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NLRB - FEPC?

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The pressures surrounding racial discrimination in employment have been increasing in recent years. In this article the author discusses the ability of the NLRB to deal with some of these problems. He summarizes significant past developments and analyzes the statutory provisions which may empower NLRB action to combat discrimination. He concludes that affirmative action is possible within the existing statutory framework.

I. Introduction

Racial discrimination in employment opportunities is probably the most intractable of all forms of racial intolerance, in the sense that it breeds upon job insecurity as well as upon prejudice. The nature and extent of this discrimination[1] and the many ways in which the present high rate of unemployment has aggravated its effects[2] have been well documented.

On the federal level ameliorative action has been limited. The many FEPC-type bills introduced in the 87th Congress were foredoomed.[3] Although at least one such bill introduced in the 88th

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1. See Equal Employment Opportunity, *Hearings Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 87th Cong., 2d Sess. (1962); *Hearings on H.R. 8219 Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 87th Cong., 1st Sess. (1961); Greenberg, Race Relations and American Law 170-86 (1959); Ruchames, Race, Jobs and Politics (1953); U.S. Comm'n on Civil Rights, Employment (1961); Weaver, Negro Labor (1946); Wesley, Negro Labor in the United States (1927).

2. S. Rep. No. 1206, 86th Cong., 2d Sess. 81-85 (1960); Senate Special Comm. on Unemployment Problems, 86th Cong., 2d Sess., Studies in Unemployment 173-223 (1960); Senate Special Comm. on Unemployment Problems, 86th Cong., 1st Sess., Readings in Unemployment 872-973 (1960). The Commission on Civil Rights has noted that "the rate of unemployment for Negroes . . . was twice that of the white population during the recent [1960] recession. In some cities more than one-third of the Negro work-force was unemployed. The old adage that Negroes are the last hired and the first fired was all too clearly demonstrated. One of the reasons for this is that, despite a dramatic increase in types of employment available to Negroes during the past 20 years, the mass of Negro workers are still confined largely to the less skilled jobs." U.S. Comm'n on Civil Rights, *op. cit. supra* note 1, at 1-2.

3. S. 2595, S. 1258, S. 1819, H.R. 8219, H.R. 104, H.R. 262, H.R. 670, H.R. 2022, H.R. 2475, H.R. 2744, H.R. 2867, H.R. 5875, H.R. 6041, H.R. 6875, H.R. 7090, H.R. 7252, H.R. 9268, H.R. 9269, H.R. 9270, H.R. 9327, H.R. 9344, H.R. 9345. See CCH Cong. Index, 87th Cong., 1962-63.

Congress has impressive individual support,[4] there is no evidence that it will fare any better.[5] The Administration's overt activity has been restricted largely to the enforcement of Executive Order 10925[6] which bars employment discrimination by the Government and by government contractors.[7]

Unions also have a heavy responsibility in this area. Yet it is certainly accurate to say that there are "many imperfections and shortcomings with respect to nondiscrimination"[8] in the union movement. In order to correct this situation the AFL-CIO has stepped up its educational program,[9] but it has rejected the remedy of disaffiliation for offending unions.[10] Some unions, notably the United Auto Workers, have their own antidiscrimination enforcement machinery.[11] The extent and effect of union attempts to eliminate racial discrimination through the collective bargaining process and of voluntary employer efforts to the same end have not been documented and thus cannot be assessed.

One potential agency in the attack on racial discrimination in employment is the National Labor Relations Board. The President has indicated that substantial reliance will be placed on that agency for the vindication of Negro rights in areas of employment not covered by Executive Order 10925.[12] Less than a year ago the board's approach in this area was cautious and its proper role ill-defined

4. S. 773 was introduced by Senators Clark, Hart, Douglas, Williams (N.J.), Javits, Long (Mo.), Humphrey, Gruening, Neuberger, Scott, Case, and Pell. Other bills pending in the 88th Congress are: S. 1210, H.R. 27, H.R. 316, H.R. 330, H.R. 405, H.R. 1623, H.R. 1767, H.R. 1938, H.R. 2999, H.R. 3523, H.R. 3571, H.R. 4031, H.R. 4573, and H.R. 4874. See CCH CONG. INDEX, 88TH CONG., 1963-64.

5. The administration's civil rights message to the 88th Congress, delivered February 28, 1963, indicated there would be no request for such legislation. *Civil Rights Message from the President,* Feb. 28, 1963, H.R. Doc. No. 75, 88th Cong., 1st Sess. 9. More recently there has been some suggestion that such a request might be made. *Civil Rights Message from the President,* June 19, 1963, H.R. Doc. No. 124, 88th Cong., 1st Sess. 11.

6. 26 Fed. Reg. 1977 (1961).

7. The Administration has recently indicated that its activities in this area will be broadened. See *Civil Rights Message,* June 19, 1963, *supra* note 5, at pp. 10-11.

8. Subcommittee to Review the Memorandum on Civil Rights in the AFL-CIO, Report to the Executive Council of the AFL-CIO, submitted by Vice President Randolph to the executive council at its meeting at Unity House, Pa., June 25-30, 1961, p. 8 (mimeo. 1961). See also U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 1, at 127-51.

9. Subcommittee to Review the Memorandum on Civil Rights in the AFL-CIO, *supra* note 8 *passim.*

10. George Meaney, president of the AFL-CIO, urging the adoption of equal employment opportunity legislation to Congress, testified that disaffiliation was not an effective remedy. Equal Employment Opportunity, *supra* note 1, at 993-94.

11. DANKERT, CONTEMPORARY UNIONISM 189 (1948); U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 1, at 141.

12. *Civil Rights Message,* Feb. 28, 1963, *supra* note 5, at p. 9; *Civil Rights Message,* June 19, 1963, *supra* note 5, at p. 10.

and speculative.[13] Within the past year, however, the NLRB has moved rapidly by sharpening four, possibly five, anti-bias remedies. Three have roots in early NLRB decisions. The fourth is new. The fifth, resurrection of which has only been hinted at so far, is also derived from early Board decisions.

The first three of these remedies are (a) the decertification of unions which discriminate against Negroes,[14] (b) the setting aside of representation elections where an employer or a union makes "exacerbated" appeals to racial bias,[15] and (c) the removal of discriminatory collective bargaining contracts as bars to representation petitions by stranger unions.[16] The fourth consists of the Board's preventing a union, when acting in its "statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[17] Similarly, employer participation in such action may be remedied.[18] The fifth remedy would make it an unfair labor practice for an employer or a union to make such exacerbated appeals to racial bias in a representation campaign as would be grounds for setting aside a representation election.[19]

Whether these remedies will be effective cannot be foretold. It is important for now, however, to inquire whether the NLRB's assumption of responsibility in this area is justified. This paper is an attempt to explore that question.

II. The Legislative Background

At first blush the Board's actions appear to be unwarranted. The NLRB sits to enforce the National Labor Relations Act of 1935 (the

13. See Maloney, *Racial and Religious Discrimination in Employment and the Role of the NLRB*, 21 Md. L. Rev. 219 (1961); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 Colum. L. Rev. 563 (1962).

14. Pionecr Bus Co., 140 N.L.R.B. No. 18 (Dec. 10, 1962); Hughes Tool Co., IR-93-63, *Racial Units Within Union Held Unlawful*, 52 Lab. Rel. Rep. 247 (1963).

15. Sewell Mfg. Co., 140 N.L.R.B. No. 24 (Dec. 20, 1962); Sewell Mfg. Co., 138 N.L.R.B. No. 12 (Aug. 9, 1962). *But see* Allen-Morrison Sign Co., 138 N.L.R.B. No. 11 (Aug. 9, 1962).

16. Pioneer Bus Co., *supra* note 14.

17. Miranda Fuel Co., 140 N.L.R.B. No. 7 (Dec. 19, 1962); Hughes Tool Co., *supra* note 14. While *Miranda* did not involve a question of racial discrimination, its prohibition of discrimination based on "irrelevant, invidious, or unfair" considerations clearly covers it. See Office of the General Counsel of the NLRB, Summary of Operations, Calendar Year 1962, at 113 (mimeo. 1963); Rothman, Four Areas of the Developing Law: Resume and Rationale 6-26, Address to the Labor Law Section, Wisconsin Bar Association, Release No. 908, Feb. 15, 1963.

18. Miranda Fuel Co., *supra* note 17.

19. Office of the General Counsel of the NLRB, *op. cit. supra* note 17, at 113-14.

Wagner Act),[20] and two major sets of amendments to it—the Labor-Management Relations Act of 1947 (the Taft-Hartley Act),[21] and Title VII of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act).[22] None of these acts makes any reference to an authority in the Board to remedy racial discrimination. Moreover, the legislative history of each indicates quite clearly that Congress had no intention of dealing with this problem at all.

A. *Wagner Act*

During the Senate hearings on the Wagner Act, the Chairman of the Senate Committee on Education and Labor, Senator Walsh of Massachusetts, made several passing references to the problem. At one point he noted:

> And there has been, unfortunately, as I have observed it in years that have passed, a philosophy among the employers in the textile industry, that by mixing the racial groups, and employing people who did not speak the same language, they wonld be in a position to combat organization.[23]

Later, he stated:

> I have found that where there is a good deal of trouble between the employer and employees it is in that class to which I referred this morning, where there has been an attempt to amalgamate the different racial groups as employees and where there has not been a meeting of the minds among the employees themselves.[24]

Finally, during the testimony of an employee representative of a company union, Senator Walsh made a brief inquiry regarding the representation of Negro workers by the Union.[25] But nothing else was raised by him or by the other members of the Committee on this subject.

A representative of the NAACP opposed the Wagner Act on the grounds that "organized labor is hostile to colored people."[26] He would have been prepared to support it if it had included provisions aimed at racial discrimination in organized plants.[27] But it did not.

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20. 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).
21. 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958).
22. 73 Stat. 541 (1959), 29 U.S.C. § 151 (Supp. II, 1961). Hereinafter the NLRA and its amendments will be collectively referred to as "the act."
23. 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 310 (1935).
24. *Id.* at 317.
25. *Id.* at 919.
26. *Id.* at 1035.
27. *Id.* at 1035-36.

A representative of the National Urban League similarly opposed the act, saying:

> [It] permits labor organizations to exclude Negroes from membership in their bodies and from employment in occupations under their jurisdiction . . . denies to Negro workers the status of "employees" when they are engaged as strike-breakers in occupational fields where they are prohibited from joining the striking union . . . fails to protect the Negro worker from practices of racial discrimination by labor unions, both as union and non-union workers, [and] . . . permits the establishment of competitive unions on the basis of race, thereby weaking [*sic*] the bargaining power of all workers.[28]

A representative of the *Daily Worker* opposed the entire act but suggested several alternative proposals, one of which would have banned discrimination by employers against Negro workers.[29]

The arguments of a representative of the Manufacturing Chemists Association on another point give some indication of the temper of the times. He said:

> [M]any of our southern plants employ a large number of colored workers. In some cases such workers are in the majority. It is not difficult to foresee the possible consequences of any attempt to apply and enforce the majority rule provisions of the Wagner bill at plants where such conditions prevail.[30]

The Federal Council of the Churches of Christ in America recommended that the act open up labor unions to all "competent workers without distinction of nationality or race."[31]

There was nothing in the debates in Congress on the problem.

B. *Taft-Hartley Act*

The record here is shorter but no less conclusive that Congress intended to keep hands off the race question in labor legislation. At one point in the House debates Congressman Marcantonio said:

> This bill has been hailed by its proponents as a new bill of rights for the working people of this country. In view of the Republican claim in the last election with respect to discrimination in employment and its pledges for the enactment of fair employment practice controls, I now inquire of the Chairman [of the House Committee on Education and Labor (Fred A. Hartley, Jr.)] if he will accept an amendment incorporating the principles

28. *Id.* at 1058-59.
29. 2 NLRB, *op. cit. supra* note 23, at 1966-69.
30. *Id.* at 2083.
31. *Id.* at 2413.

> of fair employment practices to be added to the so-called bill of rights that the gentleman proclaims his bill to be.[32]

Congressman Hartley answered:

> I will say to the gentleman that as far as that issue is concerned, I am opposed to injecting that argument into this bill.[33]

During the hearings before the House Committee, the American Civil Liberties Union proposed a bill which, among other things, made it an unfair labor practice for a labor union

> to refuse membership to, or to expel, or segregate any person by reason of such person's race, creed, color, sex, national origin, foreign nationality or lack thereof, opinion, or lack of United States citizenship.[34]

Nothing like this was enacted.

C. *Landrum-Griffin Act*

In the House debates Congressman Powell introduced an amendment to Title I of the LMRDA, a title not within the enforcement jurisdiction of the NLRB, providing:

> [N]o labor organization shall discriminate unfairly in its representation of all employees in the negotiation and administration of collective bargaining agreement [*sic*], or refuse membership, segregate or expel any person on the grounds of race, religion, color, sex, or national origin.[35]

Both Congressman Landrum and Senator Griffin opposed the amendment.[36] It was defeated by a teller vote of 215-160.

