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THE "FAIR REPRESENTATION" DOCTRINE: AN EFFECTIVE WEAPON AGAINST UNION RACIAL DISCRIMINATION?

By NEIL M. HERRING*

In the evolution of American labor law, governmental remedies for racial discrimination by labor unions are relatively recent phenomena. The "fair representation" doctrine, a narrowly defined approach in a field replete with broader alternatives, is a response to a variety of problems faced by particular groups.[1]

I. THE STEELE CASE AND ITS JUDICIAL AFTERMATH

Logically and chronologically, all discussion of the doctrine of fair representation must start with the case of *Steele v. Louisville & N. R.R.*,[2] decided in 1944. In 1940, the Brotherhood of Locomotive Firemen and Enginemen served on twenty-one southeastern railroads a notice to change their collective agreements in order to eliminate every Negro fireman on those lines within two years. As a result, these railroads indorsed the Southeastern Carriers Conference Agreement on February 18, 1941, which was intended to give preference to white firemen in bidding for vacancies and in making layoffs, in derogation of Negro firemen's seniority rights. When a Negro, Bester William Steele, brought an action against the Firemen and the

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[1] A political assumption underlies much of what will presently be dealt with; such assumption being that Negroes are entitled to absolutely equal opportunity in all areas of American life, and governmental compulsion — including a certain degree of "interference" in unions' internal affairs and bargaining conduct — should be utilized to enforce this ideal. To the extent that this dogma permeates the analysis, this is a partisan essay which asks, "What can Negroes expect to obtain from the courts and the National Labor Relations Board in the way of prophylaxis and cure of labor union discrimination, and at what cost?" The practical consequences of each episode of litigation since 1944 involving the doctrine of fair representation have been traced as far as possible, mainly through correspondence with the parties' attorneys. Historical research and personal interviews were conducted to fill in the gaps.

[2] 323 U.S. 192 (1944).

carrier, seeking declaratory and injunctive relief under the Railway Labor Act,[3] the Alabama courts dismissed the bill of complaint.[4] On certiorari, the Supreme Court held that the bill stated a cause of action for breach of the bargaining representative's duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[5]

Speaking through Chief Justice Stone, the Court ruled that both injunctive relief and damages were available to the Negro firemen for the union's breach of duty to them, if they could prove the allegations of the complaint. The Court said:

> "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."[6]

If the statute were interpreted as authorizing the union to do violence to the interests of some members of the craft for the benefit of others, the Court indicated it would raise serious questions under the due process clause of the fifth amendment.

It was not, however, until 1955 that unions which operated under the National Labor Relations Act[7] were held to have the same obligations toward employees that the Brotherhoods bore under the Railway Labor Act. In *Syres v. Oil Workers*,[8] the Fifth Circuit affirmed dismissals of Negro workers' petitions for injunctive relief, construing the Negro local's complaint as merely one for breach

[3] Railway Labor Act § 2, Fourth, 48 Stat. 1187 (1934), 45 U.S.C. § 152, Fourth (1958):

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act."

[4] Steele v. Louisville & N. R.R., 245 Ala. 113, 16 So. 2d 416 (1943).

[5] 323 U.S. 192, 203 (1944).

[6] *Id.* at 204.

[7] 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-60 (Supp. IV, 1959-62), amending 49 Stat. 449 (1935).

[8] 223 F. 2d 739 (5th Cir. 1955), *rev'd*, 350 U.S. 892 (1955).

of an agreement between it and the white local, involving no statutory or Constitutional provision upon which to predicate jurisdiction. On petition to the Supreme Court, certiorari was granted and the judgment of the Fifth Circuit reversed,[9] without oral argument, in a one sentence per curiam opinion citing *Steele* and *Brotherhood of Railroad Trainmen v. Howard.*[10] In 1963, the Supreme Court, in *Humphrey v. Moore,*[11] stated explicitly that a union operating under the NLRA has both "the responsibility and duty of fair representation," comparable to that imposed upon the Brotherhoods.[12]

A. *Injunctions*

1. *Discrimination in Collective Bargaining*

The principles of law governing judicial relief for discrimination against Negro workers by their bargaining agents originally were developed in litigation centered in the southern railroad industry. Indeed, the avenue paved by the *Steele* decision has been traveled by hundreds of plaintiffs since 1944. In order to appraise the effectiveness of injunction proceedings against discriminatory treatment during the bargaining process, the history of such conduct on the part of the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen and the Southern carriers should be examined.

When Steele was hired in 1910, ninety-eight percent of the firemen within his operating district were Negroes.[13] During this period, the railway Brotherhoods wavered between policies of accepting Negroes, and of rejecting them and seeking their elimination from the railroads.[14] The railroads, which had never hired Negroes with the intention of promoting them from firemen to engineers, took advantage of the Negroes' lack of organization by employing them to do "white men's work" at lower rates of pay. In 1918, however, wartime transportation chief McAdoo ruled that Negro railwaymen were to be paid the same amount as whites for the same work, based upon their actual craft employment.[15] The carriers soon lost interest in Negroes as a source of cheap labor, and the all-white Brotherhoods began to covet the Negroes' jobs. Ironically, the McAdoo

[9] Syres v. Oil Workers, 350 U.S. 892 (1955).
[10] 343 U.S. 768 (1952).
[11] 375 U.S. 335 (1964).
[12] *Id.* at 342.
[13] ROSS, ALL MANNER OF MEN 136 (1948).
[14] NORTHRUP, ORGANIZED LABOR AND THE NEGRO 49 (1944).
[15] United States Railroad Administration, General Order No. 27 and Supplements thereto, Nos. 12 and 20 (1918).

ruling "laid the foundation for a coalition between the carriers and the unions against Negroes in firemen's and other high-bracket positions."[16] Seniority rosters indicate that by 1925 the railroads had ceased hiring Negro firemen altogether,[17] and virtually all hiring was abandoned during the post-1930 depression period.

Since 1926 collective bargaining has been carried on within the framework of the Railway Labor Act. This statute guaranteed workers the right to choose their bargaining representatives, but it did not require a carrier to deal only with the representative chosen by the majority of employees.[18] After the 1934 amendments, which provided for exclusive representation, the Firemen and Trainmen were designated by the National Mediation Board as sole bargaining agents for their respective classes on ninety-nine percent of the total mileage covered by Class I railways.[19] In view of the fact that all of the operating railway Brotherhoods either excluded Negroes or afforded them inferior status, it was not surprising that the units deemed appropriate by the National Mediation Board were not the ones best suited to advance the welfare of Negro railwaymen.

Although diesel engines substantially reduced the need for firemen, in 1937 the Firemen induced the Association of American Railroads to sign an agreement to place a "fireman" (*i.e.*, helper) on all diesel locomotives, which had previously been operated with only an engineer and a mechanic.[20] In order to restrict this featherbed job to whites, separate agreements were concluded shortly thereafter with most carriers, providing that,

> "the employment and assignment of firemen (helpers) under the terms of the Diesel-electric agreement shall be confined to those firemen duly qualified for service on such locomotives; and that only firemen in line of promotion shall be accepted as duly qualified for such service."[21]

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[16] Ross, *op. cit. supra* note 13, at 120.

[17] *The Elimination of Negro Firemen on American Railways — A Study of the Evidence Adduced at the Hearing Before the President's Committee on Fair Employment Practices*, 4 LAW. GUILD. REV. 32, 33 (1944).

[18] Texas & N.O. R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 557-58 (1930).

[19] Class I railways, employing about 90% of all railway workers, are those having an annual operating revenue of $1,000,000.

[20] SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 190 (1941).

[21] Brotherhood of Locomotive Firemen and Enginemen, *Officers Reports* 553-54 (1941). See Mitchell v. Gulf, M. & O. R.R., 91 F. Supp. 175, 178 (N.D. Ala. 1950).

The effect of these agreements was to extend seniority rights on diesel equipment to helpers taken from the ranks of firemen but to deny Negro firemen the right to operate as helpers on diesels because both the railroads and the Brotherhood classified them as non-promotable.

By 1940, the Firemen were ready for a concerted drive to eliminate Negroes from their positions of already unequal competition. The Brotherhood asked for contracts with the southeastern carriers stipulating that only promotable men be employed on diesels, and that all vacancies and new runs[22] be staffed by promotable men.[23] The carriers refused[24] to agree to the proposals,[25] and the Firemen sought the "assistance" of the National Mediation Board, pressing for what later became known as the Southeastern Carriers Conference Agreement. The SCCA provided, briefly, that the percentage of non-promotable[26] firemen on each carrier was not to exceed fifty percent in each class of service; after that percentage was reached in a given seniority district, only promotable (white) men were to be hired for all new runs and vacancies; and, if any railroad had more stringent limitations in effect, the Firemen reserved the right to opt for their retention.[27] Thus, a Negro

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[22] Any technical scheduling changes by management — *e.g.*, change of starting time over 30 minutes, or the discontinuance and resumption of seasonal passenger service — constituted "new runs". See Testimony of Charles Houston, *Hearings on a Federal Fair Employment Practice Act Before a Special Subcommittee of the House Committee on Education and Labor*, 81st Cong., 1st Sess., 200 (May 17, 1949).

[23] *Id.* at 549-52.

[24] Except for the Frankfurt & Cincinnati Railroad Company.

[25] See a letter expressing this refusal from the Chairman of the Southeastern Carriers' Conference Committee to the President of the Brotherhood of Locomotive Firemen and Enginemen, quoted in Tunstall v. Brotherhood of Locomotive Firemen, 69 F. Supp. 826, 828, and 163 F. 2d 289, 291 (4th Cir. 1947).

[26] To remove any doubt as to which firemen were "non-promotable", the parties modified their agreement on May 23, 1941:

> "1. 'Non-promotable firemen' refers only to colored firemen.
>
> 2. Promotable firemen who are physically qualified, or previously failed an examination, or waived promotion, will be called for examination from May 1 to May 15. If such firemen fail the examinations, or waive examination, their seniority as firemen shall not be affected."

Tunstall v. Brotherhood of Locomotive Firemen, 163 F. 2d 289, 292 (4th Cir. 1947).

[27] The SCCA provided a maximum on employment of Negro firemen, but no minimum. On the St. Louis-San Francisco Railroad, where the four Brotherhoods had an agreement that after March 14, 1928, no Negroes should be hired in train, engine, or yard service, the Firemen elected to retain the 1928 agreement as having terms more favorable to the white union than the SCCA, and did not put the latter agreement into effect. On

fireman could be displaced on the ground that by his presence the fifty percent quota was exceeded. But he had no way of checking whether this was so, for only the railroad management and the sole bargaining agent knew what percentage of Negro firemen was currently employed.

In the *Steele* case, plaintiffs attacked the enforcement of the SCCA on the Louisville & Nashville Railroad in the Alabama courts; in *Tunstall v. Brotherhood of Locomotive Firemen*,[28] Negro firemen sought to void its application on the Norfolk Southern Railway in the federal courts. The cases were consolidated at the Supreme Court level, where the Court found that such unfair and illegal discrimination was subject to injunction and claims for damages.

Although the Court's opinions left no doubt as to the illegality of the SCCA, the Firemen's continued enforcement of the agreement and of a large and secret number of subsidiary agreements left Negro firemen no alternative other than to invalidate them by instituting a plethora of lawsuits. The Brotherhood and the southeastern carriers abandoned these tactics only after Tunstall's $4,000,000 damage claim[29] and the Supreme Court's decision in *Graham v. Brotherhood of Locomotive Firemen*,[30] almost eight years after the SCCA had been signed. In the *Graham* case, much of this subsequent litigation was consolidated into a claim for damages and injunctions against the Southern, Seaboard Air Line, and Atlantic Coast Line railroads. The Court forcefully reasserted the principles laid down in *Steele*, rejecting the Brotherhood's claim of mislaid venue and exemption under the Norris-LaGuardia Act.[31] Eleven years after signing the SCCA, the defendants signed a consent decree substantially embodying the terms of the preliminary injunction.[32]

Even while the *Graham* litigation was proceeding through the courts, the Brotherhood was concentrating on

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the Southern Railway, the Seaboard Air Line Railway, and other properties, the Firemen made supplemental agreements, practically prohibiting Negro firemen from serving on diesel locomotives. See *Hearings*, *supra* note 22, at 219.

[28] 323 U.S. 210 (1944), *reversing*, 140 F. 2d 35 (4th Cir. 1944). Later developments are reported at 148 F. 2d 403 (4th Cir. 1945) (service of process found adequate), 69 F. Supp. 826 (E.D. Va. 1946) (plaintiffs' motion for summary judgment granted), *aff'd*, 163 F. 2d 289 (4th Cir. 1947), *cert. denied*, 332 U.S. 841 (1947).

[29] See *Hearings*, *supra* note 22, at 220.

[30] 338 U.S. 232 (1949).

[31] 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958).

[32] Letter to the writer from Henry L. Walker, Vice-President and General Counsel, Southern Railway System, February 15, 1963; letter to the writer from Robert R. Faulkner, Special Counsel, Atlantic Coast Line Railroad Company, February 18, 1963.

replacing the doomed SCCA with yet another discriminatory stratagem. Six weeks after certiorari was denied in Tunstall's damages claim,[33] the Firemen notified the southern carriers (without similar courtesy to the Negro firemen affected) of a proposed contractual modification that "would eliminate the distinction between promotable and non-promotable firemen." This "forced promotion rule", which provided that all firemen would thereafter be required to take examinations for promotion to engineer, and those failing the examinations would be dismissed from the service, would have cost seventy-five percent of the remaining Negro firemen their jobs. It should be remembered that the railroads had never hired Negroes with the intention of promoting them to engineer status, and that the Negro firemen then in service had from twenty to forty years' seniority, as the railroads had long ago ceased hiring such personnel. Nevertheless, the Brotherhood and the carriers agreed that depriving this minority of seniority and employment rights was the most expedient — indeed, the most equitable[34] — method of affording the railroads a return on their investment in training firemen-helpers to be engineers.

Once again the Negro firemen turned to the courts for relief against the negotiation or application of the new contractual discrimination. In *Hinton v. Seaboard Air Line R.R.*,[35] *Rolax v. Atlantic Coast Line R.R.*,[36] and *Mitchell v. Gulf M. & O. R.R.*,[37] complaints following the *Graham* pattern had been filed in 1947 in an effort to enjoin continued application of the outlawed SCCA and supplementary agreements. These complaints were amended to seek relief against negotiation of the Brotherhood's forced promotion proposal. Then, two more actions, *Brotherhood of Locomotive Firemen v. Palmer*[38] and *Salvant v. Louisville & N. R.R.*,[39] were instituted with this aim. The interplay of these five actions bears recapitulation, as their history casts light on the effectiveness of the "immediate relief" which they sought.

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[33] 332 U.S. 841 (1947).

[34] See Rolax v. Atlantic Coast Line R.R., 91 F. Supp. 585 (E.D. Va. 1950).

[35] 170 F. 2d 892 (4th Cir. 1948), *cert. denied*, 336 U.S. 931 (1949). The complaint was filed in the District Court for the Eastern District of Virginia on February 12, 1947.

[36] 91 F. Supp. 585 (E.D. Va. 1950), *rev'd*, 186 F. 2d 473 (4th Cir. 1951). The complaint was filed on February 14, 1947.

[37] 91 F. Supp. 175 (N.D. Ala. 1950), *aff'd sub nom.* Brotherhood of Locomotive Firemen v. Mitchell, 190 F. 2d 308 (5th Cir. 1951).

[38] 178 F. 2d 722 (D.C. Cir. 1949) (affirming an injunction issued early in 1948).

[39] 83 F. Supp. 391 (W.D. Ky. 1949).

