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THE NATIONAL LABOR RELATIONS ACT AND RACIAL DISCRIMINATION

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As the other articles in this issue amply demonstrate, Title VII of the 1964 Civil Rights Act represents a comprehensive and pervasive congressional attempt to excise a malignant social ill. Some feel that its preliminary emphasis on mediation, its provision for individual rather than governmental enforcement in the generality of instances, and its time-consuming procedures, represent a rather blunt tool for the accomplishment of this noble surgical task. Nevertheless, the legislation represents a cornerstone in equal treatment according to merit and reflects the translation—over monumental legislative opposition—of a transcendent moral value into positive law. Its emphasis on mediation, and private enforcement in the generality of instances, reflects how Congress wanted the law to be enforced. Concededly, this value could be more expeditiously accommodated by making any breach of the law's interdictions a serious crime. But the constitutionally authorized branch of government decreed mediation and private enforcement in the generality of instances instead. The law's method of enforcement is the measure of its meaning.

In situations where employees are represented by labor organizations, however, there has recently come into being another remedy which, if ultimately sanctioned judicially, may prove to be far more efficacious than the remedy provided for by Title VII.[1] In a series of cases which are examined, *infra*, the National Labor Relations Board has held that where a labor organization causes, or *tolerates*, discrimination against employees because of race or for other "invidious reasons" it violates its duty to represent employees fairly and consequently "restrains and coerces" them in the exercise of their Section 7[2] National Labor Relations Act rights within the meaning of sec-

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[1] That some of the most aggravated forms of discrimination occur in union contexts can be seen from a comprehensive study of this problem by Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563 (1962).

[2] 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), amending 49 Stat. 452 (1935): 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).

tion 8(b)(1)(A).[3] Such conduct, furthermore, violates section 8(b)(2) since it causes an employer to discriminate "to encourage or discourage union membership" within the meaning of section 8(a)(3).[4] It is triply nefarious moreover, in that it violates the union's duty to bargain within the meaning of section 8(b)(3).[5]

This remedy before the National Labor Relations Board is probably more efficient[6] and effective than a Title VII proceeding. Its efficacy to the individual is significantly greater, moreover, since he need but lodge his charge with the Board and the Agency then prosecutes his case—if found to be initially meritorious—from investigation to court of appeals enforcement.

A singular striking fact remains, however: In the thirty years since the passage of the National Labor Relations Act and in the nineteen years since Taft-Hartley, 1964 represents the first time the Board has applied section 8's interdictions to racial discrimination. Similarly, it was not until 1962 that the Board discovered the section 9 duty of fair representation to inhere in section 7 and concluded that a violation of such duty, by action or *inaction*, "coerced and restrained" employees within the meaning of section 8(b)(1)(A). The suspicion of creativity is thus generated.[7] Indeed, in view of the fact that the

[3] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(1)(A), amending 49 Stat. 452 (1935):

> 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.

[4] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(2), amending 49 Stat. 452 (1935):

> It shall be an unfair labor practice for a labor organization or its agents—(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or 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 . . . .

61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3), amending 49 Stat. 452 (1935): "It shall be an unfair labor practice for an employer— . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[5] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(3), amending 49 Stat. 452 (1935): "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)."

[6] Though this is somewhat problematic since the median time in fiscal year 1965 between just the filing of an unfair labor practice charge and the close of the Board hearing was 124 days. Summary of Operations, General Counsel, NLRB. The time between close of Board hearing and enforcement by a court of appeals would be considerably longer. Of course, the very presence of Board proceedings causes numerous settlements, and Board orders, though not self-enforcing, are often followed.

[7] Judicial creativity is, of course, not to be eschewed *per se*. Its utility and even

NLRA was aimed at the social ills of the 1930's, including such noisome bludgeons as the yellow dog contract and, generically, the disparity of bargaining power between the individual employee and the corporate employer,[8] and that the Taft-Hartley Act sought to redress specific union abuses,[9] it is not surprising that it has been horn book law that the "discrimination" aimed at in sections 8(a)(3) and 8(b)(2) has been a specific discrimination, i.e., because of union activity or lack of same;[10] and that the "coercion and restraint" of section 8(b)(1)(A) applied to specific coercive practices and did not give the Board general equitable jurisdiction over the relationship of labor unions to their members.