There was nothing in the debates on Title VII of the act, the amendments to the NLRA, relating to the problem.

III. THE COMPULSIONS ON THE NLRB TO ACT

If this legislative history were all, the Board's assumption of jurisdiction in this area would clearly seem to be improper. But it is not all. The Board is obliged to follow three important doctrines which compel it to play a role here whatever the congressional history may

32. 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 706-07 (1949).
33. *Id.* at 707.
34. 2 NLRB, *op. cit. supra* note 32, at 3635.
35. 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1648 (1959).
36. *Id.* at 1649.

be. These doctrines may be called: the doctrine of neutrality; the *Shelley* doctrine; and the doctrine of fair representation.

A. *Doctrine of Neutrality*

It is clear that the Board cannot avoid remedying discrimination or appeals to bias in situations where it must act to protect other rights established by the act. At the very least the Board must be neutral with respect to racial questions. Take, for example, a case where an employer threatens to replace white employees with Negroes if a union wins a representation election. This is a classic threat of job loss which is plainly a violation of the act.[37] The fact that the employer couched his threat in terms that would appeal to racial bias does not make it any less a violation.

B. *Shelley Doctrine*

It is also clear that the Board, as an agency of the United States, may not in the course of protecting rights created by the act enforce racial discrimination. This much at least can be derived from the Supreme Court's ruling in *Shelley v. Kraemer*.[38]

Shelley held that by virtue of the fourteenth amendment a state court could not enforce a restrictive covenant based on color. Although *Shelley* was primarily based on the equal protection clause, it would certainly apply to federal courts and federal agencies through the due process clause of the fifth amendment.[39]

Shelley is significant for two reasons. First, it held that the state acting through its courts could not enforce discrimination that was clearly private in origin, thus in itself beyond the strictures of the fourteenth amendment. Second, it held that the state could not do this even in the course of enforcing general private rights (the right to contract and the right to dispose of property) not created for the purpose of establishing racial discrimination.

It is dangerous to generalize too far on the basis of *Shelley*. It did not hold that restrictive covenants are state action and thus proscribed by the fourteenth amendment.[40] It is not, therefore, a useful guide for those cases where private discrimination is sought to be proscribed merely because the agency discriminating may be shown to be an

37. See Boyce Machinery Corp., N.L.R.B. Case No. 15-CA-2061, IR-462-62 (mimeo. 1962), *adopted on this point*, 141 N.L.R.B. No. 76 (March 26, 1963). *Cf.* Associated Grocers, Inc., 134 N.L.R.B. 468 (1961).

38. 334 U.S. 1 (1948).

39. Bolling v. Sharpe, 347 U.S. 497 (1954). *Cf.* Hurd v. Hodge, 334 U.S. 24 (1948).

40. See, *e.g.*, Gast v. Gorek, 211 N.Y.S.2d 112 (Sup. Ct. 1961).

agency of the state.[41] *Shelley* simply means that the state cannot *compel* discrimination in certain areas.

Similarly, broader proscriptions than *Shelley* are violated where the assertion of state power is disguised in the form of the protection of general private rights.[42]

Moreover, even in those areas where *Shelley* is relevant, its application must have limits. There is little doubt, for example, that a state can enforce its general trespass laws to exclude uninvited guests from a private parlor even if invitations are based on racial considerations. Setting these limits is not easy. It involves delicate accommodations —in the extreme case a balance of the right of individual privacy against the right to equal treatment. But as the individual right asserted against equal treatment becomes a right to be intolerant within a broader area than home or family, the inability of the state to *compel* such intolerance becomes clearer.[43]

To say that *Shelley* involves difficult problems of application is not to say that it is meaningless.[44] Although it is never easy to spot the precise moment when day ends and night begins, one knows the difference between day and night. To take a closely related problem: there may be some difficulty in determining when the right of privacy appurtenant to residential property should bend to the assertion of first amendment rights;[45] but, there is considerably less difficulty in determining that rights appurtenant to commercial property of a public nature should bend to the assertion of such rights.[46] Similarly, while there may be some difficulty in determining whether a testamentary disposition that violates the constitutional principle of equal treatment is judicially enforceable,[47] there can be no doubt that a

41. See Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). *Cf.* Oliphant v. Locomotive Firemen, 262 F.2d 359 (6th Cir. 1958), *cert. denied,* 359 U.S. 935 (1959); Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

42. See Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960). *Cf.* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

43. The problem was argued in this form to the Supreme Court by counsel for the plaintiff in Griffin v. Maryland, Docket No. 26. 31 U.S.L. WEEK 3160 (1962). This case has been scheduled by the Court for reargument. 31 U.S.L. WEEK 3385 (1963).

44. Compare Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 31 (1959).

45. See Martin v. Struthers, 319 U.S. 141 (1943); Commonwealth v. Richardson, 313 Mass. 632, 48 N.E.2d 678 (1943); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961). Compare Breard v. Alexandria, 341 U.S. 622 (1951); Watchtower Bible and Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948); Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed,* 335 U.S. 875 (1948).

46. See Marsh v. Alabama, 326 U.S. 501 (1946); Amalgamated Clothing Workers v. Wonderland Shopping Center, 50 L.R.R.M. 2160 (Mich. Cir. Ct. 1962). Compare People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied,* 368 U.S. 927 (1961).

47. See *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *appeal dismissed,* 357 U.S. 570 (1958); Mills v. Philadelphia, 52 N.J. Super. 52, 144 A.2d

court may not enforce a provision of a collective bargaining agreement which requires discrimination against Negroes.[48]

Justice Douglas' statement of this principle is unexceptionable:

> A union enters into a collective-bargaining agreement with an employer that allows any employee who is a Republican to be discharged for "just cause." Employers can, of course, hire whom they choose, arranging for an all-Democratic labor force if they desire. But the courts may not be implicated in such a discriminatory scheme. Once the courts put their imprimatur on such a contract, government, speaking through the judicial branch, acts.[49]

Hughes v. Superior Court[50] is not to the contrary. There the Supreme Court allowed a state injunction barring picketing to compel employment of Negroes in proportion to the number of white customers, a practice considered to be inverse racism by the state court.[51] The Supreme Court, however, was careful to point out that the state would not enjoin picketing to prevent discriminatory hiring.[52]

More recently the issue arose in the Court of Claims in *Allen v. United States*.[53] Negro railroad employees sued the United States for salaries they would have earned if discriminatory job classifications had not been in force during a period when the railroad in question was in trusteeship under the supervision of a United States district court. The government's motion for summary judgment was granted. The court gave three reasons: (1) before the trusteeship the plaintiffs could have sued the railroad under the doctrine of fair representation (discussed below); (2) during the trusteeship they could have applied to the judicial trustee for relief under that doctrine; and (3) *Shelley* was not applicable because the "United States did not, through its judicial branch, enforce a discriminatory practice against the

728 (Ch. Div. 1958).

48. See NLRB v. Pacific Am. Shipowners Ass'n, 218 F.2d 913, 917 n.3 (9th Cir. 1955); International Ass'n of Machinists v. Street, 367 U.S. 740, 777 n.3 (1961) (Douglas, J., concurring). Black v. Cutter Labs., 351 U.S. 292 (1956), permitting enforcement of a collective bargaining agreement discriminating against Communists, is not to the contrary. The government may single out Communists for special regulation. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961). See also Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), where Mr. Justice Goldberg, speaking for the Court, refers to cases dealing with legislative investigation of communism in the following language: "It is apparent that the necessary preponderating governmental interest and, in fact, the very result in those cases was founded on the holding that the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is *itself* a permissible subject of regulation and legislative scrutiny." *Id.* at 547. (Footnotes omitted.)

49. Black v. Cutter Labs., *supra* note 48, at 302 (dissenting opinion).

50. 339 U.S. 460 (1950).

51. Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948).

52. 339 U.S. at 466.

53. 173 F. Supp. 358 (Ct. Cl.), *cert. denied*, 361 U.S. 882 (1959).

plaintiffs."[54] The clear implication was that *Shelley* would apply if the United States *did* enforce a discriminatory practice against the plaintiffs. The court said:

> The [*Shelley*] doctrine . . . is that the States and the Federal Government, through their judicial branches, will not become *particeps* to a racial discrimination, by judicially enforcing a discriminatory agreement between private persons.[55]

United Transport Service Employees v. National Mediation Board[56] adds another twist to the problem. There the plaintiffs attempted to set aside a craft determination by the Mediation Board relegating Negroes to a unit represented by a union that denied them membership. The court dismissed the action but took pains to say:

> While the action of the Board in its craft . . . determination may be treated as governmental action . . . such determination . . . could have . . . no effect to alter the collective bargaining arrangements of the individual plaintiffs.[57]

Translated, this means that as long as the plaintiffs could require the bargaining agent to deal with them fairly under the doctrine of fair representation, the action of the Board did not violate the *Shelley* principle.

United Transport raises the perplexing question whether *Shelley* must be applied one step back. That is, if a union consistently enforced a discriminatory practice in its capacity as bargaining agent, must the NLRB under *Shelley* withhold from the union its certification,[58] which is its government-given warrant to act?[59] Going back still one step further, must the NLRB under *Shelley* withhold certification from a union which has discriminatory membership policies? In some situations a local's very existence is posited on its certification as bargaining representative for the employees of a particular employer. In virtually every situation discriminatory membership policies tend to promote the existence of discriminatory practices.

Whatever the answer to these questions, it is clear that the *Shelley*

54. 173 F. Supp. at 360.
55. *Ibid.*
56. 179 F.2d 446 (D.C. Cir. 1949).
57. 179 F.2d at 453.
58. See Association for the Preservation of Freedom of Choice, Inc. v. Shapiro, 9 N.Y.2d 376, 174 N.E.2d 487, 214 N.Y.S.2d 388 (1961).
59. Although a union may legally be recognized as bargaining representative even without a certification if it represents a majority of the employees, *cf.* International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961) (certification enhances its position). See 29 U.S.C. § 158(b)(4)(B), (C) and (D); 29 U.S.C. § 159(c)(3); 29 U.S.C. § 159(e)(2) (1958); Brooks v. NLRB, 348 U.S. 96 (1954); NLRB v. Porter County Co-op, 314 F.2d 133 (7th Cir. 1963).

principle must be taken into account in evaluating the actions of the Board in the area of racial discrimination.

C. *Doctrine of Fair Representation*

There is one further principle which must be recognized in any such evaluation: the principle of fair representation. This doctrine has roots in the common law as well as in the public policy expressed by the Taft-Hartley Act[60] and more recently by Titles I-VI of Landrum-Griffin. Its core principle is that a certified bargaining agent may not enter into a collective bargaining contract which discriminates unreasonably against any group or individual.[61] It has recently been held to bar the discriminatory administration of a contract as well.[62] While the outer limits of the doctrine may be fuzzy, it is nonetheless clear that racial discrimination is considered unreasonable and is, therefore, subtended by it.[63]

On the face of it, the existence of the fair representation doctrine would seem to dispose of the need for further concern in this area. Fair representation is, however, fatally defective in at least two respects. First, much racial discrimination is accomplished by discriminating on the basis of seniority or training, areas in which Negroes because of past discrimination do not rank high. This is extremely difficult to attack because of the wide range of reasonable discriminatory determinations the bargaining agent is permitted to make. In *Ford Motor Co. v. Huffman*,[64] referring to the doctrine of fair representation, the Supreme Court said:

> A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[65]

In a recent run of cases the courts have denied relief for alleged racial discrimination largely on this ground.[66] The second defect of

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

61. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Syres v. Oil Workers, 350 U.S. 892, *reversing per curiam* 223 F.2d 739 (5th Cir. 1955). It may also apply to groups outside the certification unit if they are barred from it because of race. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

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

63. Cox, *supra* note 60, at 167.

64. 345 U.S. 330 (1953).

65. 345 U.S. at 338. See Administrative Ruling of NLRB General Counsel, Case No. SR-2073, 51 L.R.R.M. 1026 (July 19, 1962).

66. Whitfield v. United Steelworkers of America, Local 2708, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); Washington v. Central of Ga. Ry., 174 F. Supp. 33 (M.D. Ga. 1958), *aff'd sub nom.* Marshall v. Central of Ga. Ry., 268 F.2d 445 (5th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960); Marshall v. Central of Ga. Ry., 147 F. Supp. 855 (S.D. Ga. 1956). *But see* Mitchell v. Gulf, M. & O.R.R., 91 F. Supp. 175 (N.D. Ala 1950), *modified*, 190 F.2d 308 (1951).

the fair representation doctrine is that this avenue is too risky an expense for any individual worker. As noted, discrimination may be hard to prove. In addition, until recently, the only forums for individual relief under this doctrine were federal or state courts, where costs of litigation are usually prohibitive. There a worker does not have available to him *gratis,* as he might have in an unfair labor practice case,[67] the investigatory and trial facilities of a government agency.

