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Invidious Discrimination under the National Labor Relations Act: A Little Change Could Go a Long Way

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NOTES AND COMMENTS

INVIDIOUS DISCRIMINATION UNDER THE NATIONAL LABOR RELATIONS ACT: A LITTLE CHANGE COULD GO A LONG WAY

I. INTRODUCTION

When the Wagner Act[1] was passed by Congress in 1935 its stated purpose was the elimination of obstructions to the free flow of commerce by encouragement of collective bargaining and by protection of employees' exercise of their right to freedom of association and of self-organization in negotiating terms and conditions affecting their employment. Neither that Act nor subsequent acts amending it[2] contain any language specifically referring to discrimination based on race, religion, national origin or sex; yet such discrimination by employers or labor organizations bears so heavily on adequacy of bargaining representation and employment conditions that the National Labor Relations Board, which is charged with the responsibility of administering those laws, very early found itself involved with problems of invidious discrimination.

This involvement grew and took on increasing significance as the national conscience was prodded awake by such nonlabor cases of racial discrimination as *Brown v. Board of Education*,[3] and when the pressures for the recognition of civil rights for minorities exploded during the 1960s the NLRB was predictably one of the agencies of the federal government which felt the brunt.

Despite the formulation by Congress and the judiciary of alternate means of redress,[4] there is a continuing need and place in the antidiscrim-

1. Act of July 5, 1935, ch. 372, 49 Stat. 449.

2. Labor Management Relations Act (Taft-Hartley), ch. 120, 61 Stat. 136 (1947); Labor-Management Reporting and Disclosure Act (Landrum-Griffin), Pub. L. No. 86-257, 73 Stat. 519 (1959) (hereinafter referred to collectively as the National Labor Relations Act, the NLRA, or the Act).

3. 348 U.S. 886 (1954).

4. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253, 42 U.S.C. §§ 2000e-2000e-15 (1970), *as amended*, (Supp. IV, 1974) [hereinafter referred to in

ination arsenal for the remedies which the NLRB has developed. It is the purpose of this comment to examine the history and current use of these remedies, to show their strengths and weaknesses, and to suggest changes which will bring them closer to achieving the dual goals of harmony in labor relations and elimination of invidious discrimination from the employment arena.

The approaches taken by the NLRB to the problems of invidious discrimination can be grouped in three broad categories.[5] First, dis-

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the text as Title VII]; Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 42 U.S.C. § 1982 (1970).

5. A potential fourth group, correction of discrimination by means of grievance and/or arbitration procedures, has been excluded from the text because it seldom involves the NLRB and thus is not a "Board approach."

Although section 9(a) of the Act protects the rights of the individual employee to engage in adjustment of grievances with his employer in the absence of the collective bargaining representative, in practice the grievance processing function is usually performed by the union. Courts have given recognition to this practice by ordinarily requiring employees to exhaust the union procedure before bringing suit against the employer in district court for breach of the employment contract (Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)), but have had more difficulty dealing with the natural tensions between the rights of employees to act concertedly in their own interest and the union's right to be the exclusive bargaining agent of those employees.

When the complaint concerns invidious discrimination, the fact that such conduct is illegal under Title VII has led one court to rule that concerted activity outside union procedures is protected activity notwithstanding that it tends to weaken the principle of exclusive representation, because the individual and the union are forbidden by law to be on opposite sides of the issue. Alexander v. Gardener-Denver Co., 415 U.S. 36 (1973), *cf.* NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1 (9th Cir. 1965), *on remand*, 166 N.L.R.B. 551 (1967), *vacated and remanded*, 419 F.2d 216 (9th Cir. 1969).

The Court of Appeals for the District of Columbia apparently agreed with this reasoning, but would have limited the protection to individual actions undertaken after union efforts had led them to a good faith belief that it was not proceeding against discrimination to the fullest extent possible. Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973). The Supreme Court recently reversed the decision on the ground that the principle of exclusive representation offered adequate safeguards for protection of minority interests. In the Court's opinion, this consideration rendered unnecessary an undercutting of that principle to accommodate the national labor policy against discrimination. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1974). Apparently, the national policy is not as strong as had been believed. This decision may, because of that implication, dampen whatever judicial and Board enthusiasm presently exists for dealing with discrimination under the N.R.L.A. *See generally* Gould, *Racial Protest And Self-Help Under Taft-Hartley: The Western Addition Case*, 29 ARB. J. 161 (1974).

The proficiency of the grievance/arbitration process has not been entirely satisfactory with regard to protecting individuals form invidious discrimination. Two possible methods of improving its performance are worth mentioning here. One is the suggestion that concerned third parties be allowed to intervene in either proceeding if desired by the minority complainant. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Acuff v. United Papermakers & Paperworkers, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); Bloch, *Racial Discrimination in Industry and the Grievance Process*, 21 LAB. L.J. 627, 640-42 (1970); Gould, *Racial Equality in Jobs and Unions*,

crimination on the part of a union acting or seeking to act as a statutory bargaining representative has been held to be a breach of the union's duty of fair representation. Where a breach occurs, the Board has determined that its inherent authority over representation matters under section 9[6] of the NLRA warrants imposition of sanctions. Second, an employer or a labor organization which practices invidious discrimination may under certain conditions have committed an unfair labor practice as defined by section 8[7] of the Act. If so, the Board is authorized by section 10[8] to issue remedial orders to nullify the effects of that practice. Third, as a government instrumentality the NLRB is forbidden by the fourteenth amendment of the United States Constitution, as incorporated in the fifth amendment, to aid discrimination by a private party or organization. This principle has been interpreted to justify the withholding of Board processes from labor organizations and possibly employers which discriminate.

II. THE DUTY OF FAIR REPRESENTATION

The development of the fair representation doctrine began in 1944 with the Supreme Court decisions in *Steele v. Louisville & Nashville R.R.*[9] and *Wallace Corp. v. NLRB*.[10] In *Steele*, the union acting as the exclusive bargaining representative of the craft of railroad firemen agreed with the railroad-employer to restrict and ultimately exclude Negro firemen from the service. Disapproving that conduct, the Court held that the Railway Labor Act imposes upon the statutory representative of a craft "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[11]

The duty was, in the Court's opinion, necessary to avoid conflict

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Collective Bargaining and the Burger Court, 68 MICH. L. REV. 237, 245-48 (1969) [hereinafter cited as *Racial Equality*]; Gould, *Labor Arbitration of Grievances Which Involve Racial Discrimination*, 118 U. PA. L. REV. 40, 58-64 (1969). The other is the proposal to incorporate Title VII standards for proof of discrimination into the grievance and arbitration mechanisms. This is unlikely to occur spontaneously, since an arbitrator is chosen by and acts for the union and the employer and thus interprets the private agreement between them, not the public policies of the nation. *See id.* at 47-49.

For a discussion of unfair labor practices charges against unions for their handling of grievances see text accompanying notes 32-77 *infra*.

6. 29 U.S.C. § 159 (1970).
7. 29 U.S.C. § 158 (1970).
8. 29 U.S.C. § 160 (1970).
9. 323 U.S. 192 (1944).
10. 323 U.S. 248 (1944).
11. 323 U.S. at 203.

with the Constitution,[12] but it reasoned that in the case of employees who were denied membership in the union which represented them, it was the *statutory* grant to the union of the right to be the exclusive representative[13] in collective bargaining over their employment rights which called forth that duty.[14] By granting exclusive representation rights to the union, the statute deprives individual employees of the right to bargain for themselves and thus, without the union duty to represent them fairly, they are by act of Congress rendered powerless to protect themselves—a constitutionally indefensible situation.