The extent and propriety of the Board's recent entrance into other than the classic areas of its substantive jurisdiction under the theory of fair representation and under the expansive definition of "discrimination" are the subjects of this paper.

I. The Board and the Duty to Represent Fairly

Since the line of precedent beginning with *Steele v. Louisville & N.R.R. Co.*,[11] it has been a truism that a labor organization owes a duty of fair representation to all employees who are represented by it. In *Steele* the Supreme Court held that the federal courts would enjoin the enforcement by a labor union and an employer of a collective bargaining agreement which discriminated against Negro employees.[12] Any doubt as to whether this duty applied to unions under the National

necessity has been demonstrated in numerous analytic dissertations. See Llewellyn, The Common Law Tradition (1960); Friedmann, Law in a Changing Society (1959). Suffice it to say, at this point, however, that the latitude for such inventiveness is far more circumscribed to the Board under a statute designed to remedy enumerated ills than it is to the Supreme Court in interpreting the Constitution or its application to a changing viable society. Cf. NLRB v. Drivers Local (Curtis Bros.), 362 U.S. 274 (1960), where the Board's finding that peaceful minority recognition picketing was "coercion" within § 8(b)(1)(A) was held to be a "legislative" act; and Brown v. Board of Education, 347 U.S. 483 (1954), where the Court applied the equal protection clause to eradicate the separate but equal doctrine and a century of precedent with it.

[8] National Labor Relations Act § 1, 61 Stat. 136 (1947), as amended, 29 U.S.C. § 151 (1964), amending 49 Stat. 449 (1935).

[9] See NLRB v. Drivers Local, supra note 7; S. Rep. No. 105, 80th Cong., 1st Sess. (1947).

[10] In Radio Officers' Union v. NLRB, 347 U.S. 17 (1954), the Court said: "Thus Sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood," and, "The purposes of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership." Id. at 40, 52.

[11] 323 U.S. 192 (1944).

[12] The precedents are numerous: Conley v. Gibson, 355 U.S. 41 (1957); Syres v Oil Workers, 350 U.S. 892 (1955); Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Graham v. Brotherhood, 338 U.S. 232 (1949); Sells v. Firemen, 190 F. Supp. 857 (W.D. Pa. 1961); Pioneer Bus Co., Inc., 140 N.L.R.B. 54 (1962); Larus & Brother Co., 62 N.L.R.B. 1075 (1945).

Labor Relations Act as well as to those under the Railroad Labor Act was perfunctorily dispelled by the *per curiam* reversal of a failure to find a cause of action upon allegations of racial discrimination in *Syres v. Oil Workers.*[13]

The extent of the duty fairly to represent is in the process of continual definition. That it applies to disparity of treatment predicated on racial reasons is uncontestable. The periphery of the duty has not yet, however, been circumscribed. The duty of fair treatment and "honesty of purpose"[14] operates in a myriad of contexts. The according of preferential treatment to returning veterans, over and above the statutory requirements,[15] and superseniority for union representatives,[16] may be permissible and within the "wide range of reasonableness"[17] permitted the bargaining agent, whereas the settlement of a grievance not in accord with the applicable collective bargaining agreement may be a violation.[18]

The duty is in the process of elucitory litigation in original actions in the federal courts to enforce the federal statutory rights and in section 301 actions for violations of collective bargaining agreements. It is not the purpose of this paper to inquire into the extent of the right[19] but rather to inquire into the propriety of the enforcement of that right by the National Labor Relations Board.

The first case reading the duty to represent fairly into the section 7 rights of employees was oddly not a race case. In *Miranda Fuel Co.*[20] the collective bargaining agreement provided that employees might obtain leaves of absence between April 15 and October 15 in a calendar year but that if they returned later than October 15 they would be placed on the bottom of the seniority list. Lopuch obtained permission from the employer and left on April 13, not returning until October 20 with, however, a doctor's certificate that illness precluded an earlier return. The union requested the employer to place him on the bottom of the list for the late arrival but when it realized that the contract excused late arrival because of illness, it promptly bottomed

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[13] Supra note 12.