The *Hinton* defendants (Seaboard) were restrained from enforcing the SCCA by an injunction pendente lite (December 30, 1947).[40] On February 25, 1948, Seaboard moved in *Palmer* for a dismissal or, in the alternative, to stay the *Palmer* proceedings until *Hinton* could be decided. On April 13, Seaboard's motion was denied,[41] whereupon the railroad petitioned in *Hinton* for an injunction against the plaintiff's prosecution of *Palmer*, which was granted on April 27. Undeterred by this attempted invasion of its jurisdiction, on April 29 the *Palmer* court enjoined Seaboard and the Brotherhood from further negotiating a forced promotion contract. Ultimately, on November 8, the *Hinton* injunction against the prosecution of the *Palmer* action was set aside.

Meanwhile, the objections to venue upon which the original *Graham* injunction had been temporarily reversed were accepted by the district court in *Salvant*, at least until the Supreme Court could announce a contrary ruling.

On November 21, 1949, the *Palmer* injunction (against the forced promotion proposal) was affirmed, the Court of Appeals having delayed its judgment until it could rely on the Supreme Court's *Graham* decision.

The defendants (Atlantic Coast Line) in *Rolax* then convinced the district court that the plaintiffs had not done equity in *Palmer* in obtaining an injunction against a proposal (forced promotion) which would have "corrected" the discrimination complained of under the SCCA. The court denied plaintiff's motion for an injunction and found it difficult to understand why the Negro firemen-plaintiffs were resisting the Brotherhood's "good faith" attempt to give them "both equality and the responsibilities which accompany it."[42]

Following reversal of *Rolax*,[43] injunctions ultimately were issued in each of the five actions against all previous and continuing discriminatory bargaining by the Brotherhood and the southeastern carriers.[44]

In 1926, then-President D. B. Robertson of the Brotherhood of Locomotive Firemen and Enginemen had stated that he hoped Negro firemen would soon be eliminated.[45] One can only conclude, from this twenty-year vantage point, that the *Steele* line of injunctions interposed no sub-

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[40] Hinton v. Seaboard Air Line R.R., 170 F. 2d 892, 893 (4th Cir. 1948).

[41] *Ibid.*

[42] Rolax v. Atlantic Coast Line R.R., 91 F. Supp. 585, 592 (E.D. Va. 1950).

[43] Rolax v. Atlantic Coast Line R.R., 186 F. 2d 473 (4th Cir. 1951).

[44] Letter to the writer from W. R. C. Cocke, attorney for Seaboard Air Line Railroad, February 12, 1963.

[45] SPERO and HARRIS, THE BLACK WORKER 307 (1931).

stantial barrier to the achievement of the Firemen's purposes. Two cases ended in consent injunctions, one of which had to be ordered by the Supreme Court;[46] another later proved impotent in meeting more subtle breaches of the duty of fair representation.[47] Steele and Tunstall were ultimately ordered restored to their respective passenger runs and positions on seniority rosters. Since their employers had not hired Negro firemen since the 1920's, the net effect[48] of these decisions was to preserve the employment rights of a then dwindling number of elderly Negroes until their impending retirement. The *Hinton, Palmer* and *Rolax* injunctions could not, therefore, succeed in placing Negro firemen in diesel cabs,[49] but rather guaranteed the seniority prerogatives of a few old men until they departed[50] from a shrinking work force.[51]

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[46] Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949).

[47] Washington v. Central of Georgia Ry., unreported consent injunction against the forced promotion contract and other discrimination (M.D. Ga., Judge A. B. Conger, March 25, 1952), 174 F. Supp. 33 (M.D. Ga. 1958) (subsequent discrimination insufficiently shown for contempt citation), *aff'd sub nom.* Marshall v. Central of Georgia Ry., 268 F. 2d 445 (5th Cir. 1959); *but see* (unpublished) *Report on Negro Firemen* submitted by Joseph Goldstein to Attorney Joseph L. Rauh, April 20, 1954, for striking documentation of such continuing discrimination.

[48] After the Steele decision, the Brotherhood of Locomotive Firemen and Enginemen did not eliminate from its constitution the "white-born" qualification for membership. Instead, it added the following provision:

> "[I]f these provisions conflict with any federal, state, or Canadian laws, the provisions of such laws shall supersede these provisions to the extent required to bring about conformation (sic) . . . and to remove the violation or conflict."

LEISERSON, AMERICAN TRADE UNION DEMOCRACY 118-19 (1959). The Brotherhood is today the only affiliate of the AFL-CIO which has preserved such a color bar in its constitution.

[49] "I do not recall any other techniques in connection with the forced promotion contracts of Negro firemen, it being my recollection that there was promotion of Negro firemen to firemen's jobs on steam locomotives. To what extent such promotions occurred on the diesel locomotives, I do not know, but it is my present impression that most of the Negro firemen's jobs were washed out by gradual attrition and the non-employment of new Negro help on the diesels. . . ." Letter to the writer from W. R. C. Cocke, attorney for Seaboard Air Line Railroad, February 12, 1963.

[50] "Negro firemen have been retained in service until such time as their employment relationship is terminated by retirement, death, resignation, dismissal for cause, etc. . . . ." Letter to Percy W. Johnston, Jr., General Attorney, Gulf, Mobile & Ohio Railroad, from Personnel Assistant C. F. Burch, February 5, 1963.

[51] An ironic epilogue to the Firemen litigation may be found in Williams v. Central of Ga. Ry., 124 F. Supp. 164 (M.D. Ga. 1954). There the plaintiffs were white firemen who had failed examinations for promotion to engineer. Under a 1944 forced promotion contract which still applied to them (as whites), they were consequently confined to yard duty assignment, while Negroes with less seniority (but exempted from examinations) retained their road assignments. The court held that the plaintiffs, having reaped the benefits of discrimination by standing for promotion to engineer which was denied to Negroes, could not claim discrimination when such favoritism had some "inconvenience" attached to it.

The anti-Negro machinations of the Brotherhood of Railroad Trainmen, while generally more sophisticated in technique, closely paralleled those of the Firemen. At their 1919 convention, the Trainmen adopted a resolution calling on all general committees to press for a rule that no more non-promotable men would be employed, and that the practice of using "train porters" to perform the duties of baggagemen, flagmen or brakemen would be discontinued.[52] This strategy represented the Trainmen's reaction to the United States Railroad Administration's moves to set up certain functional tests for classification as brakemen[53] and to equalize black and white wages according to those tests. In self-defense, the Trainmen undertook a two-pronged attack on Negro brakemen's jobs: a series of "jurisdictional" claims filed with the National Railroad Adjustment Board;[54] and persistent pressuring of the southeastern carriers to renegotiate the Negroes out of work.

On March 14, 1928, without notice at any stage of the negotiations to Negro trainmen, the Brotherhood signed a contract with the St. Louis-San Francisco Railway which prohibited future hiring of Negroes in train, engine or yard service. This contract was the signal for a campaign, lasting through the 1950's, to deprive Negroes classified as "train porters" of the head-end braking work on passenger trains which they had been performing for over forty years, and to deliver this work to white brakemen who were BRT members. By 1946, many southern carriers had decided that if Negroes could not be exploited as brakemen for porters' wages, there was little reason to retain them in service over the protests and repeated strike threats of the Trainmen.

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[52] Brotherhood of Railroad Trainmen, *Proceedings of the Second Triennial Convention* 229-30 (1919).

[53] Supplement No. 12 to General Order No. 27, *supra* note 15:

"To carry out the intent of Article VI of General Order No. 27 and retroactive to June 1, 1918, it is ordered:

1. Employees in a passenger train crew, except conductor, collector, and baggagemaster, qualified and regularly required to perform the following duties, will be designated as passenger brakemen or flagmen and paid accordingly:

* * * * * *

2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.
3. This order shall not curtail the duties of employees heretofore classed as train porters.
4. This order shall not infringe upon the seniority rights of white trainmen."

[54] *Hearings*, *supra* note 22, at 208.

In *Randolph v. Missouri-K.-T. R.R.*[55] and *Howard v. Thompson*[56] the porters filed suit in the federal courts to protect themselves from loss of their traditional employment rights. These actions had the immediate aims of preserving the plaintiffs' jobs and preventing the Trainmen from continuing their illegal bargaining activities. Their long-range purposes were the reclassification of porters as brakemen who would receive equal pay and the prospective inducement of the Trainmen to represent Negroes' interests fairly. The lower courts found it necessary to deny jurisdiction, referring the plaintiffs to the National Mediation Board for a determination of their "jurisdictional" (*i.e.*, craft) rights. The Randolph porters secured an injunction five years later,[57] while Howard's case is still in court today under the aegis of the N.A.A.C.P.[58]

In *Hunter v. Atchison, T. & S.F. Ry.*[59] and *Dwellingham v. Thompson*,[60] Negro porters and waiters-in-charge sought to void and enjoin enforcement of NRAB awards,[61] decreed without notice to them and depriving them of employment in favor of white Trainmen. Two district courts held that the NRAB had exceeded its authority by modifying collective agreements without affording the interested plaintiffs an opportunity to be represented at the hearings. In a similar case, the union involved chose not to seek the Negroes' displacement in a subsequent fair proceeding.[62]

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[55] The history of the case is lengthy. 68 F. Supp. 1007 (W.D. Mo. 1946) (temporary restraining order), 7 F.R.D. 54 (W.D. Mo. 1947) (temporary injunction), *rev'd*, 164 F. 2d 4 (8th Cir. 1947), *cert. denied*, 334 U.S. 818 (1948); 78 F. Supp. 727 (W.D. Mo. 1948) (motions for leave to file supplemental bill of complaint and for restraining order denied), 85 F. Supp. 846 (W.D. Mo. 1949) (jurisdiction taken, after NMB dismissal), *aff'd*, 182 F. 2d 996 (8th Cir. 1950); 100 F. Supp. 139 (W.D. Mo. 1951) (permanent injunction), *aff'd sub nom.* Wood v. Randolph, 209 F. 2d 634 (8th Cir. 1954).

[56] 72 F. Supp. 695 (E.D. Mo. 1947) (injunction denied), *rev'd sub nom.* Howard v. St. Louis-S.F. Ry., 191 F. 2d 442 (8th Cir. 1951), *aff'd*, 343 U.S. 768 (1952).

[57] 100 F. Supp. 139 (W.D. Mo. 1951), *aff'd sub nom.* Wood v. Randolph, 209 F. 2d 634 (8th Cir. 1954).

[58] Interview with Mrs. Maria Marcus, Assistant Counsel, N.A.A.C.P., January 11, 1963. The case is styled Civil Action No. 62 C 358 (3), United States District Court for the Eastern District of Missouri, Eastern Division. An amended complaint was filed on December 12, 1962.

[59] 21 L.R.R.M. 2279 (1947), 78 F. Supp. 984 (N.D. Ill. 1948), *aff'd*, 171 F. 2d 594 (7th Cir. 1948), *cert. denied sub nom.* Shepherd v. Hunter, 337 U.S. 916 (1949). Later developments are reported at 188 F. 2d 294 (7th Cir. 1951) (permanent injunction reversed, but temporary injunction reinstated until final NRAB determination), *cert. denied*, 342 U.S. 819 (1951).

[60] 91 F. Supp. 787 (E.D. Mo. 1950), *aff'd sub nom.* Rolfes v. Dwellingham, 198 F. 2d 591 (8th Cir. 1952).

[61] National Railroad Adjustment Boards, First Division, Awards Nos. 6635-40 (1944).

[62] Griffin v. Gulf & S.I. R.R., 198 Miss. 458, 21 So. 2d 814 (1945).

"At the time the litigation arose the management of Gulf & Ship Island Railroad Company, as well as its own legal staff and its outside

In *Hunter,* where the courts ordered NRAB to re-open its docket on the void award, the Board ultimately preserved the rights of the plaintiff porters to head-end braking work without explicitly reversing its previous determination.[63] The practical result of the *Dwellingham* litigation was a full hearing before the NRAB Third Division, after which the Board decided that "whether a waiter-in-charge (Negro) or a steward (white) is to be used to fill the positions involved is a matter for determination by the management in the exercise of its discretion."[64] A few years before, the FEPC could only conclude that the difference between "stewards" and "waiters-in-charge" on dining cars was that the former wore black coats, and the latter wore white and were paid half of stewards' wages.[65] Shortly after the NRAB decision, however, the two groups signed agreements with the carrier which provided that waiters-in-charge could not be employed on dining cars that had more than four waiters.[66] This arrangement, while securing proportional protection from the effects of reduced

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> counsel, was of the opinion that Sam Griffin and the other Negro firemen were in the right and that the Brotherhood of Locomotive Engineers and the white firemen were in the wrong. Consequently both the lawyers representing the railroad company and the lawyers representing Griffin and the other Negro firemen took the same position in court. After the case was decided by the Mississippi Supreme Court in favor of Griffin and the other Negro firemen, the railroad company recognized the seniority rights of Griffin and the other Negro firemen. . . . [T]here were no further proceedings before the Adjustment Board and . . . the matter was finally terminated by the supreme court decision. . . . [T]he railroad immediately made up a new seniority list and started basing work assignments on it when the supreme court decision was rendered."

Letter to the writer from James Simrall, Jr., then attorney for the Brotherhood of Locomotive Engineers, February 7, 1963.

[63] National Railroad Adjustment Board, First Division, Award No. 19324, October 14, 1959.

[64] National Railroad Adjustment Board, Third Division, Award No. 6031, January 12, 1953.

[65] Hill, *Labor Unions and the Negro: The Record of Discrimination,* 28 COMMENTARY 479, 484 (1959).

[66] Memorandum of Agreements between the Missouri Pacific Railroad Company and the Brotherhood of Railroad Trainmen and Local No. 354, Hotel and Restaurant Employees International Alliance, March 25, 1953. Also, "Following the decision of the Court of Appeals, the parties entered into an agreement which provided that dining car stewards would be employed on dining cars having a certain number or more of waiters. Where less than that number were employed, the waiters in charge would work. I understand that as a result of reduction in dining car service and the substitution of grill cars for dining cars in many cases, the employment of dining car stewards was severely curtailed. I . . . do not know the status of waiters in charge at this time, although I would assume under the circumstances that they were not affected as much by the curtailment of service as were the dining car stewards." Letter to the writer from Charles R. Judge, attorney for the Brotherhood of Railroad Trainmen, February 22, 1963.

dining car service, amounts to nothing more than a racially determined allocation of job opportunities.

Clearly, the employment rights of a racial minority may be jeopardized in a number of ways after the bargaining union and employer have ceased negotiation. Unions bent on eliminating Negro workers' jobs have not hesitated to exploit the most respected techniques, including arbitration awards and jurisdictional claims before administrative agencies, for maintaining industrial peace in the attempt. Historically, the courts have found it easier to regard the deprivation of Negroes' jobs resulting from these tactics as a violation of federal Constitutional due process, than to view direct pressure on management as a violation of the Brotherhood's federal "statutory" duty of fair representation. Even when Negro workers could participate in fair hearings before the NRAB, the remedies available in that forum could hardly prove adequate. The adjustment boards are composed of equal numbers of representatives of carriers and railway labor unions. To refer the racial minority to its joint oppressors for "justice", therefore, smacks of cynical fraud. Moreover, the adjustment boards apparently refuse to hear complaints filed by individual members of a craft represented by a labor organization. Where the real grievance is systematic exclusion from preferred jobs, a series of individual complaints is cumbersome and expensive. Finally, while the relief obtainable from the NRAB is not limited to an award of damages, its decision cannot go beyond the existing contract; even if it were favorable to the plaintiffs, they would find it necessary to seek relief whenever the carrier and union modified their agreement.