The duty of fair representation was originally a judicial doctrine, enforceable in the federal district courts.[15] It was adopted by the NLRB in 1953[16] and the Board has generally complied with the court extensions and refinements of the doctrine since that time.[17]

As to the standard by which union fairness is to be measured, the courts interpreted the avoidance of "hostile discrimination," which was required under *Steele*, to preclude any union liability in the absence of bad faith.[18] As applied to invidious forms of discrimination, bad faith encompassed only conduct undertaken with *intent* to effect such discrimination. The requirement of proof of such intent offered a major barrier to use of the duty of fair representation theory to prevent any but the most blatantly discriminatory union conduct.[19]

The Supreme Court, in *Vaca v. Sipes*,[20] appears to have taken a step in the direction away from emphasis on the requirement of bad

12. *Id.* at 198.

13. For discussion of the nature and effects of this important concept see Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); J.I. Case Co. v. NLRB, 321 U.S. 332 (1943); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333 (1958).

14. The Court did not make clear whether it believed the duty of fair representation to be rooted in the Constitution or in the labor statute. This controversy remains unresolved with the present members of the NLRB split 3-2 for the constitutional basis theory, but disagreeing as what that position requires of the Board. *See* Bell & Howell Co., 213 N.L.R.B. No. 79 (1974), Bekins Moving & Storage Co., 211 N.L.R.B. No. 7 (1974).

15. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 207 (1944).

16. Hughes Tool Co., 104 N.L.R.B. 318 (1953).

17. Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955). *See also* Generac Corp. 215 N.L.R.B. No. 41 (1974); Miranda Tool Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

18. *See, e.g.*, Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962); Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959).

19. *See* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1132-33, 1155 (1973) [hereinafter cited as Clark].

20. 386 U.S. 171 (1967).

faith. In attempting to define the duty of fair representation the Court described it as an obligation "to exercise its discretion with complete good faith and honesty, *and* to avoid arbitrary conduct."[21] The language can be read as applying two separate standards, that of good faith, and that of freedom from arbitrariness. If this interpretation is correct,[22] the new emphasis on arbitrary conduct could serve as a base for expanding the duty of fair representation to prohibit union decisions in which, for example, race, religion, national origin or sex are suspected factors and the other reasons asserted for the decision are insufficient to support it. This may not seem to be a significant expansion, but it would at least have the effect of shifting to the union a portion of the burden of proof when the reasons for its conduct are not readily ascertainable.[23]

Since the *Vaca* decision, the bad faith standard appears to be on the decline in substance if not in form. The trend is toward a more liberal view of what constitutes bad faith,[24] but at least four circuits have found that it is no longer required to establish a breach of the duty of fair representation.[25]

Julia Penny Clark, in arguing that the proper standard should be that of reasonableness, has pointed out that, although the Supreme Court did not explain its use of the word arbitrary in the *Vaca* and

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21. *Id.* at 177 (emphasis added).

22. *See* Griffin v. United Auto Workers, 469 F.2d 181 (4th Cir. 1972), interpreting the *Vaca* decision as an intentional expansion of the standard; *contra*, Amalgamated Ass'n of Steelworkers v. Lockridge, 403 U.S. 274, 301 (1971) in which the Court stated that the duty of fair representation "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives . . . ."

23. In evaluating the significance of any apparent expansion it should be remembered that the Supreme Court has steadily maintained that the duty of fair representation was not intended to inhibit union discretion in bargaining for or administering contracts.

> This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract . . . such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interests or merits.

Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944). *See also* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

24. *See, e.g.*, Peterson v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); St. Clair v. Teamsters Local 515, 422 F.2d 128 (6th Cir. 1969).

25. Ruzicka v. General Motors Corp., 90 L.R.R.M. 2497, (6th Cir. 1975); Griffin v. U.A.W., 469 F.2d 181 (4th Cir. 1972); Figueroa v. Sindicato de Trajabadores Packinghouse, 425 F.2d 281 (1st Cir. 1970). *Compare* Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972), *with* International Longshoremen's Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964).

Humphrey v. Moore[26] opinions, "the contexts indicate that it used 'arbitrary' to describe irrational and unreasoned decisions."[27] If rationality should in the future become the accepted standard by which union conduct is to be measured,[28] it is clear that individuals represented by unions would have a more realistic weapon with which to protect themselves not only from the effects of invidious discrimination but from all forms of unfair or ill-considered conduct by which that union may infringe their rights.

The duty of fair representation doctrine, under the standards presently being applied, has been criticized as incapable of providing real protection for the rights of the individual employee.[29] This may be true for reasons other than the limits in scope effected by the standards. First, since the NLRB authority over representation matters comes into play only when the union attempts to take advantage of the Board's certification process, the Board cannot under the duty of fair representation doctrine remedy breaches committed by the multitude of labor organizations which have established themselves in collective bargaining relationships without aid of the Act.[30] Second, while the Board may effectively withhold or revoke union certification under section 9 of the Act, any *affirmative* remedy which it might devise would not be enforceable against an unwilling union. Finally, under the NLRA the duty of fair representation proceedings are not available to the injured employee.[31] All these factors have made the duty of fair representation alone of limited value in discouraging invidious discrimination under the NLRA.

III. Unfair Labor Practice Proceedings

A. Against Labor Unions

The aforementioned disadvantages of the duty of fair representation doctrine have not left the National Labor Relations Board to fade from the scene of effective antidiscrimination agencies. Congress unknow-

26. 375 U.S. 334 (1964).

27. Clark, *supra* note 19, at 1131.

28. A recent Board decision appears to support this standard. *See* General Truck Drivers Local 315, 217 N.L.R.B. No. 95 (1975).

29. Clark, *supra* note 19, at 1132-33, 1155.

30. Moreover, it is just such labor organizations which are likely to be most powerful and thus have a greater potential of harm from duty of fair representation breaches. However, such an offense is "reachable" through suit in federal district courts.

31. The district court proceedings, by contrast, can be initiated by the individual, but at his own expense.

ingly provided the key to a better way when it wrote unfair labor practices into the NLRA with the Taft-Hartley amendment of 1947.[32] Under section 10 of the amended Act all three of the weaknesses of section 9 proceedings were corrected and a bonus was added: the expense of charging, investigating and prosecuting an unfair labor practice is borne by the government.[33]

The NLRB made use of sections 8 and 10 in the case of *Miranda Fuel Co.*[34] The majority of the Board found that the right to be represented fairly was a right encompassed by section 7[35] of the Act. It reasoned therefore that a breach by the union of its duty of fair representation violated section 8(b)(1)(A)[36] and was an unfair labor practice which it could remedy by means of section 10 provisions for prevention of unfair labor practices.[37] The majority found further that an employer who assents to the prohibited union conduct has violated section 8(a)(1),[38] the employer parallel of section 8(b)(1)(A), and thus the same remedies are available against him.

The United States Court of Appeals for the Second Circuit denied enforcement of the Board's order in *Miranda*,[39] but only one member of the three-judge panel explicitly disapproved the rationale used.[40] The NLRB subsequently has adhered to the majority's view in numerous

32. Ch. 120, 61 Stat. 136.

33. However, the charging party does pay the price of loss of control over the case. The General Counsel of the NLRB, a political appointee, has absolute and unreviewable discretion as to whether to prosecute a complaint, in what manner, and to what extent.

34. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

35. Section 7, 29 U.S.C. § 157 (1970) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

36. Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970) provides: "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 157 of this title . . . ."

37. Section 10(c) authorizes the Board on its finding an unfair labor practice to "cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter . . . ." 29 U.S.C. § 160(c) (1970).

38. 29 U.S.C. § 158(a)(1) (1970).

39. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

40. Judge Lumbard did not find the evidence sufficient to support the finding of a breach of the duty of fair representation. *Id.* at 180 (Lumbard, J., concurring). This point prompted the observation by one commentator that it was indeed "puzzling that a divided Board would choose a vehicle so factually unattractive to deliver a revolutionary doctrine." Boyce, *Racial Discrimination and the National Labor Relations Act*, 65 NW. U.L. REV. 232, 238 (1970) [hereinafter cited as Boyce].

cases, though its members have never approved it unanimously.[41]

Two years later, the *Miranda* doctrine was expanded in *Independent Metal Workers Local 1*.[42] That union maintained racially segregated locals which had failed to process the grievances of black employees. The Board found that this practice violated section 8(b)(1)(A) under *Miranda*, and also found since the duty of fair representation applied to collective bargaining by the statutory bargaining agent, and processing of grievances is a part of the continuing bargaining process, that the union's breach of its duty of fair representation under such circumstances violated its duty to bargain within the meaning of section 8(b)(3).[43]

That same year the Board decided *Local 1376, International Longshoremen's Association*,[44] in which it found that the duty to bargain in good faith imposed by section 8(d) of the NLRA imposed the obligation on union and employer alike not to establish through collective bargaining an agreement which contained invidious discriminatory provisions. A union which bargained for such an agreement was held to have breached its duty of fair representation and to have committed a section 8(b)(3) unfair labor practice.

The duty of fair representation/unfair labor practice doctrine was broadened yet another time in 1964[45] with *Local 12, URW*[46] wherein the Board took the last major step to establish the current scope of that doctrine. In that case collective bargaining resulted in a contract which contained no discriminatory provisions on its face. However, the union passively assented to the employer's interpretation of the contract, allowing discrimination in practice, and refused to process the grievances of black employees concerning those practices. Upon the basis of *Independent Metal Workers* the union was found to have violated its duty of fair representation under section 8(b)(3). In addition, the majority of

41. *See* Pacific Maritime Ass'n, 209 N.L.R.B. 519 (1974) (Fanning, concurring). For an example of subsequent judicial approval see Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (1967), Local 12, URW, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

42. 147 N.L.R.B. 1573 (1964).

43. 29 U.S.C. § 158(b)(3) (1970).

44. 148 N.L.R.B. 897 (1964).

45. It is interesting that 1964, with its three Board extensions of the duty of fair representation, was also marked by the passage of an important congressional alternative for attacking invidious discrimination, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

46. 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

the Board found a separate breach of the duty of fair representation in the union's passivity, stating that "the duty of fair representation may be breached, not only by action, but by inaction as well."[47] The union was ordered to "[p]romptly propose to the Company specific contractual provisions prohibiting racial discrimination in terms and conditions of employment . . . ."[48] Apparently, the duty of fair representation requires the union to act affirmatively to prevent not only establishment of a discriminatory contract, but discriminatory administration of a fair contract as well.[49]

Finally, in *Local 106, Glass Bottle Blowers Association*,[50] the NLRB found that the union's maintenance of sex-segregated locals in the absence of any contract or employment discrimination was an unfair labor practice violating section 8(b)(1)(A) on the grounds that (1) separate but equal was as inherently unfair when based on sex as when based on race and (2) employees in one local were denied participation in the resolution of grievances processed by the other local, although they were bound by those resolutions.

The decision did not rely on *Miranda*,[51] but it has decided significance in regard to unfair labor practices. By implication, if the *partial* denial to unit members of their right to participate in matters affecting their employment violates section 8(b)(1)(A), then total denial of participation by withholding of membership on invidious grounds must certainly constitute the same violation.[52] It seems that the Board has achieved indirectly what it had since *Independent Metal Workers Local 1*[53] hesitated to do directly, that is bringing the unfair labor practices remedial and enforcement machinery to bear on unions which purport to represent those to whom they discriminatorially deny union membership.[54]

47. 150 N.L.R.B. at 315.

48. *Id.* at 323.

49. *Cf.* Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (1973) (affirmative duty to avoid contract provisions which discriminate on the basis of sex).

50. 210 N.L.R.B. 943 (1974), *enforced*, 520 F.2d 693 (6th Cir. 1975).

51. Chairman Miller alone would "make clear that he viewe[d] the violation . . . as arising out of [the union's] failure fairly to represent the employees, in that separate but allegedly equal representation is not fair representation . . . ." 210 N.L.R.B. at 944 n.5.

52. *See* Bekins Moving & Storage Co., 211 N.L.R.B. 138, 145 (1974) (Fanning & Penello, dissenting).

53. 147 N.L.R.B. 1573 (1964). The Board had found there that exclusion from membership on racial grounds constituted a breach of the duty of fair representation and required decertification of the union, but it declined to find an unfair labor practice.

54. The traditional reluctance of the NLRB to inquire into the membership policies

In evaluating the prospective effect of the *Glass Bottle Blowers* decision on discriminatory union membership practices, the critical question relates to the nature of evidence which the Board will deem necessary to establish the existence of such practices. In the past it has demanded evidence of actual union refusal of membership applications from the employees allegedly aggrieved by the practice as the standard for determining whether the Constitution will prohibit the Board from aiding a discriminatory union by granting it exclusive representative status.[55] In that context, the Board's standard was repudiated by the United States Court of Appeals for the Eighth Circuit in *NLRB v. Mansion House Center Management Corp.*[56] In remanding the case to the Board with directions to consider all relevant evidence, including statistical data, the appellate court stated: "When evidence *suggests discrimination of racial imbalance* the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices."[57]

The significance of this new standard will be considered more fully in another section of this comment.[58] Suffice it to say at this point that it is obviously a great deal more liberal than its predecessor, at least as to establishment of a prima facie case of discrimination in union membership. The NLRB could apply it by analogy to the proof required to make out a section 8(b)(1)(A) violation based on discriminatory denial of membership, and indeed, it could be argued that *only* by adopting such a standard will the Board be able to effectively attack with unfair labor practice proceedings the residual effects of past union discrimination.[59]

The importance of bringing breaches of the duty of fair representation within the unfair labor practices provision of the Act is best seen by

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stems in large part from the proviso to section 8(b)(1)(A) of the Act which states: "[T]his 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 . . . ." 29 U.S.C. § 158(b)(1)(A) (1970).

The proviso has been interpreted to prohibit interference by the Board with union membership criteria, but not the withholding of Board processes from those unions which utilize unacceptable criteria. Hence, until *Glass Bottle Blowers*, the finding of an unfair labor practice based on membership criteria was not allowed.

55. Mansion House Center Management Corp., 190 N.L.R.B. 437 (1971).

56. 473 F.2d 471 (8th Cir. 1971).

57. *Id.* at 477 (emphasis added).

58. See notes 78-95 *infra* and accompanying text.

59. Since the use of racial and other invidious criteria for determining union membership eligibility has been proscribed by civil rights statutes, the focus is now necessarily on the "hangover" effects of former practices.

examining the consequences. The *Miranda* doctrine affords (1) a direct remedy in that charges can be filed by anyone, (2) a specific remedy, because the Board can order the union to cease and desist its wrongful conduct and to take *whatever* affirmative steps are deemed necessary to remove the effects of that conduct, and (3) judicial enforcement of both kinds of orders by court decree and, if necessary, by contempt proceedings.[60]

Despite its obvious potential for correcting unfairness, and particularly invidious discrimination, on the part of unions, the *Miranda* doctrine has been cited as controlling the disposition of only three NLRB cases in its thirteen years of existence.[61] Of course, it has played a lesser part in numerous decisions, but the impression nevertheless is that the doctrine has been underutilized.

This dearth of *Miranda* decisions has been blamed by one commentator on the subtlety of the forms of union racism made possible, particularly in the construction trades, by the unions' conditioning of jobs and job training on discretionary criteria.[62] In comparison with the blatant discrimination found in the cases which developed the *Miranda* doctrine, that practiced under the guise of discretionary "screening" are extremely difficult to prove. The same is true of practically all forms of invidious discrimination which currently pervade union operations. If the rationale of *Miranda* is accepted as valid, the challenge becomes that of making it effective to achieve its purpose. A possible solution is to expand the duty of fair representation which underlies it.

One suggestion for accomplishing such an expansion is that the NLRB place upon the union the burden of demonstrating both the necessity and fairness of any conduct on its part which is shown to restrain an individual's freedom to enter or practice any occupation which the union controls.[63] To support such a presumption of illegality, attention must be given to the constitutional nature of the duty of fair

60. Another aspect of the *Miranda* case itself is worth noting. Under the older duty of fair representation cases, *Steele, Wallace*, and Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944), that duty had been invoked to prevent discrimination against nonunion unit members. Miranda established that the violation does not depend on union membership or the lack of it. The basis on the unfair labor practice finding was the breach of the duty of fair representation itself.