[14] Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[15] Id. at 330.

[16] Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).

[17] Ford Motor Co. v. Huffman, supra note 14, at 338.

[18] Humphrey v. Moore, 375 U.S. 335, 344 (1964), where the Court held that a wilfully erroneous or patently unreasonable interpretation of a collective bargaining agreement applied to an employee could found the basis of a § 301 suit for contract breach by the employee against employer and union; but that the facts in that case did not make out the basis for suit.

[19] For a most trenchant analysis, see Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957).

[20] 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

its request on the early departure. The employer's acquiescence was obtained.

In *Metal Workers Union (Hughes Tool Co.)*,[21] the first race case, Ivory Davis sought to bid on a job reserved under the seniority provisions of the contract for white workers. When the union failed to process his grievance a charge was filed with the National Labor Relations Board.

On the facts in these cases the Board found the commission of various unfair labor practices by both union and employer. The most ingenious, however, was the proposition that the union "coerced and restrained" Lopuch and Ivory Davis in the exercise of the rights guaranteed to them by section 7.[22] Section 7, reasoned the Board, guarantees employees the right to join and assist labor organizations and to engage in collective bargaining through these representatives. If this right is to be "meaningful" and "efficacious" it must necessarily include the right to be fairly represented.[23] But even though section 7 includes the right to be fairly represented, it must be related to a section 8 violation by the union in order for the Board's remedial powers to be operative.[24] Thus it is necessary to push the ratiocination a step further: the connivance to derogate Lopuch's employment status and the failure to process Ivory Davis' grievance constitute a "restraint and coercion" of these employees in the exercise of their section 7 rights, namely, their right to be fairly represented. The employer who acquiesces to these coercions becomes *particeps criminis* and "restrains and coerces" within the meaning of section 8(a)(1).

Moreover, the union violates section 8(b)(2)[25] in that it causes the employer to discriminate to encourage or discourage union membership "in violation of § 8(a)(3)." Finally, it violates the obligation to bargain under section 8(b)(3)[26] since this obligation *must* include the obligation to bargain fairly vis-à-vis all employees.

Rubber Workers Union[27] differs somewhat from *Hughes* in that it represents a further extension of Board power to passive union behavior. In that case employer and union had for years maintained

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[21] 147 N.L.R.B. 1573 (1964).

[22] 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), amending 49 Stat. 452 (1935).

[23] Why it took twenty years for this a priori proposition to be proclaimed is not explained.

[24] National Labor Relations Act § 10(a), 61 Stat. 146 (1947), 29 U.S.C. § 160 (1964), amending 49 Stat. 453 (1935), provides in pertinent part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ."

[25] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(2), amending 49 Stat. 452 (1935).

[26] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(3), amending 49 Stat. 452 (1935).

[27] 150 N.L.R.B. No. 18 (1964).

separate seniority lines for whites and Negroes. In addition there were segregated washroom facilities and a golf course was maintained for white workers only. Pursuant to intervention by the President's Committee on Equal Employment Opportunity, the separate seniority lines were removed. Negro employees pressed their bargaining agent to file grievances for back pay for prior discrimination and to have the washroom facilities and the golf course integrated. The Board held that the union violated its duty of fair representation and consequently "coerced and restrained" within the meaning of section 8(b)(1)(A) when it failed to press to arbitration the grievances for back pay and to desegregate the facilities and golf course. The Board ordered the union to process the grievances and to bargain for a non-discrimination clause.

The case raises some difficult questions: What is the efficacy of a future arbitration? Under extant legal principles the arbitrator's jurisdiction is limited to the collective bargaining agreement. He cannot remake the parties' bargain.[28] The remedy that he fashions must have some predicate in a contractual requirement, whether such requirement be express or implied from the parties' conduct through an analysis of past practice. Here the arbitrator finds that X's job bid was summarily rejected because of color *pursuant* to a tacit understanding between union and company. The understanding he promptly finds nugatory. But then what? There is now a void, an absence of agreement as to where X belongs. He might be in a seniority grouping which for legitimate reasons, e.g., non-relation of job duties, cannot bid into another grouping. The important fact is that there is no agreement at this time as to his status and no contractual predicate for a remedial order vis-à-vis grievant X.

