

1975-1976 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW*

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I. DUTY OF FAIR REPRESENTATION—CONSEQUENCES FOR BREACH

A. *Finality of Arbitration Awards*: *Hines v. Anchor Motor Freight*

In *Vaca v. Sipes*,¹ the Supreme Court firmly established that an employee may seek a judicial remedy against both his union and his employer, where the employee could show that the union had breached its duty of fair representation by failing to take his grievance to arbitration.² This remedy is available, according to *Vaca*, despite the employee's "failure to secure relief through the contractual remedial procedure."³ The *Vaca* Court realized that in such circumstances, the employer may in fact have done nothing to prevent the exhaustion of remedies provided by contract. Nevertheless, the Court reasoned that where an employer may have committed a wrongful discharge in breach of the collective bargaining agreement, "a breach which could be remedied through the grievance process . . . were it not for the union's breach of its statutory duty of fair representation,"⁴ the employee must not be left without a remedy:

We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.⁵

By making it clear that unions and employers could be exposed to damage suits where unions unfairly failed to use the contractual grievance procedures on behalf of its members, the *Vaca* court simultaneously effectuated two goals of national labor policy. By providing the individual employee with access to the courts, *Vaca* provided the employee's right to fair representation the added clout of a judicial remedy. In so doing, the Court also reaffirmed the longstanding policy encouraging final arbitral settlement of labor disputes⁶ by present-

¹ 386 U.S. 171 (1967).

² *Id.* at 185-86.

³ *Id.* at 185.

⁴ *Id.*

⁵ *Id.* at 186.

⁶ This policy is expressed in the Labor Management Relations Act, § 203(d), 29 U.S.C. § 173(d) (1965):

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

See also *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596-99 (1960).

ing unions and employers with an added incentive to make full use of contractual grievance procedures.

During this Survey year, in *Hines v. Anchor Motor Freight*,⁷ the Court was presented with the question whether a union's breach of its duty of fair representation would afford the employee a judicial remedy against his employer not, as in *Vaca*, where the union had failed to process the grievance, but where the union had already exhausted an arbitration process defined by the contract to be final and binding on all parties. Thus, in *Hines*, unlike *Vaca*, the interest in preserving fair representation conflicted with the interest in preserving finality of arbitration decisions, forcing the Court to choose between the policy favoring a judicial remedy when the union unfairly failed to pursue an available contractual remedy,⁸ and the policy which mandated that, wherever possible, deference was to be given to the final decisions reached through the arbitration process.⁹

In *Hines*, the original grievance arose when the company discharged several of its drivers on grounds of dishonesty, asserting that the drivers had presented the company with motel receipts which overstated the actual expenses while on the road.¹⁰ The drivers, represented by the union, asserted their innocence and opposed the discharges. Grievance procedures were instituted, at which the employer introduced into evidence the motel receipts, the motel clerk's registration cards, and the motel owner's affidavit affirming both that the registration cards were accurate and that inflated receipts had been given to the drivers.¹¹ No evidence was submitted either by the union or by the employees to counter Anchor's case, and, the discharges were sustained.¹²

Upon retaining their own attorney and covering evidence which strongly supported their case,¹³ the employees sought a rehearing by the grievance committee. When the rehearing was denied, the employees filed suit against both the employer and the union,¹⁴ alleging first that the discharges were in breach of the collective bargaining agreement,¹⁵ and second that the union had violated its duty of fair

⁷ 424 U.S. 554 (1976).

⁸ See *Vaca v. Sipes*, 386 U.S. at 185.

⁹ See note 6 *supra*.

¹⁰ 424 U.S. at 556-57.

¹¹ *Id.*

¹² *Id.* at 557-58.

¹³ The motel owner supplemented his original affidavit by stating that "he had no personal knowledge of the events, but that the discrepancy between the receipts and the registration cards could have been attributable to the motel clerk's recording on the cards less than was actually paid and retaining for himself the difference between the amount receipted and the amount recorded." *Id.* at 558.

¹⁴ Suit was brought pursuant to Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1970). 424 U.S. at 561-62.

