655 (E.D. Mich. 1961) (dictum); *cf. Berman v. National Maritime Union*, 166 F. Supp. 327 (S.D.N.Y. 1958). *But cf. Baker v. Shopmen's Union*, 403 Pa. 31, 168 A.2d 340 (1961).

178. 359 U.S. at 246.

no means of enforcing it. Since section 9(a)¹⁷⁹—in which the Supreme Court says the duty of fair representation inheres¹⁸⁰—is as much a part of the NLRA as any other section, it should not be left without sanctions for the sake of a jurisdictional principle that has already been carried to dubious limits.

The notion, occasionally advanced,¹⁸¹ that the NLRB may be more expert than the courts in handling unfair representation cases would be sharply questioned by many in the labor field today.¹⁸² In fact, the duty of fair representation has so far been enforced almost exclusively by the courts and they must remain in the field to deal with cases arising under the Railway Labor Act, over which the NLRB has no jurisdiction. In any event, the superior expertise argument could hardly justify eliminating the jurisdiction of the courts over cases the Board can not or will not decide.

The case for retention of court jurisdiction over claims that a racial minority has been unfairly represented derives additional support from the existence of a number of other exceptions to the exclusive jurisdiction principle. Even the states have been permitted to employ their own procedures when a strong enough local policy is being violated. In particular, they have been allowed to assert jurisdiction over claims of violence and mass picketing.¹⁸³ Further, in 1959 Congress specifically empowered the states to act when the NLRB declines "to assert jurisdiction over any labor dispute [because] the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . ."¹⁸⁴ The purpose of this amendment was to ameliorate the Supreme Court's exclusive jurisdiction doctrine by permitting a local remedy for those who had theretofore been remediless because the Board was too busy to hear "small" cases and the exclusive jurisdiction principle barred all other tribunals from hearing them.¹⁸⁵ Surely it is equally important that those denied fair representation in violation of the NLRA itself be assured a remedy.

179. See note 54 *supra* for the relevant portion of the text of this provision.

180. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

181. See Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 173 (1957).

182. Some idea of how the "labor relations bar" regards the relative merits of the Board and the courts is provided by the fact that the Labor Relations Law Section of the ABA recently defeated by a margin of only four votes a proposal to recommend that jurisdiction in unfair labor practice cases be taken from the NLRB and entrusted to the federal district courts. See 48 LAB. REL. REP. 442-47 (1961).

183. *UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954). See also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

184. NLRA § 14(c), added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c) (Supp. II, 1961).

185. In effect, Congress thereby overruled *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957), in which the exclusive jurisdiction principle had been applied notwithstanding the Board's refusal to assert jurisdiction.

The exclusive jurisdiction principle is also inapplicable to suits complaining of conduct violative of NLRA § 8(b)(4), as amended, 73 Stat. 542 (1959), 29 U.S.C.

If the Board should become more active in enforcing the duty of fair representation, the case for allowing the courts a parallel role would still be persuasive, at least when a claim of racial discrimination is involved. The Board may never assume jurisdiction over all forms of unfair representation. To leave aggrieved Negroes with the often impossible task of guessing which forum is right—the Board or a court—might cause just claims to go unredressed. Moreover, in some cases the Board may not be able to match the courts' power to grant effective relief. The courts plainly can require employers as well as unions to restore any benefits taken from workers by a union's breach of its duty of fair representation.¹⁸⁶ Indeed, it has been held that when an employer and a union have agreed to deny Negroes certain benefits, the employer can be ordered to grant those benefits even though the Negroes have apparently never received them before.¹⁸⁷ Comparable power in the Board would be hard to find when the Negroes discriminated against were union members. To exert authority over an employer in such a case, the Board would have to hold not only that the right of Negroes to be represented fairly is implicit in Section 7 of the NLRA, but, in addition, that an employer interferes with that right when it goes along with a union's breach of duty. Since the Board is not likely to do this, judicial relief is preferable whenever a remedy against an employer is needed.

Notwithstanding the superiority of the judicial remedy in many circumstances, which makes keeping the courts open desirable, the number of unfair representation cases pressed in the courts will be relatively low. As Professor Cox has pointed out, "only small sums are likely to be involved, . . . this branch of labor law is full of uncertainty and . . . individual workers often have difficulty in obtaining skilled and imaginative legal services."¹⁸⁸ As a result, occasions for the judicial mucking up of federal labor policy that the Supreme Court fears will be rare. If the NLRB affords a remedy, workers will normally prefer the free services of the NLRB's General Counsel. On the rare occasions when they do not, little harm can come from allowing the courts to proceed.

§ 158(b)(4) (Supp. II, 1961). Section 303 of the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 158 (1947), as amended, 29 U.S.C. § 187 (1958), as amended, 29 U.S.C. § 187(a) (Supp. II, 1961), expressly confers jurisdiction over such actions on the federal district courts. Moreover, the Supreme Court has said that the exclusive jurisdiction principle "is not relevant" to actions brought under § 301 of the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), to enforce the provisions of a collective bargaining agreement, even though the conduct constituting the alleged breach of contract may also be an unfair labor practice. *Local 174, Teamsters v. Lucas Flour Co.*, 82 S. Ct. 571, 575 n.9 (1962).

186. *Richardson v. Texas & N.O.R.R.*, 242 F.2d 230 (5th Cir. 1957).

187. *Central of Ga. Ry. v. Jones*, 229 F.2d 648 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956).

188. Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L.J. 850, 859 (1957).

Once the barrier of the exclusive jurisdiction doctrine is passed, the courts are free to award damages, injunctions, or both in appropriate cases.¹⁸⁹ Since the beginning of judicial recognition of the duty of fair representation, the Norris-Laguardia Act's ban on injunctions in labor disputes has been held inapplicable to suits to compel adherence to the duty of fair representation.¹⁹⁰

It should not, incidentally, be assumed that only the federal courts are competent to enforce the duty. State courts, too, are free to enforce it if the NLRB is not invested with exclusive jurisdiction.¹⁹¹

D. *A Partial Summary*

In theory the duty of fair representation assures Negroes that their jobs can not be affected by unfairness on the part of their collective bargaining representatives. The duty proscribes discrimination not only in bargaining for an agreement but in grievance processing as well. It even requires unions to resist discrimination practiced by employers. It protects union and nonunion workers alike and probably extends to applicants as well as to those already employed.

In practice most unfairness goes unredressed nevertheless. The NLRB has not helped much. Only its work under 8(b)(2) seems significant. Whether 8(b)(1) can be brought to bear is doubtful, employers have still to provide an occasion for the enforcement of 8(b)(3), and the Board has yet to withhold certifications and orders to bargain from unions likely to default on the duty of fair representation.

The courts, on the other hand, have usually been effective in the relative handful of cases that have come before them. The major difficulty here is the high cost of judicial relief, which makes it an impractical remedy much of the time. So far the Supreme Court's exclusive jurisdiction principle has not been applied to limit judicial activity in this area.

Even if the NLRB were to take a more active role and even if more cases could be brought to the courts, some union unfairness would, of course, still escape correction. The difficulty of proving that discrimination has occurred is a major stumbling block. When a union excludes Negroes, that fact alone is such persuasive evidence that Negroes are being ill-served that lily-white unions should be given the burden of proving their good faith whenever it is challenged. However, today most unions that advance or accept discrimination on the job actually admit Negroes. When their decisions as representatives are challenged, it is up to the challenger to prove

189. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 207 (1944).

190. *Syres v. Oil Workers*, 350 U.S. 892 (1956); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949).

191. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

that discrimination has occurred. A compensating factor is that admission of Negroes to these unions makes possible their active participation in internal union affairs, the means to ultimate reversal of union policy.

