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# EMPLOYER RACIAL DISCRIMINATION: REVIEWING THE ROLE OF THE NLRB

Lawrence F. Doppelt\*

## I. PRELIMINARY CONSIDERATIONS

One must recognize the serious failings of the Equal Employment Opportunity Commission ["EEOC"]<sup>1</sup> in dealing with racial discrimination in employment,<sup>2</sup> and, consequently, the role of the National Labor Relations Board ["NLRB"]<sup>3</sup> therein may appropriately be re-examined. For, the NLRB continues to hold employer discrimination on the basis of race<sup>4</sup> not violative of the Act.<sup>5</sup> Yet,

[r]acial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals . . . with . . . the ability to provide decently for one's family in a job or profession for which he qualifies. . . .<sup>6</sup>

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<sup>1</sup> The EEOC is charged with enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1973) [hereinafter cited as Title VII]. Section 703 makes it an unlawful employment practice for an employer to discriminate against employees in terms or conditions of employment on the basis of "race, color, religion, sex or national origin."

<sup>2</sup> See joint letter from Senators Harrison A. Williams, Jr., Chairman, and Jacob K. Javits, Ranking Minority Member, United States Senate Labor and Public Welfare Committee, to EEOC Chairman John H. Powell, Sept. 10, 1974. The Senators deplore, *inter alia*, the tremendous backlog of cases pending before the EEOC, the poor quality of EEOC investigations, the lack of success of EEOC conciliation efforts, and the generally dismal efficiency and performance of the EEOC under Title VII. 180 BNA Daily Labor Reports E-1 (Sept. 10, 1974). As of October, 1974, the backlog of unresolved charges at the EEOC was approaching 100,000, and thousands of charges had been on file for over two years. Wall Street J., Oct. 22, 1974, at 22, col. 4.

<sup>3</sup> The NLRB administers the National Labor Relations Act, 29 U.S.C. § 141 (1970) [hereinafter cited as the Act].

<sup>4</sup> This article deals exclusively with racial discrimination.

<sup>5</sup> See *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973). While *Jubilee* involved sex discrimination, the NLRB utilized the case to set forth its conclusion that discrimination based on race, religion, color, sex, or national origin is not, as such, a violation of the Act.

<sup>6</sup> *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970). That racial discrimination adversely affects a person's ability to achieve fair earnings and job security is a truism. A survey of economic statistics by various federal agencies from 1900 to 1970 documents that in 1970 the median black income was 61 percent of whites, while the black unemployment rate was almost twice that of whites. BNA, FAIR EMPLOYMENT PRACTICES 490: 211-18 (1974). In the current recession, the national unemployment figure for nonwhites is 12.8 percent as opposed to 6.4 percent for whites. N.Y. Times, Jan. 19, 1975, at 7, col. 3. See also Adams, *Toward Fair Employment and the EEOC: A Study of Compliance Procedures Under Title VII of the Civil Rights Act of 1964*, 5 n.1 EEOC CONTRACT 70-15 (August 31, 1972). (Introductory materials to the problems of discrimination and poverty are listed.)

The NLRB has not entirely eschewed the field of racial discrimination. Firm action has been taken by the NLRB against certain discriminatory practices by unions and, on a more limited basis, against actions by employers. However, the NLRB's pattern of enforcement clearly demonstrates a greater willingness to police labor organizations.<sup>7</sup>

For example, if a union discriminates on the basis of race in employment matters or causes an employer to do so, it violates the Act.<sup>8</sup> Similarly, union policies or agreements fostering racially discriminatory practices are held unlawful by the NLRB.<sup>9</sup> Once the NLRB finds a union guilty of racial discrimination, the NLRB may revoke the union's certified status<sup>10</sup> or refuse to issue even an initial certification, or, presumably, a *Gissel*-type bargaining order,<sup>11</sup> in favor of the union.<sup>12</sup>

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<sup>7</sup> Early in its history, the NLRB recognized that a union which was the exclusive representative of a group of employees had a statutory duty to treat fairly all employees in the group, irrespective of race, color, creed, or national origin. *Carter Mfg.*, 59 N.L.R.B. 804 (1944). The Supreme Court first enunciated the union duty of fair representation in cases arising under the Railway Labor Act, 45 U.S.C. § 151 (1970). *Tunstall v. Bhd. of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Steele v. Louisville, Nashville R.R.*, 323 U.S. 192 (1944). See also *Vaca v. Sipes*, 386 U.S. 171 (1967) for recent Supreme Court views on the union's duty of fair representation (race was not at issue).