Going beyond theory, in a joint study completed fifteen years after the doctrine of fair representation was born, the New York State Commission Against Discrimination and the New Jersey Division Against Discrimination concluded that, despite some gains "the historic assignment of Negro workers to menial tasks in the railroad industry [where fair representation had first been applied[68]] continues to be a fact."[69]

IV. NLRB-FEPC?

Thus while it is clear that Congress never intended the NLRB to be an FEPC, it is also clear that the NLRB must occasionally act like one when the doctrines of neutrality, *Shelley v. Kraemer,* or fair representation demand it. Does the Board's recently renewed interest in the area of equal employment opportunity reflect a proper application of these conflicting considerations?

A. *Decertification*

The legitimacy and the efficacy of decertification are two distinct questions. With regard to its efficacy the General Counsel of the NAACP Legal Defense Fund once said that it is a "technique of dubious worth against discrimination."[70] Professor, now Solicitor General, Archibald Cox has pointed out some of the reasons for this as follows:

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67. See note 17 *supra* and accompanying text.

68. See cases cited in note 61 *supra.*

69. N.Y. STATE COMM'N AGAINST DISCRIMINATION & N.J. DIV. AGAINST DISCRIMINATION, RAILROAD EMPLOYMENT IN NEW YORK AND NEW JERSEY 19 (1957).

One other "negative" aspect of the doctrine of fair representation needs mentioning. Without the doctrine, the imperative for creating an enforceable right to union membership would have been weighty, particularly since at the time the fair representation cases were first decided the closed shop was legal. It is interesting in this connection that Betts v. Easley, *supra* note 41, decided when the doctrine was still young and when the closed shop was still legal, created a "right" to union membership. The *Oliphant* case, *supra* note 41, decided in 1958, found no such right.

70. GREENBERG, RACE RELATIONS AND AMERICAN LAW 182 (1959).

> [I]t would have no practical value in situations in which the incumbent union had never been certified or was able to negotiate discriminatory or oppressive contracts by virtue of the employer's cooperation or its own economic power.[71]

Also, decertification is meaningless where discriminatory practices existed before the union arrived on the scene, a common situation in many southern plants.

On the other hand, the threat of decertification can be extremely effective as a tool to convince employees that they have more to lose by continuing discriminatory practices which favor them than by discontinuing such practices.[72] To be an effective threat, however, a remedy must be credible. Since until recently decertification was often threatened but never used, its efficacy was greatly impaired. The Board had come close to using it only twice. In *Hughes Tool Co.*[73] the Board warned the incumbent union that if it did not cease its discriminatory bargaining practices its certification would be rescinded. In *Larus & Brother Co.*[74] the Board was about to rescind the incumbent's certification when the incumbent voluntarily relinquished it. Only recently has a trial examiner of the Board actually utilized decertification.[75] This case involved the same local as in *Hughes Tool Co.* and came some ten years after the original warning.

Passing the question of efficacy, is decertification legitimate? The early Board cases threatening decertification based their dicta upon the doctrine of fair representation.[76] In *Pacific Maritime Association*,[77] for example, the Board said:

> [T]he Board will police its certification of a statutory bargaining agent to see to it that it represents equally all employees in the bargaining unit

71. Cox, *supra* note 60, at 175.

72. In the light of George Meaney's testimony that union discriminatory practices derive from rank and file prejudice, Equal Employment Opportunity, *Hearings Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 87th Cong., 2d Sess. 1006 (1962), this seems to be the ultimate rationale for the efficacy of decertification.

73. 104 N.L.R.B. 318 (1953).

74. 62 N.L.R.B. 1075 (1945).

75. Hughes Tool Co., IR-93-63, *Racial Units Within Union Held Unlawful*, 52 LAB. REL. REP. 247 (1963).

76. Pacific Maritime Ass'n, 110 N.L.R.B. 1647, 1648 (1954); Andrews Indus., Inc., 105 N.L.R.B. 946, 949 (1953); Hughes Tool Co., 104 N.L.R.B. 318, 322 (1953); Coleman Co., 101 N.L.R.B. 120, 122 (1952); Veneer Prods., Inc., 81 N.L.R.B. 492, 494 (1949); Wichita Falls Foundry & Mach. Co., 69 N.L.R.B. 458, 460 (1946); Larus & Brother Co., 62 N.L.R.B. 1075, 1084-85 (1945); Atlanta Oak Flooring Co., 62 N.L.R.B. 973 (1945); General Motors Corp., 62 N.L.R.B. 427, 431 (1945); Southwestern Portland Cement Co., 61 N.L.R.B. 1217, 1219 (1945); Carter Mfg. Co., 59 N.L.R.B. 804, 806 (1944).

77. 110 N.L.R.B. 1647 (1954).

> regardless of race, color, or creed. Should the certified bargaining agent fail to do so, the Board may revoke its certification.[78]

More recently the Board has given reason to believe that it may use the *Shelley* rationale to justify the threat of decertification in the future.[79] To the extent that certification by the Board may be said to represent a continuing enforcement of discriminatory practices, the *Shelley* rationale is applicable. In terms of *Shelley*, there is no relevant difference between refusal to certify in the first instance and rescission of an existing certification, any more than there would be a relevant difference between not issuing a permanent equitable order to enforce a restrictive convenant and revoking such an order. The difficulty with the application of the *Shelley* rationale lies in a determination of whether certification is in fact an enforcement of discrimination. Where a union engages in isolated discriminatory practices or condones discriminatory practices instituted by an employer, certification hardly seems to be an *enforcement* of racial discrimination. A certification exists in the ordinary case to protect and enforce many rights other than the union's "right" to discriminate. Where, however, the discriminatory practice pervades the entire relationship between the employer and the union and is negotiated by the union—as is the case, for example, when there is a contractual establishment of separate seniority lines for Negro and white employees—it seems inescapable that the *Shelley* doctrine ought to apply.[80]

But in those cases where *Shelley* does not apply, decertification based solely upon the doctrine of fair representation seems unjustified. The act provides that the majority representatives *"shall* be the exclusive representatives of all the employees."[81] When the Board conducts an election it *"shall* certify the results thereof."[82] There is no discretion in the Board to grant or to deny certification to a majority representative. It can be argued that this reading of the statute obviates the Board's long standing practice of setting aside elections where one side destroys the "laboratory conditions" test,[83] and that here, as in that case, reasonable limitations must be imposed on the

78. *Id.* at 1648.

79. Pioneer Bus Co., 140 N.L.R.B. No. 18, n.3 and accompanying text (Dec. 10, 1962).

80. The fact that unions may achieve bargaining rights without certification, see note 59 *supra,* does not affect this. Whatever assistance that certification gives the union in enforcing its bargaining rights is governmental assistance, thus implicating *Shelley.*

81. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1958). (Emphasis added.)

82. 61 Stat. 144 (1947), as amended, 29 U.S.C. § 159(c)(1) (1958). (Emphasis added.)

83. General Shoe Corp., 77 N.L.R.B. 124 (1948).

mandatory language of the statute. But the crux of the "laboratory conditions" test is that an election which does not satisfy such conditions fails to represent the "uninhibited desires of the employees."[84] To put it another way, such an election does not truly represent the desires of a majority of the employees. But where a majority of employees have expressed in a Board-conducted election their "uninhibited desires" to be represented by a particular union, the Board "shall" certify the union. There are instances where certification may be disregarded because the certified bargaining agent no longer represents a valid majority.[85] But these are the exceptions that prove the rule. Only an attack on the bargaining agent's majority can affect its certification. Moreover, even in such cases there is no authority in the Board to revoke the certification except under the provisions of section 9(c)(1)(A)(ii) of the act,[86] which provide for an election to indicate the lack of majority standing of the certified union.

Thus it seems fair to say that nothing short of constitutional limits, like those of *Shelley*, can whittle down the mandatory language regarding certification of a valid majority representative.

The legislative history of the act is clear that the majority representative's status as exclusive representative was to be unaffected by its attitude or actions toward racial discrimination. The fair representation cases themselves were decided on the theory that since minorities could not escape representation by a discriminatory majority representative, the discriminatory practices had to be dealt with directly.[87] The doctrine was invented because there was thought to be no other way to protect minority rights.[88] The very existence

84. *Id.* at 127.

85. See, *e.g.*, NLRB v. Porter County Co-op, *supra* note 59. The certified union's lack of majority standing may be raised by an employer's refusal to bargain or by a petition filed by another union claiming itself to be the majority representative. The kinds of showings that have to be made by the rival union or by the employer and the times at which these showings may be made involve complex questions which are beyond the scope of this paper. In any event, it is still true that the effects of a prior certification are dissipated only upon a showing that the certified union is not the majority representative.

86. 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1)(A)(ii) (1958). This has been said to be "the exclusive means by which decertification of a bargaining representative might be accomplished. . . ." Minkoff v. Scranton Frocks, Inc., 181 F. Supp. 542, 546 (S.D.N.Y.), *aff'd*, 279 F.2d 115 (2d Cir. 1960). In another series of cases the courts refused to permit the Board to withhold the benefits of the act from a majority union which stood in violation of the provisions of old sections 9(f), (g) or (h) of the act, Labor Management Relations Act, 1947, ch. 120, §§ 9(f)-(h), 61 Stat. 145-46 (1947), the non-communist oath provisions, since repealed, 73 Stat. 525 (1959), except to the extent explicitly provided by the act. See UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956); NLRB v. District 50, UMW, 355 U.S. 453 (1958). *Cf.* Leedom v. International Union of Mine Workers, 352 U.S. 145 (1956).

87. See cases collected in notes 61 and 62 *supra*.

88. See Steele v. Louisville & N.R.R., 323 U.S. 192, 207 (1944). See also Brother-

of this judicial remedy to force upon the bargaining agent its duty of fair representation weakens the logic of a decertification remedy even more.[89]

Of course if *Shelley* demands decertification, and in the case of pervasive discriminatory practices by the bargaining agent it would seem to, the practical result would not be much different from that reached if the Board's rationale for decertification[90] were sound. *Shelley* might well demand decertification as a constitutional matter even in cases where under the Board's rationale decertification would be improper. Consider, for example, the situation where a local union does not admit Negroes to membership. In *Bethlehem-Alameda Shipyard, Inc.*[91] the Board said:

> We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race.[92]

But this was keyed to the effect of such discrimination in a closed shop, then legal. Its "grave doubt" was based on the fear that:

> If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership.[93]

After the closed shop had been barred by the Taft-Hartley Act, the Board unequivocally deemed discriminatory admission practices

hood of Railroad Trainmen v. Howard, 343 U.S. 768, 774 (1952). Wallace Corp. v. NLRB, 323 U.S. 248 (1944), is not to the contrary; in that case decertification and disestablishment, ordered because the bargaining agent was found to be a company-dominated union, was required by National Labor Relations Act (Wagner Act) § 8(a)(2), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(2) (1958). While *Steele* and *Howard* were decided under the Railway Labor Act, 48 Stat. 1185 (1926), 45 U.S.C. §§ 151-58 (1958), Syres v. Oil Workers, *supra* note 61, has applied them in the context of the National Labor Relations Act.

89. The Board may now also enforce this duty. See Miranda Fuel Co., 140 N.L.R.B. No. 18 (Dec. 10, 1962). The fact that the Board will disestablish company dominated unions, even though it may also remedy their existence by a cease and desist order, does not invalidate the point. Disestablishment is ordered because, among other things, there is no other effective way to remedy the violation of National Labor Relation Act § 8(a)(2), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(2) (1958), which is raised by the very existence of a company dominated union. See Carpenter Steel Co., 76 N.L.R.B. 670 (1948).

90. See text accompanying note 77 *supra*.

91. 53 N.L.R.B. 999 (1943).

92. *Id.* at 1016. (Footnotes omitted.) See also Carter Mfg. Co., 59 N.L.R.B. 804 (1944).

93. 53 N.L.R.B. at 1016.

insufficient to justify decertification. In *Pacific Maritime Ass'n*[94] the Board even refused to hear evidence of discriminatory admission policies.[95] Following the fair representation rationale this conclusion is inescapable. Discrimination in terms of employment must be shown. But the distinction between discrimination in employment and discrimination in union membership makes very little sense under a constitutional rationale. Any time a government agency compels discrimination it must be judged in terms of *Shelley*. For example, in many cases a local is created solely for the members of one shop. In such a case if recognition is by virtue of certification, the certification is the very source of the local's existence and the government becomes heavily implicated in the enforcement of any discriminatory practices by it, *including* discriminatory membership practices.