The Firemen and Trainmen litigation represents attempts to prevent breaches of those unions' duty of fair representation in bargaining where the breaches have been drastic enough to have directly threatened Negro plaintiffs' jobs. On this crucial level, the courts have belatedly and inadequately coped with such threats, reluctantly accepting jurisdiction and permitting defendants' attorneys to becloud the real issues with dilatory procedural moves. One principle made indelibly clear by the *Steele* case was that bargaining agents had no right, at the very least, to pressure employers for the elimination of a part of their constituency.[67] By the time the courts saw fit to intervene

[67] The theories utilized by the plaintiffs during the entire course of the *Randolph* litigation (for the history of this case see *supra* note 55) demonstrate that this course of conduct by a bargaining representative could be enjoined under revered tort and equity propositions, without any reliance on the Steele doctrine.

on behalf of Negroes who were threatened with job losses because of a discriminatory agreement,[68] the defendants had initiated another equally menacing bargaining offensive.[69] On the otherhand, where Negroes could get wind of the contemplated betrayal — as they did when the Firemen proposed a forced promotion system — the relief provided by injunction against the negotiation of an obviously discriminatory arrangement proved adequate to the immediate danger.[70]

By way of contrast, three California cases decided prior to the Taft-Hartley Act[71] had established the rule that where a union maintained a closed shop, it could not demand the firing of Negroes discriminatorily barred from full membership rights. In *James v. Marinship Corp.*,[72] *Williams v. International Bhd. of Boilermakers*,[73] and *Thompson v. Moore Drydock Co.*,[74] the Boilermakers Local No. 6 had insisted, under their closed shop Master Agreement with the Pacific coast shipyards, that Negro workers join Auxiliary A-41 in order to get work clearances. The California courts protected the Negroes' jobs, explicitly offering the union the alternatives of admitting Negroes on an equal basis or refraining from enforcing the closed shop agreement against them. Faced with this choice, the Boiler-

[68] *E.g.*, the Southeastern Carriers Conference Agreement of February 18, 1941.

[69] See text at notes 33-44 *supra*.

[70] See, *e.g.*, Rolax v. Atlantic Coast Line R.R., 186 F. 2d 473 (4th Cir. 1951); Hinton v. Seaboard Air Line R.R., 170 F. 2d 892 (4th Cir. 1948); and Salvant v. Louisville & N. R.R., 83 F. Supp. 391 (W.D. Ky. 1949). The difference in potential judicial effectiveness in the two situations is pointed up by developments subsequent to Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952): "Some two or three years later the train porters on the Missouri Pacific Railroad were squeezed by the Pullman Porters Union, composed essentially of Negro workers, and forced to join that union despite the fact that the train porters contended that they did not want to agree that they were porters rather than operating trainmen. . . . The train porters of the Missouri Pacific Railroad belonged to a union of their own choice when they were rejected as members by the Brotherhood of Railroad Trainmen. The net result of the *Cook* case (Cook v. Brotherhood of Sleeping Car Porters, ... Mo. ..., 309 S.W. 2d 579 (1958), *cert. denied*, 358 U.S. 817 (1958)) was that the men lost their jobs after the injunction was lifted. The *Cook* case pointed up that when the white union left the men unrepresented, the Negro Brotherhood of Sleeping Car Porters obfuscated the proper classification of the men and in effect endorsed the rejection by the Brotherhood of Railroad Trainmen of the rights of the men to full and fair representation and proper classification. The railroad became the beneficiary also of the miscarriage, insofar as it paid brakemen classified as train porters, who did more than ordinary white brakemen, less money than a white brakeman." Letter to the writer from Victor Packman, attorney for the Negro "porters", January 9, 1963.

[71] 61 Stat. 136 (1947), 29 U.S.C. § 158a(3) (1958).

[72] 25 Cal. 2d 721, 155 P. 2d 329 (1944).

[73] 27 Cal. 2d 586, 165 P. 2d 903 (1946).

[74] 27 Cal. 2d 595, 165 P. 2d 901 (1946).

makers admitted Negro members, and today Negroes hold a substantial number of jobs in the West Coast shipyards.[75]

The duty of fair representation was extended by the Supreme Court in *Conley v. Gibson*[76] to situations in which the union failed to protest management action that resulted in Negroes' loss of jobs. The Texas & New Orleans Railroad had summarily abolished forty-five jobs held by Negro employees, in violation of a contract with the Brotherhood of Railway Clerks,[77] whose (white) Local 28[78] accepted the railroad's excuses and refused to process the displaced Negroes' grievances. These jobs were soon filled by some Negro employees, who undertook the same work without the seniority that they had accrued in service with the railroad. On remand from the Supreme Court, over seven years after the union's failure-to-protest breach of its *Steele* duty, the district court granted the defendants' motion to dismiss the complaint as to the deceased plaintiffs, and also granted defendants' motion for summary judgment as to the remaining plaintiffs' original class action.[79] Most of the issues had by then become moot, since the "threatened wholesale discharges (had) halted shortly after suit was filed, so that all named plaintiffs had nothing to actually litigate."[80]

The plaintiff carmen-helpers in *Britton v. Atlantic Coast Line R.R.*,[81] have been less successful in their fight to retain jobs "abolished" by management and assigned to white carmen and mechanics. While closely analogous to *Conley*, the situation of these Negro workers is more precarious, for the Brotherhood of Railway Carmen, the white local, has apparently "processed" their grievance through administrative arbitration.[82] Thus, in these two cases where

[75] "After the decision in the *James* case, the Boilermakers Union admitted Negroes in California, and I understand they still do. . . . I do not know their policy in the rest of the country. . . . Today the Bay Area shipyards are at a low ebb so far as employment is concerned, but I understand that Negroes are employed by them. I believe that there are only two shipyards in the area, one at Mare Island which is a naval shipyard and I know that Negroes work there, and the other is the Bethlehem shipyard here, and my general knowledge tells me that Negroes are employed there." Letter to the writer from George R. Andersen, attorney for the Negro workers, February 14, 1963.

[76] 355 U.S. 41 (1957).

[77] *I.e.*, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

[78] The plaintiffs were members of segregated Local 6051.

[79] 138 F. Supp. 60, *aff'd*, 229 F. 2d 436, *rev'd*, 355 U.S. 41 (1961).

[80] Letter to the writer from Roberson L. King, attorney for the Negro plaintiffs, February 27, 1963.

[81] 303 F. 2d 274, 50 L.R.R.M. 2232, 7 RACE REL. L. REP. 498 (5th Cir. 1962), *aff'd sub nom.* King v. Atlantic Coast R.R., 323 F. 2d 1005 (5th Cir. 1963).

[82] The Carmen's (white) local and the railroad were unable to settle the grievance, which was subsequently submitted to the Second Division of the

the plaintiffs have alleged discrimination because of the white locals' failure to protest their discharge adequately, the courts have not been able to protect Negro workers' jobs. This incapacity is traceable to the courts' acceptance of the unions' arguments that the management's decision was "justified" and that the union had done everything within its power to prevent its implementation.[83] The courts have been reluctant to inquire whether a union which maintains segregated locals and whose white members replace the discharged Negroes can be said to have earnestly prosecuted the latters' complaints.

NRAB on November 30, 1960 (Docket No. 3860). A hearing on the dispute was held on March 2, 1961, but the Division was unable to agree upon its disposition for a year. During that time, the plaintiffs filed their complaint in the district court, seeking an injunction and damages for the lost work. The court dismissed the complaint for its failure to assert a basis for federal jurisdiction, without leave to amend. The Fifth Circuit Court of Appeals affirmed the dismissal, but remanded the cause with instructions to allow the plaintiffs to amend their complaint. On June 7, 1962, the NRAB Second Division held a hearing, with a referee present, but the latter had not reached a decision by September 25. On the basis of these facts, the district court granted the defendants' motion for summary judgment on December 4, 1962. King v. Atlantic Coast Line R.R., Summary Final Judgment, No. 4576-Civ.-J, United States District Court for the Middle District of Florida.

[83] "There has been no change in the bargaining agreement since the Supreme Court decision, nor has there been any change in the relationship of the parties. The lawsuit was predicated on the premise that the defendant locals had discriminated against the plaintiffs in failing to take the necessary steps to protect their jobs. This was completely false. There was nothing left undone by the locals that they could have done to prevent the Southern Pacific Transport Company from cancelling its farm-out contract with the Railway Company and assigning its own employees to the work in question. Most, if not all, of the affected employees went to work for the Transport Company, who had a different union (the Teamsters) representing its employees. Obviously, the Brotherhood unions would have prevented their work being transferred to the jurisdiction of the Teamsters Union if it had been within their power to do so. There was the further vague contention, made by the plaintiffs, that there was unlawful discrimination in the maintenance of the two locals, one composed of whites and the other of Negroes. Not only have the courts held that this is not unlawful discrimination, but not one of the Negroes ever asked for membership in the white local." Letter to the writer from Chester M. Fulton, attorney for the Brotherhood of Railway Clerks in Conley, January 25, 1963.

Also, "The strange thing about this case is that no discrimination has ever really been present. The union has always supported the claims of the plaintiffs and continues to do so. The plaintiffs' real complaint is against the railroad. . . . [Y]ou will notice that there are no specific charges that the union has taken any affirmative action against the employees involved. The charge seems to be that the union has acquiesced in the action taken by the railroad. If the union had in fact acquiesced, and if this were done in bad faith for the purpose of discriminating against the plaintiffs to the advantage of other members of the union, I assume that this would violate the union's duty to represent all employees in the bargaining unit equally and fairly. Even this is not clearly alleged, however, in the complaint. As we understand the facts, the union has prosecuted a grievance on behalf of the plaintiffs at every stage of the grievance procedure." Letter to the writer from William H. Adams III, attorney for the Carmen in Britton, February 12, 1963.

2. *Perpetuation of Pre-existing Discrimination*

In cases involving judicial correction of previously established discriminatory employment practices, the Negro complainants have sought amelioration of their position as compared to that of the white workers, rather than protection from some newly devised threat posed by their bargaining agent. For convenience, railroad industry cases will be discussed separately; then, judicial intervention in plans for wholesale renovation of Negro workers' status.

In *Dillard v. Chesapeake & O. Ry.*,[84] Negro machinists-helpers and laborers brought an action against System Federation No. 41[85] and their employer in an effort to put an end to long-standing racially-oriented denials of promotion into higher-skill, higher-pay jobs. After the Fourth Circuit Court of Appeals found that the district court had jurisdiction,[86] and the defendants' motion for summary judgment was denied,[87] negotiations were initiated by the parties in an effort to obviate the necessity for a jury trial. In the compromise ultimately approved by the court, the defendants jointly agreed to amend the collective agreements so as to guarantee promotion solely on the bases of seniority and technical qualifications, and the union agreed not to use its position as statutory bargaining agent to impede the advancement of Negro employees.[88] No re-arrangement of job classifications was subsequently undertaken, however, and the plaintiffs were all well beyond the age limit for advancement to positions which the railroad had been steadily reducing in number.[89]

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[84] 199 F. 2d 948 (4th Cir. 1952).

[85] *I.e.*, a bargaining amalgamation of locals of the IAM, Boilermakers, Blacksmiths, Sheet Metal Workers, IBEW, Brotherhood of Railway Carmen, and the International Brotherhood of Firemen and Oilers, Roundhouse and Railway Shop Laborers — only the last of which admits Negroes to full and equal membership.

[86] 199 F. 2d 948 (4th Cir. 1952).

[87] 136 F. Supp. 689 (S.D. W.Va. 1955).

[88] "[I]t was further agreed that the applicable collective bargaining agreements should be amended so as to spell out with particularity understandings in substance as follows:

> Helpers in the Maintenance of Equipment Department to be advanced to mechanics tentative and laborers, coach cleaners, helpers, or apprentices on the basis of seniority, ability, and compliance with qualification requirements and without discrimination because of race, color, or creed.

Also, in applying Rule 40(c) of the Shop Crafts Agreement, selection to be made from those desiring to become helper apprentices in accordance with the existing agreement, without discrimination because of race, color, or creed." Letter to the writer from Strother Hynes, General Solicitor, Chesapeake & Ohio Railroad Company, January 31, 1963.

[89] Letter to the writer from Amos A. Bolen, attorney for the Chesapeake & Ohio Railway Company, February 12, 1963.

Contractual provisions in operation for thirty years, having a similar freezing effect upon Negro employees, were challenged in *Jones v. Central of Georgia Ry.*[90] The court enjoined the railroad and the Brotherhood of Railroad Trainmen from continuing practices which denied Negroes the opportunity to compete and train for jobs as flagmen, baggagemen, and conductors. It further "affirmatively required each to grant the same seniority rights, training privileges, assignments and opportunities to these jobs as white persons of similar continuous service would enjoy."[91] The railroad has declined to answer repeated inquiries as to the implementation of this decree. Most of the problems it purports to solve, moreover, are taken up again in the complaint in the current *Howard* litigation.

In *Clark v. Norfolk & W. Ry.*[92] a contractual provision excluding Negroes from assignment as car retarder operators had been removed for some time, but no Negro yardmen were being permitted to qualify for such positions. The court enjoined railroad and union from "denying to the plaintiffs the right and opportunity to qualify and be assigned on the same terms as whites."[93] By the time damages were assessed, however, one of the plaintiffs had retired, a second had failed the promotion examination as a result of obviously parsimonious training, and the third had never attempted the examination.[94]

Finally, *Richardson v. Texas & N.O. R.R.*[95] indicates that the courts can be utilized to redress a single racial grievance as readily as a pattern of discriminatory treatment. There, Negro yardmen complained of an employer practice, acquiesced in by the Trainmen, of assigning junior whites as engine foremen on Negro crews. The Fifth Circuit found *Steele* jurisdiction over "the perpetuation of preexisting discriminatory employment practices."[96] On remand, the offending contractual provision was voluntarily excised,[97] and a consent injunction was issued, restraining the defendants from interfering with the plaintiffs' exer-

[90] 229 F. 2d 648 (5th Cir. 1956), *cert. denied*, 352 U.S. 848 (1956).

[91] *Id.* at 650 n. 3.

[92] 37 L.R.R.M. 2685, 3 Race Rel. L. Rep. 993 (W.D. Va. 1956).

[93] *Id.* at 2687.

[94] 3 Race Rel. L. Rep. 988, 990.

[95] 242 F. 2d 230 (5th Cir. 1957), *reversing* 140 F. Supp. 215 (S.D. Tex. 1956).

[96] *Id.* at 234.

[97] Letter to the writer from George L. Schmidt, attorney for the Brotherhood of Railroad Trainmen, February 5, 1963.

cise of seniority rights as foremen.[98] The railroad reportedly is complying with the terms of the decree.[99]

Separate seniority lines based on racial alignments, explicit in collective agreements or tacitly perpetuated, represent a major barrier to Negro workers' advancement, particularly in southern manufacturing industries.[100] In papermaking, chemical and oil refining, steel and tobacco manufacturing — to name but a few — Negroes are usually hired exclusively as "laborer", "non-operating" or "maintenance" personnel. As a result of these discriminatory arrangements, qualified Negro workers are barred from both initial employment and promotion into production and skilled craft occupations. Negro seniority rights are operative only within certain all-Negro departments, and the Negro worker is frequently the victim of "inaccurate" job classifications and wage differentials. Such dual seniority systems have been the subjects of attack in several cases, and their modification continues to pose problems relevant to the present study.

The first — and, possibly, the most important — of these cases was *Syres v. Oil Workers*,[101] a suit to eliminate unwritten separate seniority lines negotiated by a predominantly white bargaining committee at the Port Arthur refinery of the Gulf Oil Corporation. The factual background, since it is fairly typical, bears some elaboration:[102] Negroes were hired into the "labor department" on their ability to read NO SMOKING signs; whites were hired into the "operating mechanical department", placed on proba-

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[98] (Unreported) Judgment, Richardson v. Texas & N.O. R.R., Civil Action No. 9240, United States District Court for the Southern District of Texas, November 8, 1960.

[99] "Prior to the dismissal, the railroad had begun and still is assigning foremen on the engines with Colored crews on the basis of seniority, regardless of color, with white men working as helpers if they do not have sufficient seniority to act as foremen." Letter to the writer from George L. Schmidt, attorney for the Brotherhood of Railroad Trainmen, February 5, 1963.