<sup>8</sup> *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1961), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). See also cases cited in note 9 *infra*. While *Miranda* did not involve race as such, it is commonly cited for the proposition that fair representation is required under Sections 8(b)(1)(a) and 8(b)(2) of the Act.

<sup>9</sup> *Houston Maritime Ass'n*, 168 N.L.R.B. 615 (1967); *United Rubber Workers (Business League of Gadsden)*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Galveston Maritime*, 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *Pioneer Bus Co.*, 140 N.L.R.B. 54 (1962); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

<sup>10</sup> *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

<sup>11</sup> In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that the NLRB may order an employer to recognize and bargain with a union having authorization cards from a majority of the employees in the bargaining unit even without an election, if, after the union secures majority status, the employer engages in serious unfair labor practices having the "tendency to undermine majority status and impede the election process." *Id.* at 614. See generally Doppelt & Ladd, *Gissel Packing Company—The NLRB Applies the Standards*, 49 CHI.-KENT L. REV. 161 (1972), for a review of *Gissel*-type bargaining orders.

<sup>12</sup> *Bekins Moving and Storage Co.*, 211 N.L.R.B. 7 (1974). *Bekins* was not itself an unfair labor practice case; rather, it involved NLRB certification policies in representation matters. However, the NLRB holding that it would not certify a union which discriminates in membership or representation on the basis of race, alienage, or national origin is clearly equally applicable to *Gissel* bargaining orders establishing a union as a collective bargaining agent. *Bekins* has its roots in *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973), where the Court refused to enforce a *Gissel* remedy in view of alleged union racial discrimination. The Court in effect held that NLRB machinery is unavailable to a union practicing racial discrimination.

NLRB restrictions on employer conduct, on the other hand, have not dealt directly with the problem of employer racial discrimination. Reprisals against employees who engage in concerted activities to protest alleged racist practices have been deemed unlawful,<sup>13</sup> as has employer participation with unions in discrimination.<sup>14</sup> An employer's refusal to bargain concerning the elimination of discriminatory conduct violates the Act,<sup>15</sup> and employer agreements to incorporate such conduct in a contract are similarly forbidden.<sup>16</sup> Finally, flagrant employer appeals to racism during a pre-election period, while not an unfair labor practice as such, will warrant the NLRB's overturning an otherwise valid election.<sup>17</sup>

However, these NLRB restrictions on employer conduct are clearly not central to the problem of employer discrimination, being merely ancillary thereto.<sup>18</sup> What remains untouched by the NLRB, therefore, is the most prevalent and direct form of conduct—employer discrimination in hiring, firing, and job opportunities based on race. By failing to label this discrimination unlawful, the NLRB has removed itself from the mainstream of employer racism.

In direct opposition to the NLRB's stance is a decision by the Court of Appeals for the District of Columbia. That court holds that because employer racial discrimination creates an unjustified clash of interests among groups of workers and fosters docility in its victims, the dis-

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<sup>13</sup> Such conduct violates Section 8(a)(1) of the Act. *Washington State Service Employees*, 188 N.L.R.B. 957 (1971); *Mason-Rust*, 179 N.L.R.B. 434 (1969); *Tanner Motor Livery Ltd.*, 148 N.L.R.B. 1402 (1964), 166 N.L.R.B. 551 (1967), *enforcement denied*, 419 F.2d 216 (9th Cir. 1969).

<sup>14</sup> *Houston Maritime Ass'n*, 168 N.L.R.B. 615 (1967); *United Rubber Workers*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Galveston Maritime*, 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1961).

<sup>15</sup> *Southwestern Pipe Inc.*, 179 N.L.R.B. 364 (1969), *modified on other grounds*, 444 F.2d 340 (5th Cir. 1969); *Farmers Cooperative Congress*, 169 N.L.R.B. 290 (1968), *aff'd*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969). *See also* note 20 *infra*.

<sup>16</sup> *United Rubber Workers*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Galveston Maritime*, 148 N.L.R.B. 987 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

<sup>17</sup> *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962).