The case of segregated locals also illustrates the difference between the constitutional and the fair representation approaches. The Board has held, under the fair representation doctrine, that the existence of segregated locals per se was not grounds for decertification.[96] It would only be such where the existence of the locals was a tool to promote discriminatory job practices.[97] Yet if one were to apply the *Shelley* approach, the certification of segregated locals to bargain jointly for one unit, even in the absence of a showing of job discrimination, would hardly seem in keeping with recent decisions arising under the fifth and fourteenth amendments.[98]

B. *Removal of Contract Bar*

In order to stabilize industrial relations, the Board has erected an additional protection, not specifically created by the act, for the bargaining agent; this is the doctrine known as "contract bar." This doctrine holds that once a collective bargaining agreement has been signed with the incumbent union another union cannot petition to

94. *Supra* note 76.

95. In this connection the effect of the first proviso to paragraph 8(b)(1) of the Taft-Hartley Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1) (1958), cannot be overlooked: "[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."

96. Larus & Bro. Co., 62 N.L.R.B. 1075, 1083 (1945).

97. *Ibid.*

98. See note 79 *supra*. Holding segregated locals illegal may cut both ways on the problem of discrimination. For example, it might be easier for Negroes to obtain equal opportunities when their bargaining representative is Negro and has their interests primarily in mind than it would be when the bargaining representative speaks for a majority of white employees. The Negro complainants in Andrews Indus., Inc., *supra* note 76, realized this. Their complaint was that they were to be included in a unit dominated by the majority of white employees. The Board refused to set aside a certification based on this unit but promised to do so if it were later shown that the representatives were not living up to their duty of fair representation.

represent the employees until the expiration of a reasonable time, now held to be three years.[99]

Under classic theory, the Board has not permitted a contract to be a bar where it was based on an inappropriate unit.[100] Since race is obviously not an appropriate consideration for unit determination,[101] a contract based on a unit so determined cannot be a bar.[102] This follows quite legitimately from the doctrine of neutrality previously discussed. But can a contract be removed as a bar solely because the union has violated its duty of fair representation? The Board seems to have assumed from the outset that the answer would be yes,[103] but it has never so held despite the fact that the statutory argument against such a holding is weaker than that against decertification. What the Board in its discretion has given, the Board under reasonable rules may be able to take away. In one of its recent decisions,[104] however, a discriminatory contract was removed as a bar on constitutional grounds and not under the fair representation doctrine. The Board said:

> Consistent with clear court decisions in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory, the Board will not permit its contract bar rules to be utilized to shield contracts such as those here involved from the challenge of otherwise appropriate election petitions.[105]

Why the Board felt obliged to refer to constitutional cases rather than to the duty of fair representation as it has in decertification cases is not clear. The *Shelley* rationale is not substantially more persuasive here than it is in the case of decertification. A certification absolutely blocks a new election for a period of one year from its date and effectively blocks one for an even longer period.[106] The contract bar rule blocks a new election for a period of three years from the signing of the contract.[107] Perhaps this is an indication that

99. General Cable Corp., 139 N.L.R.B. No. 111 (Nov. 19, 1962).

100. See, *e.g.*, American Bldg. Maintenance Co., 126 N.L.R.B. 185 (1960).

101. U.S. Bedding Co., 52 N.L.R.B. 382 (1943); Tampa, Fla. Brewery, Inc., 42 N.L.R.B. 642 (1942); Southern Wood Preserving Co., 37 N.L.R.B. 25 (1941); Aetna Iron & Steel Co., 35 N.L.R.B. 136 (1941); Georgia Power Co., 32 N.L.R.B. 692 (1941); Crescent Bed Co., 29 N.L.R.B. 34 (1941); Floyd A. Fridell, 11 N.L.R.B. 249 (1939); Union Envelope Co., 10 N.L.R.B. 1147 (1939); American Tobacco Co., 9 N.L.R.B. 579 (1938). *But see* NLRB v. Carlisle Lumber Co., 94 F.2d 138 (9th Cir. 1937), *cert. denied*, 304 U.S. 575 (1938).

102. Columbian Iron Works, 52 N.L.R.B. 370 (1943); Crescent Bed Co., *supra* note 101.

103. Chesapeake-Camp Corp., 57 N.L.R.B. 1784 (1944).

104. Pioneer Bus Co., 140 N.L.R.B. No. 18 (Dec. 10, 1962).

105. *Ibid.*

106. See anthorities collected in note 59 *supra*.

107. General Cable Corp., *supra* note 99.

the Board will turn to a constitutional rationale in its decertification cases as well.

C. *Setting Elections Aside*

The third remedy, derived from early precedent and newly sharpened by the NLRB, is the setting aside of representation elections if either side has made an exacerbated appeal to racial prejudice. Thus the Board in *Sewell Manufacturing Co.*[108] said, "The Board does not intend to tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election."[109] So saying, the Board set aside an election in which a Georgia employer located in a small rural town had engaged in a far-from-subtle campaign to buy votes by appealing to racial prejudice. Before the election, wide use was made of the fundamentalist-segregationist publication, *Militant Truth,* which carried such measured comments as:

> TOP UNION LEADERSHIP has consistently followed the socialist-communist propaganda line, actively promoting every red, radical, leftist, social, economic and political scheme from racial integration to unlimited public squandering.

Among other things, a picture of the IUE's James Carey dancing with a Negro woman was distributed to employees. Support by labor for the NAACP was heavily played up. Copies of the Daily Worker giving front page coverage to Martin Luther King and the Albany Movement were circulated. The Board pointed out that all of this was done "to exacerbate racial prejudice and to create an emotional atmosphere of hostility to the Petitioner."[110] It "so inflamed and tainted the atmosphere in which the election was held," said the Board, "that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility."[111]

Despite the fact that *Sewell* involved propaganda which was almost entirely of racial content, the decision is a good example of the doctrine of neutrality. Although *Sewell* must affect to some extent the amount of overt aid to civil rights causes which unions organizing in the South may safely give, including the elimination of discriminatory practices in employment situations they control, its primary effect is to insure rights of self-organization rather than rights to equal employment opportunity. The problem at which *Sewell* struck

108. 138 N.L.R.B. No. 12 (Aug. 9, 1962).
109. *Ibid.*
110. *Ibid.*
111. *Ibid.*

was summarized as follows in the recent report of the Pucinski Committee:[112] "[U]nfortunately there is a widespread use of 'race hate' material against union organization drives when the unions are on record as ending compelled segregation."[113]

Moreover, the Board's opinion, instead of emphasizing the peculiar evil of such appeals to racial prejudice and the inhibiting effect they have on assertive civil rights activities by labor, appealed to neutral principles which have been applied by the Board in a number of situations stemming from a decision handed down *after* the passage of the Taft-Hartley Act. In *General Shoe Corp.*,[114] decided in 1948, the Board laid down the following rule for representation proceedings:

> Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.[115]
>
> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees . . . . When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.[116]

In *Sewell* the Board made it clear that it was this rule, and this rule only, that was being applied:

> [T]he Board . . . oversees the propaganda activities of the participants in the election to insure that the voters have the opportunity of exercising a reasoned, untrammeled choice for or against labor organizations seeking representation rights. The Board has said in election proceedings it seeks "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." Where for any reason the standard falls too low the Board will set aside the election and direct a new one . . . .
>
> Our function . . . is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.[117]

Although the *General Shoe* standard may have been relaxed somewhat—"the rare extreme case" is transformed into "[when] for any

112. STAFF OF HOUSE SUBCOMM. ON NLRB, 87TH CONG., 1ST SESS., REPORT ON ADMINISTRATION OF THE LMRA BY THE NLRB (Comm. Print 1961).

113. *Id.* at 53. For the view that this is a neutral factor in southern organizing see Marshall, *Union Racial Problems in the South*, 1 INDUSTRIAL RELATIONS 117 (May 1962).

114. 77 N.L.R.B. 124 (1948).

115. *Id.* at 126.

116. *Id.* at 127.

117. 138 N.L.R.B. No. 12 (Aug. 9, 1962). (Footnotes omitted.)

reason the standard falls too low"—the standard applied is still a generalized one which is applicable to all cases, not merely those involving appeals to racial prejudice. By taking this "neutral" approach to racial appeals there may be some doubt as to whether *Sewell* effectively meets the dilemma of southern organizing as posed by the Pucinski Committee.[118] On the same day *Sewell* was handed down the Board decided *Allen-Morrison Sign Co.*,[119] in which it refused to set aside an election despite an obvious appeal to racial prejudice. The Board said:

> The Employer's . . . letter was temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation. The excerpt from Militant Truth concerned [civil rights] action taken by the Union . . . in a nearby city. We are not able to say that the employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters, and we therefore decline to set the election aside.[120]

In addition, in *Sewell* itself the Board quite clearly indicated that it was not departing from prior precedent upholding elections where the appeal to racial prejudice was not as exacerbated as it was there.[121] What was this prior precedent?

In *Sharnay Hosiery Mills, Inc.*,[122] the employer distributed before the election letters describing the petitioning union's antidiscrimination policies. The Board said:

> The issue before us is a narrow one. The Petitioner concedes that there were no threats or promises, and it is not suggested that the Employer misrepresented the Petitioner's position. We are asked, rather, to hold that the mere mention of the racial issue, in an election campaign, is *per se* improper and grounds for setting aside any and all elections where such might occur.
>
> We have not, in the past, attempted so to limit campaigning, but have relied on the good sense of the voters to evaluate the statements of the parties. We are satisfied that this is the better course, and adhere to it in this case.[123]

In *Mead-Atlanta Paper Co.*[124] the employer made statements to his Negro employees that in some organized plants there was a lower proportion of Negro to white workers than in his plant. This inverse racism was held not enough to invalidate the election.

118. Note 113 *supra* and accompanying text.
119. 138 N.L.R.B. No. 11 (Aug. 9, 1962).
120. *Ibid.*
121. Sewell Mfg. Co., *supra* note 108.
122. 120 N.L.R.B. 750 (1958).
123. *Id.* at 751.
124. 120 N.L.R.B. 832 (1958).

In *Chock Full O'Nuts*[125]

> the Regional Director found . . . that the evidence established that Robinson [a Negro supervisor], from the early Spring of 1957 until within a few days of the election, frequently stated to Negro employees that "he was the reason for the Union," that "some of the employees didn't want to be represented by me because of my race," and that the "white employees were jealous of my position with the Company."[126]

On the basis of *Sharnay* the election was sustained.

In *Paula Shoe Co.*[127]

> the Employer objected to a statement at the bottom of the Petitioner's handbill . . . "If you want to avoid that the Jew Sandler continue to mistreat you, vote for UTM," as designed to incite racial and religious prejudice against its plant manager and thus impair a free choice by the employees in the election . . . . The Board has previously indicated that while it does not condone appeals to prejudice, the mere mention of a racial or religious issue is not grounds for setting aside an election.[128]

In *Kay Manufacturing Corp.*[129]

> immediately before the election an International Representative of the Petitioner during a visit to the home of an employee to discuss the merits of unionization, stated that he had been told by the plant manager that "Negroes in the South were too afraid of their jobs and that the white trash was too stupid to vote for the union."[130]

The results of the election were certified.

If this were all, the Board's standard in this area would be fairly clear. Anything short of the massive kind of campaign on the race issue waged in *Sewell* would not be held to disturb the laboratory conditions requisite to a fair election. But, following this standard, little sense can be made of another recent case in this area, *Heintz Division, Kelsey-Hayes Co.*[131] A close analysis of that case reveals quite clearly that the Board is concerned about more than the maintenance of laboratory conditions when the racial issue is raised. In *Heintz* there were two petitioning unions, an unaffiliated local and a UAW-CIO local. During the campaign the unaffiliated local hired three white men and five Negroes to distribute handbills which read, simply, "Vote UAW-CIO—July 14, 1959." The purpose was clear.

125. 120 N.L.R.B. 1296 (1958).
126. *Id.* at 1298.
127. 121 N.L.R.B. 673 (1958).
128. *Id.* at 675-76.
129. 121 N.L.R.B. 1077 (1958).
130. *Id.* at 1078-79.
131. 126 N.L.R.B. 151 (1960).

This was an attempt to dramatize the UAW's position on civil rights and to use it to appeal to racial prejudice. The effect of the incident was certainly no greater than the effect of the statements in the *Allen-Morrison* case.[132] No one argued that the UAW was not against discrimination or segregation or that the handbills contained any incorrect information. But the Board threw out the election. It said:

> [I]n cases of fraud or trickery where the employees involved are deprived of their ability to recognize propaganda for what it is and thus are deprived for [sic] their ability to evaluate properly the propaganda, we have set elections aside. In our opinion the campaign tactics here employed . . . are equally pernicious. Such deception, because of the many imponderables involved in the selection of a bargaining representative, is fraught with the possibility of misleading and misdirecting the interests and desires of voters in many ways. . . . [T]o insure that our elections are conducted under proper laboratory conditions, we hold that the failure of parties in Board elections to identify themselves as sponsors of campaign propaganda initiated by them constitutes grounds for setting aside election.[133]

How this case was more likely to disturb proper laboratory conditions than *Chock Full O'Nuts, Paula Shoe, Kay Manufacturing,* or *Allen-Morrison* is hard to understand.