[100] Elaboration of the situation summarized in this paragraph may be found in articles by Herbert Hill, Labor Secretary of the N.A.A.C.P., including the following: *Labor Unions and the Negro*, 28 COMMENTARY 479 (1959); *Patterns of Employment Discrimination*, The Crisis, March, 1962; *Has Organized Labor Failed the Negro Worker?*, Negro Digest, May, 1962; See also the following articles by Professor Ray Marshall: *Ethnic and Economic Minorities: Unions' Future or Unrecruitable?*, 350 Annals of the American Academy of Political and Social Science 63 (1963); *Some Factors Influencing Union Racial Practices*, Proceedings of the 14th Annual Meeting of Industrial Relations Research Association 104 (1961); *Racial Factors Influencing Entry Into the Skilled Trades*, The Economics of Human Resources 23 (1963).

[101] 350 U.S. 892 (1955).

[102] *Id.* The facts in this paragraph are drawn from the Union Respondents' Brief in Opposition to Petition for Certiorari 19-31.

tion for six months, and required to pass certain intelligence tests. In 1954, Negro members of segregated Local 254 demanded integration, and shortly thereafter Gulf made seventy-six jobs in the operating department available to labor department employees, waiving educational and other normal requirements. Union and company stipulated that they would continue to meet until a mutually acceptable plan for open bidding could be formulated. Ultimately, a "compromise" was arrived at, giving Negroes the right to bid into operating department jobs, provided they had the high school education and passed the tests uniformly required of white employees. Local 254's demand for a single starting job was granted.

Meanwhile, Syres and Local 254 had filed a suit against the white local, seeking injunctive relief and damages. The international union intervened as *amicus curiae* on the side of the plaintiffs.[103] By the time the jurisdiction of the court had been established,[104] the new arrangement had been instituted, and the district court dismissed all but the plaintiffs' $150,000 damages claim as moot.[105] Actually, of approximately 700 Negroes employed by Gulf, 150 have crossed the line into the operating mechanical department. The balance of the Negroes "will probably not be able to promote into the skilled jobs because they do not have high school education or anywhere near its equivalent," even though the contract provided that a Negro failing the aptitude test could continue to take it every six months until he passed.[106]

The *Syres* "solution" is important for several reasons:

> "the wall has definitely been breached in the oil industry in the Gulf Coast area. . . . All refineries have nominally opened the doors to the Negroes and some refineries have developed a substantial degree of integration. . . . The big refineries of Gulf at Port Arthur, Mobil Oil at Beaumont, and Sinclair at Houston have integrated in fact. . . . In all three refineries, 150 or more Negroes have moved into the formerly restricted jobs. Refineries at Shell in Houston, Humble at Baytown, Texas, AMOCO at Texas City, and others have nominal clearance for Negroes but these refineries pretend that they can find no Negroes who can qualify equally with whites when job applications are open. The same is

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[103] 223 F. 2d 739 (5th Cir. 1955).

[104] 350 U.S. 892, *reversing* 223 F. 2d 739 (5th Cir. 1955).

[105] See 257 F. 2d 479, 481 (......).

[106] Letter to the writer from Chris Dixie, attorney for Local 23, January 18, 1963.

> true of the big Texaco refinery, across the street from the Gulf refinery."[107]

Under the new contract, Negroes at the Port Arthur refinery moved from top positions in the labor department into zero seniority standing in the newly integrated system. Since, in the oil industry, few "Negro jobs" pay higher wages than the lowest rungs on the white employment ladder, the plaintiffs who ultimately advanced did not suffer substantial cuts in wages.[108]

Facing the manpower shortage in World War II, Gulf had hired many employees who could never qualify under post-War aptitude tests. In fact, previously the company had hired employees through individual screening, without the use of either educational criteria or industrial intelligence tests. The integration plan in *Syres*, however, required Negroes who sought promotion to meet qualification standards that had been imposed on white applicants since the War; it did not go so far as to give them the benefit of the lowest standards which had ever applied in the past.[109] Of course, future employment requirements would have to be raised uniformly, but such a move could only decrease Negroes' chances for advancement.

This integration plan has served as a model in two other cases involving the same union,[110] and in *Whitfield v.*

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[107] "The situation in the Gulf Coast area of Texas, which is becoming quite industrialized, is quite different from the Old South. Integration in very substantial degree has taken place in a number of industries, notably the Steel industry, both in the basic steel plant of Sheffield Steel (Armco) at Houston, and a number of large steel fabricators." *Ibid.*

[108] Letter to the writer from Chris Dixie, attorney for Local 23, February 19, 1963.

[109] "The new plan in the Syres case required no differences in the future, and no differences in the requirements for incumbent Negroes from the requirements consistently required by the Company since World War II. In other words, incumbent Negroes are entitled to promote by passing the same tests heretofore required in modern times." *Ibid.*

[110] In Holt v. Oil Workers, 36 L.R.R.M. 2702 (Tex. D.C. 1955), the facts closely paralleled those in *Syres*. Not long after the plaintiffs filed their complaint, the defendants Local 367 and the Shell Oil refinery negotiated an emergency stop, making four "white jobs" preferentially available to members of their class. The Negro workers then reiterated their dissatisfaction in a complaint to the President's Committee on Government Contracts. Under this concerted pressure, company and union acted quickly to accomplish what they had long neglected to do for Negro equality, amending their collective agreement with a "Memorandum of Understanding" that was subsequently adopted as the basis for a voluntary dismissal. This agreement, as its *Syres* counterpart, provided that vacancies in the newly integrated Service Department would be filled by plant-wide seniority bids, irrespective of white workers' previous standing in the abandoned General Helper Department. Here, too, the Negroes "ratified" the new arrangement, even though it required them to meet the company's qualifications for promotion. See also Jones v. Distillery Workers, 5 Race Rel. L. Rep. 786 (W.D. Ky. 1960). There, Negro plaintiffs sued the union for

United Steelworkers,[111] a case which illuminates whatever flaws are not apparent in judicial supervision of such matters, it has survived legal challenge, under different social and industrial circumstances.

Of 3,000 employees at the Sheffield Steel plant in Houston, approximately 1,300 were Negroes, all of whom belonged to the integrated Steelworkers Local 2708. That union bargained with the company through a Joint Seniority Committee composed of two Negroes and two whites. In 1956, over the opposition of its Negro delegates, the committee signed an agreement for the gradual elimination of the plant's dual seniority system. Thenceforward, (1) No. 1 line jobs would be open to all bidders, subject to the company's screening, (2) the 260-hour probation period for No. 1 jobs would be abolished and replaced by industrial tests, (3) Negroes who passed the test would be given preference for No. 1 vacancies, and (4) if no Negroes (from the No. 2 line) could bid on No. 1 jobs, such jobs would be open to bidders from an integrated labor pool who had passed the tests.

In the steel industry, however, the "wage inequity" program had developed in a manner in which manual (*i.e.*, No. 2) laborers in many cases earned more than

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$250,000 damages and an injunction against an agreement which restricted them to Sanitation Department jobs and provided for separate seniority lists. The parties signed a compromise agreement, approved by the court, providing for merger of the dual seniority lists and open bidding for General Helper vacancies. As to subsequent developments, "the dual seniority list has been completely abandoned. There have been some Negroes moved into jobs other than within the Sanitation Department. There would have been more but for the fact that some of the Negroes reached on the seniority list declined to accept the advancement; hence, the next white person in line received the position." Letter to the writer from James A. Crumlin, attorney for plaintiff Negroes, March 2, 1963. Moreover, in Butler v. Celotex Corp., 3 Race Rel. L. Rep. 503 (E.D. La. 1958), the union was integrated (Local 4-179), and the collective agreement explicitly provided for a unitary promotion and seniority system. Nevertheless, in the interest of "minimum distress to present employees", the parties agreed to an arrangement that would provide for integration of the dual seniority system even more gradually than those adopted in *Syres* and *Holt*: (1) employees remaining in their present jobs retained their "unwritten" seniority rights; (2) upon promotion, demotion, transfer, etc., employees would thereafter fall under the integrated seniority system; and (3) "When the last employee possessing unwritten seniority" would make a permanent change of job, all dual seniority would terminate. In its final decree, the district court retained jurisdiction to allot costs and supervise enforcement, in case of violation of the consent injunction provisions. Since then, "the dual seniority lists have been abandoned and it appears that there have been no particular problems for any of the employees concerned." Letter to the writer from M. C. Strittmatter, Vice President for Industrial Relations, The Celotex Corporation, March 23, 1964. Finally, "[a]s a result of our efforts, a substantial number of Negroes have been properly upgraded." Letter to the writer from Revius O. Ortique, attorney for plaintiff Negroes, March 12, 1964.

[111] 263 F. 2d 546 (5th Cir. 1959), *cert. denied*, 360 U.S. 902 (1959).

skilled (*i.e.*, No. 1) laborers, because of the exertion, risk and discomfort of their tasks. Negroes at the top of the No. 2 line, then, would have to accept substantial wage cuts as the price of promoting into No. 1 bottom jobs. Furthermore, whites on No. 1 jobs, many of whom had been hired during wartime labor shortages, were exempted from taking the company's tests in order to remain in their departments.[112] The integration plan was submitted to the union membership at a "ratification" meeting which resulted in a vote of 1,412 to 202 in favor of the proposal. Of the 900 Negroes who attended, 200 voted against the plan, 14 approved it, and the rest withheld their ballots in protest. Subsequently, most of the Negro workers refused to take the promotion tests, apparently relying upon legal action to invalidate the newly adopted system. Ninety Negroes did pass, of whom forty-five moved into the lowest No. 1 line jobs, and the remainder were relegated to a reservoir for filling later vacancies.

In the district court, the plaintiffs were denied relief on the theory that the integration plan had its foundation in "essentially relevant" factors, as defined in *Steele* and *Ford Motor Company v. Huffman.*[113] The Fifth Circuit agreed:

> "We attach particular importance to the good faith of the parties in working toward a fair solution. It seems to us that the Union and the Company, with candor and honesty, acknowledged that in the past negroes were treated unfairly in not having an opportunity to qualify for skilled jobs. They balanced the interests of negroes starting Line 1 jobs against the interests of employees who have worked previously in Line 1 jobs, in the light of fairness and efficient operation. . . . *Courts, when called upon to eye such agreements, should not be quick to 'substitute their judgment for that of the bargaining agency on the reasonableness of the modifications.'* Pellicer v. Brotherhood of Railway and Steamship Clerks, 217 F. 2d 205, 206 (5th Cir. 1954). . . .
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> "We cannot turn back the clock. Unfair treatment to their detriment in the past gives the plaintiffs no claim now to be paid back by unfair treatment in their

[112] "In order to transfer or promote into any other department, whites are required to pass the examination. Quite a few of the whites have failed the examination and are thus confined to their own department." Letter to the writer from Chris Dixie, attorney for Local 2708, February 19, 1963.

[113] 345 U.S. 330 (1953).

favor. *We have to decide this case on the contract before us and its fairness to all.*

"Considering the contract from the standpoint of all the employees and recognizing the necessity for reasonable standards of operating efficiency, we find that there is no evidence of unfairness or discrimination on the ground of race. . . ."[114]

It is easy enough to applaud the courts for approving integration plans to which Negro workers offered only mild objections. But is equal enthusiasm merited when a court rejects the actual sentiments of forty-three percent of the workers in a plant? It is true that in non-racial cases, judicial intervention has been restrained by a heavy presumption of regularity accorded the actions of a statutory bargaining representative.[115] It is at best loose thinking, however, to carry this approach back into racial cases where Negro plaintiffs have invoked the *Steele* doctrine in order to put an end to "compromise" with the discriminatory environment. In race relations, Negroes are either afforded "equal" treatment or they are not; the pretense of "almost equal" treatment is cant. Considering the total unreasonableness of previous denials of promotion on the basis of race, it is questionable whether "reasonable standards of operating efficiency" may now be adduced by union and company in defense of their agreement. Finally, even if there is a retention of the guide of good faith motivation on the part of the bargaining agent,[116] or conversely, the absence of "hostile discrimination",[117] it is difficult to agree with the *Whitfield* courts that a union which concluded an agreement opposed by almost one-half of its constituency should have access to this justification.

Anticipating the reader's challenge to produce an alternative rational, let me suggest that the courts either force the incumbent (No. 1 line) whites to take the new qualification tests (which Negroes must pass in order to be promoted), and demote them if they fail, or allow the Negro workers to promote into Line 1 under the same standards

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[114] 263 F. 2d 546, 551 (5th Cir. 1959). (Emphasis added.)

[115] See, *e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and Pellicer v. Brotherhood of Railway Clerks, 217 F. 2d 205 (5th Cir. 1954).

[116] When the Steele doctrine is invoked in racial cases, it is the good faith of the union vis-a-vis the minority — *not* vis-a-vis the company — that is the test of nondiscriminatory negotiation. The Court of Appeals in *Whitfield* ignored this distinction. For discussion of the good faith standard in the different context of NLRA Sec. 8(b)(3), see text at notes 192-201 *infra.*

[117] See Mount v. Brotherhood of Locomotive Eng'rs, 226 F. 2d 604 (6th Cir. 1955), *cert. denied*, 350 U.S. 967 (1956).

by which some of the whites were hired. If it be objected that the courts cannot foist such a settlement upon private litigants, then at least they should refrain from sanctioning agreements of lesser, pragmatic justice.

3. *Denial of Union Membership*

The fact that the *Syres* and *Whitfield* litigation was conducted against fully integrated bargaining agents does not necessarily negate the proposition that Negroes within unions are less likely to be discriminated against as a minority.[118] The argument is that if Negroes belong to the union, can communicate their economic needs to the leadership and hold intra-union political power, the potential for unfair distinctions in collective bargaining will be reduced. This position finds support even in exceptional situations where integrated unions have been sued. In such cases, the bargaining agent has always freely acknowledged its *Steele* duty, the controversy being confined to whether or not it had fulfilled that responsibility.

Denial of participation in union decision making may take at least two forms: outright exclusion from membership; or relegation to a segregated — or "auxiliary" — local under the domination of the nearest white local. The first system was attacked directly for the first time in *Oliphant v. Brotherhood of Locomotive Firemen*,[119] where the Negro plaintiffs sought an order requiring their admission on the ground that their recognized bargaining agent negotiated contractual provisions which resulted in a loss of income to them, in violation of the fifth amendment. The district court[120] and the Sixth Circuit Court of Appeals dismissed the complaint, finding the Brotherhood's certification under the Railway Labor Act insufficient to make its subsequent discriminatory conduct the equivalent of federal action. The Supreme Court denied certiorari, "in view of the abstract context in which the questions sought to be raised are presented by this record."[121]

[118] Compare Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874, 875 (1957), with Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1342 and 1356-57 (1958).

[119] 262 F. 2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

[120] 56 F. Supp. 89 (N.D. Ohio 1957).

[121] 359 U.S. 935 (1959). Plaintiffs no doubt found this cryptic remark intolerably ironic, in view of the Brotherhood's long, non-abstract history of discriminatory conduct, beginning with the bankground of the *Steele* case itself. The *Oliphant* decision was anticipated by Ross v. Ebert, 275 Wisc. 523, 82 N.W. 2d 315, 2 RACE REL. L. REP. 648 (1957). In spite of equally clear evidence of discriminatory denial of membership, garnered by the state FEPC (see previous developments at 1 RACE REL. L. REP. 909 (1956) and 2 RACE REL. L. REP. 151 (1956)), the Wisconsin courts could

The second *Howard* case, begun in December, 1962, may provide the concrete opportunity required by the Court. The plaintiffs in this case likewise are seeking to enjoin "the defendant Brotherhood from denying and refusing membership in the Brotherhood of Railroad Trainmen to plaintiff and to the class he represents."[122] Even if Howard wins the second round, there is no indication that the Trainmen will open their ranks for the wholesale entrance of Negro porters. Previously, under governmental compulsion,[123] the Trainmen adopted the rule that their exclusion policy should not apply where it would be in violation of law, presumably included court orders. But "they have the black ball, although ostensibly they have this principle."[124] If a contempt proceeding in Cincinnati (by Oliphant) or Memphis (by Howard) should succeed, it is unlikely that excluded Negroes elsewhere would find it feasible to rely on this complicated and expensive process to gain admission.