IV. APPEALS TO BIGOTRY IN REPRESENTATION ELECTION CAMPAIGNS

When a union attempts to organize an employer's work force, both the union and the employer may engage in extensive campaigns to enlist the workers' support, the union to persuade them of the advantages of union representation, the employer to convince them that their best interests lay in eschewing the union.¹⁹² The ultimate aim of these efforts is victory in an election conducted by the NLRB to determine whether the workers desire the union to represent them.¹⁹³ Such campaigns, particularly in the South, have sometimes been marked by appeals to the racial prejudices of the voters.

These appeals to bigotry have taken a number of forms. Although primarily an employer tactic, unions have occasionally stooped too, and the cases have involved everything from purportedly straightforward summaries of an adversary's racial policies to threats, dire predictions, and inflammatory epithets.

Agitation of the race issue in election campaigns is to be deplored for a number of reasons. Once injected, the issue may dominate the workers' attention to the exclusion of other matters that should affect their choice of whether they want a union or not. Since racial appeals usually attack non-discriminatory unions, they penalize those that honor their statutory obligations and probably give pause to some that might pursue a nondiscriminatory policy but for the fact that it could be used against them in the South. Finally, whatever the outcome of the election, too often racial campaigns leave behind a residue of unusually intense racial animosity that poisons the plant and the community for long after.¹⁹⁴

Losers of elections in which racial appeals have figured have frequently

192. The struggle for worker loyalties obviously need not be limited to one union and one employer. Several unions may find themselves arrayed against one or more employers; or two or more unions may be fighting each other. Since inclusion of these variables would merely make the text more cumbersome without changing its substance, the discussion proceeds throughout this section as though only one union and one employer were involved.

193. See NLRA § 9, 61 Stat. 143 (1947), as amended, 29 U.S.C. § 159 (1958), as amended, 29 U.S.C. §§ 159(c) (3), (f)-(h) (Supp. II, 1961), for the NLRA's principal provisions concerning representation elections. A plant may, of course, be organized without an election. See note 114 *supra*. An organizational drive may also meet defeat without an election ever having been held. In fact, the NLRB will usually dismiss an election petition filed by an employee or employee representative unless the representative "has been designated by at least 30 percent of the employees." 29 C.F.R. § 101.18 (Supp. 1961).

194. See Subcomm. on the National Labor Relations Board of the House Comm. on Education and Labor, *Report on Administration of the Labor-Management Relations Act by the NLRB*, 87th Cong., 1st Sess. 54 (1961).

asked the NLRB to set the results of the election aside and hold a new one, which would hopefully be uncontaminated by the conduct complained of. In recent years such requests have regularly been denied.¹⁹⁵

The Board's treatment of racial appeals in election campaigns is intelligible only against the background of its treatment of other allegations of election misconduct. The Board recently stated the governing principle in this way: "An election will be set aside if it was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' free and untrammelled choice of a representative guaranteed by the act."¹⁹⁶

This does not mean that the parties must confine their arguments to dispassionate analyses of the issues. In fact, representation election campaigns frequently make political contests look scholarly by comparison. Name-calling will not lead the Board to set an election aside. Employers are free, for example, to charge union organizers with communist tactics,¹⁹⁷ racketeering,¹⁹⁸ or, apparently, anything else that strikes their fancy.¹⁹⁹ Union organizers are equally free to indulge their imaginations.²⁰⁰ Nor does the Board usually insist that parties' statements to the electorate bear some resemblance to the truth. A lie will cause an election to be invalidated "only when one of the parties deliberately misstates material facts which are within its special knowledge and where the employees are unable properly to evaluate the misstatements"²⁰¹ In applying this standard, the Board often attributes awesome evaluative powers to the workers, with the result that few elections are set aside because one of the parties has misrepresented the facts.²⁰²

195. *E.g.*, Paula Shoe Co., 121 N.L.R.B. 673 (1958); Chock Full O'Nuts, 120 N.L.R.B. 1296 (1958); Sharnay Hosiery Mills, 120 N.L.R.B. 750 (1958); Westinghouse Elec. Corp., 119 N.L.R.B. 117 (1957).

196. 25 NLRB ANN. REP. 50 (1960).

197. Peter Paul, Inc., 99 N.L.R.B. 386 (1952).

198. Independent Nail & Packing Co., 120 N.L.R.B. 677 (1958); Tuttle & Kift, Inc., 118 N.L.R.B. 125 (1957).

199. See, *e.g.*, American Greetings Corp., 116 N.L.R.B. 1622 (1956); Bridgeport Moulded Prods., Inc., 115 N.L.R.B. 1751 (1956).

200. Duro Fittings Co., 123 N.L.R.B. 1568 (1959); Milton Rubin, d.b.a. Dallas City Packing Co., 110 N.L.R.B. 8 (1954).

201. 25 NLRB ANN. REP. 52 (1960). The standard has also been put this way: "[T]he Board has adopted the policy to set aside a representation election where it appears that (1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election. United States Gypsum Company, 130 N.L.R.B. No. 99; The Cleveland Trencher Company, 130 N.L.R.B. No. 59; Kawneer Company, 119 N.L.R.B. 1460; The Calidyne Company, 117 N.L.R.B. 1026, 1028.

Celanese Corp. v. NLRB, 291 F.2d 224, 226 (7th Cir. 1961).

202. For example, in *Kennametal, Inc.*, 121 N.L.R.B. 410 (1958), the Board was unmoved by the fact that the employer had materially misrepresented the wage rates in a contract recently negotiated by the union with another firm. The Board believed "that the employees were capable of properly evaluating this election propaganda," *id.*

An employer's threats, on the other hand, will cost him his election victory if he prevails.²⁰³ An employer who threatens to worsen the lot of his workers if they favor a union has not only supplied a basis for setting the election aside, but has, in addition, committed an unfair labor practice.²⁰⁴ Similarly, an employer who promises to reward his workers in return for their rejection of the union has both given cause for the election to be set aside and committed an unfair labor practice.²⁰⁵

Threats and promises are, however, distinguished from predictions. When an employer predicts that adverse consequences will follow from unionization (or that good ones will flow from nonunionization), he does no wrong so long as he conveys the impression that not he, but the union or other forces, will bring about the results he foresees. A common example is that of the employer who tells his workers that he can not afford to pay higher wages and that if the union insists that higher wages be paid, as it is virtually certain to do if elected, he may well have to shut down.²⁰⁰

The threat-prediction distinction, as might be expected, is not always easy to apply and the Board has occasionally been rather unrealistic in its characterization of employer speeches. Statements have been construed as if they were made to an assembly of lawyers coolly parsing every line instead of to a group of workers whose jobs were at the mercy of the speaker.²⁰⁷

at 412, even though it took the form of leaflets, distributed within twenty-four hours prior to the election, that represented as maximum rates what were in fact minima. The union was defeated by two votes. See also *Weil-McLain Co.*, 130 N.L.R.B. 19 (1961); *Lundy Packing Co.*, 124 N.L.R.B. 905 (1959).

For examples of elections that were set aside because of misrepresentations see *United States Gypsum Co.*, 130 N.L.R.B. 901 (1961); *Gummed Prods. Co.*, 112 N.L.R.B. 1092 (1955); *RCA*, 102 N.L.R.B. 124 (1953).

203. See, e.g., *Aeronca Mfg. Corp.*, 118 N.L.R.B. 461 (1957); *Franchester Corp.*, 110 N.L.R.B. 1391 (1954); *J. J. Newberry Co.*, 88 N.L.R.B. 947 (1950).

204. More specifically, he has violated NLRA § 8(a)(1), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1958). See, e.g., *Franchester Corp.*, *supra* note 203; *J. J. Newberry Co.*, *supra* note 203. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" For the text of § 7 see note 102 *supra*.

205. See, e.g., *Coca-Cola Bottling Co.*, 118 N.L.R.B. 1422 (1957) (election set aside); *Franchester Corp.*, *supra* note 203 (unfair labor practice and election set aside); *Eastman Cotton Mills*, 90 N.L.R.B. 31 (1950) (unfair labor practice).