In *Heintz* the Board relied on three cases for its holding that "deception" justified setting aside this election: *United Aircraft Corp.*,[134] *Sylvania Electric Products, Inc.*,[135] and *Chillicothe Paper Co.*[136] Not one of them was really apposite.

In *United Aircraft* a forged telegram was circulated which purported to be from the IAM, the union which lost the election, to the UAW, the union winning it. The telegram lauded the UAW for its efforts in expelling communists from its ranks and mentioned various strikes in which the IAM had been engaged. In *Sylvania* a forged letter was circulated which purported to be from the organizer for the UE which insulted the men in the plant and which said that the organizer had to go "overboard" in his promises to them. In *Chillicothe Paper* a forged letter purporting to be from the petitioning union was circulated. It said that if the union came in, the work week would be reduced to give others work, that union assessments would be based on a percentage of wages, that a notorious character would represent the union in the area, and that the employees would be trained for picket duty.

In each of these cases the deception was clear. In *United Aircraft*

132. Allen-Morrison Sign Co., *supra* note 119.
133. Heintz Div., Kelsey-Hayes Co., *supra* note 131, at 153.
134. 103 N.L.R.R. 102 (1953), miscited by the Board in *Heintz.*
135. 119 N.L.R.B. 824 (1957).
136. 119 N.L.R.B. 1263 (1958).

the laudatory remarks were false in the sense that they would not have come from their purported maker, at least under these circumstances. There was also a deception in having it seem that such remarks were purposely kept from the voters, since the voters were receiving quite different information from the purported maker concerning the UAW. In *Sylvania* again the insulting remarks were implicitly false, and the organizer's purported attempt to hide his true feelings from the employees was also false. In *Chillicothe Paper* the statements were explicitly false.

In *Heintz* there was nothing untrue about the UAW's implied position on civil rights. Nor was there anything done to indicate that the UAW was attempting to hide its position from the voters. Negroes were distributing the leaflets openly. The facts here are virtually indistinguishable from those in *Allen-Morrison,* except that here the statement regarding the union's position on civil rights was dramatized, but in a rather matter-of-fact way. Yet here the Board set the election aside. Recognizing that this case was different from *United Aircraft, Sylvania,* and *Chillicothe Paper,* the Board relied on a theory that was neither needed nor used in those cases. The Board in *Heintz* leaned heavily on the fact that the unaffiliated local had failed to identify itself as the sponsor of the innocuous leaflet involved. The Board said:

> [T]o insure that our elections are conducted under proper laboratory conditions, we hold that the failure of parties in Board elections to identify themselves as sponsors of campaign propaganda initiated by them constitutes grounds for setting aside the election.[137]

There are at least two reasons why the Board had to introduce this extra factor, why it would not have been enough to say that when votes are bought by a clear appeal to racial prejudice the Board ought not enforce the results, a position which the Board in *Heintz* was straining to reach. One is derived from the statutory scheme, discussed above, which severely circumscribes the Board's discretion in election cases, absent a question concerning the valid majority standing of the winning union. The other is derived from the first amendment to the Constitution which would seem to apply to governmental control of speech in this area.

The crowning irony of *Heintz* is that in seeking to escape the free speech question by relying on the unaffiliated union's failure to label its propaganda, the Board created an additional free speech problem. Just a year before *Heintz* was decided, in *Talley v. California,*[138] the Supreme Court held that a local ordinance requiring

137. 126 N.L.R.B. at 153.
138. 362 U.S. 60 (1960).

the source of a handbill to be printed on it was an infringement on free speech. In *Talley* the Court did expressly refrain from passing on an ordinance directed at fraudulent handbills. But there was nothing in the handbill in *Heintz* or in the circumstances in which it was handed out, other than the lack of identification, protected by *Talley*, that was fraudulent. Passing the transparency of the Board's rationale in *Heintz*, what are the free speech limitations on the Board in election cases?

To begin with, whatever limitations there may be are constitutional rather than statutory; that is, section 8(c) of the act,[139] the so-called free speech section, does not apply here. Section 8(c) provides:

> The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

By its terms section 8(c) applies ouly to unfair labor practice cases. In *Metropolitan Life Insurance Co.*,[140] the Board said:

> Section 8(c) does not . . . prevent the Board from finding in a *representation* case that an expression of views, whether or not protected by Section 8(c), has, in fact, interfered with the employees' freedom of choice in an election, so as to require that an election be set aside.[141]

For a while it seemed that the Board might abandon the section 8(c) rule of *Metropolitan*;[142] but the Board never said that it would. Contrariwise, it has recently indicated that it intends to adhere to it. In *National Caterers, Inc.*,[143] the Board, in a footnote, said:

> We find no merit in the Employer's contention that such a finding [that his action interfered with employee free choice in an election] is contrary to the rights of free speech guaranteed employers in the Act. We have held that the Act does not prevent the Board from holding in a representation case that expression of views, whether or not protected by Section 8(c), can be a basis for upsetting an election. See *Metropolitan Life Insurance Company* . . . .[144]

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139. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (Supp. II, 1960).

140. 90 N.L.R.B. 935 (1950), *overruled on a different point* in National Furniture Mfg. Co., 106 N.L.R.B. 1300 (1953).

141. 90 N.L.R.B. at 938.

142. *E.g.*, Crown Drug Co., 110 N.L.R.B. 845 (1954); Lux Clock Mfg. Co., 113 N.L.R.B. 1194 (1955).

143. 125 N.L.R.B. 110 (1959).

144. *Id.* at 113 n.4.

Beside the fact that the words of section 8(c) themselves dictate this result, it is also consistent with the section's legislative history. Congress, in enacting section 8(c), was primarily interested in cases in which the Board had used non-coercive speech as evidence of an unfair labor practice. The House Conference Report on the act explained:

> The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.[145]

Typically, in an area where discretion had allegedly been abused, Congress stepped in not to define the lines of discretion more sharply but to eliminate it altogether.

An argument can be made that Congress used the words "unfair labor practice" in section 8(c) to mean, generically, all remedies under the act. If section 8(c) is no more than a restatement of the first amendment this is a reasonable argument. The first amendment is as concerned with indirect restraints on speech as with direct restraints.[146] If, on the other hand, Congress had in mind something other than the incorporation of the first amendment, one who takes the position that section 8(c) applies to something more than unfair labor practices has very little on his side.

That Congress meant merely to incorporate the first amendment into Taft-Hartley seems unlikely. An amendment proposed by Senator McClellan to do just that[147] was eventually dropped, as had been a similar proposed amendment to the Wagner Act. That Congress intended to give broader coverage than the first amendment provides seems more tenable. To have merely enacted the first amendment would have been unnecessary. As the House Report on the Wagner Act said, commenting on a provision guaranteeing that "Nothing in this Act shall abridge the freedom of speech, or of the press, as guaranteed in the first amendment to the Constitution,"[148]

> [This] amendment [has] . . . no proper place in the bill. There is no reason why the Congress should single out this provision of the Constitution for

145. 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 549 (1949) [hereinafter cited as LEGISLATIVE HISTORY].

146. *Cf.* Speiser v. Randall, 357 U.S. 513 (1958).

147. 2 LEGISLATIVE HISTORY, *op. cit. supra* note 145, at 1432-34.

148. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935 at 3258 (1935).

> special affirmation. The amendment could not possibly have had any legal effect, because it was merely a restatement of the first amendment to the Constitution, which remains the law of the land irrespective of Congressional declaration.[149]

What then are the constitutional limits here? It is difficult to argue that the first amendment has no application to representation proceedings;[150] the Board itself feels bound by it.[151] Clearly, if an employer loses the fruits of victory in a representation case because of the exercise of protected speech he is being deprived of substantial rights, *e.g.*, the right to be free from organizational or recognitional picketing for a year;[152] the right to be free from a representation proceeding for a year;[153] and, if the union's loss is directly attributable to the protected speech, the right not to have to deal with the union. From any realistic viewpoint he is being penalized for the exercise of free speech. Representation proceedings, while not adversary, are an important preliminary step in the application of a whole statutory scheme. Insofar as the government may prejudice an individual under that scheme, and prejudicial treatment will usually involve considerable economic forfeit, it may only do so subject to the Bill of Rights. The Supreme Court expressed this limitation as follows in *Speiser v. Randall*,[154] dealing with tax exemptions:

> The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech . . . . It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. . . . This Court has similarly rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board . . . or the opportunity for public employment . . . . So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.[155]

But to say that the first amendment is applicable here is obviously not to say that any limitation on speech is proscript. Whatever meaning the first amendment may have in relation to speech of a political nature, when speech is used for purposes of economic warfare or for

149. *Ibid.*
150. See Union Carbide Corp. v. NLRB, 310 F.2d 844 (6th Cir. 1962). *But see* Foreman & Clark, Inc. v. NLRB, 215 F.2d 396 (9th Cir. 1954), *cert. denied*, 348 U.S. 887 (1954).
151. See Decorated Prods., Ine., 140 N.L.R.B. No. 131, n.3, 52 LRRM 1250 n.3 (1963).
152. 73 Stat. 525 (1959), 29 U.S.C. § 158(b)(7)(B) (Supp. II, 1960).
153. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(3) (1958).
154. 357 U.S. 513 (1958).
155. *Id.* at 518-19.

economic solicitation—"commercial speech"—a balancing test has always been applied. Even the most insistent advocate for an absolutist test regarding political speech, Mr. Justice Black, has consistently adopted the balancing test where speech of this economic nature is concerned. The philosophic and historic underpinnings for this difference in approach are beyond the scope of this paper. It will suffice to set forth some of the many examples of it.

In *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*,[156] the Court held that a nationwide publicity campaign between the trucking industry and the railroad industry was protected by the first amendment from the application of the Sherman Act because the publicity was thought to be speech aimed at legislative action. But Justice Black, writing for the court, said:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.[157]

In *Martin v. Struthers*[158] the Court held that municipal regulation of door-to-door religious solicitation was proscribed by the first amendment. In *Breard v. Alexandria*[159] it held that such regulation of door-to-door commercial solicitation was not. In *Lovell v. City of Griffin*[160] broad protection was given the street distribution of religious leaflets. In *Valentine v. Chrestensen*[161] regulation of street distribution of advertising literature was permitted.

Commercial speech is not automatically beyond the pale. Where its commercial aspects are outweighed by some general social purpose served by the speech and its means of transmission is not socially offensive[162] the balance will be struck in favor of the first amendment claim: thus *Noerr Motor Freight;* thus the protection given to the expressing by leaflet of grievances arising from rights given by Congress though arising in a commercial context;[163] thus the protection given an appeal to exercise legal rights even though arising in a

156. 365 U.S. 127 (1961).
157. *Id.* at 144.
158. 319 U.S. 141 (1943).
159. 341 U.S. 622 (1951).
160. 303 U.S. 444 (1938).
161. 316 U.S. 52 (1942).
162. Compare Kovacs v. Cooper, 336 U.S. 77 (1949); Wollam v. City of Palm Springs, 379 P.2d 981, 52 L.R.R.M. 2688 (Cal. Super. Ct. 1963); Hughes v. Superior Court, 339 U.S. 460 (1950).
163. Schneider v. Town of Irvington, 308 U.S. 147 (1939). Although Valentine v. Chrestensen, *supra* note 161, also involved a leaflet, the classic form of social protest, see Talley v. California, *supra* note 138, the leaflet was found to be for commercial purposes.

commercial context.[164] But such commercial speech—speech which arises in a setting of economic warfare or economic solicitation—is inspected more carefully than other speech, and if a legislature can find in it a social harm, far short of the "clear and present danger" test, the courts have permitted its regulation.

No better example of this approach, and none closer to the problem at hand, can be found than in the regulation of peaceful picketing. The Supreme Court has implied that picketing is not speech.[165] But this is judicial shorthand at best. Take the following case: the NAACP sets up a picket on a public sidewalk in front of a store that refuses to hire Negro employees; the sign reads simply, "Do Not Patronize—This Store Does Not Hire Negroes." This picketing protests the labor policies of the employer; and it has long been the law that such picketing, while aimed at racial discrimination, would be considered a "labor dispute."[166] It is an attempt to exert economic pressure to affect an employer's employment policies. Yet it seems very likely that a regulation of such picketing would be struck down as violating the first amendment. Here the social content of the speech outweighs any harm there may be in the form of its transmission.[167] On the other hand, such picketing, because involving commercial consequences beyond its social appeal, not unlike those in *Noerr Motor Freight*, would be scrutinized carefully by the Court. In *Edwards v. South Carolina*[168] the Supreme Court had little difficulty striking down municipal regulation of a mass demonstration on a much greater scale than a peaceful picket line which protested racial discrimination. But, significantly, the demonstration in *Edwards* was aimed not at a shop owner but took place on the State House grounds of South Carolina; it thus did not come in a context of economic warfare. The Court was careful not to cite a single case involving a constitutional attack on picketing, although Justice Clark, dissenting, did not indulge in the Court's implicit distinction in this regard.[169]

Even Justice Black has succumbed to the Court's balancing test in this area. In *Giboney v. Empire Storage Co.*,[170] he wrote the opinion

164. Talley v. California, *supra* note 138; Thomas v. Collins, 323 U.S. 516 (1945); Compare American Fed'n of Labor v. Mann, 188 S.W.2d 276 (Tex. Civ. App. 1945).