As for the elimination of segregated locals, two as yet isolated state developments represent the only judicial accomplishments in the exercise of *Steele* theory. In *Betts*

find no constitutional or statutory right of the plaintiffs to be admitted to the Bricklayers Union. Soon after this decision, however, the AFL-CIO Civil Rights Committee persuaded the Bricklayers local to admit Negroes. Subsequently, the Wisconsin fair employment practices statute was amended to allow enforcement of the commission's "recommendations" in equity by an aggrieved party against a non-complying party. WIS. STAT. ANN. SEC. 111.36(3) (1964 Supp.); see Fleischman, *Labor and the Civil Rights Revaluation*, NEW LEADER, April 18, 1960. It should be noted that Menifee v. Local 74, Lathers Union, 3 RACE REL. L. REP. 507 (N.D. Ill. 1958), is the only reported case in which the defendant consented to a decree enjoining it from denying membership to Negro applicants. Since that decree, "all Negroes who desire membership in Local 74 are now admitted; and all discriminatory practices have ceased." Letter to the writer from George N. Leighton, attorney for plaintiff Negroes, March 5, 1963. "The best estimate is that there are perhaps a score of Negro journeymen in the Local Union at the present time." Letter to the writer from Leo Segall, attorney for Local 74, March 12, 1963. The complaint in Menifee, however, was drawn exclusively in terms of anti-trust violations; the apparent membership "victory", therefore, can hardly be scored in the *Steele* doctrine column.

[122] Howard v. St. Louis-S.F. Ry., Civil Action No. 62 C 358 (3), United States District Court for the Eastern District of Missouri, Eastern Division, Amended Complaint 8 (December 12, 1962). If the Supreme Court's denial of review in *Oliphant* and the trial examiner's reluctance to rest his decertification order on the constitutional ground in Hughes Tool Co., discussed beginning at note 187 *infra*, may be regarded as advice from the bench, the N.A.A.C.P. may be expected to de-emphasize the "governmental action" argument in *Howard* and other future cases where the membership issue arises.

[123] Subsequent to the decision of the court in Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

[124] Testimony of Charles Houston, General Counsel for the Negro Railway Labor Executives Committee, *Hearings*, *supra* note 16, at 133.

v. Easley,[125] the Kansas Supreme Court found illegal federal action by segregated locals of the Brotherhood of Railway Carmen. Negro and white carmen employed by the Santa Fe Railway had been members of an integrated company union, but, soon after certification by the National Mediation Board, the Brotherhood undertook to establish separate lodges. The larger Negro lodge was dominated by white Local 850 in convention representation, grievance handling and collective bargaining. The court enjoined the Brotherhood from acting as bargaining agent for the Negro workers as long as the latter "are not given equality in privileges and participation in union affairs."[126] Today,

> "the union is composed of approximately 400 members, white, Negro, and Latin American workers. . . . [E]ven though the total of the Negro and Latin American membership is in the minority, there have been numerous Negro presidents over the years since the decision was rendered. Presently, Negroes hold the positions of president, financial secretary and local chairman of the union."[127]

The second result of judicial action occurred almost simultaneously in California, where courts had long barred closed-shop bargaining agents from maintaining closed unions. In three actions brought against the Boilermakers Local No. 6,[128] the union was given the alternatives of dropping its color bar or refraining from inducing the Negro plaintiffs' discharge because of their refusal to join Auxiliary A-41. In *Williams v. International Bhd. of Boilermakers*,[129] the court met the employers' argument that they had no way of ascertaining the Negroes' status when faced with a union demand for their discharge. Placing responsibility for compliance with the injunction squarely on the Boilermakers, the court said it would allow the employers in the future to accept at face value union statements that Negroes who had been offered full membership had failed to maintain good standing under the closed shop agreement. In *Thompson v. Moore Drydock Co.*,[130] a companion case, the fact that some of the plaintiffs had already joined the auxiliary local did not constitute a waiver of their

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[125] 161 Kan. 459, 169 P. 2d 831 (1946).
[126] *Id.* at 466.
[127] Letter to the writer from Elmer C. Jackson, Jr., attorney for plaintiff Negroes, January 5, 1963.
[128] See cases cited notes 71-73 *supra* and accompanying text.
[129] 27 Cal. 2d 586, 165 P. 2d 903 (1946).
[130] 27 Cal. 2d 595, 165 P. 2d 901 (1946).

objections to second-class status, which the court found to be against public policy.

The plaintiffs in *Conley v. Gibson*[131] originally sought a declaration that segregated locals were "illegal" and an injunction against the enforcement of the Railway Clerks' requirement that the plaintiffs join Negro Local 6051 in order to retain their union membership. Neither of these claims was ever passed upon, and since the cause was ultimately dismissed without a hearing on the merits,[132] it is possible that these discriminatory practices continue today. This assumption may not be unwarranted in light of the fact that the Brotherhood of Railway and Steamship Clerks, whose president[133] is a member of the AFL-CIO Civil Rights Committee, still maintains segregated locals (and separate seniority rosters) in New York, Tulsa, St. Louis, and Minneapolis.[134]

B. *Damages*

In much of the litigation protesting unions' breaches of their *Steele* duty, plaintiffs have included demands for the recovery of compensatory and punitive damages. The problems involved in pursuing these claims may be conveniently handled under the following headings: (1) From whom — union, employer, or both — may they be recovered? (2) How should they be computed? (3) May punitive damages be recovered absent a showing of particular injury?

The cases are in accord that damages for discrimination effected by actual or constructive collusion between union and employer recovered against both.[135] Plaintiffs may re-

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[131] 138 F. Supp. 60 (S.D. Tex. 1955).

[132] See text at notes 79-83 *supra*.

[133] George M. Harrison, after whom is named all-white Lodge 783, which has yet to merge with (Negro) Friendship Lodge 6118, despite an order to do so from the New York State Commission Against Discrimination.

[134] Hill, *Labor Unions and the Negro: The Record of Discrimination*, 28 COMMENTARY 479, 485 (1959).

[135] See, *e.g.*, Rolax v. Atlantic Coast Line R.R., 186 F. 2d 473 (4th Cir. 1951); Dillard v. Chesapeake & O. Ry., 136 F. Supp. 689 (S.D. W.Va. 1955); Central of Ga. Ry. v. Jones, 229 F. 2d 648 (5th Cir. 1956). For a contrary view, see Judge Brown's dissent in *Jones*, at 649:

> "So while the Railroad knew all the while that the Brotherhood was not fulfilling its duties, it was not up to it either to demand a change or prick the conscience of its adversary.
>
> "If it had no duty to make its adversary bargain better, on what ground can it be made to pay for that which such energetic, conscientious bargaining might have produced?"

Ironically, "the plaintiffs did collect some damages in *Jones*, after the denial of certiorari. Those damages were paid by the Railroad." Letter to the writer from Jerome A. Cooper, attorney for plaintiff Negroes, March 19, 1964.

quest a specific allotment of liability, but more frequently they have won the right to choose between joint tortfeasors by seeking the broadest possible allocation.[136] The fact that the plaintiffs in some cases ended by recovering no cash at all is no yardstick of their net success where the money claim has been transparently tactical. For example, the following claims for damages were wholly omitted from eventual "settlements":

Case	*Minimum Compensatory Damages Sought*
Butler v. Celotex Corp.[137]	$150,000
Conley v. Gibson[138]	75,000
Graham v. Southern Ry.[139]	50,000
Jones v. Distillery Workers[140]	250,000
Menifee v. Local 74, Lathers Union[141]	80,000
Richardson v. Texas & N. O. Ry.[142]	100,000

Since the aim of these actions was invariably to compel the bargaining agent to conform to fair-representation standards, and since abandonment of discriminatory practices usually costs the employer little, the inference may be drawn that the unions' risk of financial loss is one upon which plaintiffs may profitably concentrate.

Psychological considerations may also be important when damages are asked as compensation for past discrimination. Where the defendant union has evinced little promise of serious reform, Negroes have had no reason not

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[136] See, *e.g.*, Sells v. International Bhd. of Firemen and Oilers, 190 F. Supp. 857 (W.D. Pa. 1961).

[137] 3 RACE REL. L. REP. 503 (E.D. La. 1958). Letter to the writer from M. C. Strittmatter, Vice President for Industrial Relations, The Celotex Corporation, March 23, 1964.

[138] 138 F. Supp. 60 (S.D. Tex. 1955), 6 RACE REL. L. REP. 818 (S.D. Tex. 1961).

[139] 74 F. Supp. 663 (D.D.C. 1947). Letter to the writer from Henry L. Walker, Vice President, Southern Railway System, February 15, 1963.

[140] 5 RACE REL. L. REP. 786 (W.D. Ky. 1960). Letter to the writer from James A. Crumlin, attorney for plaintiff Negroes, March 2, 1963.

[141] 3 RACE REL. L. REV. 507 (N.D. Ill. 1958). "[O]ur purpose at the time in settling the litigation by means of a Consent Decree was to avoid the tremendous costs which are incurred in trying any anti-trust case. . . . Some money was paid to the plaintiffs on Count I, but the amount bore no relationship to the claims asserted by the plaintiffs and was also, in our opinion, predicated upon what we anticipated our costs of litigation would be." Letter to the writer from Leo Segall, attorney for Local 74, March 12, 1963.

[142] 140 F. Supp. 215 (S.D. Tex. 1956). Judgment, Civil Action No. 9240, United States District Court for the Southern District of Texas, Houston Division, November 8, 1960. Letter to the writer from James M. Neel, attorney for Texas & New Orleans Railroad, February 12, 1963.

to press for whatever they might win.[143] The same is true where a change in union conduct would have little ameliorative effect on Negroes' employment status, as in situations where automation has been wiping out white and Negro job prospects,[144] or where the plaintiffs are too old to be affected by any injunctive decree.[145] But the setting is quite different in *Syres*-type litigation, where the decision to press for large damages may directly affect the very solution which the defendants have already worked out. Maintaining an action against one's union brothers — however recent or superficial the family connection may be — clearly is not the most prudent method of gaining friends during the initial period of workers' resentment over integration.[146]

The difficulty in arriving at a consistent theory for computing compensatory damages has foiled several plaintiffs who did pursue their claims. The rule has been well settled that individual plaintiffs must show deprivation of their particular rights before recovery in behalf of the class they represent may be had.[147] In *Clark v. Norfolk & W. Ry.*,[148] the plaintiff who had retired before he had an opportunity to qualify as a car retarder operator was awarded $1800; two other plaintiffs who had failed or neglected to qualify

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[143] See, *e.g.*, Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Brotherhood of Locomotive Firemen v. Mitchell, 190 F. 2d 308 (5th Cir. 1951); Rolax v. Atlantic Coast Line R.R., 186 F. 2d 473 (4th Cir. 1951).

[144] See, *e.g.*, King v. Atlantic Coast Line R.R., 303 F. 2d 274 (5th Cir. 1962), 323 F. 2d 1005 (5th Cir. 1963). "The employees in question are all Carmen Helpers, whose duties consist largely of manual labor around the cars. I imagine that a large part of their work was formerly oiling and packing wheel boxes. The amount of this work, however, has been drastically reduced as a result of the introduction by the railroad of Timpken roller bearings and lubricator pads. Formerly wheel boxes had to be lubricated and packed every day or so, sometimes more frequently. Apparently with the new equipment, this task need be performed only once every several months." Letter to the writer from William H. Adams III, attorney for the Carmen, February 12, 1963.

[145] See, *e.g.*, Sells v. International Bhd. of Firemen and Oilers, 190 F. Supp. 857 (W.D. Pa. 1961); and Clark v. Norfolk & W. Ry., 3 RACE REL. L. REP. 988 (W.D. Va. 1958).

[146] "The integration of the Gulf refinery at Port Arthur was accompanied by a great deal of resentment, recalcitrance, and some passion on the part of the white employees. Even after the plant was integrated, the Negro employees, following suit, saw fit to maintain their action for damages against their union brothers. However, at the present time the Gulf refinery is operating satisfactorily without incident, and the presence of the Negroes in the operation and mechanical departments has given management no operational problems at all." Letter to the writer from Chris Dixie, attorney for Local 23 in Syres, January 18, 1963.

[147] Syres v. Oil Workers, 257 F. 2d 479 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959).

[148] 3 RACE REL. L. REP. 988 (W.D. Va. 1958).

won $1 each. On remand in *Conley v. Gibson*,[149] defendants' motion for summary judgment as to two plaintiffs who had died was granted, as no substitution under Rule 25(a) had been ordered. Conley himself had disappeared,[150] and the remaining representative's deposition showed no individual loss of time, pay or seniority rights. On these facts, the district court had no alternative but to grant a judgment of dismissal of the class action.

The *Syres* case dramatically illustrates the damages problems inherent in class actions under the *Steele* doctrine. On remand from the Supreme Court,[151] Local 254 withdrew from the case as a party plaintiff, but plaintiffs Syres and Warrick persevered in their class action for damages suffered as a result of the discriminatory original contract. The trial was before an all-white jury which "found that there was no conspiracy between the company and the union in the designing of the old contract, and that all of the provisions of the old contract rested upon relevant factors as defined in the *Steele* decision."[152] The plaintiffs probably could have attacked this jury finding as unsupported by the evidence and contrary to the requirements of *Steele* as a matter of law.[153] Instead, they propounded a theory of damages which claimed a lump sum recovery to be divided among the plant's Negroes, with-

[149] 6 RACE REL. L. REP. 818 (S.D. Tex. 1961). 138 F. Supp. 60, *aff'd*, 229 F. 2d 436, *rev'd*, 355 U.S. 41 (......).

[150] "The other living pliantiff, J. D. Conley, who was described by his counsel as 'a sort of transient person', did not appear and his counsel asserted his inability to locate him" for the taking of depositions. Letter to the writer from Edward J. Hickey, Jr., attorney for Railway Clerks, February 1, 1963. Conley's default gave the district court an alternative ground for dismissal under RULE 37(d), F.R. CIV. P.

[151] Syres v. Oil Workers, 350 U.S. 892 (1955).

[152] Letter to the writer from Chris Dixie, attorney for Local 23, January 18, 1963.

[153] This would be true even though the established discriminatory practices existed at least partially at the insistence of the joint owner of the statutory bargaining power (Local 254). "The Steele decision came into existence as a result of predatory attacks conducted during the depression by the white railroad unions who covered the Negroes' jobs. . . . [T]he activities of the railway Brotherhoods were well known to the Negro communities of the South during the CIO organizing campaigns in the late 1930's and early 1940's. The result was that while the Negroes were willing to have unions, especially CIO unions, they very frequently extracted promises from their white co-workers that the jobs would remain divided as is. That is to say, the Negroes caused the whites to promise them that the existing ratio between white and Negro jobs would remain the same, and this is a part of the historical background in the South which caused practically all of the industrial plants in this area to be divided along racial lines. During the 1950's the Negroes demanded abandonment of the old system and adoption of integrated seniority lines, and this is where the Syres case came in." Letter to the writer from Chris Dixie, attorney for Local 23, January 18, 1963. See Marshall, *Racial Factors Influencing Entry Into the Skill Trades*, THE ECONOMICS OF HUMAN RESOURCES 23, 32 (1963).

out the requisite showing of particular injuries. The Court of Appeals refused to permit such a computation by averages and dismissed the case.[154] While exact proof of the amount may not be required,[155] plaintiffs must show for each individual who is to recover some differential between what he did earn and what he might have earned without discriminatory disadvantage.