¹⁵ 424 U.S. at 558. The collective bargaining agreement provided that discharges would be made only for "just cause." It was the employees' position that, although dishonesty may have been a just cause, they were innocent of the employer's charges. Thus, the discharge was erroneous. *Id.*

representation "by arbitrarily and in bad faith depriving petitioner of their employment and permitting their discharge without sufficient proof."¹⁶

Both the union and Anchor moved for summary judgment, asserting that the employees had been properly discharged for just cause in accordance with the contract. Further, the defendants contended that the employees were bound by the contract provision stating that a decision by the grievance committee was final and binding on all parties. As such, defendants argued that where the employees were "diligently and in good faith represented by the union," and where the resulting decision was adverse, the same employees could not "relitigate" their grievance in federal court.¹⁷

The district court granted defendants' motions for summary judgment on the grounds that the committee's decision was final and binding on all parties, and that the employees had failed to show facts from which the court could infer that the union had acted arbitrarily, perfunctorily, or in bad faith.¹⁸ The Court of Appeals reversed as to the union, finding that the employees' allegations of bad faith or arbitrary conduct were sufficient to afford them the opportunity to prove their claims at trial.¹⁹ The court affirmed the district court's dismissal of the case against Anchor, however, finding that the finality provision of the contract had to be observed where there was no evidence of misconduct on the part of the employer.²⁰

The Supreme Court granted the employees' petition for certiorari seeking reversal of the circuit court's ruling as to Anchor,²¹ and held that an employee's section 301 claim against his employer is permissible—despite a "final," "binding" adverse decision of the grievance committee—where the union has breached its duty of fair representation in processing the employee's grievance.²² Paralleling the language of *Vaca v. Sipes*, the Court stated:

[W]e cannot believe that Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.²³

In support of its holding, the majority reviewed the public policy underlying the enforcement of collective bargaining contracts. The

¹⁶ Employees claimed that the union could have discovered the falsity of the charges with a minimum of investigatory effort, but had made no attempt to do so. *Id.*

¹⁷ *Id.* at 558-59.

¹⁸ 84 L.R.R.M. 2649 (N.D. Ohio 1973).

¹⁹ 506 F.2d 1153, 1156, 87 L.R.R.M. 2971, 2973 (6th Cir. 1974).

²⁰ *Id.* at 1158, 87 L.R.R.M. at 2973-74.

²¹ 421 U.S. 928 (1975).

²² 424 U.S. at 571.

²³ *Id.* at 570. For the parallel language in *Vaca v. Sipes*, see text at note 5 *supra*.

Court first pointed to the "strong policy favoring judicial enforcement of collective bargaining contracts"²⁴ embodied in section 301.²⁵ The majority explained that the terms of the collective bargaining agreement which provided for settlement of contract disputes squarely fell within the type of contract provisions to be enforced under section 301.²⁶ Yet, despite the policy favoring judicial enforcement of labor contracts, both Congress and the courts have recognized that where a grievance arbitration process is available under the collective bargaining agreement, such arrangement is considered preferable to the resolution of disputes by resort to the courts.

The majority pointed out that the policy encouraging settlement of grievance by methods agreed upon by the parties has been long recognized to depend on the willingness of the courts to give the contractual grievance procedures "full play."²⁸ Thus, courts have been careful "not to usurp those functions which collective bargaining contracts have properly entrusted to the arbitration tribunal."²⁹ As such, courts have refused to allow a party to use section 301 in order to sidestep the grievance machinery set forth in the contract.³⁰ The *Hines* Court stressed, however, that the congressional and judicial encouragement of private arrangements for settling contract disputes presumed "that the contractual machinery would operate with some minimum levels of integrity."³¹

For example, in the case of employee-union relations under the collective bargaining system, the union as the representative of the employee is granted broad authority to negotiate and administer the collective bargaining agreement for the benefit of all of the workers in the bargaining unit.³² In return for this increase in individual bargaining power vis à vis the employer, the employee, by necessity, is forced

²⁴ *Id.* at 562.

²⁵ Section 301(a), 29 U.S.C. § 185(a) provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy

In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), the Supreme Court established that § 301 allows individual suits against unions and employers by employees seeking to vindicate "uniquely personal rights" such as wages, hours, and wrongful discharge. *Id.* at 198-200. *Cf.* *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453 (1957).

²⁶ 424 U.S. at 562.

²⁷ *Id.* at 562-63. *See also* *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960).

²⁸ 424 U.S. at 562.

²⁹ *Id.* at 562-63, quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 569 (1960).

³⁰ *See* *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

³¹ 424 U.S. at 571.