The situation was similar with respect to the washroom and golfing facilities. Neither item was mentioned in the collective bargaining agreement, and the employer with the acquiescence of the union had maintained these on a segregated basis over the years. Where there has never been any agreement and where no legal fiction exists to comfort an eager intellect what authority would an arbitrator have to order the facilities integrated? Surely, even under the most generous interpretation of an arbitrator's anointed role, as in *United Steelworkers v. War-*

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[28] In Enterprise Wheel & Car Corp. v. United Steelworkers, 363 U.S. 593, 597, the Court said:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

rior & Gulf Nav. Co.,[29] a contract violation by the employer is the predicate for the unloosing of his remedial powers. Most assuredly, the Supreme Court did not intend to create a plenipotentiary Pooh Bah to right social ills and dispense social justice irrespective of the parties' bargain.

It might be interposed at this juncture that the same difficult questions inhere in a court remedy to enforce the duty to represent fairly. A court's general jurisdictional grant, however, is plenary. An arbitrator's must stem from the parties' bargain. A court can grant affirmative relief—irrespective of the agreement between the parties—in accordance with the principles of fair treatment and freedom from invidious and hostile conduct. This is what was done, for example, in *Graham v. Brotherhood*[30] and in *Conley v. Gibson*.[31] Unless we are willing to enlarge, well beyond the principles of *Warrior*, an arbitrator's jurisdiction into an area not dependent upon the collective bargaining agreement, in further encroachment on the general jurisdiction of the judiciary, to send the case to the arbitrator as the Board did in *Rubber Workers* seems to be a fatuous act leading to a futile result if the arbitrator stays within the confines of his authority, or, to certain reversal if he transcends it.

Existing precedent interpreting section 8(b)(1)(A)'s "coercion and restraint" in a case where the Eisenhower Board attempted similar creativity to achieve a purpose socially useful to its thinking casts more serious doubts as to the validity of the Board's present conclusions.

In *Curtis Bros. Inc.*,[32] the Board had held that "stranger picketing" of an establishment for recognition purposes, where the employees had recently voted against union representation, was "restraint and coercion" within the meaning of section 8(b)(1)(A). A rather plausible argument was put forth thus: Section 7 guarantees the right not to join a labor organization. These employees demonstrated in an election that they did not want to be represented. The continued picketing is adversely affecting the employer's business and two significant economic pressures are being visited upon the employees because of the exercise of the right not to join: (1) The diminution of business is decreasing their work opportunities, and (2) the employer's economic ills are pressuring him to coerce the employees to join against their wishes.

In reversing the Board the Supreme Court made much of the

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[29] 363 U.S. 574 (1960).

[30] Supra note 12.

[31] Supra note 12.

[32] 119 N.L.R.B. 232 (1957), order set aside, Drivers Local v. NLRB, 274 F.2d 551 (D.C. Cir. 1958), aff'd, 362 U.S. 274 (1960).

legislative history, noting that when Congress enacted section 8(b)(1)(A) it purposely chose not to use the word "interfere" which existed in the NLRA since 1935 and which was applicable to a similar employer unfair labor practice, but restricted the interdictable union conduct to "restraint and coercion." The entire opinion exudes the principle that active conduct in the nature of physical force or distinct threats of direct economic reprisal was necessary to amount to restraint or coercion. The Court said in pertinent part:

> The report of supplemental views which announced the five Senators' intention to propose the amendment identifies the abuses which the section was designed to reach. That report states: "The Committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act." S. Rep. No. 105, 80th Cong., 1st Sess. 50. Similar expressions pervaded the Senate debates on the amendment. The note repeatedly sounded is as to necessity for protecting individual workers from union organization and tactics tinged with violence, duress or reprisal. Senator Ball cited numerous examples of organizing drives characterized by threats against unorganized workers of violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union. 93 Cong. Rec. 4016-4017. When Senator Ives objected to the words "interfere with" as too broad, Senator Taft insisted that even those words would have a limited application and would reach "reprehensible" practices but not methods of peaceful persuasion.[33]

A general principle of construction for Taft-Hartley was then sounded by the Court:

> This history makes pertinent what the Court said in Local 1976, *United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93, 99-100, 42 LRRM 2243: "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contend-

[33] Id. at 285-86.