However long-standing or easily proven unions' breaches of their *Steele* obligations may be, the courts have agreed that plaintiffs' damages claims are cut off by the local statute of limitations. In *Jones v. Central of Georgia Ry.*,[156] Negroes had been denied work in certain positions for over thirty years, but the Alabama statute limited their money recovery to one year before the filing of their action. This principle was paid lip service in a case in which punitive damages were awarded,[157] and in another in which the plaintiff lost by directed verdict.[158] Punitive damages, which are not subject to such limitation, have been utilized as an incentive to quick settlement in conformity with *Steele* principles and as compensation in cases where union reform would be unlikely or of no practical value to the particular complainants. Both of these aspects were present in *Clark v. Norfolk & W. Ry.*[159] where the trial judge had no way of predicting whether the plaintiffs would ever qualify as car retarder operators, even with cooperative instruction from the Trainmen. Although the three old Negroes could not show actual detriment or an amount of damages capable of ascertainment, the court awarded each of them $1,000 "punitive" damages. This technique of assigning liability, however, is probably confined to the set of facts peculiar to the *Clark* case.

In the twenty years since the *Steele* decision, Negro plaintiffs have claimed upwards of $6,000,000 in compensatory and punitive damages. They have actually collected $2,802 of the former and $3,000 of the latter. These figures indicate that while damages for breach of a union's fair-representation duty may not be prominent in plaintiffs' real expectations, they are an essential part of the strategy of

[154] 257 F. 2d 479 (5th Cir. 1958).

[155] Mitchell v. Gulf, M. & O. R.R., 91 F. Supp. 175 (N.D. Ala. 1950), *aff'd sub nom.* Mitchell v. Brotherhood of Locomotive Firemen and Enginemen, 190 F. 2d 308 (5th Cir. 1951).

[156] 229 F. 2d 648 (5th Cir. 1956), *cert. denied*, 352 U.S. 848 (1956).

[157] Clark v. Norfolk & W. Ry., 3 RACE REL. L. REP. 988 (W.D. Va. 1958).

[158] Sells v. International Bhd. of Firemen and Oilers, 190 F. Supp. 857 (W.D. Pa. 1961); letter to the writer from Loyal H. Gregg, attorney for the Brotherhood, February 14, 1963.

[159] 3 RACE REL. L. REP. 993 (W.D. Va. 1956) (injunction); 3 RACE REL. L. REP. 988 (W.D. Va. 1958) (damages).

invoking judicial coercion. The intransigent Brotherhood of Locomotive Firemen and Enginemen, for example, agreed to abandon the SCCA *in practice* only after Tunstall pressed his suit for $4,000,000; the fact that Tunstall would ultimately recover a paltry $1,000 could not be reliably predicted by the Firemen. Furthermore, if damages for a particular unfair practice are once awarded, their memory may serve as a deterrant to future discriminatory schemes contemplated by a union. If the employer has been found jointly liable, its penalty may also be an incentive to greater resistance against bargaining agent demands for mistreatment of minorities.[160]

Not all plaintiffs since Steele have won their cases on the merits, and not all of those who have won have been reimbursed for the expenses of victory. Most have been able to tax costs to the unions,[161] but in only three of the cases did the defendants pay the plaintiffs' attorneys' fees.[162] The terms of two reported settlements also included such an allowance.[163] In one instance, an international union sided with the Negro plaintiffs but dropped out of the case when the discriminatory arrangement was modified, and the plaintiffs continued to press their damage claims against the local.[164] In another, the same international played an active role in settling the case favorably for the plaintiffs and later undertook to pay the local's share of their attorneys fees; fifty percent of these costs were borne by the company.[165]

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[160] On the other hand, the employer faced with demands for discriminatory provisions may not have to bargain at all.

[161] Including the plaintiffs in all the Firemen and Trainmen litigation.

[162] Clark v. Norfolk & W. Ry., 3 RACE REL. L. REP. 988 (W.D. Va. 1958); Mitchell v. Gulf, M. & O. R.R., 91 F. Supp. 175 (N.D. Ala. 1950); Rolax v. Atlantic Coast Line R.R., 186 F. 2d 473 (4th Cir. 1951).

[163] Dillard v. Chesapeake & O. Ry., last reported at 136 F. Supp. 689 (S.D. W.Va. 1955), "was disposed of by settlement in an amount which took care of plaintiffs' costs, attorneys' fees, etc." Letter to the writer from Amos A. Bolen, attorney for the Chesapeake & Ohio Railway Company, February 12, 1963. In Menifee v. Local 74, Lathers Union, 3 RACE REL. L. REP. 507 (N.D. Ill. 1958), "treble damages plus attorneys' fees and costs were sought. We had anticipated that if a trial was had before a jury the actual recovery of damages against the union would have been in the neighborhood of $250,000. Such a trial, however, would have been quite extensive and costly. As a consequence, the consent decree was entered into, and the plaintiffs were paid $10,000 cash by the defendants." Letter to the writer from George N. Leighton, attorney for plaintiff Negroes, March 5, 1963.

[164] Syres v. Oil Workers, 257 F. 2d 479 (5th Cir. 1958).

[165] Butler v. Celotex Corp., 3 RACE REL. L. REP. 503 (E.D. La. 1958). Letter from William E. Rentfro, General Counsel, Oil, Chemical and Atomic Workers International Union, to Willie Bates, President of Local 4-179, March 13, 1958:

> "Although the International Union was never served and never became an actual party-defendant to these proceedings, we were instru-

C. *A Partial Summary*

While the *Steele* line of cases may have settled the substantive law governing unions' duty of fair representation, skilled defendants' attorneys have been able to delay hearings on the merits of plaintiffs' claims until years after the discriminatory *faits accomplis*.[166] Where the courts have been sidetracked by procedural niceties of process, venue and pleading requirements, delays in granting relief have had the same practical effects as denial of protection. Moreover, the appealability of interlocutory decisions, however essential to the judicial process, permits irremediable attenuation of the urgent search for protection. Beyond

mental in convincing the company that the matter should be settled across the bargaining table rather than in federal court. We also followed the negotiations very closely and certified to the federal court that the stipulation for settlement had the approval of the International Union. . . . Early in negotiations, counsel for the plaintiffs requested, as a part of the settlement, that they be paid by the defendants, attorneys' fees in the amount of $5,000. This was a class action which certain members of the Local were forced to bring in order to enforce their rights. Under these circumstances, the court would have jurisdiction to assess attorneys' fees against the defendants. . . . I discussed the matter with President Knight and he agreed that, under the circumstances of this case, and since Local 4-179 would be obligated to pay substantial attorneys' fees to its local counsel, the International Union would voluntarily pay Local 4-179's share of any attorneys' fees that may be assessed by the court against the Company and the Local. . . . It was finally agreed that the court would be requested to award attorneys' fees to counsel for the plaintiffs in the amount of $3,000. This order will be directed against the Local Union and the Company jointly, but the International Union will voluntarily pay the Local's Union share when the order is issued. In view of the Company's willingness to agree to a $5,000 fee for plaintiffs' counsel, it should be apparent that the fees collected by the attorneys for the Company in this matter were considerably higher."

[166] Despite the Steele decision, inferior courts continued to dismiss actions to enforce the duty of fair representation, on the ground that plaintiffs failed to exhaust their administrative remedies. In Dillard v. Chesapeake & O. Ry., 199 F. 2d 948 (4th Cir. 1952), Negro machinists' helpers and laborers sued to put an end to discriminatory denials of promotions collusively perpetuated by the railway management and System Federation No. 41. The district court dismissed the complaint for lack of jurisdiction. A year later, the dismissal was reversed and the cause remanded, ending in "settlement" over five years after the suit for an injunction had been instituted. Letter to the writer from Strother Hynes, General Solicitor, Chesapeake & Ohio Railway Company, January 31, 1963. Conley v. Gibson, 355 U.S. 41 (1957), *reversing* 229 F. 2d 436 (5th Cir. 1956), in which the plaintiffs sued to prevent impending abolition of their jobs and seniority rights, went to the Supreme Court for a determination of the jurisdictional issue almost four years after the filing of the complaint. In Richardson v. Texas & N.O. R.R., 140 F. Supp. 215 (S.D. Tex. 1956), *rev'd*, 242 F. 2d 230 (5th Cir. 1957), Negro yardmen's grievance over the assignment of junior whites as engine foremen on Negro crews was accorded similar treatment by the district court which had dismissed Conley. The plaintiffs' claims were "settled" by a consent judgment almost five years after presentation to the trial court. Letter to the writer from George L. Schmidt, attorney for the Brotherhood of Railroad Trainmen, February 5, 1963.

this, the duplication of effort required in invoking geographically particular sanctions against regional bargaining misconduct — *e.g.*, in the southern railroad industry — limits the effectiveness of all but the best organized attacks. In a few instances, the occasional unrealism or incompetence of the judges charged with enforcement of the *Steele* doctrine have led plaintiffs down the road to frustration, if not despair. The "appropriate forum" hurdle is both institutional and idiosyncratic.

As for the effectiveness of injunctive relief, the decrees which ultimately issued were never as comprehensive as those which the plaintiffs had requested.[167] Compliance with even a limited decree, moreover, depends upon the original plaintiffs' access to information about the continuing bargaining conduct of the offending union. Where Negroes are excluded from membership or participation, awareness of threatening maltreatment may come too hard and too late. Even where it is possible to ascertain the degree of defendants' "compliance", the potential for subtle evasion of any injunction — by "reasonable" bargaining, calculated to affect Negro workers adversely[168] — makes contempt proceedings an unwieldy and impractical method of guaranteeing fair treatment.

In many situations, the courts cannot affort plaintiffs a full measure of practical relief, no matter how ready they stand to do so. The previous duration of discriminatory practices has been deemed irrelevant to the "reasonableness" of their modification and rejected as a standard for measuring compensatory damages. More important,

> "the efforts of Negroes to enjoy equal job opportunity have been frustrated by the contracting economy. Never forget that the *Syres* and *Whitfield* plans have been overtaken by economic pressures which cause the labor force as a whole to come down the ladder rather than to occupy new jobs and new openings. . . . A part of this comes from business conditions and the

[167] The relief sought in the complaint in Rolax v. Atlantic Coast Line R.R., 91 F. Supp. 585 (E.D. Va. 1950), may be taken as typical:

(1) a declaratory judgment stating the parties' respective rights and duties;
(2) discovery of pending or negotiated agreements on job assignments or other employment rights;
(3) an injunction against recognition of the SCCA;
(4) an injunction against the Brotherhood of Locomotive Firemen and Enginemen from representing the firemen's craft as long as it refused to represent the plaintiffs in good faith;
(5) damages, compensatory and punitive, for violation of the plaintiffs' seniority rights; and
(6) an order restoring the plaintiffs' seniority rights.

[168] *Cf.* Marshall v. Central of Georgia Ry., 268 F. 2d 445 (5th Cir. 1959).

other part from the gradual encroachments of automation. . . ."[169]

This explains how the railroad Brotherhoods can continue to deprive Negroes of jobs by means of spread-the-work schemes, and of equal pay through spurious craft classifications.[170] It also means that the "compromises" effected in southern industrial plants bear the promise of real integration only for the next generation of Negro workers.

Although plaintiffs' damages claims have enjoyed a comparatively small measure of satisfaction, in terms of the amounts actually collected, their collateral function in judicial proceedings under *Steele* doctrine should not be disregarded. Obviously, a union faced with a class action, in which the plaintiffs' cumulated claims may represent a substantial sum, may be more defensively disposed toward amicable settlement of the Negroes' grievances. The record of petty collections indicates, however, that plaintiffs risk heavy expenses in turning to the courts for relief. This problem may be occasionally alleviated by the modest fee-setting of local civil rights attorneys. But neither the prospect of winning costs nor the proximity of sympathetic lawyers may be consistently relied upon by Negro workers who seek judicial improvement of their situation.

II. POTENTIAL NLRB ACTION

The National Labor Relations Board is the administrative agency charged with the primary enforcement[171] of the federal labor statutes.[172] As such, it has two sets of devices at its command for policing unions' breaches of their *Steele* duty, both of which are continuing and prospective: (1) adjudication of unfair labor practices, with wide choice of remedies for proven wrongs; and (2) refusal to aid discriminatory unions in becoming or remaining exclusive bargaining agents. Since the duty of fair representation is only implicit in the NLRA, the statute is silent

[169] Letter to the writer from Chris Dixie, attorney for Local 23 and Local 2708, February 19, 1963.

[170] Simon Howard may ultimately overcome these Trainmen tactics, for the benefit of a dwindling number of Negro porters. But if any social predictions are possible after the recent resolution of the bitter dispute between railroad management and unions, that detente spells the absolute end for Negro firemen on American railroads.

[171] See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); I.A.M. v. Gonzales, 356 U.S. 617 (1958); Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953).

[172] 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-60 (Supp. IV 1959-62), amending 49 Stat. 449 (1935).

on how that duty is to be enforced. What follows is an exploration of the possibilities for such practical action.[173]

A. *Unfair Labor Practices*

1. *Section 8(b)(2)*

The California cases led by *James v. Marinship Corp.*[174] clearly indicates that the fair representation duty can preclude a union from instigating employer discrimination against Negroes who have been denied full union membership. To some extent, Section 8(b)(2) fosters this result, forbidding unions

> "to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."[175]

Thus, the law is violated if Negro workers who have been denied union membership are subsequently denied employment because they are not union members.[176] No case has yet decided whether a union may object to a Negro's employment on the basis of his race rather than his lack of membership. When a Negro non-member is discriminated against, however, white workers are likely to conclude that it is best to be both white and a union member, and that inference is sufficient encouragement of union membership to fall within the prohibition of Section 8(b)(2).[177]

Until recently, the section afforded no aid to a Negro who was admitted to union membership but discriminated against on the job because of his race. In *Miranda Fuel*

[173] See, generally, Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 172-75 (1957); Maloney, *Racial and Religious Discrimination in Employment and the Role of the NLRB*, 21 MD. L. REV. 219 (1961); Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547 (1963); GREENBERG, RACE RELATIONS AND AMERICAN LAW 177-83 (1959). The ambition of the present discussion is to appraise the NLRB's practical accomplishments, past and impending.

[174] 25 Cal. 2d 721, 155 P. 2d 329 (1944); see text at notes 75-78, *supra*.

[175] 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958).

[176] As the late Senator Taft put it during the debate on the bill that bore his name:

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

[177] See Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

Co.,[178] a non-racial case, a majority of the Board held that a labor organization violates Section 8(b)(2) 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. . . . [U]nion membership is encouraged or discouraged *whenever* a union causes an employer to affect an individual's employment status. . . ."[179]

This broadly stated rule extended the principle laid down in *NLRB v. Gaynor News Co.*,[180] where the respondent company was found to have violated the act by giving certain wage and vacation payments to union members only. Enforcement of the Board's *Miranda* Section 8(b)(2) finding was denied, however, in a split decision by the Second Circuit Court of Appeals.[181] Judges Medina and Lumbard disagreed with the Board's reading of *Local 357, IBT v. NLRB*,[182] that a Section 8(b)(2) violation does *not* necessarily flow from conduct which has the foreseeable result of encouraging membership, but that, given such "foreseeable result", the finding of a violation may turn upon an evaluation of the disputed conduct "in terms of legitimate employer or union purposes." The court held that an unfair labor practice has been committed only if the discrimination is deliberately designed to encourage membership in the union.[183] If the position of the majority of the Board were sustained, Judge Medina noted, the Board would be inundated with charges of racial discrimination at the hands of bargaining agents.[184]

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[178] 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962).

[179] *Id.* at 200. (Emphasis added.) Even the dissenters noted that "the reduction of Lopuch's seniority for his absence from work is a far cry from the arbitrary and invidious discrimination" in cases such as Steele.