206. Statements of this sort were held not to invalidate elections in, e.g., *Supplec-Biddle-Steltz Co.*, 116 N.L.R.B. 458 (1956); *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300 (1953); *Silver Knit Hosiery Mills, Inc.*, 99 N.L.R.B. 422 (1952). *Accord*, *Chicopee Mfg. Corp.*, 107 N.L.R.B. 106 (1953) (union's election defeat allowed to stand); *Syracuse Color Press, Inc.*, 103 N.L.R.B. 377, 378 (1953), *enforced*, 209 F.2d 596 (2d Cir.), *cert. denied*, 347 U.S. 966 (1954) (employer not guilty of an unfair labor practice when statement complained of "was merely a prediction of economic consequences beyond [employer's] control"); *Electric Steel Foundry*, 74 N.L.R.B. 129 (1947) (union's election defeat allowed to stand and unfair labor practice complaint dismissed).

207. See, e.g., *Globe Motors, Inc.*, 123 N.L.R.B. 30 (1959); *Nash-Finch Co.*, 117 N.L.R.B. 808 (1957); *Chicopee Mfg. Corp.*, *supra* note 206; *Cleveland Plastics, Inc.*, 85 N.L.R.B. 513 (1949). See also *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 79-80 (Comm. for Economic Development ed. 1961):

[The NLRA] has been interpreted to permit a wide array of 'predictions' by employers of dire consequences, such as closing the plant, should the union be victorious in the representation election. We believe that these interpretations

For all its difficulty, the threat-prediction distinction is now firmly entrenched.²⁰⁸

In recent years, although there have been a few indications that a change may be in the offing,²⁰⁹ the Board has refused to treat racial appeals differently from other kinds of election rhetoric. Thus, it has rejected the contention that a union's election victory should be set aside because the union referred to the company's plant manager as "that Jew" in one of its handbills.²¹⁰ And misrepresentations dealing with race, like those dealing with other subjects, have been left to the workers to see through. In *Kresge-Newark, Inc.*,²¹¹ for example, the Board was untroubled by the employer's claim that an official of the victorious union had said that the employer would lay off colored employees unless they elected the union to protect their jobs. The Board refused to grant a hearing to determine whether the statement had been made, since even if it had, it "constituted at most an accusation against the Employer in the nature of campaign propaganda which the employees were capable of evaluating in choosing their bargaining representative."²¹² In *Chock Full O'Nuts*,²¹³ the Board was unwilling to set aside a union's defeat that had been preceded by statements to Negro

have gone too far and that they give too little weight to the relationship between words and their context as affected by time and place, by the positions of the speaker and listener, by the tone of the speech, and by the past actions of the speaker. Illustrations have been all too frequent in recent years of distortions of meaning easily created when words are removed from their context. The law should be changed so that expressions of view that may be coercive are clearly judged as part of the surroundings within which the statements are made.

The Board may be moving toward a more realistic position with the help of President Kennedy's appointees. See *Haynes Stellite Co.*, 136 N.L.R.B. No. 3, 49 L.R.R.M. 1711 (1962); *R. D. Cole Mfg. Co.*, 133 N.L.R.B. No. 130, 49 L.R.R.M. 1033 (1961); *Somismo, Inc.*, 133 N.L.R.B. No. 131, 49 L.R.R.M. 1030 (1961).

208. The Board has not always been so tolerant of anti-union statements by employers. Allegations formerly classified as threats and therefore violative of § 8(a) (1) have regularly been permitted since the Taft-Hartley Act was passed. Compare *Morrison Turning Co.*, 77 N.L.R.B. 670 (1948), with *Granwood Furniture Co.*, 129 N.L.R.B. 1465 (1961). Compare *Taitel, d.b.a. I. Taitel & Son*, 45 N.L.R.B. 551 (1942), with *Douglas Silk Prods. Co.*, 107 N.L.R.B. 450 (1953). Compare *Stone, d.b.a. J. H. Stone & Sons*, 33 N.L.R.B. 1014 (1941), modified on other grounds and enforced, 125 F.2d 752 (7th Cir.), cert. denied, 317 U.S. 649 (1942), with *Edmont Mfg. Co.*, 120 N.L.R.B. 525 (1958). Compare *Stover, d.b.a. Stover Bedding Co.*, 15 N.L.R.B. 635 (1939), enforced, 114 F.2d 513 (10th Cir. 1940), with *Brunswick Quick Freezer, Inc.*, 119 N.L.R.B. 1495 (1958). The Board retreated from its pre-1947 view under heavy attack from the courts, see, e.g., *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); *NLRB v. American Tube Bending Co.*, 134 F.2d 993 (2d Cir.), cert. denied, 320 U.S. 768 (1943); and, finally, from Congress, see NLRA § 8(c), 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958); H.R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947).

209. See text accompanying notes 215-19, 222-34 *infra*.

210. *Paula Shoe Co.*, 121 N.L.R.B. 673 (1958).

211. 112 N.L.R.B. 869 (1955).

212. *Id.* at 871. Since a prediction implies that facts exist that make the predicted event likely to occur, a prediction misrepresents to the extent that such facts do not exist. In *Kresge-Newark*, then, if the union official actually did state that the employer would lay off all Negro employees if the union were not elected to protect them, he was guilty of misrepresentation unless facts existed that made such action by the employer likely; cf. *International Union of Elec. Workers v. NLRB*, 289 F.2d 757 (D.C. Cir. 1960); *Haynes Stellite Co.*, 136 N.L.R.B. No. 3, 49 L.R.R.M. 1711 (1962).

213. 120 N.L.R.B. 1296 (1958).

employees by a Negro vice-president of the company that, "[H]e was the reason for the Union,' that 'some of the employees didn't want to be represented by me because of my race,' and that the 'white employees were jealous of my position with the Company.'"214. Without attempting to determine whether the vice-president's statements had any foundation in fact, the Board noted that the union had responded to them and concluded that the conduct complained of was insufficient to warrant setting the election results aside. Once again, then, the Board indicated its confidence in the capacity of workers to find the truth amid conflicting allegations.

The Board missed an opportunity to take a more realistic position with respect to racial misrepresentations in *Heintz Div., Kelsey-Hayes Co.*²¹⁵ The United Auto Workers, having lost a close election to the Heintz Employees Union, Independent, asked that the election be set aside because of the distribution the day before the election of handbills reading: "Vote U.A.W.-C.I.O.—July 14, 1959." The handbills were distributed by eight men the Independent had enlisted at a baseball game several days earlier; five of them were Negroes. The Board found that the distribution, which was solely the work of the Independent, had been carried on in such a way as to lead employees to believe that the UAW was sponsoring it. One fact not noted in the Board's decision must be added—less than twenty of the 1,377 employees eligible to vote were Negroes.²¹⁶

The Board set the election aside. It did not, however, rest its decision on the theory that the Independent had in effect misrepresented the extent of Negro participation in the UAW's organizational campaign and that this is reason to set an election aside. It chose rather to lay down a general principle, seemingly unrelated to race. As the Board put it, "[W]e hold that the failure of parties in Board elections to identify themselves as sponsors of campaign propaganda initiated by them constitutes grounds for setting aside the election."²¹⁷ Moreover, as the case is summarized in the Board's annual report,²¹⁸ only this principle matters. Those unfamiliar with the case must wonder, as they read the report, why "the intervening union selected some spectators at a baseball game to distribute handbills urging a vote for the petitioner,"²¹⁹ for not a word is said about the color of the spectators chosen.

Racial threats are, of course, just as unfair and just as much ground for setting an election aside as those not involving race. Thus, an employer's

214. *Id.* at 1298.

215. 126 N.L.R.B. 151 (1960).

216. See *Hearings on Administration of the Labor-Management Relations Act by the NLRB Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 981 (1961).

217. 126 N.L.R.B. at 153.