<sup>18</sup> For example, reprisals against employees for engaging in concerted activities, regardless of any racial motivation, violates the Act. *Salt River Valley Water Users Ass'n v. NLRB*, 206 F.2d 325 (9th Cir. 1953). Employers cooperating with unions in discriminating against employees also violate the Act (racism not being a necessary element). *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954); *A. Nabowski*, 148 N.L.R.B. 876 (1964), *aff'd*, 359 F.2d 46 (6th Cir. 1966). Similarly, employer refusals to bargain generally over terms and conditions of employment are a violation of the Act. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). Moreover, pre-election appeals too strongly geared to emotionalism may, in any event, constitute grounds for overturning an otherwise valid election. *Storkline Corp.*, 142 N.L.R.B. 875 (1963).

crimination inhibits free employee exercise of concerted activities<sup>19</sup> and thereby interferes with protected rights under the Act.<sup>20</sup>

The NLRB and various commentators<sup>21</sup> rely upon three basic legal arguments in rejecting this interpretation: first, the EEOC, and not the NLRB, is the sole and proper agency for litigating racial issues;<sup>22</sup> second, employer racial discrimination does not interfere with the protected rights of employees under the Act,<sup>23</sup> and third, it is not, and never was, Congress' intent in passing the Act to bring racial discrimination within its purview.<sup>24</sup>

Unquestionably, each of these legal arguments has, or at some time had, surface appeal, and, at one time, considerable force. The great mass of legal commentary supports at least one of these contentions.<sup>25</sup>

On the other hand, countervailing legal positions which are equally meritorious should not be overlooked.<sup>26</sup> Yet that is precisely what the NLRB has done, failing to accord to such opposing contentions the weight to which they are entitled. In fact, the NLRB has cavalierly failed to take notice not only of basic arguments contrary to its own holdings,<sup>27</sup> but of those in support as well.<sup>28</sup>

The result of this stance has been that the NLRB has not faced the issues that should be dispositive of this matter. For, whether or not

<sup>19</sup> Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in violation of their rights under Section 7 of the Act. Section 7 of the Act protects, *inter alia*, the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

<sup>20</sup> *United Packing House Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969). The Court held that employer discrimination on the basis of race or national origin was a violation of Section 8(a)(1) of the Act. This is the only case that has so held.

<sup>21</sup> Among the various books or articles on *United Packing House Workers v. NLRB*, or the issues raised therein are Boyce, *Racial Discrimination and the NLRA*, 65 NW. U.L. REV. 232 (1970); Gould, *Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 MICH. L. REV. 237 (1969); Gould, *The Emerging Law Against Racial Discrimination in Employment*, 64 NW. U.L. REV. 359 (1969); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1964); Note, *Allocating Jurisdiction Over Racial Issues Between the EEOC and NLRB: A Proposal*, 54 CORNELL L. Q. 943 (1969).

<sup>22</sup> See, e.g., Silberman, *The Search For an Effective Remedy in Employment Discrimination*, 23 N.Y.U. ANNUAL CONFERENCE ON LABOR 133 (1970).

<sup>23</sup> See, e.g., Gould, *The Emerging Law Against Racial Discrimination in Employment*, *supra* note 21; Note, *Employer Racial Discrimination as an Unfair Labor Practice—New Power for the NLRB*, 57 GEO. L.J. 1313 (1969). This is the main ground upon which the NLRB relies.

<sup>24</sup> See, e.g., Boyce, *supra* note 21; Gould, *The Emerging Law Against Racial Discrimination*, *supra* note 21.

<sup>25</sup> See note 21 *supra*.

<sup>26</sup> See part II *infra*.

<sup>27</sup> *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973) takes little or no notice of the legal arguments set forth in part II *infra*.

<sup>28</sup> *Jubilee Mfg. Co.* similarly takes little or no notice of arguments favoring its own position.

the NLRB should consider cases of employer racial discrimination is, in the last analysis, a policy question, especially since the legal arguments on both side of the question are equally convincing.<sup>29</sup> The NLRB, however, has refused to look past its own legal position to consider the policy arguments.<sup>30</sup>

## II. LEGAL CONTENTIONS

### A. *The Proper Forum Argument*

While the contention that the EEOC is the sole and proper agency for dealing with employer racial discrimination<sup>31</sup> was, perhaps, once viable, it is now established that there are "parallel or overlapping remedies against discrimination," and that an individual is entitled to pursue "his rights under both Title VII and other applicable state and federal statutes."<sup>32</sup> This clearly applies to litigation before the NLRB as well as before other federal agencies.<sup>33</sup>

Thus, if a racially discriminatory practice is otherwise violative of the Act, the NLRB will have concurrent jurisdiction with the EEOC.<sup>34</sup> The latter agency, although a proper forum, is not the sole one for matters coming under Title VII.