61. *See* General Truck Drivers Local 315, 217 N.L.R.B. No. 95 (1975); Nelson Construction Co., 193 N.L.R.B. 724 (1971); Houston Maritime Ass'n, 168 N.L.R.B. 615 (1967).

62. Boyce, *supra* note 40, at 241.

63. *Id.* at 246-53.

representation. The *Steele* opinion compared this duty with the duty of a legislature to give equal protection to those whom it represents; therefore, the Board would have support for applying to union conduct the same presumption of unconstitutionality which federal courts currently apply to state conduct which interferes with the fundamental rights of individuals.[64]

However, this proposition is vulnerable to attack in several respects. For one thing, the Supreme Court has explicitly warned the NLRB *not* to make the assumption that union conduct violates the law.[65] For another, it is far from settled that the duty of fair representation is rooted in the Constitution.[66] The Court's *Steele* opinion was not clear on the point, but it referred to the duty several times as a statutory one and implied that it was being imposed to *avoid* constitutional problems. Moreover, the proposition of a constitutional base necessarily carries with it the characterization of the union as a governmental body. This concept is difficult to support under the more recent "governmental action" cases.[67]

A broader approach which avoids these problems is that of applying to union decisions alleged to violate its duty of fair representation

64. "Because of the importance of the right involved and the suspect nature of the state's classification, the usual presumption of constitutionality is reversed." Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 719 (1969).

65. Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961) (reversing a Board finding that exclusive hiring halls per se violate the NLRA).

66. *See* note 14 *supra* and accompanying text.

67. There are two possible approaches by which unions could be characterized as governmental instrumentalities. The first emphasizes the status of exclusive bargaining representative as a government granted monopoly. Since the authority of a certified union is not merely tolerated, but is affirmatively directed by federal statute, and its effect is to make employees who voted against the union unwilling captives of its representative monopoly, then, it is said, the union acting is its statutory capacity must be subject to the same restrictions as the government itself. Put another way, "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin . . . to its exercise by Government itself." American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1950). The Court in that case found no government action, however.

The second approach may be called the extensive regulation theory. It is based on the idea that, in view of the public nature of union functions, their comprehensive regulation and control by the government has so enmeshed government in union affairs and conduct that union actions have become government actions. This was the argument advanced in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). It was rejected by the Court as applied to state regulation of the discriminating *party* where the state regulation was not in direct support of the discrimination itself.

At least one circuit has stated in dictum that a union is *not* a governmental instrumentality. NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 475 (8th Cir. 1971).

the standard of reasonableness.[68] This appears to be an alternative approved by the Board. In the recent case of *General Truck Drivers Local 315*[69] it was confronted with a union decision, made pursuant to a poll of union members who could have been adversely affected, to refuse to allow the employer to reassign with full senority an employee whose job had been eliminated. The employment contract purported to guarantee the employee such reassignment. The Board[70] relied on *Miranda* for its finding of a section 8(b)(1)(A) violation, and discussed its understanding of the duty of fair representation.

It is "more than an absence of bad faith or hostile motivation,"[71] at least as to rights under an existing agreement,[72] said members Kennedy and Jenkins, but it is also the avoidance of arbitrary conduct—conduct which is missing some ingredient required by the decision-making process. The missing ingredient, a proper *reason*, causes the union's decision to violate the duty of fair representation. If no reason is apparent to support a union decision, the union is responsible for showing a proper one.[73]

The majority found that the union had based its decision on a poll which was inherently unfair to the complainant (1) by virtue of its timing, after the job elimination had been announced, and (2) because only union members who stood to lose from the union's assertion of the contract right had participated.[74] While it was conceded that the union had the power under the contract and the NLRA to reach the result it did, the duty of fair representation forbade reaching it by means of an unfair procedure.

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68. *See* note 27 *supra* and accompanying text.

69. 217 N.L.R.B. No. 95 (1975).

70. The case was decided by a panel of three members, Jenkins, Kennedy, and Penello.

71. 217 N.L.R.B. No. 95, at 6.

72. This limitation may be important as regards charges of invidious discrimination because not all collective bargaining agreements contain antidiscrimination clauses; however, there is some evidence that such provisions are becoming more common. *See* BASIC CONTRACTS PATTERNS: ANTIDISCRIMINATION CLAUSES, LABOR RELATIONS YEARBOOK 34 (1969) showing that even then 46 percent of the agreements in force contained such clauses.

73. The Board appears to have, in effect, approved the reverse presumption of legality mentioned in the text accompanying note 65 *supra*, and its position is accordingly weakened by the Supreme Court's caution in Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961). Since the NLRB approach was not grounded in constitutional considerations however, its opinion escapes a portion of the criticism directed to that proposal.

74. The Board refrained from discussing the effect of a union decision based on fair polls of its membership, but its language implies that such would be acceptable conduct. *Cf.* Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972).

The "standard of rationality" set out in the majority opinion[75] has several advantages. It is applicable to union decisions based on insufficient or no reasons (arbitrary decisions) and to those made for improper reasons (discriminatory decisions). Moreover, although the Board's approach shows the influence of both equal protection and due process considerations, those doctrines are applied by analogy, not by incorporating the duty of fair representation into the Constitution. The standard is grounded in the Act as interpreted by the NLRB and thus the problems inherent in constitutionalizing the duty are avoided.

There is no indication whether the "standard of rationality" will be adopted by a majority of the entire Board and thus be assured of some influence on future cases.[76] Of the alternative means of broadening the duty of fair representation, this one appears to offer the most promise and the fewest theoretical weaknesses. The NLRB would be well advised to take advantage of it.[77]

It should be noted that broadening of the duty of fair representation as a solution to the underutilization of the *Miranda* doctrine has no special significance to the victim of union discrimination on invidious grounds. The change from a "bad faith" standard to a "rationality" standard does not address his problem, because invidious discrimination, when *proved*, was outlawed under the old standard. To make the *Miranda* doctrine effective to prevent discrimination, the solution must be directed to the problems of proof.

B. Against Employers

Under the Act, an employer has no obligation toward his employees comparable to the union's duty of fair representation because that duty arises out of the representation of the employee by the union.[78]

75. Member Penello found no breach of the duty of fair representation. In the absence of hostility or bad faith he would view the decision as one within union discretion. 217 N.L.R.B. No. 95, at 15 (Penello, dissenting).

76. The trend in the federal courts toward broadening the standard could be a factor favoring adoption.

77. In the interest of completeness, it should be mentioned that the United States Court of Appeals for the Sixth Circuit has just handed down a decision which suggests another appealing alternative. In Ruzicka v. General Motors Corp., 90 L.R.R.M. 2497 (1975), that court held that *negligence* on the part of a union in grievance processing may be a breach of the duty of fair representation. The impact of the idea was considerably weakened by the court's characterization of the particular conduct involved as also arbitrary and intentional. *Contra*, Brough v. United Steelworkers of America, 437 F.2d 748 (1st Cir. 1970); Bazarte v. United Transport Union, 429 F.2d 868 (3d Cir. 1970); Operating Engineers Local 18, 144 N.L.R.B. 1365 (1963).