³² *See* *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

to subordinate his individual interests to that of the bargaining unit.³³ It is because the collective bargaining process involves this subordination of individual rights that courts have charged the bargaining agent with a duty of fair representation "equal in scope" to his authority to negotiate and enforce the contract.³⁴ Thus the union "as the statutory representative of the employees [has been] subject always to complete good faith and honesty of purpose in the exercise of its discretion."³⁵

When the duty of fair representation is not fulfilled, the basic presumptions underlying the court's deference to contractual grievance procedures are undermined: without good faith and honest representation by the union, the worker, "stripped of traditional forms of redress by the provisions of federal labor law,"³⁶ has no effective remedy against his employer or his union for breach of the collective bargaining agreement. Therefore, courts have held that where "the union refuses to press or only perfunctorily presses the individual's claim . . ." the employee is not barred from bringing his grievance to court under section 301.³⁷

Having examined these basic principles, the Court had little trouble rejecting the respondents' contention that where grievance procedures have been pursued through the binding arbitration stage, an employer not involved in the union's alleged breach of its duty of fair representation should be protected from the burden of "relitigating" the contract dispute. The Court reasoned that where the union has breached its duty of fair representation, the whole process of grievance arbitration had been tainted,³⁸ regardless of whether the employer has been implicated in the union's breach, and regardless of whether the process has just begun or has entered its final stages. Where the grievance procedures have been subverted by the union's conduct in representing its members, the *only* forum in which the employee can thereafter fairly present his claim against the employer is a judicial one. Therefore, the Court determined that

[t]he union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of finality provisions of the contract.³⁹

³³ See *Vaca v. Sipes*, 386 U.S. at 182; *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

³⁴ *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). See also *Vaca v. Sipes*, 386 U.S. at 182; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

³⁵ 424 U.S. at 564, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

³⁶ *Id.*, quoting *Vaca v. Sipes*, 386 U.S. at 182.

³⁷ *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). See also *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steinman v. Spector Freight System*, 441 F.2d 599, 603 (2d Cir. 1971); *Rothlein v. Armour Co.*, 391 F.2d 574, 578-79 (3d Cir. 1968).

³⁸ 424 U.S. at 567-68.

³⁹ *Id.* at 567.

The Court was aware that as a result of its decision, employers could be exposed to damage suits for claims which had already been "litigated" through the grievance procedure.⁴⁰ The majority was additionally aware that, in response to this decision, employers could arguably become "far less willing to give up their untrammelled right to discharge without cause and to agree to private settlement procedures."⁴¹ However, the Court pointed out that its decision makes a judicial remedy available only in the narrowest of circumstances. In order to obtain relief, the employee must prove *both* an erroneous discharge and a taint of the arbitration decision by the union's breach of its duty of fair representation. In the majority's view, the burden on employees thus remains a "substantial one."⁴² Further, any alternative result would mean that "[w]rongfully discharged employees would be left without jobs and without a fair opportunity to secure an adequate remedy."⁴³

The dissent argued that the union's breach of its duty of fair representation was an insufficient reason to void an otherwise valid arbitration decision in favor of the employer. Justice Rehnquist urged that *Vaca v. Sipes* allowed an employee to turn to the court only where the union had *prevented* him from taking his grievance to arbitration. According to the dissent, "the existence of a final arbitration decision is the crucial difference between this case and *Vaca*."⁴⁴ Where the employee had no access to the contractual grievance procedure, the availability of a judicial remedy "bolstered the consistent policy of this Court of encouraging the parties to settle their differences according to the terms of their collective-bargaining agreement."⁴⁵ Rehnquist argued that where the grievance is presented to a fair and neutral arbitrator, and the Court allows the decision to be vacated because the employee did not receive fair representation from the union, it establishes a "new policy of encouraging challenges to arbitration decrees by the losing party on the ground that he was not properly represented."⁴⁶ In that the employee has an independent remedy against the union for breach of its duty of fair representation, the dissent felt that provision for a judicial remedy against the employer in these circumstances was "anomalous and contrary to the longstanding policy of this Court favoring the finality of arbitration awards."⁴⁷

It is submitted that the majority reached the correct result in extending a judicial remedy to employees who have been unfairly represented in the arbitration process. In *Hines*, The Court was faced

⁴⁰ See *Id.* at 569.

⁴¹ *Id.* at 570.

⁴² *Id.*

⁴³ *Id.* at 571.

⁴⁴ *Id.* at 575 (Rehnquist, J., dissenting).

⁴⁵ *Id.* at 574. See text at notes 5-9 *supra*.

⁴⁶ 424 U.S. at 574.

⁴⁷ *Id.*

with three distinct interests: the employees' interest in obtaining a fair forum to present breach of contract claims against the employer; the employer's interest in freedom from multiple exposure to litigation; and the public interest in maintaining the legitimacy and usefulness of the collective bargaining process. When all of these interests were examined in light of the policy encouraging final resolution of labor disputes through contractual grievance procedures, the majority properly found the interests of the employer to be the least compelling.