218. 25 NLRB ANN. REP. 52 (1960).

219. *Ibid.*

threat to fire workers of one race and replace them with members of another is no different from a simple threat to fire.²²⁰ In either case, if workers are told that they must reject a union to avoid the threatened consequences, the employer has committed an unfair labor practice and supplied a basis for setting the election aside.

Promises present a more complicated picture. Although promises to reward workers for opposing a union have long been held both an unfair labor practice and reason to set the results of an election aside, whether this rule applies to promises to maintain the status quo is not clear.²²¹ Nevertheless, in *Westinghouse Elec. Corp.*,²²² in which a majority of the Board regarded the union's effort to bring the racial issue before it as procedurally defective,²²³ the two members who reached the merits provided support for the view that an election should be set aside when an employer promises to maintain a racial status quo. How far the two members—Bean and Murdock—were willing to go is a matter of some doubt because their opinion gives conflicting answers to practically indistinguishable questions. On the one hand, they maintained the election should have been set aside if the employer promised "the continuation of a discriminatory advantage, or favored treatment to one class of employees over another in return for votes against the

220. *Granwood Furniture Co.*, 129 N.L.R.B. 1465 (1961); *accord*, *Fred A. Snow Co.*, 41 N.L.R.B. 1288 (1942).

221. In *Coca-Cola Bottling Co.*, 118 N.L.R.B. 1422 (1957), an employer promised its employees "a year round job with a year round pay envelope" if they rejected the union. The Board did not say whether it regarded this as a promise to preserve or to change the status quo, but the employer's uncontradicted assertion was that its employees had received year-round paychecks in every year but two, and those were years in which unions had called strikes. The employer's statement was held a "clear promise of benefit" and therefore ground for setting aside the union's election defeat. *But see Milwaukee Elec. Tool Corp.*, 110 N.L.R.B. 977, 987 (1954) ("All of our benefits have been given *willingly*, and without pressure, and will be continued indefinitely if we are left to make our own decisions . . ."), and *Protein Blenders, Inc.*, 105 N.L.R.B. 890, 896-97 (1953), *enforcement denied on other grounds*, 215 F.2d 749 (8th Cir. 1954) ("The benefits listed below have been established at Protein Blenders for a long period of time and they shall continue to be offered so long as we receive reasonable co-operation from you, our employee."), in which the quoted remarks were held not to be promises of benefit and therefore not to constitute unfair labor practices. See also *Happ Bros.*, 90 N.L.R.B. 1513, 1531-32 (1950), *enforcement denied on other grounds*, 196 F.2d 195 (5th Cir. 1952), in which the Board, while finding certain features of a speech violative, said nothing about the following promise to maintain the status quo:

I know that you have heard many things about what we, the management, would do as soon as we were free of the union contract. I do not think the older employees have believed that Happ Bros. Co. would rush in to cut wages, take away vacations, or in any way change our present method of operation; but to settle any doubt in any of your minds let me tell you that we will make absolutely no change in the operation of this plant. Every procedure, such as seniority rights, vacations, rest periods, etc., will remain as is.

222. 119 N.L.R.B. 117 (1957).

223. In an earlier decision, a panel of the Board had overruled the union's numerous objections to its election defeat and certified that the union was not the exclusive bargaining representative. 118 N.L.R.B. 364 (1957). Shortly thereafter the union moved the Board to reconsider and set aside this decision. The majority appears to have regarded the racial issue raised by the motion as an entirely new objection, for it "concluded that the motion for reconsideration in effect constitutes an additional objection to the election which was not filed timely under the Board's Rules." 119 N.L.R.B. at 118. Accordingly, the motion for reconsideration was denied.

Union."²²⁴ On the other, they intimated no opinion as to whether the election should have been set aside if "the Employer, either directly or by innuendo, [told] employees that if the Union lost the election it would persist in its practices of denying Negro employees the equality of opportunity of advancement in employment enjoyed by white employees."²²⁵ Although the two statements are not, of course, precisely identical, the differences between them are either so slight, or require such subtle analysis to be perceived,²²⁶ that for practical purposes—their probable impact on the workers—they are indistinguishable.

In effect, then, Bean and Murdock left open the question whether the election should have been set aside if the employer promised "the continuation of a discriminatory advantage . . . in return for votes against the Union." Nevertheless, their first statement suggests that they may well have been willing to include promises to maintain the status quo within the ambit of illegality. Whether their seeming open-mindedness on this point extended to all promises to maintain the status quo or only to those having to do with race is unclear.

If employer promises to maintain the status quo are now to be objectionable, employer predictions may also come in for closer scrutiny. Before the *Westinghouse* case an employer's racial predictions, just like those not involving race, were regarded as unobjectionable.²²⁷ In *Westinghouse* itself,

224. *Id.* at 120-21.

225. *Id.* at 121.

226. Perhaps the distinction intended had to do with possible implications from the two statements. The first might be thought to imply a threat that the employer would itself discontinue the discriminatory advantage if the workers did not deliver their votes, whereas the second might be thought to imply only that the employer would lose its power to continue the old racial practices if the union won. On this analysis, the first statement would be objectionable because of its implied threat, but the second would be unexceptionable. Nevertheless, as the text indicates, it is unlikely that the company's employees would have drawn such a distinction. Both statements would probably have suggested only that the company was willing to continue its discriminatory practices, but that the union would seek to end them.

227. *Happ Bros.*, 90 N.L.R.B. 1513 (1950). However, before the enactment of the Taft-Hartley Act in 1947, employer predictions, racial or otherwise, were not so sacrosanct. See note 208 *supra*. For a nearly exhaustive collection of the pre-1947 cases involving statements about race see *Hearings on Administration of the Labor-Management Relations Act by the NLRB Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 910-12 (1961). *Bibb Mfg. Co.*, 82 N.L.R.B. 338 (1949), *enforced as modified*, 188 F.2d 825 (5th Cir. 1951), can be said to mark the transition from the old to the new. The employer in that case had distributed *The Trumpet*, a vicious anti-union newspaper, to its employees. The trial examiner concluded that, "the respondent is legally responsible for the coercive statements, the appeals to race prejudice, the threats of economic reprisals, and of physical violence as well as the authentic sounding promises of rewards and inducements used by The Trumpet in its campaign to coerce the employees 'to keep the CIO out of the South' and that the respondent thereby violated Section 8(1) of the Act." *Id.* at 362. (Emphasis added.) The trial examiner found that the employer had also violated 8(a) (1) when a supervisor told an employee "that he could join the Union if he wanted to work with Negroes." *Id.* at 377.

By the time the case came before the Board, the Taft-Hartley Act had been passed, and although the Board adopted "the findings, conclusions and recommendations of the Trial Examiner, insofar as they are consistent with this Decision and Order," a close reading of the Board's decision reveals that the change had already begun. In particular,

a plant manager's statement to southern white workers that the union, if elected, would require promotions to be made according to seniority regardless of color did not prevent a panel of the Board from certifying that the union had lost the election.²²⁸ But if an employer can not promise his workers that he will maintain the status quo if the union is defeated, it would seem to follow that his freedom to make dire predictions about what the union will do if elected must be seriously restricted. This is so because many employer predictions necessarily imply that the employer, if left alone, will not make the woeful changes he attributes to the union. Implicit in his prediction is a promise to do no worse than maintain the status quo. If, for example, an employer warns his workers that the union will insist that white and Negro employees work side by side, his warning is pregnant with the pledge that he will not do this if left to manage his plant without a union. Bean and Murdock seem to have recognized this, for they said:

Originally, the Union said that Babcock promised if the Union lost, the existing racial segregation practice would be retained. Now it tells us that the Regional Director is in possession of employee affidavits quoting Babcock as saying 'if the Union won, colored people working in maintenance would get the job promotions instead of the white people.' There is no substantial difference between these two quotations, and I therefore cannot agree that the appeals to racial prejudice were never in issue in this case before the present motion was filed.²²⁹

They thus equated a promise to maintain the status quo with a prediction that the union would change it.