> ing forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." Certainly due regard for this admonition quite apart from the caveat in § 13 requires caution against finding in the nonspecific, indeed vague, words, "restrain or coerce" that Congress intended the broad sweep for which the Board contends.[34]

One must note that in order to uphold *Rubber Workers* and *Hughes Tool* an additional premise is required over and above an expansive construction of "restrain and coerce." In *Curtis Brothers* the substantive right not to join a labor organization was admittedly, and *in haec verba*, a section 7 right; here the Board must go a step further and read into section 7 the right of fair representation.

Concededly, the Court may feel that the social utility to be achieved by expansive construction today far outweighs the Eisenhower Board's concern for the loss of work opportunities by the employees in *Curtis Brothers*. Apart from the blatant result orientation of such an approach, however, expansive construction along the lines of fair representation engenders questionable consequences which portend repudiation for the doctrine:

(1) *Miranda* itself illustrates the difficulty of attempting to constitute the Board as chancellor-in-equity over union action. While no one can justifiably quarrel with the application of section 8 to racial discrimination *as a result*, reasonable men can differ as to its application to *Miranda*. There, as the Second Circuit held, the loss of seniority for early departure on leave of absence was certainly a possible interpretation of the collective bargaining agreement. Nevertheless, the Board interjected itself and without considering past practice, the intentions of the parties, the industrial realities of the given enterprise, and other labor contract arcana, substituted its judgment *de novo* for that of the parties. Where there is no clear cut evidence[35] that the legislature intended to set the Board up as final moral arbiter of fair-

[34] Id. at 289-90.

[35] Even advocates of the theory that the Board exercise jurisdiction under § 8 admit that there is an absence of such evidence. See Sovern, Race Discrimination and the National Labor Relations Act: the Brave New World of Miranda, N.Y.U. 16th Conf. on Labor 3, 13 (1963).

ness, it should not be presumed simply because it may work good results in some matters of social and moral importance.

(2) The existence of the Civil Rights Act itself evidences an established congressional remedy for employment discrimination. The pre-emption problem is indeed very real.[36] Another facet of pre-emption is that the courts have exercised jurisdiction to enforce the duty of fair representation for over two decades now. Harmonization with the pre-emption doctrine as defined in *San Diego Building Trades Council v. Garmon*[37] would now require the courts to defer to the Board's primary jurisdiction if such legitimately exists.

(3) The legitimacy of Board authority is additionally problematic in view of Landrum-Griffin.[38] In 1959, after months of investigation into abuses of union power, the Congress enacted pervasive and comprehensive legislation to regulate and control its excesses. This legislative fact is entirely inconsistent with a plenum of power in the Board to establish criteria for union fairness.

(4) There has existed over the years a balance of interests between employers, employees and unions. Collective bargaining freedom and the voluntary settlement of labor disputes have been primary policies in this labor relations context.[39] The establishment of the Board with powers of general superintendence over unions and their freedom to act would work consequences injurious to this balance and those policies.

These same considerations argue repudiation for the Board's ancillary doctrine that the breach of the duty of fair representation is also cognizable under section 8(b)(3), the refusal to bargain section. Apart from the fact that the legislative history of this section is replete with evidence that the Legislature sought to create the same duty on labor unions as had existed with respect to employers,[40] and that the duty as the language of section 8(b)(3) is structured runs to the employer, neo-expansiveness here would have the same consequence of compromising the federal labor policy for voluntary settlements without justification in either language or legislative history.