As the majority was well aware,⁴⁸ federal labor policy demands both initial recourse contractual grievance procedures⁴⁹ and limited appeal from the decisions reached thereby.⁵⁰ Yet the national labor policy does not take this direction in order that employers may be shielded from the inconvenience of relitigating issues which had already been raised and decided. Rather, the policy encouraging arbitration has its roots in the notion that the process itself is a "stabilizing influence" in labor relations.⁵¹ An agreement to submit grievances to arbitration has been viewed as the *quid pro quo* for inclusion of a no-strike clause in the collective bargaining contract.⁵² As such, the requirement that employers and employees attempt to resolve labor disputes through contractual grievance procedures is not motivated by the desire to provide the employer a forum in which claims against him can be finally resolved, but rather, is set forth as a key to industrial peace and uninterrupted productivity.⁵³

The policy mandating judicial deference to arbitration decisions is equally informed by considerations more compelling than the employer's exposure to relitigation: Where the grievance machinery under a collective bargaining agreement is seen to be "at the very heart of the system of industrial self-government,"⁵⁴ the arbitration process is viewed as essential to the day-to-day workings of that system. It serves both to fill in gaps which may be left by the collective bargaining agreement and to "make the agreement serve the specialized needs" of each industry.⁵⁵ Courts have realized that "the ablest judge cannot be expected to bring the same experience and

⁴⁸ See at 562-63.

⁴⁹ Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

⁵⁰ United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

⁵¹ United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960).

⁵² United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 & n.4 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448, 455 (1957).

⁵³ United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960); See also Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

⁵⁴ United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

⁵⁵ *Id.* at 580-81. See also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

competence to bear upon the determination of a grievance, because he cannot be similarly informed."⁵⁶ Thus, appeal from an arbitration decision is limited—not because the employer would be inconvenienced otherwise, but because deference is warranted by the nature of the process itself.

On the other hand, cases which have considered the issue of judicial review where the union has perfunctorily or in bad faith processed an individual grievance⁵⁷ reveal that an underlying premise of the collective bargaining system is that employees be afforded a *fair* opportunity to settle grievances which arise under the contract.⁵⁸ Thus, in light of the purposes underlying the national policy encouraging resolution of labor disputes through final arbitration, it must be concluded that the employer's interest in freedom from litigation should not outweigh the employee's interest in an opportunity to be represented fairly in a claim against the employer, especially where the claim involves loss of livelihood.

It is only with the confidence that grievances have been fairly presented and considered that courts have been willing to defer to arbitration awards.⁵⁹ Thus, where a final arbitration decision is binding even though the process was tainted by unfairness, both the decision and the process lose legitimacy. On the other hand, maintaining a collective-bargaining system that is conditioned on the fairness of process serves to strengthen that system, by promoting confidence in the decisions it produces.

B. *Union Liability for Compensatory Damages under the Railway Labor Act:* Harrison

In the *Survey* year case of *Harrison v. United Transportation Union*,¹ the United States Court of Appeals for the Fourth Circuit

⁵⁶ *Id.* at 582. See also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1950).

⁵⁷ See, e.g., *Vaca v. Sipes*, 386 U.S. at 185-86; *Steinman v. Spector Freight System*, 441 F.2d 599, 602-03 (2d Cir., 1971); *Bieski v. Eastern Auto. Forwarding Co.*, 396 F.2d 32, 37 (3d Cir., 1968); *Rothlein Armour Co.*, 391 F.2d 574, 578-79 (3d Cir., 1968).

⁵⁸ *Steinman v. Spector Freight System*, 441 F.2d 599, 603 (2d Cir., 1971); *Bieski v. Eastern Auto. Forwarding Co.*, 396 F.2d 32, 37-38 (3d Cir., 1968); Cf. *Vaca v. Sipes*, 386 U.S. at 185. Cases which deny judicial review do not hold otherwise. For example, in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), the Supreme Court reversed an award of severance pay granted to an employee who had made no attempt to utilize the grievance machinery to enforce his aim, but who instead had sued his employer in state court. The court held that "federal labor policy requires that individual employees wishing to assert contractual grievances must attempt to use the contract grievance procedure . . ." The Court recognized however, that a different result could obtain where "the union refuses to press or only perfunctorily presses the individual's claim . . ." 379 U.S. at 652. (emphasis added). See also, *Andrus v. Convoy Co.*, 480 F.2d 604, 606 (9th Cir., 1973).

⁵⁹ See cases cited in note 58 *supra*.