165. Hughes v. Superior Court, *supra* note 162.

166. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, *modified*, 304 U.S. 542 (1938).

167. In Tinsley v. Richmond, 368 U.S. 18 (1961), involving a related situation, the first amendment claim was not raised below and thus was not open for review. See Tinsley v. City of Richmond, 202 Va. 707, 119 S.E.2d 488 (1961). *But see* Clemmons v. Congress of Racial Equality, 201 F. Supp. 737 (E.D. La. 1962). The picketing in Hughes v. Superior Court, *supra* note 162, was to *enforce* racial discrimination.

168. 372 U.S. 229 (1963).

169. *Id.* at 241.

170. 336 U.S. 490 (1949).

for the Court sustaining regulation of picketing in violation of a state antitrust statute. In it he said, "[T]he Court [has been] . . . careful to point out that it was within the province of states 'to set the limits of permissible contest open to industrial combatants.' "[171] And the Court's approach to picketing has followed this line. While *Thornhill v. Alabama*[172] seemed to suggest that picketing is automatically protected by the first amendment or that its regulation must at least overcome an initial presumption of validity, the Court has more recently stated that there is a

> broad field in which a state, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.[173]

Nor can the Court's approach here be considered *sui generis* as simply relying on the peculiar effectiveness of picketing, as has sometimes been suggested,[174] although historic fears of picketing excesses do seem to be weighed in the balance. More is involved. All speech is a call to action.[175] In certain respects the demonstration in *Edwards* was just as "effective" as a picket line; and the leafletting campaign in *Schneider v. Town of Irvington*[176] was just as "effective" as the leafletting campaign in *Valentine v. Chrestensen.*[177]

Similarly, employer speech in a representation election campaign is in the first amendment ballpark; but because this speech is simply a tool of economic warfare, "some public policy"[178] can limit it. The question is—what policy?

A suggestion of an answer to this essential question has been given in the cases coming up under the Board's fluctuating no-solicitation rules. These rules, subject to various niceties and recent changes not relevant here, have held that it is an unfair labor practice for an employer to adopt an *invalid* no-solicitation rule, one that bars all union solicitation on his premises, while at the same time using the premises to speak against the union. To the extent the employer is required to open his premises to union solicitation as a condition precedent to speaking against the union, he is being penalized for his

171. *Id.* at 499. Compare Justice Black's dissent in Scales v. United States, 367 U.S. 203, 259-62 (1961).
172. 310 U.S. 88 (1940).
173. International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 293 (1957).
174. Hughes v. Superior Court, *supra* note 162, at 465.
175. "Every idea is an incitement. It offers itself for belief and if believed it is acted on . . . ." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
176. 308 U.S. 147 (1939).
177. 316 U.S. 52 (1942).
178. International Bhd. of Teamsters v. Vogt, *supra* note 173.

exercise of speech.[179] Yet the Supreme Court has not seen his right to speak under these circumstances as absolute. In *NLRB v. United Steelworkers of America*[180] the Court held that the enforcement of a no-solicitation rule was not an unfair labor practice primarily because it had been stipulated that the rule involved was a valid one. It felt obliged, however, to add the following dictum:

> We do not at all imply that the enforcement of a *valid* no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis, in the actualities of industrial relations, for such a holding.[181]

So the test of regulation of speech in this area becomes whether there is some basis, "in the actualities of industrial relations," for such a holding. And presumably the NLRB, the expert in this area, shall be able to make conclusive determinations as to the existence of such "actualities" as would require the regulation of speech.

In its brief in the *Steelworkers* case the NLRB had argued as follows in support of its holding below that noncoercive employer speech coupled with a valid no-solicitation rule was not an unfair labor practice:

> The fact that an employer's views may, because of his economic position, carry an impact far beyond its mere logic or persuasiveness is a consideration which is specifically foreclosed by Section 8(c) [in an unfair labor practice case] if not by the First Amendment itself.[182]

While the Court sustained the Board's ruling below as a matter of statutory construction, the quoted argument of the Board's brief was implicitly rejected in the Court's dictum set forth above. Revealingly, this argument was explicitly rejected by Justices Black and Douglas in their dissent[183] adopting the opinion of the court of appeals, which did not even hint that the first amendment was relevant to its decision.[184]

If, then, employer speech, as a tool of economic warfare, may be regulated subject to the "actualities of industrial relations," how do we define these "actualities"?

Initially it seems settled that where such an appeal is an intimation

179. See Speiser v. Randall, *supra* note 154, at 518-19; NLRB v. F. W. Woolworth Co., 214 F.2d 78, 83 (6th Cir. 1954). *But see* Bonwit Teller, Inc. v. NLRB, 197 F.2d 640, 645 (2d Cir.), *cert. denied*, 345 U.S. 905 (1952).

180. 357 U.S. 357 (1958).

181. *Id.* at 364. (Emphasis added.)

182. Brief for NLRB, p. 31, NLRB v. United Steelworkers of America, 357 U.S. 357 (1958).

183. 357 U.S. at 365.

184. United Steelworkers of America v. NLRB, 243 F.2d 593 (D.C. Cir. 1956).

of job loss to a white work force where the union is allegedly integrationist, or to a Negro work force where the union is allegedly segregationist, the speech is not protected. Why should this be so? As discussed above, the Court has employed two criteria when evaluating first amendment claims relating to speech used as an economic weapon. First, is the message directed at some broader purpose than the immediate economic warfare involved? Second, is there any evil which a legislature could reasonably find in such speech? Obviously there are also other unarticulated assumptions at work. The ancestry of any particular mode of speech may be one: thus the sometimes illogical preference for distribution of leaflets over peaceful picketing, though the effects may be identical; thus the preferred position for books over motion pictures. It is hard to believe, for example, that the prior restraint involved in *Times Film Corp. v. City of Chicago*[185] would have stood were book sellers rather than motion picture producers involved. More important, however, than the pull of history on these decisions is the fact that speech can very rarely be stripped down to a bare tool of economic warfare. Nor is it ever easy to determine just how insubstantial the noncconomic crust around the economic core of the speech must be before the propensity to harm will render the speech vulnerable to regulation. But these difficulties are minimal where the threat of job loss because of union membership is involved. There the economic core of the speech stands naked. There the harm, the frustration of a neatly drawn accommodation standing at the heart of a fundamental adjustment in our economic system, is clear.

But to say that threats make the easiest case is not to say they constitute the ouly situation in which the "actualities of industrial relations" permit regulation of speech. Take, for example, that which may be the hardest case: during a representation campaign the employer distributes a leaflet stating "*XYZ* Union has a policy of maintaining integrated locals. Do not join *XYZ* Union." What would happen if these cases were transposed into a picketing situation? Is the following really a different case? The White Citizens Council pickets *ABC* Department Store with signs reading: "*ABC* maintains nondiscriminatory hiring policies. Do not patronize." The free speech claim is similar in both instances. In both, a racist appeal is being used to secure an ultimate economic goal, although in the *ABC* case there is even more than a job-seeking economic goal involved. The fact that the first amendment claim in the *ABC* case would seem to be foreclosed by *Hughes v. Superior Court*[186] gives some credence to defining the "actualities" so as to permit regulation of employer

185. 365 U.S. 43 (1961).
186. 339 U.S. 460 (1950).

speech in the *XYZ* case. But this assumes that the picketing in *Hughes* to enforce racist hiring policies can be matched with the form of speech delivery in the *XYZ* case. In many ways it can. As Judge Learned Hand said in *NLRB v. Federbush Co.*:[187]

> Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment.[188]

Employer speech in a representation campaign is potentially as menacing to its audience as is picketing to its and is, like picketing, subject to severe abuses. In some ways the *XYZ* speech is more harmful than picketing. The employer there is in a position unilaterally to establish racist conditions, something the *Hughes*-type picket cannot do. The *XYZ* leaflet then begins to appear more like a promise that if the *XYZ* union is rebuffed, the segregated condition of the plant will remain as is. This promise raises a harm of constitutional dimensions which must be weighed against the free speech claim. That is, the enforcement of the promise by recognizing the election as valid and by certifying the results would seem to bring the whole *Shelley* apparatus into play.

The *reductio ad absurdum* sometimes raised to this is the example of an employer advising his Negro employees not to join a union because it maintains segregationist policies. But put it another way. Could the Congress ban picketing to protest racial discrimination? As stated above, in this instance the social content of the speech outweighs any harm there may be in the form of its transmission.

Thus the way seems clear for a holding that as a *constitutional* matter there is nothing to stop the NLRB from barring all appeals to racial prejudice in an election campaign because all such appeals imply a promise of discrimination if the union loses. This does not mean that a sound administration of the act demands complete silencing of racial propaganda in an election campaign or even that such control is justified under the act. But to the extent that such appeals to racial prejudice cause representation elections to be determined by anything less than the "uninhibited desires of the employees"[189] re-

187. 121 F.2d 954 (2d Cir. 1941).

188. *Id.* at 957. Compare NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

189. General Shoe Corporation, 77 N.L.R.B. 124, 127 (1948).

garding union membership, regulation of them seems plainly proper, if not compelled by *Shelley*. And thus the rule adopted by the Board in *Sewell Manufacturing Co.*[190] does not seem to cover all speech in this area which may, as a constitutional matter, be regulated. By insisting that the speech be "inflammatory"[191] or that it "be exacerbated,"[192] standards which may be sufficient with regard to truthful information regarding the civil rights policies of the union involved, the Board ignores other important types of appeals to racial prejudice. What if the appeal is untruthful? What if it is irrelevant, because dealing with other unions? Indeed, what if the appeal is truthful and germane and does not carry any threat or promise with respect to economic conditions or jobs[193] but is simply a thinly veiled promise to maintain segregated conditions?[194] In all three of these last-mentioned situations the Board seems free, as a constitutional matter, to impose restrictions on the racial appeal involved. The right to be informed means the right to be informed substantially accurately; it means the right to be informed regarding the civil rights policies of the union in question, not such policies of some other union. And when the information is couched in such language or given under such circumstances that its primary purpose is to promise the maintenance of segregated conditions, not only is the first amendment claim minimal but also *Shelley* places a substantial constitutional consideration in the balance in opposition to it. Board member Bean put it this way, dissenting in *Westinghouse Electric Corp.*,[195] with respect to the last-mentioned type of racial appeal:

> Did the employer [implicitly] promise the continuation of a discriminatory advantage, or favored treatment to one class of employees over another in return for votes against the Union? If it did, such conduct obviously requires that the results of the election be set aside.[196]

This simple, common sense rule takes into account more than the

190. 138 N.L.R.R. No. 12 (Aug. 9, 1962).
191. Allen-Morrison Sign Co., 138 N.L.R.B. No. 11 (Aug. 9, 1962).
192. Sewell Manufacturing Co., *supra* note 190.
193. Associated Grocers, 134 N.L.R.B. 468 (1961).
194. Query if this is a promise with respect to working conditions. The NLRB does not seem to have recognized as a legitimate working condition under the act an employee's desire not to have to work in the company of Negroes. In an administrative decision in 1951 the General Counsel of the NLRB is reported to have ruled as follows: "Regional Director's refusal to issue complaint alleging discriminatory refusal to hire group of strikers is sustained since strike was for sole purpose of attempting to cause employer to discharge Negro employees because they were Negroes and such concerted activity does not come within activity protected by § 7 of the NLRA." Admin. Ruling of NLRB Gen. Counsel, Case No. 56, 27 L.R.R.M. 1442 (1951). See also Macon Textiles, Inc., 80 N.L.R.B. 1525 (1948).
195. 119 N.L.R.B. 117 (1957).
196. *Id.* at 120-21.

Board ever has, surely more than in *Sewell,* the "actualities" of a representation campaign. In so doing it is unimpeachable in terms of the first amendment. Also, no less a rule can be squared adequately with the Board's generally applied "laboratory conditions" test.