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[36] The pre-emption question has been discussed before in Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 95 (1964); and Note, The Civil Rights Act of 1964, 78 Harv. L. Rev. 684, 690 (1965).

[37] 359 U.S. 236 (1959).

[38] Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401 (1964).

[39] Smith v. Evening News Ass'n, 371 U.S. 195 (1962); United Steelworkers v. Warrior & Gulf Nav. Co., supra note 29; Labor Management Relations Act § 203(d), 61 Stat. 153 (1947), 29 U.S.C. 173 (1964).

[40] S. Rep. No. 105, supra note 9.

II. Section 8(b)(2) and its Application to Racial and Other Invidious Discrimination

It has been observed *supra* that the extension of general Board superintendence over labor unions and the enforcement of the duty of fair representation is probably not either legally or semantically defensible in the light of section 8(b)(1)(A)'s legislative history, the interpretation in *Curtis Brothers*, and the relevant federal labor policies. However, it is possible to partially translate the values which motivated the rationale of *Miranda* into positive law by an interpretation of section 8(b)(2) in a liberal but nevertheless somewhat less than plenary sense.

In both *Miranda* and *Hughes Tool* as well as in *Rubber Workers* the Board found in addition to violations of the duty to represent fairly, violations of section 8(b)(2) which makes it an unfair labor practice for a union to cause an employer to discriminate against an employee in violation of section 8(a)(3). Section 8(a)(3) proscribes employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

Apart from the semantic difficulty of characterizing inaction, i.e., a failure to process a grievance (particularly where there is no contract provision on which to bottom the grievance) as the causing of employer discrimination, the Board's analysis under this section has provoked a trenchant dialogue with the Second Circuit. In *Miranda* that court refused enforcement first because it did not find sufficient evidence of a discriminatory or invidious motivation on the part of the union, and second, because even if there was a discrimination it was not the kind that is interdicted by section 8(a)(3).

The court expounds the orthodox theory of section 8 discrimination: The discrimination must be motivated by a desire to encourage or discourage union membership or must be such as necessarily has that result. If the employer discriminates or the union causes the employer to discriminate for other reasons not related to union activities, it is not the type of discrimination interdicted by section 8, regardless of how invidiously motivated either union or employer may be. Thus, in *Miranda*, even if the union acted with invidious intent and clearly urged the employer to an unreasonable interpretation of the seniority provision to get Lopuch placed on the bottom of the seniority list, there would be, absent a showing that its conduct was motivated because of union activities or lack of it, no violation of section 8(b)(3). The court stated in pertinent part:

> As the various ways to discriminate against a person, or to be unfair or unjust to him, are legion, it would seem at first

> blush that the bearing of Sections 7 and 8 above described is intended to affect only union considerations. Another way of stating the same thing is to say that, to constitute an unfair labor practice under Section 8, the union or the employer must have committed some act the natural and foreseeable consequence of which is to be beneficial or detrimental to the union. The classic way of describing such effect in the typical case is to say that the act in question "encouraged union membership as such."
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> But here the placing of Lopuch at the bottom of the seniority list, even if done through sheer whim or caprice, and even if arbitrary, unjust and "invidious," whatever that may mean in the context of the facts of this case, could not conceivably have been thought to encourage union membership, because his demotion affected union and nonunion men alike. Indeed, the foreseeable effect, in the context of this case and the terms of Section 8 of the collective bargaining agreement, could only be "to encourage timely return and continuous work until the annual layoff, the identical objective which prompted the contract provision," as pointed out by the dissenting members of the Board.[41]

The orthodox or "narrow" view can perhaps be better appreciated from the facts in *NLRB v. Local 294, Int'l Bhd. of Teamsters*,[42] which preceded *Miranda* in the Second Circuit. There one Monty was deprived of choice trucking routes because the business agent told the employer he was a "troublemaker." The court refused enforcement since there was no evidence that the bargaining agent was referring to Monty's union activities when it referred to him as a "troublemaker."