¹ 530 F.2d 558, 90 L.R.R.M. 3265 (4th Cir. 1975) (per curiam), cert. denied, 96 S.

held that a union which breaches its duty of fair representation² under the Railway Labor Act³ (RLA) may be held liable for the loss of an employee's earnings during a suspension.⁴ The Fourth Circuit further held that such liability would result where the wronged employee could demonstrate that the loss of his contractual claims against his employer arising from the employee's failure to exhaust the administrative remedies available under the collective bargaining agreement and the RLA⁵ was due to the union's breach of its duty of fair representation (DFR) and not to the employee's own negligence.⁶ In so doing, the Fourth Circuit sharply increased the consequences of a union's failure to provide at least a "minimum" fair representation under the Railway Labor Act.⁷

Harrison, a railway conductor, was suspended for sixty days without pay by his employer, the Norfolk and Portsmouth Belt Line Railway (Belt Line). The reason given for Harrison's discharge was "insubordination."⁸ The United Transportation Union (UTU) represented Harrison both at the hearing on the charge and at successive appeals to the Belt Line management.⁹ Thereafter, a meeting occurred where a UTU representative and the Belt Line president a-

Ct. 1739 (1976). Chief Judge Haynsworth and Judge Field formed the majority; Judge Winter concurred in part and dissented in part.

² See *Vaca v. Sipes*, 386 U.S. 171, 176-77 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202-03 (1944). See notes 2-3 at p. —.

³ 45 U.S.C. §§ 151 *et seq.* (1970). The railway union's duty of fair representation is implied from the sections of the RLA. See *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 199-203 (1944).

⁴ 530 F.2d at 562, 90 L.R.R.M. at 3268.

⁵ As a general rule of federal labor policy, the federal courts will not hear actions by an employee against the employer where the employee has failed to exhaust the administrative remedies provided in the collective bargaining agreement and the RLA. See *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 325-26 (1972). The RLA procedure is set forth *infra* at note 11.

⁶ 530 F.2d at 562-63, 90 L.R.R.M. at 3268-69. Specifically, the court stated that if the union failed to process Harrison's appeals through the appropriate levels such that his claim against his employer lapsed, then the union "should be responsible to Harrison for the value of the right he lost as a direct result of the union's deliberate misconduct." *Id.* at 562, 90 L.R.R.M. at 3268. The circuit justices all agreed that Harrison could also recover punitive damages if the fact-finder determined that UTU acted "wantonly or maliciously or that it acted recklessly or in callous disregard of Harrison's rights . . ." *Id.* at 563, 90 L.R.R.M. at 3270. They also held that Harrison could recover reasonable attorney's fees since his suit against the union served a "common benefit" to all employees: to insure the right to receive fair representation of individual claims against the employer. See *id.* at 564 & n.2, 90 L.R.R.M. at 3270 & n.2, citing *Hall v. Cole*, 412 U.S. 1, 8-9 (1973). The issues of punitive damages and attorney's fees will not be discussed herein.

⁷ Traditionally a union which breaches its duty of fair representation is held only for damages which "flowed" from its own misconduct. See *Czosek v. O'Mara*, 397 U.S. 25, 29 (1969). In *Czosek* the Supreme Court indicated that this liability would include expenses incurred by the employee in collecting his claim from the union, but not the employee's actual lost wages. *Id.* See notes 33-36 and accompanying text *infra*.

⁸ 530 F.2d at 559-60, 90 L.R.R.M. at 3266-67.

⁹ *Id.* at 560, 90 L.R.R.M. at 3267.

greed that the union would halt "progress" on Harrison's claim in return for the reinstatement of another employee.¹⁰ In accordance with this agreement, UTU did not follow the statutory appeals procedure under the RLA¹¹ of filing Harrison's claim with the local National Railroad Adjustment Board (NRAB).¹² Further, in violation of its constitution and by-laws, UTU did not inform Harrison of its agreement with Belt Line or of its failure to file a claim with the NRAB.¹³ Subsequently, the mandatory period provided in the collective bargaining agreement for 'bringing grievances before the NRAB passed and Harrison's right to pursue the claim individually or through the UTU "lapsed."¹⁴

Thereafter, Harrison commenced an action in federal district court against UTU and Belt Line alleging that in handling his grievance, they had illegally conspired to deprive him of his right to pursue that grievance.¹⁵ The district court directed a verdict for Belt Line

¹⁰ *Id.* The Belt Line president wrote of the meeting: "Conductor Howard J. Gray, Jr., will be reinstated . . . provided the UTU does not further [any] progress . . . [on] the claim in favor of S.D. Harrison. It was agreed by those in attendance that they [the claims] would not be progressed until too late to do so account time limit." *Id.* (Emphasis added by Court). There is no indication in the opinion as to what is meant by "time limit." The collective bargaining agreement between Harrison and UTU may have provided a mandatory period for bringing grievances before the NRAB.