### B. *Interference with Protected Employee Rights*

The NLRB has rejected, on the basis of three major premises, the District of Columbia Court of Appeals' conclusion that racial discrimination interferes with protected employee rights.<sup>35</sup> First, the NLRB reasons that, while racial discrimination may divide employees, it may also "coalesce" them, thereby fostering, rather than thwarting, group action.<sup>36</sup> In addition, it finds that docility is only "one of several possible consequences" of employer racial discrimination, with in-

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<sup>29</sup> See part III *infra*.

<sup>30</sup> Or if it has, it has not so stated. *But see* Member Kennedy's concurring opinion in *Bekins Moving and Storage Co.*, 211 N.L.R.B. 7 (1974), where he expresses concern over the possible impact on the NLRB if it takes jurisdiction over Title VII matters.

<sup>31</sup> See note 22 and accompanying text *supra*.

<sup>32</sup> *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974).

<sup>33</sup> This is made quite clear by the Supreme Court in *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974), wherein the Court quotes with approval a senatorial interpretative memorandum to Title VII stating, *inter alia*, "If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." *Id.* at 1019 n.9.

<sup>34</sup> *United Packing House Workers v. NLRB*, 416 F.2d 1126, 1133 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969).

<sup>35</sup> *United Packing House Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969).

<sup>36</sup> *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973).

creased "militancy" being an equally probable consequence.<sup>37</sup> Finally, the Board concludes, on the basis of the above, that racial discrimination is not "inherently destructive" of employee rights.<sup>38</sup>

This NLRB response overlooks the realities of the situation and relies upon questionable legal analysis. Actually, the Board decision itself provides the basis for inferences which yield results quite contrary to its own conclusions.

The NLRB does not deny that employer racial discrimination has a foreseeable effect of dividing groups of workers and causing docility among the victims. On the contrary, it accepts the fact that this may be the result<sup>39</sup>—indeed, a different finding would be suspect in the view of the well-documented opinions of the District of Columbia Court of Appeals<sup>40</sup> and of the Board's dissenting member.<sup>41</sup> Moreover, the NLRB's own experience vividly documents that racial messages by employers may divide employees and suppress concerted activity.<sup>42</sup> Similarly, labor consultants frequently encounter employers who utilize racism during pre-election periods to divide employees, thereby preventing their unionization.<sup>43</sup> That racial fear and prejudice are often encouraged in both union and nonunion shops to prevent employees from forming concerted fronts is, in fact, well known by those who have worked in the field of labor relations.<sup>44</sup>

Inasmuch as employer racial discrimination does, therefore, have a foreseeable coercive effect on concerted activity, the fact that it may not always result in such is, as a legal matter, irrelevant. Obviously, the NLRB is correct that racial discrimination may result in cohesiveness and militancy, rather than divisiveness and apathy. But so, too, may union discrimination which, nevertheless, remains unlawful. For

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<sup>37</sup> *Id.* at 273.

<sup>38</sup> *Id.* at 272.

<sup>39</sup> *Id.* at 272, 273. Indeed, the NLRB did not dispute this before the District Columbia Court of Appeals. *United Packing House Workers v. NLRB*, 416 F.2d at 1136.

<sup>40</sup> *United Packing House Workers v. NLRB*, 416 F.2d at 1135-37.

<sup>41</sup> *Jubilee Mfg. Co.*, 202 N.L.R.B. 272, 274 (1973) (Jenkins, dissenting); *The Emporium*, 192 N.L.R.B. 173 (1971) (Jenkins, dissenting).

<sup>42</sup> *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962); *Allen Morrison Sign Co.*, 138 N.L.R.B. 73 (1962). See also cases cited in note 13 *supra*.

<sup>43</sup> For example, employers may spread the word in predominantly white plants that if the union gets in it will require more black employees, bring in black union bosses, or use union dues money to support black causes.

<sup>44</sup> See letter from Walter Reuther, President of the United Automobile Workers of America Union, to Senator Lister Hill, Feb. 11, 1964, in support of the passage of Title VII:

Today anti-union employers seek the same result [dividing workers] by a new division of the workers in which they would play off white against Negro to perpetuate fear, to depress wages, and to create tension and hostility between working groups. . . . [E]mployers are playing the racial discrimination game to break the strength of labor and prevent organization.

110 *Cong. Rec.* 7206 (1964).

example, wrongful employer discrimination against union leaders may, in fact, lead to unity, rather than fear.<sup>45</sup> Many are the concerted strikes which have directly resulted from, and been made more militant by, unlawful union-busting tactics.<sup>46</sup> However, the fact that employer unlawful conduct thus results in unity and strength, rather than divisiveness and docility, does not make it any the less invalid in view of the foreseeably coercive effect.<sup>47</sup> Similarly, the fact that racial discrimination may not actually deter concerted activity does not render it non-violative of the Act where such restraint is, admittedly, a clearly foreseeable result thereof.