Whether or not predictions are to be regarded as implicit promises to maintain the status quo, it seems arbitrary to equate promises to maintain a racial status quo with promises to change things for the better. For one thing, a promise not to change will often add nothing to what the workers already expect. Thus, an employer who promises, whether expressly or by implication, that promotion lines hitherto reserved for whites will remain so if the union is defeated is painting the lily if he is a southern employer who has used Negroes only for janitorial work. If he said nothing at all on the subject, his employees would expect him to retain this state of affairs. For

the Board stated: "it is abundantly clear that at least some statements in *The Trumpet* were designed to defeat self-organization, not by appealing to the employees' sense of reason but by inciting physical violence, by threatening loss of employment, and by promises of benefits. On their face such statements exceed the permissible bounds of free speech and, when made or utilized by an employer to defeat self-organization, constitute *per se* an unfair labor practice." *Id.* at 339-40. Note the absence of any reference to the appeals to race prejudice, an omission of no practical significance in the case itself since the Board ordered the employer to stop distributing *The Trumpet* anyway, but one that in retrospect seems portentous. Nor did the Board's decision mention the supervisor's racial comment. Since *Bibb*, no racial prediction has been held either an unfair labor practice or reason to set an election aside.

228. 118 N.L.R.B. 364 (1957).

229. 119 N.L.R.B. at 120 n.3.

another, to hold a promise to maintain a racial status quo an unfair labor practice or ground for setting an election aside would introduce a fresh unsubstantial distinction into this area. Interdiction of promises to maintain a racial status quo would not affect the employer who, by dint of legal advice, intuition, or good luck, made no promises or predictions, but simply recounted what purported to be the policy followed by the union in other plants.²³⁰ Employees can draw their own conclusions when told that elsewhere this union has insisted that lines of promotion previously reserved for whites be opened to Negroes.

Bean and Murdock found more than promises disturbing in *Westinghouse*. They also asked: "Did the Employer deliberately attempt to provoke and inflame the employees to racial prejudice as a technique for clouding the issue of the imminent election?"²³¹ If so, the Board "should not evade the responsibility of deciding whether the resultant balloting reflected the considered judgment of the workmen themselves."²³² Unfortunately, the standard stated—did the results reflect the considered judgment of the workmen—is so vague that almost any result reached would be consistent with it. Some examples of its application would have been helpful, but these Bean and Murdock apparently deemed it inappropriate to provide in the *Westinghouse* case.²³³ We shall see presently how they responded in later cases.

Chairman Leedom also dealt with the racial appeals problem in *Westinghouse*. Concurring in the view that the union's motion was procedurally defective, he was nevertheless moved to express his misgivings about the Board's tolerance of racial appeals. He said:

The more subtle problem, however, arises when the reference to job retention or job loss is tied to the fact that the Union has a policy, at odds with that of the Employer, which calls for disregarding racial lines in the allocation of jobs, the implication being that, if the Union wins the election, union policy will probably prevail thereafter in the plant. It is true that the Board has heretofore found that statements endeavoring to forecast what will eventuate

230. However, when a promise to maintain the status quo if the union is defeated can fairly be construed as implying a threat that the employer will himself change matters for the worse if the union is not defeated, the promise should be held an unfair labor practice and ground for setting an election aside. The promise quoted from *Protein Blenders, Inc.*, discussed note 221 *supra*, probably should have been held an unfair labor practice for this reason.

231. 119 N.L.R.B. at 121.

232. *Ibid.*

233. The standard seems to be that generally applied by the Board in election cases. See, e.g., *Metropolitan Life Ins. Co.*, 90 N.L.R.B. 935, 938-39 (1950). Years of application have made relatively clear what the Board means by it in cases not involving race. That meaning is largely set forth in the beginning paragraphs of this section summarizing the Board's treatment of objections to elections. See generally 25 NLRB ANN. REP. 50-54 (1960). However, at the time Member Bean wrote in *Westinghouse* the number of racial appeals cases decided by the Board was too small to have provided a comparable gloss. As a result, it was impossible to know, for example, whether Member Bean would have held that the conduct complained of in *Westinghouse* itself prevented the balloting from reflecting "the considered judgment of the workmen themselves."

because of union demands and union practices are predictions which fall within the protection of the Act, and I have subscribed to that approach. However, I have serious doubts whether that principle should be applied in a case where the prediction involves an advantage or a disadvantage to an employee growing out of racial prejudice. The consequence of injecting the racial issue where racial prejudices are likely to exist is to pit race against race and thereby distort a clear expression of choice on the issue of unionism. Clearly, to draw the issues along these lines does not effectuate the policies of the Act. The implications are far greater, in my opinion, than the reach of the Act, for they bespeak an assault upon the spirit of our Constitution.²³⁴

Although the precise limits of Chairman Leedom's concern with racial appeals were necessarily left somewhat vague, his opinion appeared to leave little room for racial issues in representation election campaigns.

The appearance was misleading. In a series of decisions rendered after *Westinghouse*, the Board, without dissent by Leedom or Bean,²³⁵ rejected claims that election results had been tainted by the injection of racial issues. The leading case is *Sharnay Hosiery Mills, Inc.*,²³⁶ in which the Board refused to set aside a union's defeat even though the employer had circulated a letter to the workers that stated that the union: (1) strongly favors integration; (2) has submitted a pro-integration brief to the Supreme Court of the United States; (3) "is striving to eliminate segregation from every phase of American life";²³⁷ and (4) is a member of the AFL-CIO, which recently gave \$75,000 to the NAACP. The Board found that the statements involved "no misrepresentation, fraud, violence, or coercion and that [they] were temperate and factually correct. They therefore afford no basis for setting aside the results of the election."²³⁸ Leedom and Bean, referring to their *Westinghouse* opinions, expressed their concern over the injection of the racial issue but concurred in the result nevertheless. They thought the result was dictated by the "special circumstances" of the case but never specified what those circumstances were.

Whatever they were, the same or similar circumstances were presumably present in *Chock Full O'Nuts*,²³⁹ for the Board followed *Sharnay* in that case without separate comment from Leedom or Bean. That was the case in which the company's Negro vice-president "from the early spring of 1957 until within a few days of the election [held in July, 1957], frequently stated to Negro employees that 'he was the reason for the Union,' that 'some of the employees didn't want to be represented by me because of my race,' and

234. 119 N.L.R.B. at 118-19.

235. Member Murdock, who had joined Member Bean's dissenting opinion in *Westinghouse*, left the Board shortly thereafter.

236. 120 N.L.R.B. 750 (1958).

237. *Id.* at 750.

238. *Id.* at 751.

239. 120 N.L.R.B. 1296 (1958).

that the 'white employees were jealous of my position with the Company.' " After noting that the union had "commented on certain aspects of the problems of racial discrimination and bias in an attempt to offset any persuasive appeal Robinson, as an officer of the Employer, might have,"²⁴⁰ the Board simply said: "While we do not condone appeals to racial prejudice, nor the conduct of the Company's vice presidents in raising the issue, we do not find . . . the injection of the issue, or the context in which it was discussed herein, sufficient ground for invalidation of the results."²⁴¹ In two respects, *Chock Full O'Nuts* goes even further than *Sharnay*. First, the racial appeal was made with great frequency in *Chock Full O'Nuts*, whereas in *Sharnay* it was made in a single mailing to employees. And, second, in *Sharnay* the Board at least took the trouble to point out that the statements there were "temperate and factually correct."²⁴² The Board did not seem to have been interested in whether that was also true in *Chock Full O'Nuts*.