[180] 347 U.S. 17 (1954).

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

[182] 365 U.S. 667 (1961).

[183] 326 F. 2d 172, 180 (2d Cir. 1963).

[184] The *amici curiae* briefs filed by the N.A.A.C.P. and the A.C.L.U. appear to assume that it is in the public interest to have such controversies channeled into the administrative machinery of the NLRB, where the remedy of reinstatement with back pay is available. Judge Medina considered this assumption to be a matter of "policy" to be determined by Congress. In the view of dissenting Judge Friendly, Congress has already made this determination in passing the prohibition contained in Sec. 8(b)(2). He finds it desirable to channel such cases into the NLRB, since the ability of the aggrieved employee to proceed in court against the employer is seriously limited by the usual arbitration provisions, which only the union may enforce.

Before the Second Circuit's *Miranda* decision was rendered, the trial examiner in the latest *Hughes Tool Co.*[185] case supplied the final requisite step in the process of broadening Section 8(b)(2) to cover union indifference to racially invidious treatment:

> "What is said in *Miranda* with respect to union *action* would appear equally applicable to *inaction* which was founded upon 'arbitrary or irrelevant reasons or upon the basis of an unfair classification'. I find, therefore, that Local 1's failure to process or investigate Davis' grievance violated Section . . . 8(b)(2) . . . of the Act."[186]

Even after the denial of enforcement in *Miranda,* another trial examiner evaded the Second Circuit opinion by manipulating Justice Harlan's explanation of *Gaynor* in his *Local 357* concurrence:[187]

> "Having found that the joint bargaining representative . . . instigated the execution . . . of the contract's 1962 extension, including the discriminatory work quotas, that the Association was thereby caused to execute and to maintain and enforce the contract containing these provisions which naturally and foreseeably encouraged or discouraged union activities of its employees, and that no legitimate union or employer justification for these acts has been shown, I find and conclude that the Respondents by their conduct violated Sec. 8(b)(2) of the Act."[188]

The General Counsel had offered a simpler theory in this case, following the trial examiner's reasoning in *Hughes Tool Co.* The application of seventy-five percent to twenty-five percent work quotas in the contract based on race and union membership, he argued, discriminated against Negro employees in violation of Section 8(a)(3). It was within the white local's power to accomplish a termination or modification of this discriminatory condition; they were requested by the Negro local to do so, but refused. By

[185] Case No. 23-CB-429, 52 L.R.R. 247 (1963). Previous Board decisions concerning these parties are reported in 119 N.L.R.B. 739 (1957); 104 N.L.R.B. 318 (1953); 100 N.L.R.B. 208 (1952); 97 N.L.R.B. 1107 (1952); 88 N.L.R.B. 1039 (1950); 85 N.L.R.B. 663 (1949); 77 N.L.R.B. 1193 (1948); 69 N.L.R.B. 294 (1946); 56 N.L.R.B. 981 (1944), *modified,* 147 F. 2d 69 (5th Cir. 1945); 53 N.L.R.B. 547 (1943); 45 N.L.R.B. 821 (1942); 36 N.L.R.B. 904 (1941); 33 N.L.R.B. 1089 (1941); 27 N.L.R.B. 836 (1940).

[186] 52 L.R.R. 247, Trial Examiner's Intermediate Report 17 (1963).

[187] 365 U.S. 667, 681 (1961).

[188] Local 1367, ILA, 55 L.R.R. 138, Case No. 23-CB-476, Trial Examiner's Decision 17 (1964).

such refusal, he concluded, they caused the employer Association to continue the discriminatory condition, and thereby violated Section 8(b)(2).

2. *Section 8(b)(3)*

Section 8(b)(3) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)."[189] Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith* with respect to wages, hours, and other terms and conditions of employment. . . ."[190] Professor (now Solicitor General) Cox has suggested that the duty "to confer in good faith" extends to the employees represented by the union.[191] Professor Sovern has challenged this position, arguing that the obligations arising under Section 8(b)(3) were intended merely to parallel the employer's obligations under Section 8(a)(5); since there can be no duty of fair representation on the employer, "the duty to bargain collectively, then, probably does not include the duty to represent fairly."[192]

Although the NLRB General Counsel declined to so argue, the trial examiner in *Hughes Tool Co.* found that the white local's refusal to investigate or process a Negro's grievance violated Section 8(b)(3), reading the rule of *Conley v. Gibson*[193] directly into the NLRA. Judge Medina's opinion in *Miranda Fuel Co.* chose Sovern's analysis over Cox's. The General Counsel's pro-Cox argument in *Local 1367, ILA*,[194] in the face of the Second Circuit's *Miranda* decision on the issue, was rejected by the trial examiner after careful review of the section's legislative history.

Acceptance of the expansive interpretation of Section 8(b)(3), apparently advocated for the present by the General Counsel, could lead to full — but not necessarily exclusive[195] — administrative enforcement of the duty of fair representation in all areas of collective bargaining. Even Professor Sovern does not find the provision useless:

[189] 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

[190] 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958) (emphasis added.)

[191] Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 172 (1957).

[192] Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COL. L. REV. 563, 588-89 (1962).

[193] 355 U.S. 41 (1957), discussed at notes 79-83, *supra*.

[194] 55 L.R.R. 138 (1964).

[195] See cases cited note 174, *supra*; Sovern, *supra* note 195, at 608-13; Albert, *supra* note 176, at 588.

"Although the section seems not to afford workers any direct protection, the duty it imposes on unions in favor of employers has aspects that support the duty of fair representation. In fact, a union plainly violates the duty it owes to an employer if it makes and insists upon a racially discriminatory demand under 8(b)(3)."[196]

The employer's action would rest upon its privilege lawfully to refuse to bargain about demands that the union may not insist upon as a condition of reaching an agreement.[197] But such indirect protection of Negro workers' rights, as its proponent concedes, would be ridiculously weak. Indeed, the absence of even a single case applying Section 8(b)(3) to strike down a racially discriminatory demand demonstrates that employers rarely offer the assumed resistance. "[M]any discriminatory demands cost a company nothing to grant, whereas resistance may lead to its having to yield on something expensive."[198]

3. *Section 8(b)(1)(A)*

In the past twelve years, the NLRB has nearly reversed its position on the question whether a union's breach of its duty to represent fairly is also a violation of Section 8(b)(1). In 1952, the General Counsel took the position that despite the Supreme Court's decision in the *Steele* case, and the application of that doctrine to the NLRA in *Wallace Corp. v. NLRB*,[199] he could find nothing in the Taft-Hartley Act which made it an unfair labor practice to bargain discriminatorily and unfairly against excluded minorities. In the amicus curiae brief filed with the Supreme Court in *Ford Motor Co. v. Huffman*,[200] decided in 1953, the Board and its counsel took the position that the right to equal representation, in view of the absence of affirmative legislative history, could not be found implicit in Section 7 of the act, so as to render violations of that right an unfair labor practice within Section 8(b)(1).

In 1954, the General Counsel affirmed a regional director's refusal to issue an 8(b)(1) complaint in a case where a union failed to protest a company rule limiting Negro job bids to the cleaning and sanitation departments.[201] In 1956, the General Counsel was asked to issue unfair labor

[196] Sovern, *supra* note 176, at 589.
[197] NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).
[198] Sovern, *supra* note 176, at 590.
[199] 323 U.S. 248 (1944).
[200] 345 U.S. 330 (1953).
[201] Case No. 1047, 35 L.R.R.M. 1130 (1954). The union never explicitly approved the rule or demanded its revision, in spite of a plant-wide-seniority contract provision.

practice complaints against several employers and unions on the ground that "the employers had discriminated against (employees) on a racial basis upon demand by or in conspiracy with (the) unions." He refused[202] because there was no evidence of attempts by the unions to cause discrimination by the companies, and a mere failure to move to eliminate employer discrimination does not violate Section 8(b)(1). This ruling implied that if evidence of union instigation were presented, the General Counsel would issue an unfair labor practice complaint.

Two years later, in *Local 229, United Textile Workers*,[203] the Board sidled up to the proposition that a union violates Section 8(b)(1) when it defaults on its duty of fair representation. The breach of duty was the union's exclusion of non-union workers in the bargaining unit from the benefits of a Health Trust Fund supported by their employer's contributions and administered by the union. Although the result could easily have been reached without recourse to the doctrine of fair representation,[204] the trial examiner chose to support his decision with that rationale, and the Board accepted his findings and conclusions without further comment.

The *Local 229* hint was expanded into a general principle in *Miranda Fuel Co.*, when the Board deftly inserted the "statutory" duty to deal fairly into the exclusive representation clause of Section 9(a), incorporated that section into the "employees' rights" wording of Section 7, and held the breach of duty to be a violation of Section 8(b)(1):

> ". . . Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon consideration or classifications which are irrelevant, invidious, or unfair."[205]

[202] Case No. K-311, 37 L.R.R.M. 1457 (1956).

[203] 120 NLRB 1700 (1958).

[204] The precedents clearly establish that when a union withholds from non-union employees benefits financed by their employer, it restrains those employees in their right — guaranteed by Sec. 7 — to refrain from becoming union members; see, *e.g.*, Radio Officer's Union v. NLRB, 347 U.S. 17 (1954); Indiana Gas & Chemical Corp., 130 NLRB 1488 (1961); and Carty Heating Corp., 117 NLRB 1417 (1957).

[205] 140 NLRB 181, 185 (1962).

The turning point had definitely been passed, leaving undetermined only the *a fortiori* question "whether in certain circumstances a union's unequal treatment, *based on racial considerations,* of unit employees may not be an unfair labor practice."[206] Although the Board's order was denied enforcement by the Second Circuit Court of Appeals,[207] only one of the three judges who participated in the case took a position of outright rejection of the majority's theory of the scope of the duty of fair representation.[208]

The trial examiners' decisions in the latest *Hughes Tool Co.* episode[209] and *Local 1367, ILA,*[210] if accepted by the Board and ultimately by the courts, will culminate the administrative about-face on the question. In the first of these cases, a joint certification had been issued to Independent Metal Workers Union Locals 1 (white) and 2 (Negro) as the bargaining representative of employees at the Hughes Tool Company, Houston, Texas. Local 1, purporting to act as the certified representative, entered into an agreement with the company in December, 1961, under which certain jobs in the unit were open only to white employees and others were open only to Negroes. A Negro employee (the treasurer of Local 2) made a bid for an apprenticeship which was denied by the company. Local 1 then summarily refused to investigate or process the Negro's grievance, relying on the discriminatory contract. The General Counsel cautiously limited his unfair labor practice complaint — Local 1's refusal to process a Negro grievance was claimed to be a violation of Section 8(b)(1) only — probably because he also sought the broader remedy of rescission of certification.

The trial examiner held that

> "if a labor organization which is the exclusive bargaining representative declines to process the grievance

[206] Office of the General Counsel, NLRB, *Summary of Operations, 1962,* 52 L.R.R. 6, 13 (1962) (emphasis added.)

[207] 326 F. 2d 172 (2d Cir. 1963), 54 L.R.R.M. 2715 (1963).

[208] There is further uncertainty as to the position that the Board itself might take if faced with the same questions again, since Member Rodgers of the majority has now left the Board. The remaining members have adhered to the positions they took in decisions since Miranda. In two later cases, for example, Chairman McCulloch concurred in holdings that cleared unions of unlawful discrimination charges but said that he did so for the reasons set forth in his Miranda dissent; Members Leedom and Brown applied the standards of the majority opinion in Miranda. Operating Engineers Union, 54 L.R.R.M. 1235 (1963); Typographical Union, 54 L.R.R.M. 1281 (1963). In a similar case decided by a four man Board, Chairman McCulloch and Member Fanning concurred but added that they do so on the Miranda dissent; Members Leedom and Brown again applied the standards of the Miranda majority. Teamsters Union, 54 L.R.R.M. 1356 (1963).

[209] 52 L.R.R. 247 (1963).

[210] Case No. 23-CB-476, 55 L.R.R. 138 (1964).

> of a member of the unit, it has to that extent refused to represent him, and hence it has restrained or coerced him in the exercise of his right to be represented. . . ."[211]

The illegality of this inaction was not cured by the fact that separate locals administered the two units (or two sections of the same unit), since whatever arrangements may be worked out between the recipients of a joint certification, they must observe the same legal duties imposed on a single representative with respect to full and fair representation of the unit. Furthermore, in the trial examiner's view, the case was not rendered moot by the fact that Local 1 had already approved amendments to its constitution and bylaws which would eliminate racial discrimination or the added fact that the new contract did not provide for such discrimination.

In *Local 1367, ILA,* the controversy between two joint bargaining segregated[212] locals centered about a hiring hall "work sharing formula" that divided available work according to a seventy-five percent to twenty-five percent quota system. Besides this racial division of longshoremen labor, there were further understandings, incorporated by reference into the collective agreement, that Negroes and whites could not comprise a "mixed gang", Negro and white gangs could not work together in a single hatch on a ship, and neither race could apply to the other's local for a job referral. Trial Examiner Kessel agreed with the General Counsel's theory that

> "the maintenance and enforcement . . . of the contractual provisions for the 75-25 percent division of work between Locals 1367 and 1368 constitute unlawful conduct by the joint collective bargaining representative . . . because these provisions discriminate against a class of employees in the represented unit (Negroes who must unequally with the white employees seek job referrals through Local 1368) on the irrelevant, invidious and unfair basis of race and that these labor organizations have thereby violated . . . Sec. 8(b)(1)(A) of the Act."[213]

The no-doubling arrangement and the ILA's reprisals against the Negro charging parties, conducted under the

[211] Hughes Tool Co., Trial Examiner's Intermediate Report 15.

[212] Racial segregation is the rule within the South Atlantic and Gulf Coast District of the ILA. Although there are no ILA or District constitutional provisions compelling it, all locals within the District from Lake Charles, Louisiana, to Brownsville, Texas, are so administered. Negro Longshoremen comprise 75-80% of the membership of these locals.

[213] Local 1367, Trial Examiner's Decision 10.

guise of a trusteeship, were likewise found violative of the section. Instead of recommending that the parties adopt a fifty to fifty percent quota system for sharing the work, as requested by the complaining Negro local, the trial examiner left them to their own devices for formulating a non-discriminatory hiring method in accordance with the requirements of the NLRA.

Elevating the tactics of the N.A.A.C.P. and the General Counsel in *Hughes Tool Co.* into a rule of administrative practice, a regional director refused to issue an 8(b)(1) complaint against Steelworkers Local 2401 (of Atlantic Steel Company, Atlanta), on the ground that "the evidence fails to show that Respondent has, within six months prior to the filing of the charge herein, failed to entertain or process any grievance presented to it or that it has interpreted any claim adversely to the complainant. . . ."[214] The General Counsel, however, accepted the charging party's theory of continuing *prima facie* violations in the local's negotiation and acquiescence in segregated promotion and seniority lines.[215] Although the initial proceedings in this cause proved abortive,[216] the ultimate result will be of crucial importance in the development of fair representation theory and sanctions. In effect, the N.A.A.C.P. has mounted a collateral attack on *Whitfield v. United Steelworkers*[217] by alleging that a union's *failure* to act (even without the presentation of grievances, as in *Hughes Tool Co.*) constitutes the basis for an unfair labor practice.[218]

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[214] 52 L.R.R. 247 (1963).

[215] *Ibid.*

[216] The testimony on Negro complainants at the hearing apparently bore little similarity to the potent charges of discrimination in the affidavits submitted. The N.A.A.C.P. ascribes this disparity between promise and performance to the traditional intimidation of Negroes on Southern witness stands, regardless of forum, and intends to press its complaint with other grievants. Interview with Herbert Hill, Labor Secretary, N.A.A.C.P., April 11, 1963.