D. *Appeals to Racial Prejudice as an Unfair Labor Practice*

With respect to such appeals the General Counsel of the NLRB has recently made the following statement:

> Because of the substantial importance of this problem in the administration of law, the Office of the General Counsel would consider it necessary if appropriate charges were filed in a given case involving appeals to racial prejudice to issue an unfair labor practice complaint. This would permit a Board determination whether in certain circumstances appeals to racial prejudice do not merely interfere with free choice in an election but whether such appeals may not also constitute an unfair labor practice against which a remedial order should be obtained.[197]

Unlike the remedy of setting aside elections, an unfair labor practice order is subject to the provisions of section 8(c) of the act, set forth above.[198] A comparison of the cases in this area decided before 8(c) with those decided subsequent to its enactment indicates the effect on the regulation of appeals to racial prejudice which the free speech clause of the act has had.

1. *Pre-8(c) Cases.*—In *Planters Manufacturing Co.*[199] the Board said,

> We find that the [employer] . . . in attempting to arouse racial prejudice between the white and colored employees for the purpose of causing some to cease being members of the Union . . . and in other ways, has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act.[200]

In *Arcade Sunshine Co.*[201] the Board held that a statement that the union would not be friendly to Negroes constituted interference.

In *California Cotton Oil Corp.*[202] the Board held that statements that Negroes in the plant would not be treated as well by the union as by management constituted interference.

In *E. Bigelow Co.*[203] the company president said, "I have been told, through reliable sources, that if the union goes into effect, that will

197. OFFICE OF THE GENERAL COUNSEL OF THE NLRB, SUMMARY OF OPERATIONS, CALENDAR YEAR 1962 at 113-14 (Mimeo. 1963).
198. See text accompanying note 139 *supra.*
199. 10 N.L.R.B. 735 (1938).
200. *Id.* at 753.
201. 12 N.L.R.B. 259 (1939).
202. 20 N.L.R.B. 540 (1940).
203. 52 N.L.R.B. 999 (1943).

be all of it for the niggers."[204] This was held to constitute interference.

In *S. K. Wellman Co.*[205] the foreman said that "if the CIO got in the plant, it would be fulla negroes."[206] This was held by the trial examiner to be evidence of interference and his findings were affirmed by the Board.

In *Reeves Rubber, Inc.*[207] a statement by the company president that if the plant were organized it would be "run by Negroes from Los Angeles and Mexicans from San Juan Capistrano" was held by the trial examiner to be evidence of interference. The Board affirmed his findings.

2. *Post-8(c) Cases.*—In *Bibb Manufacturing Co.*[208] the trial examiner said:

> Foreman Kite approached Mercer and asked him if he had joined the Union. . . . [Mercer] answered that he was going to as soon as he had a dollar, whereupon Kite told him that he could join the Union if he wanted to work with Negroes. This was another obvious attempt to raise the race prejudice among white employees in order to discourage membership in the Union by creating the economic threat that Negro employees would be allowed to hold positions then reserved for white employees. The respondent acknowledged that it restricted its Negro employees to certain menial tasks reserving the other jobs for white employees. The undersigned finds that this economic threat constituted interference, restraint, and coercion in violation of Section 8(1) of the Act.[209]

No exceptions were taken to his ruling.[210]

In *American Thread Co.*[211] the plant superintendent was reported to have said that if the plant were organized "we would be working side by side with Negroes and sharing the same rest room with them, and . . . they wasn't for us."[212] In analyzing this statement the trial examiner, who was affirmed by the Board, said:

> [These remarks] are not violative of the Act. Under the Act, mere words ascribable to an employer do not constitute unlawful interference with the legal rights of the employees unless the words amount to an actual threat of economic punishment for engaging in collective activities, or, when interpreted in the light of other proven facts, to an implied threat of the same character; hence the discussion of facts and arguments, or the ex-

204. *Id.* at 1006.
205. 53 N.L.R.B. 214 (1943).
206. *Id.* at 222.
207. 60 N.L.R.B. 366 (1945).
208. 82 N.L.R.B. 338 (1949), *modified,* 188 F.2d 825 (5th Cir. 1951).
209. *Id.* at 377.
210. *Id.* at 346.
211. 84 N.L.R.B. 593 (1949).
212. *Id.* at 601.

> pression of opinions, preferences, or dislikes on the subject of labor relations, do not violate the Act.[213]

In *Happ Brothers Co.*[214] a forelady said that "if the employees 'got tied up with the C.I.O. and John L. Lewis, they'd work side-by-side with Negroes.' . . . '[d]on't you know if you all get the Union up here, you'll be setting up here by niggers' "?[215] The trial examiner said that the forelady by

> asking employees whether they had gone to a union meeting or whether union representatives had been to see them, in appealing to racial prejudice, and in threatening them with loss of their jobs . . . interfered with, restrained, and coerced . . . employees in the exercise of the rights guaranteed by Section 7 of the Act.[216]

Without even deeming it necessary to explain, the Board upset the trial examiner's report on this point.[217]

In *Model Mill Co.*[218] the employer

> directed . . . a colored employee, to take his . . . chair behind his desk, as an illustration of what the advent of the union might mean, remarking, in effect: "How would you like someone to come into your home and tell you how to run it"?[219]

The trial examiner, affirmed by the Board, said that this "conduct is not found to constitute interference, restraint, or coercion, but is considered as the exercise of protected free speech . . . ."[220]

More recently, in 1958, the General Counsel of the NLRB issued a ruling declaring that under the following set of facts no unfair labor practice complaint ought issue:

> As part of its campaign to defeat the union, the company attacked the union on racial grounds. Company officials issued statements to the effect that the union was an advocate of racial integration not ouly in schools, housing, and social relationships, but also on jobs, and that a union victory would mean that Negroes would work alongside white employees in the plant.[221]

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213. *Id.* at 601-02.
214. 90 N.L.R.B. 1513 (1950), *enforcement denied on another ground,* 196 F.2d 195 (1952).
215. *Id.* at 1533.
216. *Id.* at 1533-34.
217. *Id.* at 1514.
218. 103 N.L.R.B. 1527 (1953).
219. *Id.* at 1534.
220. *Id.* at 1538.
221. Admin. Ruling of NLRB Gen. Counsel, Case No. 723, 43 L.R.R.M. 1219 (1958).

In *Empire Manufacturing Co.*[222] the trial examiner, who was affirmed by the Board, said:

> [Supervisor] Sowers stated that if the Union came in "They will do like they do up North, they will hire Niggers and put them on all these machines with you all." . . . Considering the locality of the plant [North Carolina], I consider the statements should be accepted as a threat to impose more onerous working conditions and a violation of Section 8(a)(1) . . . .[223]

In *Petroleum Carrier Corp.*[224] the trial examiner, who was affirmed by the Board, found that an employee had been called into the office of an assistant manager who had made a statement to him

> suggesting a limitation of the workweek to 40 hours if the Union succeeded in its campaign to be unlawful. Had this statement stood alone it and the accompanying threat to hire anybody ["Nigger, cajun, wop or whatnot"] would have been covered by the shield of isolation, but it occurred in a context of coercive and restraining interrogation.[225]

He found the threat to hire anybody to be "a direct threat that the employees would suffer enforced association with persons of supposedly inferior origins if they accepted the Union and the falsity of the premise does not negate the threat."[226]

Finally, in *Associated Grocers, Inc.*,[227] the trial examiner, who was affirmed by the Board, made the following finding:

> On July 12 [three days before the election] the Company placed an ad in the Port Arthur News help-wanted column advertising for white employees in the warehouse . . . approximately 100 applicants responded and arrangements were made for them to fill out their forms at a table placed out on the loading dock within sight of the employees. A large majority of the warehouse and truckdriver employees are Negro . . . . I find that the Respondent interfered with and coerced employees by the July 12 advertisement; its specification of white help, unexplained, plainly would have the natural effect of intimidating the existing Negro complement.[228]

What is the pattern emerging from these post 8(c) cases? At the outset a threat to impose loss of economic privilege was considered outside the scope of 8(c)—thus *Bibb Manufacturing Co.*[229]—but a threat that the Union would mean loss of non-economic segregated

222. 120 N.L.R.B. 1300 (1958).
223. *Id.* at 1317.
224. 126 N.L.R.B. 1031 (1960).
225. *Id.* at 1038.
226. *Id. at* 1038-39.
227. 134 N.L.R.B. 468 (1961).
228. *Id.* at 473-74.
229. Note 208 *supra.*

conditions was considered protected—thus *American Thread Co.*,[230] *Happ Brothers Co.*,[231] and the 1958 Ruling of the NLRB General Counsel.[232] More recently, however, while a *Bibb Manufacturing* threat is still unprotected, *viz., Associated Grocers, Inc.*,[233] a threat that the union will mean non-economic desegregation is also unprotected, not only where the employer threatens unilaterally to desegregate, as in *Petroleum Carrier Corp.*,[234] but also presumably where the threat is that the union itself will cause such desegregation, as in *Empire Manufacturing Co.*[235]

A rule like the one which can be derived from *Empire* is proper where it is directed at setting an election aside. It accurately evaluates the "actualities" of the circumstances, thus escaping any first amendment obstacle; and it properly defines the requirements for meaningful "laboratory conditions," thus coming within a neutral rule applied by the Board in all cases, not only in those dealing with appeals to racial prejudice. Is such a rule also proper here? Where it is used to fashion an unfair labor practice, different considerations are at work than in an election situation. Section 8(c) is explicit that speech can be regulated as an unfair labor practice only where it contains a "threat of reprisal or force" or a "promise of benefit." Are the statements in *Empire* "threats" or "promises" in this sense? If the threat or promise were with respect to job loss or other economic discrimination, there would be no difficulty. Such threats or promises are clearly exempted from section 8(c).[236] But the threat or promise here deals with working side by side with Negroes, not with economic discrimination. If having to work in desegregated conditions is an onerous working condition, a strike to protest desegregation ought to be protected activity; but the Board does not seem to have considered such protests as protected activity.[237] Either the question of desegregation on the job is a legitimate working condition or a promise or threat with respect to it is not exempted from section 8(c); in terms of a neutral application of the act, one cannot have it both ways.

It is, however, totally unrealistic to say that the question of desegregation on the job does not deal with conditions of employment, relevant to employees; thus the position that protests concerning such conditions are not "concerted activities" within the meaning of the act seems plainly wrong. This is not to say that the Board

230. Note 211 *supra*.
231. Note 214 *supra*.
232. Note 221 *supra*.
233. Note 227 *supra*.
234. Note 224 *supra*.
235. Note 222 *supra*. See also Boyce Machinery Corp., *supra* note 37.
236. See note 145 *supra* & accompanying text.
237. See text of note 194 *supra*.

will therefore be compelled to protect attempts to impose segregated conditions. It seems doubtful that *Shelley* would permit such compulsion. What this means simply is that a statement with respect to desegregation can be a promise or a threat within the meaning of section 8(c).

A second difficulty with the *Empire* test is that the threat involved is not a threat that the *employer* will do something but that the *union* will bring certain conditions about. But here the employer is warning that if the union demands desegregation he may throw up his hands and in this fashion the desegregation which is said will follow unionization is traceable to actions within the employer's control.[238] And his degree of control is not eliminated by the fact that the question of desegregation conditions may be a mandatory subject of collective bargaining;[239] the duty to bargain in the language of the act "does not compel either party to agree to a proposal or require the making of a concession."[240] He is implicated in any conditions which unionization may bring because they cannot exist unless he agrees to them.

There is another approach to this aspect of *Empire*. Section 8(c) exempts a "promise of benefit" from its terms. Here there is a promise to maintain segregated conditions as long as the union stays out; this is not simply a promise to maintain the status quo in all events. To whatever extent the employer's continued degree of opposition to desegregation is conditioned on the absence of a union, this is a promise of benefit unshielded by section 8(c).[241]

This approach opens the door to what could be a very effective remedial order. Proceeding on the promise theory underlying *Empire* one remedy which suggests itself is an order that the employer cease and desist from promising to maintain segregated conditions in the event the union loses the election and that he post notices to the effect that he will not continue segregated conditions if the union

238. See Boyce Machinery Corp., *supra* note 37. *But see* Southwester Co., 111 N.L.R.B. 805 (1955).

239. Since it concerns a condition of employment it would seem to be a mandatory subject of bargaining. See Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948), *cert. denied on this point*, 336 U.S. 960 (1949). Compare the press release issued by the NLRB General Counsel March 18, 1963, NLRB General Counsel Reports Issuance of Unfair Labor Practice Complaint Based on Racial Discrimination in Job Conditions, stating in part:

"Future litigation will undoubtedly be required to test not only the extent of a union's obligation of fair representation to all employees in the bargaining unit, but also whether the duties and responsibilities of an employer, where a collective bargaining relationship exists, includes the obligation not to participate in or be a party to provisions based upon discriminatory or disparate treatment of employees in the bargaining unit, no matter how or by whom such contract provisions were initiated or motivated."

240. 49 Stat. 452 (1935), 29 U.S.C. § 158(d) (1958).

241. *Compare* Southland Manufacturing Co., 98 N.L.R.B. 53, 55 (1952), *with* Northern Fruit Co., 108 N.L.R.B. 1017 (1954).

loses the election. One can hardly imagine the Board ordering an employer to post notices saying that he will *continue* segregated conditions in all events.