78. NLRB v. Miranda Fuel Co., 326 F.2d 172, 185 (2d Cir. 1963).

Accordingly, an employer acting alone has traditionally been considered outside the reach of unfair labor practices provisions.[79] A challenge to this view was offered by the United States Court of Appeals for the District of Columbia in *United Packinghouse Workers v. NLRB*.[80] Judge Skelly Wright's opinion found that unjustified discrimination on the part of an employer was per se a restraint on the exercise of employees' section 7 rights and thus a violation of section 8(a)(1). The restraining effect was characterized as twofold:

> (1) racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination.[81]

The court concluded that the confluence of the two factors was a sufficient interference with the employees' rights to constitute the violation, and it remanded to the Board for hearings on the issue of whether the company in fact had a "policy and practice" of racial discrimination.[82]

On remand, the NLRB refrained from comment on the new theory and found that no discriminatory practice existed. However, four years later in a case involving sex discrimination it specifically rejected the court of appeals' per se approach. In *Jubilee Manufacturing Co.*[83] it found that employer discrimination on the basis of race, color, religion, sex or national origin, standing alone, was neither inherently destructive of section 7 rights within the meaning of section 8(a)(1) nor discouragement of union membership in violation of section 8(a)(3). The

79. In contrast, employer discrimination in concert with a union is a violation by him of sections 8(a)(1) & (3) of the Act. Similarly, his delegation to the union of an employer function such as hiring gives rise to derivative liability in him if the union discriminates in its performance of that function. Morris-Knudsen Co. v. NLRB, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1962). The Board has further regulated employers' discriminatory conduct in the context of inflammatory appeals to racial prejudice during organizational campaigns. *See, e.g.*, Sewell Mfg. Co., 138 N.L.R.B.. 66 (1962).

80. 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

81. *Id.* at 1135.

82. Following the Board's acceptance of the remand, the Supreme Court denied certiorari, Farmers' Cooperative Compress v. United Packinghouse Workers, 396 U.S. 903 (1969). This action was interpreted by some as the Court's "stamp of approval." Kohlmeier, *NLRB's Role in Job Bias Disputes Is Enhanced by the Supreme Court*, The Wall Street Journal (Western ed.) Nov. 11, 1969, at 3, col. 1.

83. 202 N.L.R.B. 272 (1973).

majority would require actual proof not only of unjustified discrimination but of the causal relationship between employer conduct and the interference with exercise of employee rights.

At first blush the Board's requirement seems reasonable. The agency has a legitimate interest in confining the extension of its remedies to situations covered by the language of the Act, and it has shown a trend away from per se rules in favor of a more flexible "totality of circumstances" approach.[84] However, Member Jenkins made a telling point in *Farmers' Cooperative Compress*[85] when he equated the majority's acceptance of the employer's defense that the results of its practices were the consequence of application of lawful criteria rather than discriminatory intent with holding "that unlawful discrimination can be proved only if a hostile intent or purpose to discriminate is shown."[86] He pointed out that the Board had previously found inquiry into subjective intent unrewarding and unreliable in other areas of the statute.

By focusing on proof of intent rather than the effects of the challenged practices the Board has made the burden of the complainant doubly difficult. Whereas emphasis on the effects of the practice would make provable the more sophisticated forms of discrimination *and* would tend to bring out evidence of a nexus between the practice and the restraint on employees, emphasis on intent has just the opposite result. If there is any doubt that the Board's requirement is so onerous as to effectively eliminate unfair labor practices proceedings as a means of discouraging individious discrimination by employers, one need only consider that since the ruling in *Jubilee* not a single charge of a section 8(a)(1) violation based on such discrimination has been prosecuted before the NLRB.

Substantive criticism of the *Packinghouse* doctrine has centered around Judge Wright's theory that discriminatory practices breed "docility." In a period marked by racial hostility the idea was easily labeled "an anachronism,"[87] and the *Jubilee* majority pointed out that docility was only one of several possible effects. Whether or not this prong of

84. *See, e.g.*, Blue Flash Express, Inc., 109 N.L.R.B. 591, 594 (1954). *Cf.* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

85. 194 N.L.R.B. 85 (1971).

86. *Id.* at 91 (Jenkins, dissenting).

87. *Racial Equality, supra* note 5, at 238. However, the same criticism does not necessarily lend itself to discrimination based on religion, sex, or national origin. *See* Comment, *Labor Law—Sex Discrimination—Employer Sex Discrimination and the Labor Management Relations Act*, 5 RUTGERS-CAMDEN L.J. 585, 597 (1973).

the argument has merit, the focus on it has served to divert attention from the stronger of the two effects theorized in *Packinghouse.*

There is undeniable realism in the second proposition, that employer discrimination causes an "unjustified clash of interests"[88] between victims of discrimination and other employees who presumably benefit, or believe that they benefit from the practice. When the majority perceives its interest to lie in perpetuation of such practices, concerted action by members of both groups is hampered as energy and resources which might have been expended to further the common advantage must be diverted to reconciling these conflicting interests for purposes of collective bargaining, grievance processing and other basic union functions.

The *Jubilee* opinion's assertion that the "clash" was no more likely than that discriminatory treatment would "cause minority groups to coalesce, and *it is possible* that this could lead to collective action with nonminority group union members[,]"[89] is, by contrast, sheer supposition lacking even the support of common sense. An example may serve to highlight the inconsistency of that proposition with fundamental labor law principles.

The principle of exclusive representation was formulated for the purpose of avoiding the dissention and disruption of disorderly collective bargaining, which it was believed would occur if the employer was permitted to bargain with more than one representative from a unit, and thus to arrive at multiple agreements resulting in disparate treatment of groups within the unit.[90] If so fundamental a principle was created to avoid the disruptive effect of disparate treatment by an employer on other than invidious grounds, can it possibly be believed that the fact of invidiousness will serve to nullify the expected disruption? In all likelihood, quite the contrary is true.

The lack of following achieved by the *Packinghouse* doctrine is little short of remarkable if any credit is given to the arguments just made.[91] Several possible explanations suggest themselves. For one thing, discrimination became increasingly subtle as employers who sought to resist the spirit of the Civil Rights Act of 1964[92] discarded

88. United Packinghouse Workers v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir.), *cert. denied,* 396 U.S. 903 (1969).

89. 202 N.L.R.B. at 272-73 (emphasis added).

90. J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944).

91. Only one court has approved it. *See* Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971).

92. Pub. L. No. 88-352, 78 Stat. 241.

obvious forms in favor of those more difficult to detect and prove.[93] Even under the *Packinghouse* per se rule, de facto discrimination had to be proved by evidence which met the Board's onerous requirements,[94] and thus courts were given little opportunity to consider the doctrine.

Another factor may well have been the mood of anticipation which prevailed as Congress debated extensions in coverage and enforcement powers of the Equal Employment Opportunity Commission (EEOC). It was widely expected that the Commission would be given cease and desist powers and would be enabled thereby to more effectively attack discrimination by employers as well as others. Although the expectations were not borne out,[95] the atmosphere was not one in which courts could be expected to undertake expansions of the Board's jurisdiction.

A third explanation may be simply judicial distaste for per se rules. In consideration of the very real possibility that a rigid rule is inadequate to the myriad variations possible in the section 8(a)(1) case, it is suggested that many of the benefits of such a rule could be attained while still affording employers protection against unrealistic findings of unfair labor practices, the fear of which constitutes the major objection to a per se rule. The key is to concentrate not on the theoretical structure of the unfair labor practices concept, but on the problems of proof which present the real obstacle to effective use of that concept to discourage invidious discrimination by employers.

IV. CONSTITUTIONAL RESTRICTIONS ON BOARD ACTION

One of the most significant developments in the handling of invidious discrimination under the NLRA has been the recent revitalization of the theory that the NLRB is prohibited by the fifth amendment from aiding a union which practices such discrimination.[96] The new life came out of the opinion of the Eighth Circuit in *Mansion House Center*

93. Boyce, *supra* note 40, at 242.

94. *See* note 86 *supra* and accompanying text.

95. The EEOC was instead given only the authority to instigate court action through a legislative compromise. (Previously it had been necessary for the Commission to recommend prosecution to the Justice Department.) As to increased effectiveness, according to the American Bar Association (ABA) Labor Relations Law Section, 1974 Committee Report 45, the Commission in 1974 had a backlog of 85,000 cases and expected its case intake for the next fiscal year to exceed 100,000. These figures necessarily indicate delays.