In short, notwithstanding the expressions of concern in *Westinghouse*, the NLRB's racial appeals decisions after *Westinghouse* seem indistinguishable from those that went before. The Board has condemned racial appeals only when they amounted to threats and thus to unfair labor practices.²⁴³ If there has been any departure at all, it is in the elimination of doubt that an employer's statement to southern whites that he will bring Negroes into the plant if it is unionized constitutes a threat to worsen the working conditions of the whites. The justification for holding such statements to be unfair labor practices was well stated by Trial Examiner Funke in *Petroleum*

240. *Id.* at 1298.

241. *Id.* at 1299. *Accord*, *Kay Mfg. Co.*, 121 N.L.R.B. 1077 (1958) (union agent's statement to employee that plant manager had said that "Negroes in the South were too afraid of their jobs and that the white trash was too stupid to vote for the union" does not constitute basis for setting union's election victory aside); *Paula Shoe Co.*, 121 N.L.R.B. 673 (1958) (union's election victory should not be set aside merely because union had referred to the company's plant manager as "that . . . Jew" in a handbill distributed to the workers); *Mead-Atlanta Paper Co.*, 120 N.L.R.B. 832 (1958) (employer's statement to groups of Negro employees that proportion of Negro employees was lower in some union plants in area than in employer's plant does not warrant setting union's defeat aside). See Case No. 723, 43 L.R.R.M. 1219 (1958) (employer's "statements to the effect that the union was an advocate of racial integration not only in schools, housing, and social relationships, but also on jobs, and that a union victory would mean that Negroes would work alongside white employees in the plant" do not constitute an unfair labor practice; the union's election defeat was set aside on other grounds).

242. 120 N.L.R.B. at 751.

243. *Granwood Furniture Co.*, 129 N.L.R.B. 1465 (1961) (employer committed an unfair labor practice by suggesting to Negro employees that if the union won, the company might replace them with white workers); *Petroleum Carrier Corp.*, 126 N.L.R.B. 1031 (1960) (employer committed an unfair labor practice by stating that if workers chose the union, employer would work "anybody he could, nigger, cajun, wop or what-not"); *Empire Mfg. Corp.*, 120 N.L.R.B. 1300, *enforced*, 260 F.2d 528 (4th Cir. 1958) (employer committed an unfair labor practice by threatening to hire Negroes if plant were unionized). By ignoring the rationale in *Heintz Div., Kelsey-Hayes Co.*, discussed in text accompanying notes 215-19 *supra*, one could consider the case an exception to the proposition here advanced.

There have not been any cases involving promises of improvement. If there had been, these too would presumably have been held unfair.

*Carriers Corp.*²⁴⁴ A supervisor had said that if the plant were unionized, he would work "anybody he could, nigger, cajun, wop or whatnot."²⁴⁵ The trial examiner, whose holding of an unfair labor practice was adopted by the Board, supported his conclusion this way:

I regard Guthrie's promise to hire anybody as a threat that working conditions would not be as pleasant after the advent of the Union. There are large areas and many localities in this country where those of Anglo-Saxon stock regard themselves as an elite segment of society with the same arrogance and as little reason as Hitler so regarded Nordics. I cannot read into Guthrie's statement that he would hire a 'nigger, cajun, wop or whatnot' an expression of dedication to principles of democracy or fair employment practices. It was, rather, a threat that the employees would suffer enforced association with persons of supposedly inferior origins if they accepted the Union and the falsity of the premise does not negate the threat.²⁴⁶

244. 126 N.L.R.B. 1031 (1960).

245. *Id.* at 1035.

246. *Id.* at 1038-39. General Counsel Rothman, testifying before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor, seemed to be of the view that the *Petroleum Carrier* case represented a shift in the Board's approach to appeals to racial prejudice. He said:

I believe that the leading case of the Board on this matter is one decided quite some time ago, known as *Happ Brothers*, [90 N.L.R.B. 1513 (1950), *enforcement denied*, 196 F.2d 195 (5th Cir. 1952)] in which the Board decided that an appeal to racial prejudice under the facts and circumstances of that particular case was not coercive conduct under the statute. But more recently the Board, in . . . *Petroleum Carriers Corporation*, took the view, without discussion, that it would affirm the trial examiner's finding that the employer violated section 8(a)(1) of the act by, among other things, threatening that his employees would suffer enforced association with persons of alleged inferior racial origins if they accepted the union seeking to organize them, and this was an unfair labor practice.

I believe that in view of what has been known to be the Board position and the result in the *Petroleum Carrier Corporation* case, where the Board reached the conclusion without dealing too directly with the matter, the matter requires clarification, and my view is that under the appropriate facts and circumstances, I would be prepared to issue a complaint that an appeal to racial prejudice can, under the appropriate facts and circumstances . . . result in a finding of the kind of threat or coercion that would be a violation of the statute.

Hearings on Administration of the Labor-Management Relations Act by the NLRB Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor, 87th Cong., 1st Sess. 1312 (1961).

But *Happ Bros.* and *Petroleum Carrier* are easily reconcilable. The employer's statement in *Happ Bros.* can fairly be construed as no more than a prediction that the union would require whites to work with Negroes. As a prediction, the statement is unexceptionable under standard Board doctrine. The statement in *Petroleum Carrier*, on the other hand, can only be read as a threat that the employer will punish the workers by making them work with people objectionable to them if they choose the union. As a threat of punishment, the statement should, of course, be an unfair labor practice. The only doubt one might have had is whether an employer's threat, in order to be an unfair labor practice, had to be a threat of economic deprivation—for example, lower wages, less work—or whether a threat to make the workers uncomfortable in some other respect would suffice. No reason to distinguish between threats of economic privation and all others is apparent and the Board has never drawn such a distinction. See *Advertiser Co.*, 97 N.L.R.B. 604 (1951) (threat that, "Starting next . . . Thursday [the election was scheduled for Wednesday] I'm going to be the toughest s— of b— you ever had to work for . . ."). In fact, the Board found an 8(a)(1) violation in a case, much like *Petroleum Carrier*, decided two years earlier. *Empire Mfg. Co.*, 120 N.L.R.B. 1300 (1958), *enforced*, 260 F.2d 528 (4th Cir. 1958).

How should racial appeals be treated? One thing at least is clear: the Board can not exclude them entirely from election campaigns. The Board has the power to police election campaigns not for the purpose of punishing bigoted unions and employers, but for the very limited purpose of keeping the parties from rendering too unlikely something approximating an intelligent choice by the voters. This means that incidental ugliness that probably did not affect the outcome of the election should not invalidate it. Thus, the Board was correct in refusing to set aside an election because of a single reference to "that Jew," the plant manager.²⁴⁷ However deplorable, it is unlikely that this one statement accounted for the union's victory. A new election in such a case would be nothing more than a means of punishing the offending union by putting it to the expense of renewing its campaign and the risk of losing the election for reasons having nothing to do with race. To be sure, if the Board were to make it known that even this would cost offenders their victories, we might expect employers and unions to be influenced accordingly and the incidence of racial utterances in election campaigns would presumably diminish. But they would not vanish and the Board would be using its limited resources for a purpose that has nothing to do with the job it was created to do.

When we keep in mind the reason for the Board's power to police election campaigns, it becomes clear as well that the Board should not bar a party from accurately summarizing its adversary's policies and practices on race. Surely no one would suggest that Negro workers are not entitled to know that the union seeking to represent them engages in racial discrimination. Indeed, if the Board were to order a new election because an employer had informed his Negro workers of that fact, it might well be infringing constitutional rights.²⁴⁸ Can we treat differently the freedom to inform white workers who benefit from their employer's discrimination that the union seeking their support has elsewhere insisted upon equal rights for Negroes? In both cases the information is pertinent to a rational choice by the employees. If the two cases are to be treated differently, it must be for reasons having nothing to do with the Board's responsibility to safeguard a free, unconfused choice for the voters. Different treatment would have to be based upon a wish to affect the racial practices of employers or unions or both. That is to say, different treatment would have as its objective preventing employers from benefitting from their racism or helping unions to adopt fair racial practices by eliminating one pressure on them to discriminate—that a nondiscriminatory policy may hurt their organizational efforts in the South.