Furthermore, the NLRB is wrong, as a matter of law, in requiring that racial discrimination be "inherently destructive" of employee rights under the Act in order to be unlawful. It suffices that it have a foreseeable effect of interfering with employee concerted activities, as admittedly it does.<sup>48</sup> For, against this foreseeable result is an absolute lack of business justification therefor.<sup>49</sup> And where conduct foreseeably coercive of protected employee rights is unaccompanied by any valid business purpose, it is violative of the Act without more.<sup>50</sup> It is only where there is a valid business purpose for a practice that it must be "inherently destructive" of employee rights to be unlawful.<sup>51</sup>

Finally, the NLRB has overlooked certain inferences which should, as a matter of economic realities, be drawn from its own conclusions. For it is precisely those rather aberrational results of past discrimination cited by the NLRB<sup>52</sup> which are primary causes of today's employer racial practices. These, too, are intimately related to protected employee activities.

<sup>45</sup> A sophisticated employer knows that discharging or discriminating against a union leader is a two-edged sword. It may well divide, but then again, it may serve to unite. Union leaders often seize upon such discriminatory tactics to prove to employees that they must, indeed unify for strength.

<sup>46</sup> Cf. *Kohler Co.*, 148 N.L.R.B. 1434 (1964), *aff'd*, 345 F.2d 748 (D.C. Cir. 1965). See also cases cited in A. COX & D. BOK, *LABOR LAW* 890-904 (7th ed. 1969).

<sup>47</sup> *Id.*

<sup>48</sup> See note 51 and accompanying text *infra*.

<sup>49</sup> In view of the legislative intent set forth in Title VII, as well as ethical and moral considerations, there can be no business justification for racial discrimination.

<sup>50</sup> *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). As stated by Mr. Justice Goldberg in *Am. Ship Bldg. v. NLRB*, 380 U.S. 300, 339 (1965):

[T]he correct test for determining whether Section 8(a)(1) has been violated in cases not involving an employer anti-union motive is whether the business justification for the employer's action outweighs the interference with Section 7 rights involved. In *Republic Aviation Corp. v. Labor Board* [324 U.S. 793 (1945)] for example, the Court affirmed a Board holding that a company "no-solicitation" rule was invalid . . . not because such a rule was "demonstrably . . . destructive of collective bargaining", but simply because there was no significant employer justification for the rule and there was a showing of [protected] union interest. . . .

<sup>51</sup> *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

<sup>52</sup> *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973).



That is, employers have recognized, with the NLRB, that victims of past discrimination may well tend to "coalesce", and/or exercise their rights in a militant manner.<sup>53</sup> It is no secret to employers that blacks are more likely than whites to organize into unions.<sup>54</sup> Employers further feel, intuitively,<sup>55</sup> that blacks are more likely than whites to militantly press their grievances, especially where they constitute a shop majority of employees.<sup>56</sup> And it is for just such reasons that employers frequently discriminate against blacks in hiring and job opportunities.

Such reasons for discriminating are, of course, unlawful under the Act. For, they are grounded on deterring employees from engaging in union and/or other concerted protective activities.<sup>57</sup> While not all employers have such unlawful intent under the Act in engaging in discriminatory practices, it is naive not to recognize that numerous acts of racial discrimination are based on just such wrongful intent.

In determining the rights and duties of parties under the Act,<sup>58</sup> the NLRB can certainly take note of the foregoing widespread wrongful motivation<sup>59</sup> behind employer racial discrimination. And, absent any possible employer justification for racial discrimination, an inference of wrongful intent under the Act may thereby be added to the scale to find illegal activity<sup>60</sup> lacking contrary evidence from the employer.<sup>61</sup>

In sum, the findings of the NLRB may support the conclusion that employer racial discrimination, with or without a warrantable inference of wrongful intent, violates the Act by interfering with protected employee rights. A contrary conclusion would belie the realities of industrial relations, human experience, economics, and established legal principles.

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<sup>53</sup> Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973).

<sup>54</sup> Black workers are more likely to join unions than white workers, they have joined unions in a greater proportion to their percentage participation in the work force than whites, and they have a generally higher labor union representation than white employees. BUREAU OF LABOR STATISTICS, SELECTED EARNINGS AND DEMOGRAPHIC CHARACTERISTICS OF UNION MEMBERS, 1970 (1972).