96. The Board first utilized this constitutional limitation theory in the *Independent Metal Workers* case. Following *Mansion House*, a three member majority of the present Board has embraced it with renewed vigor. For the most thorough recent discussion of the NLRB's reasoning on the matter see Bekins Moving & Storage, 211 N.L.R.B. 138 (1974).

Management Corp. v. NLRB[97] wherein that court refused enforcement of a Board decree which ordered the employer to bargain with a union alleged to practice racial discrimination in membership.

In *Mansion House* the union confronted the employer with authorization cards signed by seven of eight painters in his employ. The employer refused to recognize the union as collective bargaining representative, and subsequently discharged the employees, according to the Trial Examiner, because of their union activity. The union charged violations of sections 8(a)(5),[98] (1) and (2). At the unfair labor practices hearing the employer defended the refusal to bargain charge with the assertion that he had no duty to bargain with that union because it had racially discriminatory membership policies and was therefore not qualified to act as a bargaining representative. He offered to show that in the operating area of the union, the population was more than fifty percent nonwhite while the minority membership in the union comprised less than two percent.

That evidence was excluded by the Trial Examiner who would have required a showing that black employees had actually applied for and been refused membership by the union. The Board agreed, found that a section 8(a)(5) violation had occurred, and issued the order to bargain.

In its denial of enforcement the court of appeals held:[99] (1) The fifth amendment forbids access to NLRA remedial machinery to a union which is unwilling to correct past practices of racial discrimination in membership. (2) Where an employer defended his refusal to bargain on the ground of racial discrimination, it was error to test the charges on the sole question of whether any nonwhites had been refused union membership. (3) Where the offered evidence shows significant minority underrepresentation in union membership the Board must inquire whether the union has "taken the initiative to affirmatively undo its discriminatory practices."[100] Because of the important implications,

97. 473 F.2d 471 (8th Cir. 1971).

98. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. § 158(a)(5) (1970).

99. Before rendering its opinion the court asked for supplemental briefing by the Board on several of the issues involved. For a summary of the response see Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?*, 42 U. CHI. L. REV. 1, 7 n.33 & 34 (1974).

100. 473 F.2d at 477. This portion of the holding has been characterized as imposing on the Board a duty of independent investigation. Leslie, *Governmental Action and Standing: N.L.R.B. Certification of Discriminatory Unions*, 1974 ARIZ. ST. L.J. 35, 65

each holding will be examined in detail.[101]

The determination that the fifth amendment prohibits utilization of NLRA processes by a discriminatory union[102] necessarily rests on two propositions. First, action by the NLRB is governmental action. It is not seriously questioned that conduct by a federal agency in the performance of its statutory functions is governmental action for purposes of applying constitutional limitations.[103] Second, by recognizing a discriminatory union as collective bargaining representative the Board has denied equal protection to minority group unit members within the meaning of the fifth and fourteenth amendments.[104] It is far from clear that this is true.

The Board's recognition amounts to a congressionally authorized grant of exclusive power to the union to act as the bargaining representative for all members of the unit. As far as the NLRA is concerned, that action by the Board is commanded in recognition of the fact that by election or otherwise a majority of the employees in the unit have expressed the desire to be represented by that union. The question is, does that action "foster or encourage racial discrimination"[105] where it has the effect of forcing minority employees to accept representation by an organization which formerly denied membership to persons of their group?[106] To say that it does is to ignore the distinction so often stressed by the courts between governmental involvement with the dis-

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[hereinafter cited as Leslie]. In practice, however, it will entail only an obligation to consider exculpatory evidence provided by the union.

101. For a detailed discussion of the effect of the *jus tertii* doctrine on the implied holding that an employer has standing to assert the rights of his employees see Leslie, *supra* note 100, at 38-46. While the Act allows anyone to assert employees' rights with regard to unfair labor practices charges, it is silent on that count as to proceedings in which union disqualification is sought.

102. While the same rationale could theoretically be applied to impose penalties against employers who bargain with discriminatory unions, it seems unlikely the Board will do so. *But see* Laborers' Local 478, 204 N.L.R.B. 357 (1973) (Jenkins, dissenting).

103. "Although the union itself is not a government instrumentality, the National Labor Relations Board is." 473 F.2d at 475.

104. The *Mansion House* court explained that the Board would significantly become "a willing participant in the union's discriminatory practices." 473 F.2d at 475. However, it failed to articulate the reasoning by which it found the necessary nexus between the Board's action and the unequal protection. Whatever its reasons for that conclusion, the court seemed to draw added support for it from the fact that the Board was seeking judicial enforcement of its order. It found such enforcement forbidden by the line of cases exemplified by Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); and Hurd v. Hodge, 334 U.S. 24 (1947). Of course such reliance is unwarranted if the action of the Board was not a violation of equal protection.

105. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

106. This approach should be distinguished from that which focuses on the union's action as governmental action. *See* note 67 *supra*.

criminatory *practice* and governmental involvement with the discriminating *party*.[107]

A good illustration of that distinction is afforded by the case of *Moose Lodge No. 107 v. Irvis*[108] in which the asserted governmental involvement was extensive state regulation of a private organization through a liquor control board. The trial court had found that the cumulative effect of that regulation constituted sufficient state involvement in the lodge's discriminatory practices to activate the fourteenth amendment's limitations. This reasoning was rejected by the Supreme Court which found that only one state regulation was prohibited, and that was one which required licensees to abide by their constitutions and bylaws. The effect of that requirement was to enforce the discrimination *itself* where the organization's constitution contained racially discriminatory provisions. The other regulations which the lodge had to follow to retain its liquor license did not specifically relate to the discrimination and thus, while they evidenced state support for the lodge, they did *not* support discrimination in such a way as to call forth the equal protection doctrine.[109]

By the same token, the NLRB's involvement is with the union and not with its practice of invidious discrimination, and further, the Board's act of recognition serves to subject the union to the duty of fairness to all those whom it represents. Thus, far from encouraging discrimination, it can be argued that the Board's action serves to discourage it by subjecting the perpetrator to unfair labor practices peoceedings.[110] It follows that if the Board's action does not violate the fifth and fourteenth amendments, judicial enforcement of that action is not forbidden.

That there is arguably no constitutional requirement that the NLRB withhold its processes from those who practice invidious discrimination is not to say that the Board *may* not withhold them. There is some support for the idea that the NLRA could and should be interpreted to allow this under the Board's implied discretionary authority over

107. *See, e.g.*, Driscoll v. Operating Engineers Local 139, 484 F.2d 682 (7th Cir. 1973); Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

108. 407 U.S. 163 (1972).

109. *See also* Burton v. Wilmington Park Authority, 365 U.S. 715, 725 (1961), wherein the Court found that "[t]he state has so far insinuated itself into a position of interdependence with [the discriminating party] that it must be recognized as a joint participant *in the challenged activity* . . . . (Emphasis added.)

110. *See* Bekins Moving & Storage Co., 211 N.L.R.B. 138, 145 (1974) (Fanning & Penello, dissenting).

representation matters.[111] Under this theory the Board would decide in each case whether its interference with union membership policies or its denial of process was necessary to effectuate the purposes of the NLRA, utilizing its expertise in making that finding and taking into account the countervailing legislative intent evidenced by the Taft-Hartley addition to section 8(b)(1)(A) of a proviso which specifically protects the right of a union to make its own rules respecting membership.[112]

This approach offers the advantage of flexibility, and it confines the problem to statutory dimensions thereby giving effect to the long-standing judicial doctrine of avoiding constitutional solutions where there are plausible alternatives. It would allow the Board to resort to denial of certification only in extreme cases so that the possibility of leaving employees without a bargaining representative to deal with an employer who may also discriminate would be minimized.