[217] 263 F. 2d 546 (5th Cir. 1959), *cert. denied,* 360 U.S. 902 (1959), discussed at notes 111-17, *supra.*

[218] That the General Counsel is now solidly behind this offensive can hardly be doubted after his recent issuance of an 8(b)(1) complaint against Local 12, United Rubber Workers at the Goodyear Tire & Rubber Company, Gadsden, Alabama, 52 L.R.R. 247 (1963). The discrimination charged lies both in the union's refusal to process job transfer grievances of Negro workers and in its failure to protest segregated working conditions. Indeed, Mr. Herbert Hill and General Counsel Rothman have actually held periodic strategy conferences since the N.A.A.C.P. attacks began. Interview with Herbert Hill, April 11, 1963. "It is the intention of the Office of the General Counsel to give solid support to efforts to provide equal representation where the rights invoked are intended to be protected under industrial relations principles defined in the NLRA. Where they are not properly subsumed under the remedial provisions of this statute, of course, our hands will be tied." Office of the General Counsel,

In his civil rights message to Congress on March 1, 1963, President Kennedy said he had directed the Justice Department to "participate" in NLRB cases involving charges of local union racial discrimination. He told the Department "to urge the Board to take appropriate action against racial discrimination in unions, so that administrative action . . . will make unnecessary"[219] the enactment of new legislation. General Counsel Rothman welcomed the participation of the Justice Department, and announced his intention — already apparent — to secure rulings that racial discrimination in the negotiation, execution, maintenance or enforcement of a contract runs afoul of the unfair labor practice provisions of the NLRA.[220]

B. *Refusal to Aid Discriminatory Unions in Becoming or Remaining Exclusive Bargaining Agents*

1. *Rescission of Certification*

Only the first word of a journal of positive accomplishments in the area of recognition sanctions has been written by the Board. When a union refused "to process and present grievances of all members of the bargaining unit on a non-discriminatory basis,"[221] the Board indicated that rescission would be "appropriate", but refrained from so acting because it regarded the matter as one of first impression and because a joint holder of the certification[222] had not been guilty of any misconduct. When a union compelled Negro workers to continue membership in a separate Negro local that was uncertified and not a party to the collective agreement, rescission was not ordered because the objectionable contract had expired and the offending union voluntarily relinquished its certification and requested a new election.[223] No matter how unfavorable proof of past discrimination has been, the Board has to date exercised lenient restraint, admonishing unions to take advantage of opportunities to correct their conduct.

In fact, the Board has never rescinded a single union's certification because of racial discrimination, although for twenty years it has reiterated, in various forms:

> "We entertain grave doubt whether a union which discriminatorily denies membership to employees on

NLRB, *1962 Calendar Year Report*, 8 RACE REL. L. REP. 313 (1963). Editors note: Mr. Rothman's term has expired and the new General Counsel is Arnold Ordman.

[219] 52 L.R.R. 289 (1963).

[220] *Ibid.*

[221] Hughes Tool Co., 104 NLRB 318, 319 (1953).

[222] *I.e.*, the segregated Negro Local 2.

[223] Larus & Brother Co., 62 NLRB 1075 (1945).

the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act. . . ."[224]

"In the absence of proof that the union discriminatorily denies membership to employees in the appropriate unit because of their race, we see no reason to dismiss its petition. However, if it is later shown, by appropriate motion, that the union has denied equal representation to any such employee because of his race . . . we will consider rescinding any certification which may be issued herein."[225]

There are recent indications, however, that the Board may soon attempt to give substance rather than lip service to the *Steele* doctrine. In *Pioneer Bus Co.,*[226] where the bargaining representative executed contracts which discriminated on racial lines, the Board again stated that such action warranted revocation. But no motion for rescission had been filed, for that remedy was unnecessary under the Board's holding that a discriminatory contract establishing separate racial seniority lines may not bar a petition for an election. It should be pointed out that this decision was not based upon the fair representation doctrine, but rather on the constitutional ground first rationalized in *Shelley v. Kraemer.*[227] This reasoning could very well lead to a declaration that such separate seniority lines are illegal in all the industries under the jurisdiction of the NLRB, and may indicate that the Board prefers a constitutional framework for its decision on rescission cases now pending. At any rate, under the holding of *Whitfield v. United Steelworkers,*[228] if a union makes a contract allowing transfer from one line of promotion to the other, with loss of seniority for those transferring, this "solution" is considered an adequate correction of the illegality of separate lines of promotion. In effect, the leading judicial decision on this problem has already narrowed the implications of the Board's decision in *Pioneer Bus Co.*

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[224] Bethlehem-Alameda Shipyard, 53 NLRB 999, 1016-17 (1943); *accord,* Atlanta Oak Flooring Co., 62 NLRB 973 (1945).

[225] Carter Mfg. Co., 59 NLRB 804, 806 (1944); *accord,* Andrews Indus., Inc., 105 NLRB 946 (1953); General Motors Corp., 62 NLRB 427 (1945); Southwestern Portland Cement Co., 61 NLRB 1217 (1945); and Virginia Smelting Co., 60 NLRB 616 (1945).

[226] 140 NLRB 54, 51 L.R.R.M. 1546 (1962).

[227] 334 U.S. 1 (1948).

[228] 263 F. 2d 546 (5th Cir. 1959), *cert. denied,* 360 U.S. 902 (1959).

In *Hughes Tool Co.,*[229] the trial examiner rested his rescission order on the *Pioneer Bus Co.* rule and the inadequacy of usual remedies for unfair labor practices. Acknowledging the reforms effectuated by Local 1 since the filing of the motion to rescind, he found rescission nevertheless essential in the light of the long history of racial discrimination at the Hughes plant. The trial examiner further recommended that in any future representation proceeding involving the plant,[230] it should be made "inexorably clear to all participants that the Board will not tolerate racially discriminatory practices on the part of any union which it certifies."[231] This admonition would be consistent with the Board's characterization of rescission, in earlier *Hughes Tool Co.* litigation, as "an anticipatory curb on a variety of actions not compatible with the status of certified bargaining representatives."[232]

2. *Refusal of Certification*

When actions "not compatible with the status of certified bargaining representatives" can be anticipated *before* certification, application of the curb would seem to be equally appropriate. Professor Sovern has suggested that

> "a union's refusal to admit Negroes is highly probative evidence that it will be unwilling or unable to represent them fairly. . . . Indeed, even in the absence of a conflict of interest, the union leadership has much less incentive to bestir itself in behalf of those excluded from membership. Consequently, once a union has been shown to exclude Negroes from membership, fair representation seems so improbable that the union should have the burden of adducing evidence that it will represent Negroes in the bargaining unit fairly. If the union fails to produce such evidence, the Board should conclude that it probably will violate the duty of fair representation."[233]

[229] 52 L.R.R. 247 (1963).

[230] During the period of the petitioning Steelworkers' incumbency at the Hughes Tool plant, that union also maintained segregated locals, and entered into contracts providing for separate lines of progression and seniority.

[231] 52 L.R.R. 247, 248, Trial Examiner's Intermediate Report 19.

[232] 104 NLRB 318, 322 (1953). With regard to the practical efficacy of this remedy, the present General Counsel of the N.A.A.C.P. Legal Defense Fund once said that it is a "technique of dubious worth against discrimination." GREENBERG, RACE RELATIONS AND AMERICAN LAW 182 (1959). Whether or not he has changed his position, the current legal offensive within the administrative machinery of the NLRA is being conducted by the General Counsel of the N.A.A.C.P. itself, a separate legal entity which derives less of its operating income from the contributions of labor organizations.

[233] Sovern, *supra* note 173, at 600.

The NLRB has consistently refused to deny certification even where it has appeared most probable that the winning union would violate its duty. The Board has not been moved by allegations of past discriminatory representation, offered to support the probability of future unfairness,[234] nor by allegations of discriminatory denials of membership.[235] On the other hand, the Board has persistently refused to recognize a petition for representation where the petition proposes, either explicitly or implicitly, to exclude Negroes from the bargaining unit on the basis of race.[236] It should then follow that the Board will decline to entertain a petition from a union that will ultimately create an all-white unit by failing to represent Negroes in the unit delineated by the Board.[237] Whether the NLRB will accept this view — assuming it agrees with the N.A.A.C.P. and its General Counsel in the rescission cases — remains to be seen. Its rejection will continue to rob the duty of fair representation of much of its potential for preventive action.

3. *Refusal of Orders to Bargain*

Rescission or refusal of discriminatory unions' certification will be sanctions of minimal importance unless the Board also refuses to compel employers to bargain with such unions.[238] The Board has already stated it will not compel an employer to bargain about obviously discriminatory demands.[239] And if, as may be predicted from *Hughes*

[234] Coleman Co., 101 NLRB 120 (1952).

[235] See, *e.g.*, Pacific Maritime Assoc., 112 NLRB 1280 (1955), Stickless Corp., 110 NLRB 2202 (1954), Texas & Pacific Motor Transp. Co., 77 NLRB 87 (1948).

[236] Larus & Brother Co., 62 NLRB 1075, 1081 (1945).

[237] Compare Summers, *The Right to Join a Union*, 47 COL. L. REV. 33, 65 (1947), with Sovern, *supra* note 176, at 600-01. Professor Aaron has suggested that the NLRA be amended to forbid the recognition or certification as exclusive bargaining representative of any union that discriminates in the admission or representation of minority groups. That is the only practical way . . . in which unions can be compelled to conform to the national labor policy and to the constitution of the AFL-CIO. Letter to the Editor, *New Leader* 30 (May 2, 1960).

[238] In many situations, a local's very existence is posited on its certification as bargaining representative. But a union may legally be recognized as bargaining representative without a certification if it represents a majority of the employees. *Cf.* International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961). 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).

[239] NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944). Otherwise, the NLRB would be in the absurd posture of compelling employers to engage in negotiations the purpose of which is to violate the Act.

Tool Co., the Board will begin to draw inferences in certification cases from a union's all-white membership rolls, it can hardly be expected to respond differently in refusal-to-bargain cases. Professor Sovern extends this reasoning to its practical limits:

> "The rule should be that an employer is free to refuse to bargain altogether with a union that has pressed a discriminatory demand, even if the pressure falls short of refusing to conclude an agreement without the discriminatory provision. The union's demand is ample evidence of its propensity for ignoring the duty of fair representation. Under the circumstances it must be reckoned likely to transgress again during its tenure as exclusive representative. . . ."[240]

Even if the NLRB adopted this principle, however, unions with strong, well-established bargaining relationships and unions in a position to strike recalcitrant employers would not be seriously hindered in the attainment of their racially invidious aims. But given the choice between abandoning segregationist policies and risking their bargaining-agent status in recognition strikes, most unions will choose to cease discriminating — particularly when concurrent pressure is being exerted by their international parent.[241]

III. CONCLUSION

Nothing short of a strong national fair employment practices law will provide adequate relief for the ubiquitous racial discrimination long practiced by American unions and employers. At least until such a program becomes probable, however, the existing restraint of the doctrine of fair representation should be utilized in the courts to the fullest extent possible. Unfortunately, the availability of judicial relief is limited by the financial resources of complainants, and the present posture of the N.A.A.C.P. Legal Defense and Education Fund promises little assistance in this vital "civil rights" area. Even if access to judicial coercion were free, its effectiveness in changing union racial practices would be restricted, as court actions require great organization and time, are uncertain as to their outcome, and rarely produce compensatory damages for the plaintiffs. Lawsuits are valuable to aggrieved minority

[240] Sovern, *supra* note 176, at 605.

[241] This is both the historical experience and the operating rationale of the N.A.A.C.P. Interview with Herbert Hill, January 11, 1963.

groups, however, as threats to discriminating unions. Occasionally, injunctions have enabled Negroes to prevent unions from causing them to lose their jobs.

Without explicit statutory prohibition of union membership discrimination, Negro workers must ultimately rely on forces outside the labor movement to effect changes in bargaining agents' conduct. The courts and the NLRB can help in this respect, by recognizing that white unions are not likely to represent Negroes fairly and that they should — when their actions are challenged — bear the burden of proving that they *have* given fair representation to Negroes. But the key to practical implementation of the principle of fair representation lies in the possibility of prophylactic sanctions. The NLRB can accomplish much that has been shown to be beyond the courts' capacities by rescinding and withholding certification from and by refusing to order employers to bargain with unions likely to default on their duty. The potential for enforcement of the duty through unfair labor practice proceedings is in the initial stages of realization. As long as Congress is in default with regard to effective FEPC legislation, one of its existing enactments, the NLRA, should be widely exploited. If and when Congress does establish machinery for attacking racially unfair employment practices, the Board should remain in the field as an alternative forum for selective local offensives.

Unions are unlikely to promote the interests of Negroes except where the abolition of racial discrimination is elevated to the level of their other political and economic objectives. The AFL-CIO and the national unions do not favor discrimination, but they will have little power to change the practices of local unions until public pressures raise the priority of anti-discrimination policies by tarnishing their public moral image. The real problems of employment discrimination will probably remain at the local level, and whether or not locals will take remedial action depends upon the extent to which they may be compelled to do so by parent internationals or by external agencies. AFL-CIO President George Meany has requested federal fair employment practices legislation which would establish a framework within which the labor movement might vigorously enforce its own verbally equalitarian policies. But even with such a framework, implementation of the *Steele* doctrine will require concerted effort — and, perhaps, bitter conflict — by aggrieved individuals, pressure groups, fact-finding organizations, employers and the power

echelons of the union bureaucracies, all using weapons appropriate to the local union whose policies are under attack.

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EDITOR'S NOTE

The publication of this article follows on the heels of the National Labor Relations Board's heralded decision in the *Metal Workers Union*[1] (Hughes Tool Co.) case. The Board, adopting for the most part the trial examiner's decision, declared that the union's breach of its fair representation duty resulted in a violation of Sections 8(b)(1)(A), 8(b)(2) and 8(b)(3) of the National Labor Relations Act, and proclaiming that a finding of such racial discrimination on the part of a union warranted a refusal or rescission of the union's certification, ordered, for the first time, the certification rescinded. With the use of sweeping language, the Board stated that, "(A) labor organization cannot, when acting as exclusive bargaining representative, lawfully exclude, segregate, or otherwise discriminate among members of a bargaining unit on racial grounds."[2]

Affirming the trial examiner's findings, the Board held, first, that when Local 1 (white) declined to process the grievance of a Negro union member of Local 2 whose application for an apprenticeship was ignored, it "refused to represent him, and hence it has restrained or coerced him in his exercise of his right to be represented"[3] in violation of Section 8(b)(1)(A). Second, the refusal to process the grievance amounted to an 8(b)(3) violation, in that the processing of grievances is part of the bargaining function and, a fortiori, a refusal to process the grievance is a refusal to bargain. Third, the withholding from the applicant of treatment which would have been given him had he been eligible for membership in Local 1 established a violation of 8(b)(2) in that the union, "for arbitrary or irrelevant reasons or upon the basis of an unfair classification . . . [attempted] to cause or does cause an employer to derogate the employment status of an employee, and that union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status."[4] Then the Board, after stating "that the Board

[1] 2 Lab. Rel. Rep. (56 L.R.R.M.) 1289 (1964).

[2] 2 Lab. Rel. Rep. (56 L.R.R.M.) at 1291.

[3] *Ibid.*

[4] 2 Lab. Rel. Rep. (56 L.R.R.M.) at 1292. See Miranda Fuel Co., 140 N.L.R.B. No. 7, 51 L.R.R.M. 1584, 1587 (1962).

cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative"[5] ordered the union's certification rescinded.

A minority of the Board argued that there was no legislative authority for basing an unfair labor practice upon a violation of the duty of fair representation. Despite the minority's reasoning and the Second Circuit Court of Appeals' reversal of the Board in *Miranda*,[6] it is believed that the majority opinion will prove persuasive when *Hughes* reaches the courts.

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[5] 2 Lab. Rel. Rep. (56 L.R.R.M.) at 1294.

[6] N.L.R.B. v. Miranda Fuel Co., Inc., 326 F. 2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963).