NLRB v. Shear's Pharmacy Inc.[43] contrasts vividly with *Miranda* and *Local 294*. There an employee procured a leave of absence to have an operation and collected union benefits during this time but never actually had the operation. Upon her return to work the shop steward, after having learned of this fact, dissuaded the employer from reinstating her. The court, in this case, enforced the Board's reinstatement order because:

> One declared motivation for Mrs. Gordon's objecting to Mrs. Budnick's reinstatement was that the latter had drawn welfare benefits without having earned them by submitting to the surgery the prospect of which had led to her

[41] Miranda Fuel Co., supra note 20, at 176.
[42] 317 F.2d 746 (2d Cir. 1963).
[43] 327 F.2d 479 (2d Cir. 1964).

> leaving the job. The union's "disfavor" was thus rooted, at least in part, in Mrs. Budnick's violation of a supposed union rule other than one requiring the prompt tender of dues and initiation fees.[44]

Thus we have the anomalous situation that the union violates the act where it causes derogation of employment status because the employee violated a union rule, (albeit a reasonable rule—the collecting of welfare payments under a pretext), and that it does not violate the act where it derogates his status for no other reason than that he is a "troublemaker." The court's rationale can be extrapolated to other facts which sharpen the anomaly: The business agent causes an employer to fire or otherwise derogate X's employment status because he refuses to beat up a personal enemy of the business agent, or because he is a Negro; this is no violation under the Second Circuit's rationale because the bargaining agent's hostilities and motivations are not related to X's union activities or lack of them. On the other hand, where derogation of employment status is caused by the bargaining agent because X refuses to attend one union meeting a year, there is a clear violation.

It is submitted that an interpretation, though dialectically engaging, which works such pragmatic anomalies should be avoided if possible. As Judge Learned Hand said in *Cabell v. Markham:*

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[45]

The Supreme Court itself after struggling bravely with the complex semantics of section 8 has indicated that its proper construction lies in a balancing of legitimate interests rather than in dialectic exegesis. This is most apparent in two cases which are virtually indistinguishable in a verbal application of the statute.

In *NLRB v. Erie Resistor Corp.*[46] an employer experiencing an economic strike promised superseniority to replacements and to those who returned to work. The trial examiner found that the employer was motivated by a legitimate interest in keeping production going and not by anti-union animus. The Board disagreed on the basis that the awarding of superseniority to replacements and returnees was discrimination *per se*. There was no independent evidence of either a

[44] Id. at 481.
[45] 148 F.2d 737 (2d Cir. 1945).
[46] 373 U.S. 221 (1963).

motive to discriminate or of one to discourage union membership, but rather of a desire to keep the business going. Nevertheless, the Court enforced the Board's order in the context of the particular case which showed the superseniority plan to have been very successful in breaking the strike and to have been devastating to the union. It deferred to the Board's expertise:

> We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights.[47]

In *American Ship Bldg. Co. v. NLRB*[48] which came as somewhat of a surprise after *Erie Resistor* the Court held that an employer could legitimately temporarily lock out his employees after a bargaining impasse even though his purpose was to bring economic pressure to bear on them and their bargaining representative to secure favorable contract terms for himself. The rationale now turned upon lack of motivation to injure or destroy the bargaining relationship, albeit the employer was admittedly attempting to make such relationship more responsive to his own interests. *Erie Resistor* was distinguished thus:

> But this lockout does not fall into that category of cases arising under § 8(a)(3) in which the Board may truncate its inquiry into employer motivation. As this case well shows, use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such. The purpose and effect of the lockout was only to bring pressure upon the union to modify its demands. Similarly, it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest.[49]

The difficulty in the reconciliation of the two cases is that in *Erie*, where a violation was found, the employer acted defensively after a strike was called in order to keep his plant going, and there was no independent motive to destroy or pressure the bargaining relationship; whereas, in *American Ship Building* the employer was the aggressor where his motive was to pressure the employees and their bargaining agent. The delicate balancing of interests and pragmatic consequences was the determinative criterion.

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[47] Id. at 231.
[48] 380 U.S. 300 (1965).
[49] Id. at 312.