The second *Mansion House* holding, that union membership discrimination must be measured by indirect statistical evidence as well as by actual proof of discriminatory acts, may turn out to be the significant one. It was reached by the court after it considered the impact of Title VII cases holding that " 'as a matter of law that these statistics, which revealed an extraordinarily small number of black employees . . . established a violation of Title VII . . . .' "[113] and that by demonstration of a substantial disparity between the percentage of Negro residents in the county and of Negroes included " '[t]he appellants thereby made out a prima facie case of . . . discrimination, and the burden fell on the appellees to overcome it.' "[114] The court concluded that the same standard of proof was applicable to discrimination under the NLRA and that statistical evidence could provide sufficient proof to establish a prima facie case of past racial practices. It follows that if the union can not meet its burden of refuting the evidence or showing affirmative efforts to rectify the situation, that evidence establishes the violation and the Board is bound to refuse to recognize the union as collective bargaining agent.

In essence, the court of appeals switched the emphasis of inquiry from the intent underlying the discriminatory policy to the effect of that

111. Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?*, 42 U. CHI. L. REV. 1, 11-12 (1974).

112. *See* note 54 *supra.*

113. 473 F.2d at 476, *quoting from* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

114. 473 F.2d at 476, *quoting from* Turner v. Fouche, 396 U.S. 346 (1970).

policy. It raised the standard of acceptable union conduct stating: " '[G]ood intent or the absence of discriminatory intent does not redeem employment procedures . . . that operate as "built-in headwinds" for minority groups . . . .' "[115] The implication is that evidence which would establish discrimination for Title VII purposes will establish discrimination for purposes of requiring the NLRB to deny its aid.

Although the Board was not bound to follow the *Mansion House* approach,[116] it has applied the constitutional limitation doctrine and has accepted, with some modification, the evidentiary standard as well. In *Bekins Moving & Storage Co.*,[117] an employer filed objections to the union petition for a Board election on the ground that the union practiced invidious discrimination in membership and was therefore not qualified to act as exclusive bargaining agent. The Board explicitly approved the constitutional limitation doctrine, but determined that in the interest of avoiding delay it would not entertain a charge of union discrimination for the purpose of postponing or defeating an election. The proper time for such an allegation, it said, was after the union had won, in a challenge to its certification.[118]

This limitation of the *Mansion House* doctrine eliminates one of its major drawbacks. If the Board had allowed employers to delay elections by the mere allegation of discrimination, the momentum of union organizational efforts would often be dissipated by that delay alone. Such an attractive possibility could be expected to encourage frivolous charges and to significantly increase the workload of the NLRB.

The *Bekins* majority, by resting its disposition of the case on constitutional considerations, bypassed the opportunity to clarify the evidentiary guidelines set out in *Mansion House*. The Board did state, however, that it would determine on a case-by-case basis whether the nature and quantum of proof offered would mandate withholding certification. It indicated that it had no intention of regarding

> every possible alleged violation of Title VII, for example, as grounds for refusing to issue a certificate. There will doubt-

115. 473 F.2d at 477, *quoting from* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

116. It could, for example, have sought contrary rulings in other circuits and paved the way for Supreme Court review on the ground of conflict among the circuits.

117. 211 N.L.R.B. 138 (1974).

118. While the dissenting opinion found no constitutional requirement that certification be withheld, it pointed out that if the majority was correct, a precertification challenge ought to be allowed because the employees' knowledge that the union might later be disqualified could well affect the outcome of the election.

> less be cases in which we will conclude that correction of such statutory violations is best left to the expertise of other agencies or to remedial orders less draconian than the total withholding of representative status.[119]

In the 2½ years since *Mansion House* was decided, the case-by-case approach has made little headway toward establishing generally applicable guidelines to the evidence problem. The rulings have uniformly been directed to evidence which will not establish a prima facie case of discrimination,[120] and because such a case has not yet been held established, the showing required to overcome one has not received any discussion.

Despite the frustrating lack of evidentiary guidance, the NLRB has begun to establish policies which set the boundaries of the *Mansion House* defense. It found that a showing of membership discrimination on noninvidious grounds does not qualify to invoke the *Mansion House* doctrine.[121] The defense does not apply where the charging party is the union local but it is the individual members who stand to benefit from Board processes.[122] It does not encompass allegations of sex discrimi-

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119. 211 N.L.R.B. at 139-40.

120. Hawkins Constr. Co., 210 N.L.R.B. 965 (1974) (a showing of 2.4 percent minority union membership in a population with 3.3 percent was insufficient); Grant's Furniture Plaza, 213 N.L.R.B. No. 80 (1974) (statistical showing of minority underrepresentation in union does not make out a prima facie case without evidence of union control of entry into the job field); *id.* (a Justice Department complaint alleging discrimination is not proper evidence because not a proven charge).

The last ruling hints at the related problem of what effect to give to a decision finding discrimination based on such a complaint. In this connection, it is worthwhile to consider the Supreme Court's opinion in Alexander v. Gardener-Denver, 415 U.S. 36 (1973), wherein the Court concluded that an arbitration decision adverse to the employee claim of discrimination was not conclusive of the issue in a subsequent Title VII charge based on the same evidence. *See also* Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971).

The problems of relating and coordinating proceedings under the NLRA, Title VII, and the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (now considered applicable to racial discrimination under employment contracts, *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)) have been of increasing concern to courts and commentators. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); Macklin v. Spector Freight, 478 F.2d 979 (D.C. Cir. 1973); Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972); L.R. Wilson, 204 N.L.R.B. 357 (1973); Beaird, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469 (1972); Blumrosen, *The Newport News Agreement: One Brief Shining Moment in the Enforcement of Equal Employment Opportunity*, 1968 U. ILL. L.F. 269; Kilberg, *Progress and Problems in Equal Employment Opportunity*, 24 LAB. L.J. 651 (1973); Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?*, 42 U. CHI. L. REV. 1 (1974); Note, *Allocating Jurisdiction over Racial Issues Between the EEOC and NLRB: A Proposal*, 54 CORNELL L. REV. 943 (1969).

121. Community Service Publishing, Inc., 216 N.L.R.B. No. 180 (1975).

122. General Cinema Corp., 214 N.L.R.B. No. 147 (1974).

nation.[123] An employer who objected unsuccessfully to certification of the union on grounds of discrimination cannot reassert those grounds in defense of a subsequent unfair labor practices charge.[124] Finally, the Board declined to rule that the fact that the employer's commission of unfair labor practices was unrelated to union discrimination precludes his use of the defense.[125]

Considering the frequency with which the Board has been confronted with the *Mansion House* defense, it is striking that thus far there has not been a single instance in which that defense prevailed. The cases seem to indicate that the NLRB is far more concerned with limiting the doctrine than with preventing membership discrimination by unions. There are several possible explanations for this attitude.

For one thing, the total denial of representative status is a serious matter, and one which the Board has often indicated it would not undertake lightly.[126] Only once has certification been denied for reasons of union discrimination.[127] Thus, the current Board attitude is really the continuation of a long-established policy.

Another consideration is the requirement under *Mansion House* that the employer's refusal to bargain must be caused by the union's discriminatory practices.[128] In the cases brought thus far, there has been no attempt by the employers to show this cause and effect relationship. Although the Board disposed of these cases on other grounds, a part of its willingness to do so might well be the lack of such a showing.

Aside from the reasons behind the reluctance of the NLRB to apply the *Mansion House* doctrine, there are basic weaknesses in the doctrine which militate against its use. The questionableness of the constitutional limitation theory has been discussed previously[129] and

123. Bell & Howell Co., 213 N.L.R.B. No. 79 (1974). This determination was the result of Member Kennedy's conviction that only classification declared "suspect" by the Supreme Court should be considered as requiring the withholding of certification. The other members split two and two as they had in *Bekins*.

124. Preform Co., 215 N.L.R.B. No. 9 (1974).

125. Williams Enterprises, 212 N.L.R.B. No. 132 (1974). The case was decided on other grounds, but that ruling would appear to be required by *Mansion House*, 473 F.2d at 474.

126. *See, e.g.*, Pioneer Busing Co., 140 N.L.R.B. 54 (1962); Hughes Tool Co., 104 N.L.R.B. 318 (1953); Larus & Bros. Co., 62 N.L.R.B. 1075 (1945).