¹¹ The RLA requires that employer-employee disputes which are not settled through the grievance mechanisms provided in the collective bargaining agreement be submitted to a division of the National Railroad Adjustment Board for settlement. See § 3, First (i), 45 U.S.C. § 153 First (i) (1970) which states:

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on [the date of approval of this Act] shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

An important feature of the RLA is that employees have the right to petition the NRAB themselves, even where their union refuses to process their grievance. See § 3, First (j), 45 U.S.C. § 153 First (j) (1970). The NLRA contains no similar provision guaranteeing to employees the right to process grievances without the support of their union. Under the NLRA, the right of the individual to involve the higher stages of the grievance processes may be eliminated by the collective bargaining agreement between the union and the employer. See *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

¹² 530 F.2d at 560, 90 L.R.R.M. at 3267.

¹³ *Id.*

¹⁴ *Id.* Apparently, the collective bargaining agreement between Belt Line and UTU provided a mandatory period for bringing grievances before the NRAB. See note 10 *supra*. The RLA does not specify a time limit for filing grievances with the NRAB. See note 11 *supra*.

¹⁵ The jurisdictional bases of Harrison's claim are unclear. Harrison did not sue Belt Line for wrongful discharge. See 530 F.2d at 565, 90 L.R.R.M. at 3271 (Judge Winter dissenting in part). Such a claim, absent alleged violation of the RLA, would be a state claim, and would be brought in state court or, if there is diversity and the requisite amount in controversy, in federal court.

because of the legal insufficiency of the evidence of conspiracy but submitted the case against UTU to the jury, apparently on the theory that UTU may have breached its duty of fair representation.¹⁶ The jury found against UTU and awarded Harrison back pay and punitive damages.¹⁷

The United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's directed verdict for Belt Line on Harrison's conspiracy claim, largely because it agreed that Belt Line had no knowledge of UTU's duty to inform Harrison of its decision not to "progress" his rights.¹⁸ In a split decision,¹⁹ the Fourth Circuit also upheld the jury finding that UTU breached its duty of fair representation either by "arbitrarily" giving up Harrison's grievance to further the grievance of another employee, or by intentionally failing to inform Harrison that it would not "progress" his claim to the NRAB.²⁰ More importantly, the circuit court held that Harrison could recover from UTU the value of his contractual rights against Belt Line²¹ where he could demonstrate that the loss of such

See *Cunningham v. Erie Railroad Co.*, 266 F.2d 411, 414-15 (2d Cir. 1959). Harrison also did not allege that Belt Line "acted in concert with UTU with the joint motive to discriminate" against him. 530 F.2d at 531, 90 L.R.R.M. at 3267. Such a claim would involve federal law under the RLA, see *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 328-29 (1969), and would properly be brought in federal court with jurisdiction existing under 28 U.S.C. §§ 1331, 1337 (1970). See *Cunningham*, 266 F.2d at 414. However, whether Harrison's claim against his employer arose under federal or state law, he would still have to exhaust the administrative remedies provided in the collective bargaining agreement and the relevant statutes or else demonstrate why such exhaustion was not necessary. *Id.* at 414-15.

Harrison seems simply to have based his action on a straight civil conspiracy claim with federal jurisdiction existing either under 28 U.S.C. § 1332 (1970), assuming diversity and the requisite \$10,000 minimum claim, or 28 U.S.C. § 1331, assuming the presence of a federal question and a \$10,000 minimum claim. This strategy may have been utilized as an attempt to provide Harrison with his monetary relief without having to confront directly the mandatory features of Belt Line's grievance machinery with UTU, see text at note 14 *supra*, or the basic merits of his wrongful discharge claim.

¹⁶ Although the circuit court's opinion is ambiguous here, Harrison does not seem to have claimed specifically that UTU breached its duty of fair representation. See 530 F.2d at 559, 90 L.R.R.M. at 3266. However, the court clearly treated Harrison's complaint as such. See *id.* at 561, 90 L.R.R.M. at 3268. DFR claims are implied under the RLA, see *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 199-203 (1944), and federal jurisdiction exists under 28 U.S.C. §§ 1331, 1337 (1970). See *Cunningham v. Erie Railroad Co.*, 266 F.2d 411, 414-15 (2d Cir. 1959).

¹⁷ 530 F.2d at 559, 90 L.R.R.M. at 3266.

¹⁸ *Id.* at 560-61, 90 L.R.R.M. at 3267-68. The court stated that without proof that the railroad knew of the union's duty to notify Harrison of its decision not to "progress" his rights, it could not conclude "that Belt Line conspired to accomplish the lawful objective of sustaining discipline against Harrison by the unlawful means of denying him fair representation of his grievance claims." *Id.* at 561, 90 L.R.R.M. at 3268.

¹⁹ See note 1 *supra*.

²⁰ 530 F.2d at 561-62, 90 L.R.R.M. at 3268. On either theory, the circuit court clearly contemplated some intentional conduct by UTU. See *id.* at 562, 90 L.R.R.M. at 3268 where the court refers to UTU's "deliberate misconduct."