<sup>55</sup> Frequently, this intuitive sentiment is correct.

<sup>56</sup> Indeed, this fear of "tipping" the racial composition of the work force—and the apprehension of the militancy that will follow such tipping—is behind much employment discrimination.

<sup>57</sup> This is a classic violation of Section 8(a)(1) and/or Section 8(a)(3) of the Act.

<sup>58</sup> It is the function of the NLRB to work an adjustment in "weighing the interests of the employees in concerted activity against the interests of the employer in operating its business. . . ." NLRB v. Erie Resistor, 373 U.S. 221, 229 (1963).

<sup>59</sup> Of course, some employers are motivated by nothing more than pure prejudice or the belief that blacks are not as productive as whites. The existence of alternative motivations should not, however, deter NLRB recognition of the frequent wrongful intent discussed above.

<sup>60</sup> Cf. NLRB v. Stowe Spinning, 336 U.S. 226 (1949), where discriminatory intent tipped the scales against the employer.

<sup>61</sup> The NLRB may infer discriminatory intent, even absent specific evidence of a subjective motivation, based on what human experience teaches is the foreseeable result of certain conduct. NLRB v. Erie Resistor, 373 U.S. 221 (1963).

### C. Legislative Intent

Probably the strongest legal argument against bringing employer racial discrimination within the aegis of the Act involves the absence of legislative intent.<sup>62</sup> There is no doubt that Congress did not have racial discrimination in mind when passing the Act in 1935,<sup>63</sup> and the legislature has periodically refused to bring employer racism specifically within the ambit of the Act since then.<sup>64</sup>

However, Congress' initial intent is not determinative of the issue. The passage of Title VII evinced a new legislative purpose,<sup>65</sup> and this revision must be recognized by the NLRB in implementing the Act.

Plainly, national labor policy embodies the principles of non-discrimination as a matter of highest priority, . . . and it is a commonplace that we must construe the NLRA in light of the broad national policy of which it is a part.<sup>66</sup>

"Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another. . . ."<sup>67</sup> The Act ". . . must be read with other federal statutes which establish the national labor policy."<sup>68</sup>

For example, while Congress did not intend to cover racial discrimination by unions when union unfair labor practices were first brought within the Act, the NLRB has found that national labor policy requires such an inclusion.<sup>69</sup> Similarly, Congress, when first considering the act, did not foresee that the NLRB would later defer

<sup>62</sup> See M. SOVERN, *RACIAL DISCRIMINATION IN EMPLOYMENT* 995 (2d ed. 1973). See also note 24 *supra*.

<sup>63</sup> *Id.*

<sup>64</sup> Congress has refused to enact the following bills which would have made employer discrimination on the basis of race an unfair labor practice under the Act: S. 1897, 83d Cong., 1st Sess. (1953); S. 1831, 83d Cong., 1st Sess. (1953); H.R. 12348, 86th Cong., 2d Sess. (1960).

<sup>65</sup> "Title VII . . . provides us with a clear mandate from Congress that no longer will the United States tolerate [racial] discrimination." *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

<sup>66</sup> *Emporium Capwell Co. v. Western Addition Community Organization*, 43 U.S.L.W. 4214 (1975). As stated by Mr. Justice Douglas, dissenting, ". . . Title VII . . . unequivocally makes the eradication of employment discrimination part of the federal labor policy, in light of which all labor laws must be construed." *Id.* at 4220. In *Emporium Capwell*, the Court held that employee picketing to protest alleged racist practices by an employer, and which is conducted in derogation of the established collective bargaining representative and outside the orderly contractual grievance procedure, is not protected by the Act. The decision was not in any way based upon the lack of a need to protect minority interests under the Act; rather, it was squarely based on the policy of upholding the principle of majority rule through the exclusive collective bargaining agent. In fact, the Court specifically noted that such undermining of the majoritarian principle by employees may work against eliminating racial discrimination rather than in favor of it.

<sup>67</sup> *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

<sup>68</sup> *The Emporium*, 192 N.L.R.B. 173, 177 (1971).

<sup>69</sup> See cases cited in notes 8, 9, and 10 *supra*.

its jurisdiction to the arbitral process. Again, however, this has been deemed necessary to adjust the Act to national labor policy.<sup>70</sup>

The fact that Congress expressly declined to establish employer racial discrimination as an employer unfair labor practice<sup>71</sup> is not conclusive of its intent. In recent years, Congress has expressly declined to establish union racial discrimination as an unfair labor practice under the Act.<sup>72</sup> The NLRB nonetheless holds such discrimination violative of the Act.<sup>73</sup> The same argument can be forwarded with respect to employer discriminatory practices.