The relevant teaching of *Erie* and *American Ship Building* to the present inquiry is that verbal niceties are the least important part of the equation. Specifically, *Erie* teaches that any discrimination (disparity of treatment) without sufficient justification which in fact tends to encourage or discourage union membership is bad. The difficult question of psychic motivation is set aside as inappropriate to the inquiry. The Erie Resistor Company was not motivated by a desire to discourage but as the trier of fact found only to continue its business. Nevertheless, the disparity of treatment, i.e., awarding the strikers superseniority, did in fact discourage union membership or allegiance. The most material part of the inquiry was whether there was sufficient justification. The Court struck the balance in favor of the employees.

In the instant inquiry there is no justification for a union causing discrimination for racial or for other truly invidious reasons. Indeed the question of discrimination and justification are inextricably intertwined. Discrimination implies at least a lack of reason for the derogation of employment status. Where a union causes discrimination for racial reasons there is more than a lack of reason; there is a truly invidious reason. The question, however, is whether in cases where the motivation is not clearly because of union activities, or lack of same, the Board should go further and whether the standard should be a finding of (1) discrimination because of a truly invidious reason, as race, or failure to commit a criminal act at the union's behest; or (2) discrimination without honesty of purpose, as where, a union believing an employee has been discharged for good cause but lacking the courage to settle the grievance, rigs the arbitration award; or (3) discrimination because of an arbitrary or stupid reason, as where the union in good faith acquiesces to an interpretation of a collective bargaining agreement which is clearly erroneous, and injurious to an employee or group of employees; or (4) derogation of employment status without sufficient reason. Detailed answers at this time would be premature. However, it is suggested that since some hostile motivation is usually required under section 8(b)(2) only the first two categories should be included in that section's purview. Any further extension of Board power would additionally generate the adverse consequences applicable to the fair treatment theory enumerated before.

The second consideration is whether such invidious or dishonest discrimination caused by a union encourages or discourages union membership. When the Supreme Court was first faced with this language in *Radio Officers*[50] it was argued that the refusal to hire one Fowler at the union's urging could not have encouraged union membership since Fowler and all radio officers were union members and

[50] Radio Officers' Union v. NLRB, supra note 10.

the union was and had been closed for several years. The Court, perceiving the consequences such a sophistical interpretation would work, held that any discrimination which increased the quantum of desire of individuals to become union members or to remain good union members was encouragement of union membership.

Where a bargaining agent causes an employee to be discharged because he refuses to do the bargaining agent's bidding on a personal matter, the other employees are undoubtedly intimidated to do his bidding in the future. Thus, when he demands that a certain union rule be obeyed, they are encouraged to obey that rule, *i.e.*, to be good union members because their jobs are at stake. The dichotomy between situations where the bargaining agent has a union reason and when he has a nonunion reason is impossible of application to empirical facts. When the command is given the fear is there, caused by prior knowledge of what happened to the employee who refused on a personal matter. The motivation may not have been to cause tighter allegiance to union rules, but the necessary consequence of arbitrary and invidious treatment is precisely that.

In *Lummus Co. v. NLRB*[51] where the union business agent blackballed two brothers because one had been "abusive" toward a union official the court of appeals, adopting this rationale, said:

> The Union had the power to cause any company in that area not to hire the Kivlins. It announced it was using that power because Kivlin was insubordinate to union officials. The natural foreseeable consequence of Kennedy's statement was to impel the Kivlins and others to respect the position and accept the authority of union officials, and Kennedy must be deemed to have intended that result. Thus the refusal of the Union to refer caused a discrimination in regard to hire, the intent and effect of which was to encourage union membership.[52]

The judicious application of section 8(b)(2) to truly invidious discriminations, where encouragement is a natural and foreseeable consequence, will partially translate the moral force which generated *Miranda* and *Hughes Tool* into positive law without creating the untoward consequences heretofore mentioned. This interpretation of section 8(b)(2) has the additional value that it is not motivated solely by a desire to achieve a good result, but that any other interpretation would lead to anomalous distinctions dependent on the elusive, if not meaningless, question whether the hostile union conduct was motivated for "union" reasons.

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[51] 339 F.2d 728 (D.C. Cir. 1964).
[52] Id. at 734.