²¹ The circuit court also awarded Harrison punitive damages and attorney's fees. *Id.* at 563-64, 90 L.R.R.M. at 3269-70. See note 6 *supra*.

rights was not the result of his own failure to pursue an appeal to the NRAB, but rather resulted from the deliberately misleading conduct of the union in failing to inform him of its decision not to appeal to the NRAB.²² In so holding, the circuit court sustained the jury's finding that the value of Harrison's lost rights against Belt Line was the "economic loss suffered by Harrison as a result of the suspension."²³

The majority's decision turned on a strict reading of the Supreme Court's decision in *Andrews v. Louisville & Nashville Railroad Co.*²⁴ In *Andrews*, a railroad employee sued his employer in state court for wrongful discharge without pursuing the RLA appeals procedure through the NRAB.²⁵ Analogizing to cases arising under the National Labor Relations Act,²⁶ the Supreme Court found a strong federal labor policy favoring the settlement of disputes through the statutory arbitration process.²⁷ As a result, the Court held that an aggrieved employee must exhaust the NRAB grievance and arbitration procedures provided in the Railway Labor Act before seeking a judicial determination of his claims.²⁸ In *Harrison*, the majority interpreted *Andrews* to mean that the NRAB procedures constituted an employee's "exclusive remedy" against his employer.²⁹ The court reasoned that

²² *Id.* at 562-63, 90 L.R.R.M. at 3268-69. The Court found that UTU's failure to notify Harrison of its agreement with Belt Line denied Harrison the "fair opportunity" to process the grievance himself or to obtain counsel to represent him. *Id.* at 562, 90 L.R.R.M. at 3269. In a sense, the court's reasoning may be understood to rest on a notion of detrimental reliance: it found that Harrison had reasonably relied to his detriment upon UTU to process his claim to the NRAB, and that as a result, he lost his right to appeal because of the lapse of time. In this manner, the court distinguished Harrison's situation from cases where the aggrieved employees knew of their union's refusal to process their claims and could thus appeal to the NRAB individually. See *Czosek v. O'Mara*, 397 U.S. 25 (1970). In these cases, employees in successful DFR actions against their unions could recover only their costs, such as attorney's fees, in bringing their claims to the NRAB. *Id.* at 29. See notes 33-36 and accompanying text *infra*.

²³ 530 F.2d at 561, 90 L.R.R.M. at 3269. The jury had awarded Harrison \$1,570 for lost wages, though there is no indication in the opinion whether this amount was the exact income which Harrison would have earned had he not been suspended. *Id.* at 559, 561, 90 L.R.R.M. at 3266, 3269. See note 32 *infra*.

²⁴ 406 U.S. 320 (1972). *Andrews* was a 7-1 decision, Justice Douglas dissenting.

²⁵ *Id.* at 320-21. The employer removed the case to federal court and then moved to dismiss the complaint for failing to pursue the remedies provided by § 3 First (i) of the RLA, 45 U.S.C. § 153 First (i) (1970).

²⁶ 29 U.S.C. §§ 151 *et. seq.* (1970). The Court in *Andrews* relied heavily on its decision in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), where it held that "federal labor policy requires" that aggrieved employees must first "attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress" before they can maintain an action for breach of that contract. *Id.* at 652 (emphasis added by Court).

²⁷ 406 U.S. at 322-23.

²⁸ *Id.* at 326.

²⁹ 530 F.2d at 562, 90 L.R.R.M. at 3268. A similar interpretation of *Andrews* was reached by the Fourth Circuit several years earlier in *Dorsey v. Chesapeake and Ohio Railway Company*, 476 F.2d 243, 83 L.R.R.M. 2038 (4th Cir. 1973) (*per curiam*). In *Dorsey*, the Fourth Circuit held that a railroad employee who was dismissed for violating a company rule prohibiting the use of intoxicants while on company property was re-

since Harrison could no longer personally file a claim with the NRAB within the allowable time limits, and since UTU had failed to progress the claim, Harrison was precluded from pursuing his "exclusive remedy."³⁰ However, the majority did not believe that Harrison should lose his right of action where the loss was not the result of his own negligence or misconduct. Instead, insofar as it was the union's own deliberate misconduct which caused Harrison to lose this right, the court held that the union should respond "to the extent of the value" of the right lost.³¹ In order to so respond, the court concluded, a union must be responsible for the value of what an employee would have recovered had he not been foreclosed from pursuing his contractual claim.³²