Accordingly, the rules of the game have been changed by the passage of Title VII. The legislative intent therein set forth must be recognized under, and reconciled with, the Act.

### III. POLICY CONSIDERATIONS

Acknowledging the existence of valid legal arguments on both sides of the employer racial discrimination issue, it is quite possible that policy issues may be decisive. As with the legal contentions, there are substantial policy arguments in favor of, and in opposition to, an expanded NLRB role.

#### *A. Arguments Favoring an NLRB Role*

Employer racial discrimination must be recognized as an industrial evil which requires prompt elimination. It is, in a sense, "social dynamite,"<sup>74</sup> straining the economic and social structure of both abuser and abused. The minority, denied elemental justice, remains educationally, economically, and psychologically disadvantaged,<sup>75</sup> while the majority becomes prey to the hatred engendered among the victims of the unjust practices.

This problem is not being sufficiently handled by the EEOC.<sup>76</sup> An agency with a backlog of 100,000 pending cases (many on file for over two years) is an administrative paper tiger.<sup>77</sup> The Commission warrants

<sup>70</sup> Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). For further examples, see Doppelt, *OSHA: Impact on the NLRA and Arbitration*, 20 WAYNE L. REV. 1015, 1016, 1017 (1974).

<sup>71</sup> See note 64 *supra*.

<sup>72</sup> S. 2956, 89th Cong., 2d Sess. (1966); H.R. 624 and 626, 88th Cong., 1st Sess. (1963); H.R. 6807 and 6806, 87th Cong., 2d Sess. (1962); H.R. 12348, 86th Cong., 2d Sess. (1960); S. 1897, 83d Cong., 1st Sess. (1953); S. 1831, 83d Cong., 1st Sess. (1953).

<sup>73</sup> See note 2 and accompanying text *supra*.

<sup>74</sup> Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 366 (1966).

<sup>75</sup> *Id.* See also note 6 *supra*.

<sup>76</sup> See note 2 and accompanying text *supra*.

<sup>77</sup> It is not the intent of this article to place the blame for this condition solely on the EEOC. Congress, which has failed to give the EEOC the power and funding that it needs, must share the responsibility.

neither the respect of employees nor the apprehension of employers. An employer engaging in acts of racial discrimination will scarcely be deterred by the possibility of a charge which will not be investigated until well after the facts are stale or forgotten and after the victim is wholly discouraged.

Even if the EEOC were to operate efficiently, it is doubtful whether it alone could adequately deal with the problem. Title VII enforcement is "a necessary but not a sufficient condition for the elimination of unequal employment opportunities."<sup>78</sup> The EEOC clearly needs help from other sources if it is to function at a level commensurate with its stated goals.

The NLRB would be of enormous assistance in reducing the incidence of employer racial discrimination. A competent agency that is generally respected in the industrial relations area, the NLRB is administratively equipped to probe charges of employer discrimination.<sup>79</sup> With free legal services, relatively swift procedures, broad remedial powers, a skilled staff, and a reasonable caseload,<sup>80</sup> the NLRB can deal as forcefully with actions involving employer discrimination as it has with actions involving unions.<sup>81</sup>

Moreover, should it assume jurisdiction over employer racial discrimination, the NLRB need not turn itself into a quasi-EEOC. The NLRB could defer to the EEOC on more controversial or complex issues.<sup>82</sup> Or, in lieu of deferring to the EEOC, the Board could legitimately proceed with great caution and thereby avoid the pitfalls which have so ensnared the EEOC.<sup>83</sup>

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<sup>78</sup> Adams, *supra* note 6, at 127. The report concludes that fair employment legislation will not alone eliminate unequal employment opportunities.

<sup>79</sup> This is, after all, what the NLRB does day after day in cases arising under Section 8(a)(3) of the Act wherein employees complain that they have been discriminated against because of union activities. During 1973, 63 percent of the charges filed with the NLRB against employers involved alleged discrimination. 38 NLRB ANN. REP. 93 (1974).

<sup>80</sup> Peck, *Remedies in Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 WASH. L. REV. 455 (1971); Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846 (1966). Compare 38 NLRB ANN. REP. 6 (1974) (the NLRB's pending caseload) with Wall Street J., *supra* note 2 (EEOC backlog).