127. Independent Metal Workers Local 1, 147 N.L.R.B. 1573 (1964). The case was also the first in which the Board found itself *constitutionally required* to make the denial.

128. *See* note 124 *supra* and accompanying text.

129. See note 14 *supra* and accompanying text; text accompanying note 66 *supra*.

presents the strongest theoretical argument for discarding the doctrine. Additionally, there exist several policy considerations. In order to effectuate the doctrine, the Board is required to refuse to carry out its statutory function of encouraging orderly collective bargaining. It thus undercuts fundamental labor policy and is placed in the position of being at odds with its own purpose.

When the *Mansion House* doctrine is applied to deny certification to a discriminatory union, the effect is to refuse to employees their section 7 right to be represented by their chosen bargaining agent.[130] Moreover, the doctrine takes away from minority employees the decision as to whether they would prefer representation by a union which discriminates to no representation at all. It is quite possible that they would conclude that their rights would be better protected by any union than by their employer, who may himself practice invidious discrimination.

The doctrine provides employers with an incentive by allowing them to raise the issue of union discrimination and thereby delay or avoid establishment of a collective bargaining relationship. But it is not every employer who is possessed of a social conscience which demands that he expend time and money in an effort to override for their own good a decision his employees have made. Perhaps it is not unrealistic to say that the real appeal of the doctrine is not to that employer, but to the one who simply does not want the union.

This possibility could be tolerated if the *Mansion House* doctrine was effective in preventing invidious discrimination by unions, but such is not the case. It has not only failed to attain that objective in practice, but is impotent to reach strong unions who are able to establish collective bargaining relationships without resorting to help from the Board. In fact, the threat of disqualification may serve to discourage use of the certification process by those unions which are powerful enough to do without it, but which might otherwise utilize it for convenience or insurance.

For all these reasons the *Mansion House* doctrine is unsound. It should accordingly be discarded in favor of the solution implied in the *Glass Bottle Blowers* case[131] under which a union which discriminates in membership would be certified and subject itself to the likelihood of an unfair labor practices charge by the employer or unit members if it did

130. 29 U.S.C. § 157 (1970).
131. *See* notes 52-61 *supra* and accompanying text.

not remedy the effects of its unlawful policies. This approach would avoid all of the major objections to the *Mansion House* doctrine and would offer the advantages of section 8 remedies which were discussed in connection with the *Miranda* doctrine.[132]

V. A Suggested Solution

The theories under which the NLRB inhibits invidious discrimination have one problem in common. Each has been rendered less effective because of unrealistic standards of proof. It is time that the NLRB face the fact that overtly discriminatory conduct is largely a phenomenon of the past, that the residual discrimination is no less real or damaging, but far more difficult to demonstrate. For this reason attempts to reach discriminatory behavior through expansions in the scope of existing theories will be largely ineffective, as the Eighth Circuit recognized in *Mansion House*, unless they concurrently address the issue of the nature and quantum of proof which the Board should require to establish that invidious discrimination exists.

An attractive solution to the evidentiary dilemma already exists in the scheme proposed by the *Mansion House* opinion. Its concentration on the discriminatory *effects* of the questioned practice places the emphasis where it belongs—on the fact that the result of the practice is an improper one. Although that scheme has thus far been applied by the Board only to permit employers to justify their own antiunion behavior, it seems that it could be applied as well in any context in which discriminatory conduct allegedly violates the Act. This would mean that statistical evidence showing any sort of union discrimination regarding membership criteria, hiring hall referrals or grievance processing could, if persuasive, call forth from that union the requirement that it justify its conduct.

The same requirement would have to be met by employers, but through a different process, since it must be established not only that they discriminate but also that their discrimination interferes with employees' exercise of their rights to establish or to refrain from establishing a collective bargaining relationship. In this situation, the standard of proof would have to apply to both stages. This approach would avoid the rigidity of the *Packinghouse* doctrine and would considerably lighten the burden for the complaining party.

132. See text accompanying note 60 *supra.*

It may be argued that this proposal would require the Board, and particularly its administrative law judges, to engage in lengthy hearings in an area where they have little experience. As to experience, what the Board has not learned from its consideration of the cases which have asserted the *Mansion House* defense, it could with little effort garner from judicial application of the similar Title VII standard. There is no doubt that more time will be consumed in considering evidence under a more liberal standard. Yet it is important to remember that delay is an inevitable result where the issue itself has become more complex. The increased time is mandated not so much by application of a new standard as by the demands of reality. The alternative is to ignore reality and, for the sake of convenience, to set the Board's course in the direction of obsolescence as far as its involvement with discrimination in labor relations is concerned.

If the NLRB should see fit to adopt a more realistic approach to evidence of discrimination, it should also accept the responsibility of setting out some guidelines as to how it will be applied. It has already been noted that its reluctance to apply the constitutional limitation doctrine has resulted in its failure to establish evidentiary guidelines in cases under that doctrine. While it is possible that a case-by-case approach would prove adequate, implementation of the new standard would be greatly facilitated by the Board's utilizaiton of its rule-making power to establish general limits to the standard. Carefully formulated guidelines would not only be of great help to the General Counsel and to potential complainants, but could also go a long way toward keeping increasing demands on Board resources within manageable proportions.

VI. CONCLUSION

The present ineffectiveness of the NLRB in solving problems of invidious discrimination is due in part to the Board's vacillation between its duty to comply with the national labor policy against discrimination and its desire to limit its jurisdiction in order to (1) restrict its decisions to situations traditionally covered by the Act, and (2) to avoid impinging on territory relegated by Congress to other enforcement agencies.[133] While it is obviously important to reconcile these conflicting considerations, such a result cannot be achieved by hesitation.

The NLRB occupies a unique position in that it affords the only

133. But Title VII was not intended to limit or exclude remedies for discrimination under the NLRA. 110 CONG. REC. 13650-52, 13653 (1964).

extrajudicial forum with jurisdiction over labor discrimination which also has experience in dealing with a broad range of employment controversies and which possesses the statutory authority to issue both cease and desist orders and a variety of specific remedial orders limited only by imagination.[134] For these reasons the Board presents an ideal vehicle for the resolution of controversies involving invidious discrimination in the employment arena. It is unthinkable that it cannot and should not recognize that the aforementioned considerations are not in conflict. The elimination of tensions which arise from discrimination is essential to the maintenance of industrial peace and orderly collective bargaining which it is the very purpose of the NLRA to foster.

Of course it would be simplistic to claim that practical reconciliation of those duties is easy. But once a firm decision is made that it can and must be done without substantial sacrifice of either, the way is cleared toward formulation of a policy under which unduly mechanical interpretation of the Act will not be allowed to interfere with its use in discouraging invidious discrimination by those within its powers.

Implementing such a policy need not entail radical restructuring of the methods now utilized by the Board. Indeed, adoption of the *Mansion House* evidence standard of proof to employer and union discrimination under the traditional duty of fair representation and unfair labor practices theories would go a long way toward accomplishing the desired ends, and the structure of those theories would remain intact. Moreover, by taking the approach of strengthening those two concepts the Board would increase the effectiveness of its processes to deal with the reality of covert discrimination. If this were to occur, there would be no need to retain the constitutional limitation doctrine with its questionable rationale and drastic results. It could be allowed to sink into well-deserved oblivion.

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134. By contrast, the EEOC is directed to engage in voluntary conciliation. It cannot impose remedies nor issue cease and desist orders. This weakness in enforcement powers has prompted one author to observe: "If [the *Packinghouse*] view prevails, continued existence for the EEOC, with no power to issue cease and desist orders, would be difficult to justify." Sovern, *An Overview of Equal Employment Opportunity*, an unpublished paper presented at an ABA Section of Labor Relations seminar, *quoted in* B. MELTZER, LABOR LAW: CASES, MATERIALS AND PROBLEMS 911 (1970).