247. See *Paula Shoe Co.*, 121 N.L.R.B. 673 (1958).

248. Cf. *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941).

But these objectives, worthy as they are, should not be pursued in this way. If the NLRB's power to police election campaigns were a truly potent weapon against racial discrimination, we would have to consider whether it should be brought to bear even though Congress obviously did not intend that it be used for this purpose and even though its use would require the always questionable invocation of governmental processes to suppress relevant information. The reality is, however, that the setting aside of elections in which an employer has simply told the truth is a singularly inept way of combatting discrimination.

It must be kept in mind that the setting aside of an election is the prelude to the holding of another as soon as it is thought that the taint of the misconduct attending the first has worn off. In some cases the Board helps the purification along by ordering disclaimers from the offending party.²⁴⁹ If, for example, the taint is an employer's threat to close down if the workers choose the union, his promise not to do so presumably helps eliminate the fears engendered by his first statement. But how can the impact of an employer's truthful statement about a union's racial policies be eliminated? The employer obviously can not be required to lie, *i.e.*, say that the union does not in fact pursue such policies. The workers are not likely to forget what they have been told and if the Board were to urge them to ignore it, it would probably succeed only in making itself ridiculous. The second election, then, would be likely to produce the same result as the first.²⁵⁰

The only way to make truthful statements about race a rarity in election campaigns is to change the underlying truth. In other words, both

249. See, *e.g.*, *Franchester Corp.*, 110 N.L.R.B. 1391 (1954); *Eastman Cotton Mills*, 90 N.L.R.B. 31 (1950); *J. J. Newberry Co.*, 88 N.L.R.B. 947 (1950).

250. See *Hearings on Administration of the Labor-Management Relations Act by the NLRB Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 575 (1961):

Mr. Pucinski [Chairman of the Subcommittee]. What was the net result of that order by the Board or the General Counsel in setting aside this election? Did you hold another election?

Mr. Hartnett [Secretary-Treasurer of the International Union of Electrical Workers]. Another election was held. The damage was already done. In the second election we were defeated again, not nearly so badly as in the first case.

Mr. Pucinski. Did the employer in the second election again resort to racial prejudice?

Mr. Hartnett. No; I would say that he did not, sir. He did not resort to racial prejudice. He had gotten his work done. He no longer needed to do this kind of job. He had his licks in. The ease was insurmountable as far as getting over that particular obstacle was concerned.

See also *id.* at 1030-31, where Joseph A. Jenkins, Regional Director, NLRB, 28th Region, and formerly a member of the Board, said:

The difficulty with it, Mr. Chairman, is this: You draw up a set of standards and suppose you were to say that the use by either side of countermileus [*sic*, presumably contumelious] or opprobrious epithets would be ground for setting an election aside, say like calling somebody a 'nigger' instead of a Negro, something like that. You would not stop them from doing it. They would do it anyway. You would set the election aside because they did it. You hold the other election and what happens? You get the same results that you got in the first election.

unions and employers must be required to follow nondiscriminatory policies. Then, neither will be able to gain an advantage over the other by informing workers that, unlike the other, it offers the "benefits" of racial discrimination.

The foregoing discussion applies with equal force to well-founded predictions. An employer's prediction that a union will pursue antidiscrimination policies in his plant is not significantly different from a statement that it has pursued them elsewhere.

However, when a prediction is ill-founded or a purported summary of a union's racial practices inaccurate in any material respect, the Board should not adhere to the tolerant attitude toward falsehood that it adopts in cases not involving race. For one thing, the Board's assumption about the capacity of workers to separate truth from falsehood in the heat of an election campaign, even if valid in the case of other misrepresentations, seems particularly questionable in the case of racial appeals. For another, if the Board is wrong about the capacity of workers to weed out lies when race is not involved, it can console itself with the substantial possibility that the particular lie complained of probably did not have much impact on the election anyway. This would be false consolation in racial appeal cases in the South. To understate the point, the indications are that many white workers in the South care about race. Their vote in a representation election may well be affected by what they believe to be the union's position on that subject. Moreover, since the Board's attitude toward falsehoods in general is largely a reaction to the administrative impossibility of policing all election propaganda,²⁵¹ it is significant that cases involving racial appeals represent a small proportion of the Board's caseload. Consequently, relatively little additional work would be involved if the Board were to require any party who chose to speak about race to cleave to the truth.

Finally, the Board should set aside an election whenever it believes that the racial issue has been unduly emphasized. The workers' choice in a representation election is of vital importance to them. They will be bound by it for at least a year²⁵² and usually far longer.²⁵³ Ideally, their choice

251. See 25 NLRB ANN. REP. 52 (1960).

252. NLRA § 9(c)(3), 61 Stat. 144 (1947), as amended, 29 U.S.C. § 159(c)(3) (Supp. II, 1961): "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." The no-election period is actually somewhat longer than a year in most cases in which a union has been chosen, because the Board counts from the date the union's victory was certified rather than from the date the balloting occurred and, at the other end of the year, refuses even to begin processing a petition for a new election until the full year has expired. See *Centr-O-Cast & Eng'r Co.*, 100 N.L.R.B. 1507 (1952). However, when employees have chosen not to be represented by any union, the Board will process an election petition if it is filed no more than sixty days before the anniversary of the election. *Vickers, Inc.*, 124 N.L.R.B. 1051 (1959). And in special circumstances an election petition will be processed during the certification year even though a union has been elected exclusive representative. See *General Elec. Co. Appliance Serv. Center*, 96 N.L.R.B. 566 (1951).

253. If a union prevails and negotiates a collective bargaining agreement for a term of two years or longer, the NLRB's "contract-bar" rules will, in most cases, prevent

should be made after full consideration of all relevant facts and arguments. Although the Board obviously can not guarantee this, it can at least attempt to prevent overdoses of racial propaganda from making intelligent consideration impossible. To be sure, even a few brief references to race may be equally distracting, but we have seen that the matter can not be hushed entirely. However, the fact that some discussion may be unavoidable should not prevent the Board from taking corrective steps when the distracting effect of the race issue is obviously manifested by frequent and inflammatory references.

Admittedly this is eminently unsatisfying—it is not only a modest limitation but a vague one at that, and, as I have already suggested, since workers are not likely to forget the harangues to which they have been exposed, it may even be futile.²⁵⁴ Nevertheless, I fear that it is all that can be done. To go further would require a complete ban on racial utterances and this we have already rejected. To do less would leave the parties with no incentive to restrain themselves. And, while vague, the suggestion does have some meaning. It would, for example, cause an employer's election victory to be set aside when preceded by such conduct as the following, recently described before a House subcommittee:

As early as August 21, a letter was sent by the company. [NECO] to its employees attacking IUE for supporting integration. Additional literature was circulated using this theme, and approximately 3 days before the election, the employer posted in his plant full-sized reproductions of a front page of the June 4, 1957, edition of the Jackson Daily News. This issue of the newspaper was published earlier in the year in Jackson, Miss., on the day before an election in which IUE was the petitioner at a plant in Jackson. Printed in the middle of the front page of the paper was a large picture of IUE President Carey dancing with a Negro. The caption under the picture as it appeared on the front page of this Jackson newspaper was 'Union leader James B. Carey dances with a

the holding of another election for two years. See *Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 121 N.L.R.B. 990 (1958). For an exception see *Hershey Chocolate Corp.*, 121 N.L.R.B. 901 (1958). Wholly apart from the Board's "contract-bar" rules, experience indicates that a union victorious in a representation election is likely to be around for a long while and that defeat may spell the end of organizational efforts for an extended period.

254. Nevertheless, the hope here would be that the lapse of an interval without frequent reference to the subject might permit other issues to be brought home to the workers so that the racial issue would become one of many rather than the exclusive or primary question on which the workers vote.