<sup>81</sup> Cf. Boyce, *supra* note 21; cases cited in notes 8 and 9 *supra*.

<sup>82</sup> Cf. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). The NLRB could properly defer to the EEOC in novel, complex, or controversial issues on the basis that the EEOC, not the NLRB, is primarily responsible for effectuating national labor policy in matters of racial discrimination.

<sup>83</sup> *Id.* Issues such as reverse discrimination, quotas, special treatment for minorities, comparative seniority systems, and others, might be avoided. For examples and discussions of some of these issues, see *Jersey Power & Light Co. v. Local 327*, —F.2d— (3d Cir. 1975); *Waters v. Wisconsin Steel Works*, 502 F.2d 1039 (7th Cir. 1974); *Local 189, Paper Makers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); Kaplan, *supra* note 74.

By assuming some of the responsibility for policing racial discrimination, the NLRB would free the EEOC of a portion of its load. The EEOC could then function more efficiently, zeroing in on the serious areas of discriminatory conduct. One of the EEOC's greatest handicaps has been its inability to allocate resources on a "worst first basis".<sup>84</sup> With NLRB assistance, the EEOC would be able to divert its primary attention from individual private complaints.<sup>85</sup>

### *B. Arguments Against an NLRB Role*

Against the foregoing policy considerations militates a powerful, and perhaps determinative, counterargument: the possibility that opening the NLRB to allegations of employer racial discrimination would so overwhelm the agency as to divert it from its main function.

The NLRB's traditional function has not been to police racial discrimination though such may be related to concerted activity. Its primary purpose is "fostering collective bargaining, protecting employee rights to act concertedly, and conducting elections . . .".<sup>86</sup> Certainly, the NLRB should not risk jeopardizing major employee and union rights under the Act.

Whether this would necessarily be the cost of the added jurisdiction is subject to speculation. The NLRB is best able to evaluate its own resources and potential and to predict its ability to take on employer racial discrimination without impairing its other functions. Initially, then, it should be the NLRB's task to confront the problem.

The NLRB, however, has failed thus far to deal with the issue.<sup>87</sup> Since neither Congress nor the public knows the NLRB's capabilities in this area, the NLRB should frankly state whether it can or can not assume this burden. If a negative determination is made, the issue will then be passed on to Congress and the public for appropriate action. If, on the other hand, the NLRB finds that it can feasibly manage jurisdiction over such matters, it should say so and perhaps reverse its present position.<sup>88</sup>

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<sup>84</sup> Adams, *supra* note 6, at 130.

<sup>85</sup> This is not to underestimate the importance of such private complaints. They, too, need immediate attention which the EEOC has likewise not provided.

<sup>86</sup> Jubilee Mfg. Co., 202 N.L.R.B. 272, 273 (1973).

<sup>87</sup> Member Kennedy has touched on this issue but has not supported his conclusion with statistics or any rationale. See note 30 *supra*.

<sup>88</sup> Another issue that the NLRB must consider is whether, if it assumes jurisdiction over cases involving racial discrimination, it must also assume jurisdiction over sex discrimination cases. While the latter problem is outside the scope of this article, many of the legal and policy arguments detailed above apply to sex as well as race discrimination. On the other hand, the NLRB has already recognized a distinction between the two types of discrimina-

## IV. CONCLUSION

Employer racial discrimination remains a cancerous disease in our society which must be removed. The NLRB, charged with protecting the "legitimate rights" of employees, has the legal weapons to enter the fight against racial discrimination. The issue is ripe for reconsideration.<sup>89</sup>

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tion. In *Bekins Moving and Storage Co.*, 211 N.L.R.B. 7 (1974), the only holding upon which an NLRB majority could agree was that a union was disqualified from receiving certification when it practiced discrimination on the basis of "race, alienage, or national origin." There was no majority on the issue of other types of discrimination. Accordingly, the Acting Regional Director for the NLRB's 13th Regional Office has held that *Bekins* does not preclude certification for a union which allegedly practices sex discrimination. *Union Carbide Corp.*, 86 L.R.R.M. 1606 (1974). See also *Bell & Howell*, 213 N.L.R.B. 79 (1974).

<sup>89</sup> Significantly, the United States Supreme Court, albeit implicitly and only by footnote, very recently apparently cited with approval the District of Columbia Court of Appeals' decision in *United Packing House Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969); *Emporium Capwell v. Western Addition Community Organization*, 43 U.S.L.W. 4214 (1975). This is still further reason for the NLRB to reevaluate its position.