But either approach—threat or promise—can be the basis for another effective remedy beyond the usual, and usually inadequate, cease and desist order. Once a union has secured proper authorizations from a majority of employees and the employer can be shown to have no good faith doubt as to this majority, he must recognize the union on demand. One indication of the employer's lack of good faith doubt of union majority is his commission of unfair labor practices aimed at undermining such majority.[242] Thus a demand by a majority union for recognition could effectively cut off any racial appeals remediable as an unfair labor practice. The deterrent effect of an order to bargain is much greater than the deterrent effect of setting aside an election the employer has won in part because of "inflammatory" appeals to racial bias.

But beyond this, an unfair labor practice cannot be particularly effective here. Unless the Board is prepared to seek injunctive relief to support its complaints—an avenue secured to it by the act[243] but rarely used for employer violations—an unfair labor practice remedy, except for the two just discussed, is largely meaningless. It orders the employer to cease and desist from violating the law long after the effects of his violation have been spent. Compared with the remedy of setting aside an election[244] such an order represents at best a hollow victory not only for the union having to meet the racial appeals, but also for the community at large, which presumably has some interest in their deterrance.

E. *Failure to Represent Fairly as an Unfair Labor Practice*

In *Miranda Fuel Co.*,[245] the Board ruled on two points. Its first holding was that section 7 of the act protects employees in their right to fair representation, and thus union activity which violates this right is an unfair labor practice. Similarly, employer participation in such activity is also an unfair labor practice. Given the Board's initial premise its conclusion cannot be denied. Section 8(b)(1)(A)[246] makes it an unfair labor practice for a union to impede

242. *E.g.*, Bausch & Lomb, Inc., 140 N.L.R.B. No. 146 (1963).

243. 49 Stat. 453 (1935), *as amended*, 29 U.S.C. § 160(j) (1958).

244. The effectiveness of this remedy is also subject to some doubt. In the *Sewell* situation itself the Board set aside two elections because of improper appeals to racial bias. Each of them, as well as a third election, was lost by the union by virtually the same vote. While the election slate was wiped clean, the Board's remedy could not erase the effects of the appeal to racial bias.

245. 140 N.L.R.B. No. 7 (Dec. 19, 1962).

246. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958).

the exercise of rights guaranteed by section 7 of the act, and section 8(a)(1)[247] makes it an unfair labor practice for an employer to impede the exercise of such rights. But what are the rights protected by section 7? Section 7 provides, in relevant part:

> 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. . . .[248]

It is the right "to bargain collectively through representatives of their own choosing" which the Board found in *Miranda* to subtend the protected right to be represented fairly. As a matter of statutory construction it is difficult to say that such a reading has no merit. If there is a right to fair representation under the act, there is no particular reason to assume that Congress intended the protection of this right to be solely by the courts. The original fair representation cases arose in the courts because they were under the Railway Labor Act,[249] which makes no provision for administrative enforcement of its section 7-type provisions. Nor, since *Miranda* did not involve racial discrimination, is the legislative history relevant with respect to Negro rights under the act.

On the other hand, this holding of *Miranda* raises at least two significant problems. First, will its effect be to remove enforcement of fair representation rights under the act from the courts? There is no other instance in which the courts have taken jurisdiction over violations of the act not specifically granted by it to them. Granted, the doctrine of primary jurisdiction may here be somewhat mechanistic in view of the courts' long involvement in this area and the Board's johnny-come-lately assertion of jurisdiction. Nevertheless, dual jurisdiction here would be something of an anomaly. But if the courts must bow to the Board's primary jurisdiction, the loss may be slight from a "result oriented" point of view. Court actions have not proved particularly effective in this area.[250] Yet given the broad discretion of the NLRB general counsel to issue or to refuse to issue complaints, the gain in supplanting court actions by an administrative remedy may well be questioned.

Another question raised by this holding of *Miranda* concerns just how much will be read into the rights protected by section 7. *Miranda* says that the right to be represented fairly is guaranteed by the right to bargain collectively. The same logic would seem to demand that

247. 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1958).
248. 49 Stat. 452 (1935), *as amended,* 29 U.S.C. § 157 (1958).
249. See Note 88 *supra.* See also authorities collected in notes 60 & 61 *supra.*
250. See note 66 *supra* and accompanying text.

the right to "form, join or assist labor organizations," also protected by section 7, subsumes employee rights in such labor organizations, including perhaps rights created by Landrum-Griffin. Further, would not section 7 protect violations of section 12 of the act,[251] which makes it illegal to interfere with any member of the Board "in the performance of duties pursuant to this Act"? This provision is at the base of all the rights created by the act.

The second holding of *Miranda* is equally provocative. The Board held that "a statutory bargaining representative and an employer also respectively violates sections 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee."[252] The Board's position here had been hinted at in prior decisions[253] and has been speculated on by numerous commentators.[254]

Section 8(b)(2) of the act provides, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents . . . 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 initiation fees uniformly required as a condition of acquiring or retaining membership.[255]

How is this to be read in connection with section 8(a)(3)? That section, in relevant part, makes it 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 . . . . [N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.[256]

This language is difficult. What is the difference between (A) and

251. 49 Stat. 456 (1935), 29 U.S.C. § 162 (1958).
252. Miranda Fuel Co., *supra* note 245, 51 L.R.R.M. at 1587.
253. *E.g.*, Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999, 1016 (1943).
254. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Graham, *Taft-Hartley's Enigmatic* § 8(b)(2), 1961 LAB. LAW J. 1033; Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).
255. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958).
256. 49 Stat. 452 (1935), *as amended*, 29 U.S.C. § 158(a)(3) (1958).

(B)? Assuming there is a difference, why was (B) and not (A) referred to in 8(b)(2)? Why was there need to refer specifically to either (A) or (B) in 8(b)(2) when its opening clause refers to all of 8(a)(3)?

To begin with the last question, it could be argued that specific mention of the types of discrimination was necessary because a union was to be held liable not only where there was a reasonable ground *to believe* that membership was denied for the given reasons, but also where membership *was* denied for those reasons. It was important, that is, to hold a union where membership was denied for an illegal reason which the discharging employer might not have suspected.

If this is so, why, referring to the second question above, was (B) and not (A) of 8(a)(3) included in 8(b)(2)? Could it be that a union was to be chargeable only when membership had actually been denied, whereas an employer could be chargeable when such membership was merely "not available"? Is it possible that the 80th Congress intended to attach greater culpability to an employer for the maintenance of improper union security than to the incumbent union?

Even assuming that some sense can be made out of the above, an additional problem remains. Section 8(a)(3) proscribes only discrimination which encourages or discourages union membership. Clauses (A) and (B) merely define the kind of activity that will not constitute justification for such discrimination. In the second clause of section 8(b)(2), however, which incorporates clause (B) of 8(a)(3), to cause discrimination against a nonmember who has been "denied" membership is an unfair labor practice without regard to whether such discrimination encourages or discourages union membership. There is some justification for this. Congress may well have assumed that when a union causes such discrimination, the encouragement or discouragement of membership must have been intended, and may be presumed to result therefrom. But if Congress explicitly made this assumption with regard to nonmembers and *not* with regard to members, how is the Board's assumption in *Miranda* and the Supreme Court's assumption in the *Radio Officers* case[257] justified, *i.e.*, that encouragement or discouragement with respect to members may also be inferred from discriminatory union action?

In addition, to show a violation of section 8(b)(2) would a nonmember Negro have to show that he applied for and was denied membership, or would it be sufficient to show that membership was not available? If it is not enough to show that membership was not

257. Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

available, what do we do with the implicit position of the Supreme Court in the *Radio Officers* case that discrimination for purposes of 8(b)(2), as well as for 8(a)(3), is actionable where the subject of discrimination does not have the slightest intention of joining the union?

If *Miranda* did not compound these problems arising under sections 8(a)(3) and 8(b)(2), it certainly did little to eliminate them. Where conduct has the "foreseeable result," *Miranda* tells us, of encouraging union membership "the finding of a violation may turn upon an evaluation of the disputed conduct 'in terms of legitimate employer or union purposes.' "[258]

If this is correct, and if it means anything, must it not also mean that employer discrimination without a "legitimate" purpose, the foreseeable result of which is to encourage or discourage union membership, is a violation of the act? And this without regard to whether the union caused such discrimination or whether the discrimination was motivated by union animus? If Negroes are discriminated against *as Negroes* for the purpose of defeating the union it should be clear that there is a violation of section 8(a)(3).[259] But the question raised by *Miranda* is what happens where Negroes are discriminated against *as Negroes* and there is no union animus connected with the discrimination but its "foreseeable result" is to encourage or discourage union membership. What, for example, if an employer refuses to hire Negroes and the bargaining agent has done nothing to secure an FEPC clause in the collective bargaining contract? In terms of the *Radio Officers* case there is certainly a discouragement to join *that* union. What if a Negro employee is subjected to discrimination by the employer *as a Negro* and the collective bargaining contract has nothing to protect him? In terms of *Radio Officers* he is again discouraged. In fact this holding of *Miranda* may well suggest that any time there is a union on the scene, employer discrimination based on considerations which are not "legitimate" is a violation of section 8(a)(3). It is certainly not stretching the intent which Congress had in 1935, when the predecessor to 8(a)(3) was enacted, to read that *any* job discrimination which resulted in the encouragement or discouragement of union membership was to be prohibited. Such is, after all, a fair paraphrase of the statutory language itself, which bars "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." It is plausible to say that *Radio Officers* and *Miranda* have read "to encourage or discourage"

258. Miranda Fuel Co., *supra* note 245, 51 L.R.R.M. at 1588.
259. Compare Miami Coca-Cola Bottling Co., 140 N.L.R.B. No. 134 (1963).

to mean "the foreseeable result of which is to encourage or discourage."

Whatever merit there may be to this view is not helped by the standard of "legitimate purpose" that controls it. A standard somewhat less vague would be that employed by the Board in its first—the fair representation—holding of *Miranda*, that discrimination is proscript which is "irrelevant, invidious or unfair."[260]

Why should not an employer's obligation to abstain from discrimination which encourages or discourages union membership be the same as the union's obligation under section 7 to abstain from discrimination in bargaining? If anything, the concern of the framers of sections (8)(3) and 7 was more with the consequences of anti-union activity than with the evils of majority rule. Moreover, if there is any symmetry to Taft-Hartley it too would demand this result; that is, it seems strange to say that the standards for discrimination in section 8(b)(2) and under section 7 differ. And it would be even stranger to say that the standards for discrimination under sections 8(a)(3) and 8(b)(2) differ, since in this regard the wording of the two sections is virtually the same.

What the Board will do with *Miranda* is of course speculative. Until recently it has consistently hewed to the standard position: discrimination because of race alone is not a violation of section 8 (a)(3). Thus, in *Young's Motor Freight Lines*[261] the Board found that the discharge of Negro employees because "they were objectionable to some of Respondent's customers clearly antedated the commencement of the dischargee's union activity." It was, therefore, not a violation. And in *Peerless Quarries, Inc.*,[262] where the enforcement of an invalid union security clause was held to be an unfair labor practice, the Board emphasized that they did not find that an individual discharged under that clause was entitled to protection because he was a Negro.[263]

But the possibility of a different approach following *Miranda* cannot be discounted.

V. CONCLUSION

The Board's recent activity in the area of fair employment practices has been, on the whole, justifiable in terms of the doctrines of neutrality, fair representation and *Shelley v. Kraemer*. It can be argued that

260. Miranda Fuel Co., *supra* note 245, 51 L.R.R.M. at 1587.
261. 91 N.L.R.B. 1430 (1950).
262. 92 N.L.R.B. 1194, *enforced*, 193 F.2d 419 (10th Cir. 1951).
263. See also Administrative Ruling N.L.R.B. Gen. Counsel, Case No. 1047, 35 L.R.R.M. 1130 (1954).

a more forthright adoption of the *Shelley* rationale would avoid difficult problems of statutory construction, as in the case of decertification. This approach might enable the Board to go further in that area or the contract bar area than the doctrine of fair representation will permit and further than the "inflammatory" standard will permit in the election area. It can also be argued, with respect to both an appeal to prejudice and the failure to represent fairly as unfair labor practices, that neutral principles of general application could take the Board further than it has yet moved.

But in considering the outer limits of justifiable doctrine, other factors cannot be ignored. The mentality, the administrative apparatus and the staff limitations of the NLRB, and the broad discretionary powers of its general counsel, make it a very poor substitute for an FEPC. Though it may become an adequate gadfly with respect to dramatizing the nature and extent of employment discrimination, too great a reliance on administrative inventiveness can be harmful, not only in terms of dissipating Board resources needed in other areas, but also in terms of funneling civil rights energies into what may well turn out to be a blind alley.