It may be asked, however, whether there is anything to prevent the offending party from doing the same thing all over again. This poses a problem only for employer conduct, since unions obviously have no interest in winning election victories merely to have them set aside. And even a violently anti-union employer is likely to boggle at the prospect of having his enterprise disrupted by the turmoil of repeated elections with their attendant campaigns. If an occasional employer is undeterred by this prospect, the unfair labor practice provisions of the NLRA might well be brought into play. It seems reasonable to assume that the Board could successfully assert that persistent subversion of the representation election processes constitutes interference with the workers' rights under § 7 and thus a violation of § 8(a)(1) of the NLRA. Cf. *B. F. Moss*, 65 N.L.R.B. 118 (1946); *National Mineral Co.*, 39 N.L.R.B. 344 (1942).

lady friend. He is president of the IUE which seeks to unionize Vickers plant here.' Directly below the picture and the caption was an article headlined 'Race mixing is an issue as Vickers workers ballot.' Above the reproduction the employer posted the caption 'Meet the president of the IUE.' Not only were these posted in various places about the plant, but on the following day at captive audience meetings before three groups of employees, the company president read a prepared speech to its employees. During the course of the speech he waved the June 4 front page in his hand. The speech, delivered in an angry agitated tone, focused on the racial issue he had raised.²⁵⁵

In sum, the results of an election should be set aside because a statement about race was made during the election campaign if: (1) it seems likely that the statement affected the outcome of the elections; and (2) the statement (a) threatened a worsening of working conditions; (b) promised an improvement in working conditions; (c) was inaccurate; or (d) was part of a series of frequent and inflammatory references to the race issue. At present, the Board appears to be in partial disagreement on the last two criteria. As in cases not involving race, it will set an election aside because of inaccurate statements "only when one of the parties deliberately misstates material facts which are within its special knowledge and where the employees are unable properly to evaluate the misstatements,"²⁵⁶ and it has yet to hold a statement about race beyond the voters' capacity to evaluate.²⁵⁷ With respect to the other criterion, perhaps there is a point at which the Board would hold that the race issue had been sufficiently agitated to invalidate an election, but the Board would apparently place that point so far out that it would affect no case likely to arise, whereas the standard suggested here is intended to reach cases like *NECO* and *Chock Full O'Nuts*.²⁵⁸ Both differences seem to stem from the Board's unwillingness to recognize the distracting effect of the race issue.

V. CONCLUSION

While the pressure for a comprehensive federal fair employment practice law must be maintained until Congress yields, at the same time existing

255. This description is taken from the testimony of Mr. Al Hartnett, Secretary-Treasurer of the IUE, in *Hearings on Administration of the Labor-Management Relations Act by the NLRB Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 560 (1961). The case referred to is *NECO Elec. Prods. Corp.*, 124 N.L.R.B. 481 (1959), *remanded on other grounds sub nom. International Union of Elec. Workers v. NLRB*, 289 F.2d 757 (D.C. Cir. 1960). The racist statements are mentioned only in the opinion of the court of appeals; they were not, however, material to its decision. Neither the NLRB's opinion, nor any decision that follows the *Neco* case even mentions the atmosphere of racism.

256. 25 NLRB ANN. REP. 52 (1960).

257. *But cf. Heintz Div., Kelsey-Hayes*, discussed in text accompanying notes 215-219 *supra*.

258. 120 N.L.R.B. 1296 (1958). This case is discussed in text accompanying notes 239-42 *supra*.

restraints on discrimination should be used to the fullest extent possible. The direct advantages for the Negroes who break into "white jobs," although hardly to be ignored, are not the only ones to be hoped for from such a course of conduct. There is reason to believe that substantial improvement in any sector of civil rights has a snowball effect. Improvement in employment opportunities provides the wherewithal for better housing and education, which, in turn, nurture the capacity for employment at still higher levels. The economic support upon which much of the Negro's struggle for equality depends can be expected to increase. Those responsible for the vocational guidance of Negro youths may be enlightened and abandon their "realistic" advice to train only for jobs currently open to Negroes.²⁵⁹ Negro youths themselves will be encouraged to study to realize their aspirations. And this, in turn, will increase the pressure for more comprehensive relief.

During this period in which Congress is in default, it seems particularly fitting that one of its existing enactments—the NLRA—be exploited to its utmost. Via section 8(b)(2)'s restraints on the power of unions to cause employers to discriminate against nonmembers, the NLRA offers potentially important relief against lily-white unions that seek to keep Negroes off the job or confined to inferior positions. Yet Negro workers have rarely sought to invoke the protection of this section. They should be awakened to it, especially since the prosecution of an unfair labor practice costs the complainant nothing.

The duty of fair representation is theoretically even more useful. Its protection extends beyond 8(b)(2)'s to encompass those admitted to union membership as well as nonmembers. Moreover, whereas 8(b)(2) is violated only if a union causes an employer to discriminate, the duty of fair representation also reaches discriminatory union inaction. Thus, it requires unions to process the grievances of Negroes on the same terms as those of whites and even commands them "fully and earnestly to bargain to prevent, and, where necessary, remove, discriminations"²⁶⁰ practiced by employers.

Again, however, the gap between potentiality and reality is great. Part of this gap is permanent; through it pass the many instances in which the fact that discrimination has occurred simply can not be proved. However, the NLRB can effect a partial closing of the remainder whenever it wishes. It can do so by withholding certifications from and refusing to order employers to bargain with unions likely to default on the duty of fair representation. Whether it can also enforce the duty through unfair labor practice proceedings is, it must be confessed, problematical.

259. The practice of giving such limiting advice is reported in NAACP, *THE NEGRO WAGE-EARNER & APPRENTICESHIP TRAINING PROGRAMS* 14 (1960).

260. *Central of Ga. Ry. v. Jones*, 229 F.2d 648, 650 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956).

Still more of the duty's potential can probably be realized through private action in the courts. The hard task of proving that discrimination has occurred can be eased for some cases if the courts will recognize that lily-white unions are not likely to represent Negroes fairly and should, therefore, have the burden of proving that they have done the unlikely when their actions are challenged. Such a rule would have the desirable side effect of generating fresh pressure on lily-white unions to lower their admission barriers. Even if they persist in their exclusionary policies, the duty of fair representation may still require them to allow Negroes to participate in their deliberations affecting collective bargaining. This may even include the right to vote in union elections.

The availability of judicial relief, unlike the remedies the NLRB can provide, is limited by the financial resources a complainant can muster for litigating in the courts. Negro organizations should give serious thought to whether any of their funds and energies can be spared from other concerns to do sustained battle here.

The pressure of the law, complemented by pressures from within the labor movement itself, must be brought fully to bear on unions that still engage in racial discrimination if the pressures to continue the practice are to be overcome. Without external impetus, union leaders are not likely to opt for fair employment practices when their followers are bigots.

Among the pro-discrimination pressures to be overcome are those mounted by southern employers when unions that espouse a nondiscriminatory policy seek to organize their plants. Appealing to racial prejudice, these employers underscore the nondiscriminatory practices of the organizing union in the hope that this will cause their employees to reject it.

This tactic, rightly condemned by a congressional committee as "contemptible,"²⁶¹ can not be prohibited altogether. Not only would an effort to do so raise serious questions about our commitment to freedom of expression, but, in addition, the nature of these utterances is such that their damage probably can not be undone by any remedies at our disposal. Although some limitations are possible, the only truly effective way to prevent companies from capitalizing on union fair employment policies is to require them to adhere to the same sort of policies themselves. For this we must look beyond the National Labor Relations Act.

261. Subcomm. on the National Labor Relations Board of the House Comm. on Education and Labor, *Report on Administration of the Labor-Management Relations Act by the NLRB*, 87th Cong., 1st Sess. 55 (1961).