In reaching this conclusion, the court greatly expanded the potential liability of a union that breaches its duty of fair representation. Previously, the Supreme Court in *Czosek v. O'Mara*,³³ had stated that a union which had discriminatorily refused to process employee grievances based on wrongful discharge could not be held responsible for lost wages unless it was somehow implicated in instigating the wrongful discharge.³⁴ Instead, the *Czosek* Court asserted that a union's liability would be limited to those damages which "flowed" from its own conduct and would not include damages resulting solely from the employer's misconduct.³⁵ In this context, the Court indicated that a union could be held liable only for wronged employees' difficulty and expense of recovering from their employer.³⁶

The *Harrison* majority distinguished *Czosek* on the facts: The *Czosek* employees knew of the union's refusal to process their claims and could therefore appeal to the NRAB themselves or through independent counsel. Under these circumstances, the Fourth Circuit stated it would indeed be unfair to "visit" the total economic loss upon

quired to exhaust his remedies with the NRAB before bringing his suit in federal court. *Id.* at 244-45, 83 L.R.R.M. at 2038-39. The court reached this conclusion notwithstanding the employee's contention that *Andrews* did not require exhaustion where his wrongful discharge complaint alleged constitutional violations of his due process rights. *Id.* at 245, 83 L.R.R.M. at 2038-39.

³⁰ 530 F.2d at 562, 90 L.R.R.M. at 3268.

³¹ *Id.* at 563, 90 L.R.R.M. at 3269.

³² The court indicated that it would be for the fact-finder to determine the "value" of the right lost. *Id.* Thus, the Fourth Circuit opinion seems to contemplate that the jury determine the merits of both a DFR claim against his union and his contractual claim against his employer, since in order for a jury to determine the value of an employee's lost "right" of action, it would have to come to some conclusion regarding the merits of the employee's contractual claim against his employer. See note 23 *supra*.

³³ 397 U.S. 25 (1970).

³⁴ *Id.* at 28-29. See note 7 *supra*. Where the employer is implicated in the wrongful conduct, such as where it acts jointly with the union to discriminate against employees, see, e.g., *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 325 (1969), both the union and employer may be held jointly and severally liable for back pay. See *Vaca v. Sipes*, 386 U.S. 171, 197 n.18 (1967) (dictum).

³⁵ 397 U.S. at 29.

³⁶ *Id.*

the union, insofar as "the loss of the right to enforce the contract claim was as much the fault of the individuals as the union's."³⁷ Harrison on the other hand, was denied the opportunity to process his claim individually by the union's own misconduct in not informing him of its inaction. These circumstances, the Fourth Circuit believed, justified extending *Czosek* to include union liability for compensatory damages since "the union's conduct ha[d] not simply put Harrison to additional trouble and expense; it ha[d] extinguished his right of enforcement."³⁸

An important aspect of the Fourth Circuit's opinion was its conclusion that Harrison's right of action was "extinguished" by his failure to pursue the administration procedures of the NRAB. In so concluding, the Fourth Circuit expressly rejected a holding by the Second Circuit in *Schum v. South Buffalo Railway Co.*³⁹ that "extinguishment" did not occur in such circumstances.⁴⁰ In *Schum*, the employee, like Harrison, had been denied his right to appeal his discharge to the NRAB because of his union's failure to file a timely appeal.⁴¹ Nevertheless, the Second Circuit found that the aggrieved employee could still sue his employer for wrongful discharge in the same federal district court action as that of his DFR suit against his union.⁴² Unlike the *Harrison* court, the *Schum* court did not believe an employee's failure to exhaust the NRAB procedures always "extinguished" his claim against his employer. Instead the Second Circuit, relying on cases which held that "exhaustion" is not always required,⁴³

³⁷ 530 F.2d at 562, 90 L.R.R.M. at 3269.

³⁸ *Id.* at 563, 90 L.R.R.M. at 3269. Under *Harrison*, plaintiff recovers back pay to the extent of his "right" lost. See *id.* at 562, 90 L.R.R.M. at 3269. This allows the factfinder a certain discretion in valuing that right. See note 32 and accompanying text *supra*.

³⁹ 496 F.2d 328, 331-32, 86 L.R.R.M. 2459, 2461-62 (2d Cir. 1974).

⁴⁰ The *Harrison* court stated that: "*Schum*, however, appears to us to be inconsistent with the whole theory and purpose of the [Railway Labor] Act as construed in *Andrews*." 530 F.2d at 563, 90 L.R.R.M. at 3269.

⁴¹ 496 F.2d at 329-30, 86 L.R.R.M. at 2459-60. However, *Schum*'s union was merely negligent while Harrison's union intentionally relinquished his claim. Compare *Schum*, 496 F.2d at 331-32, 86 L.R.R.M. at 2461, with *Harrison*, 530 F.2d at 560, 562, 90 L.R.R.M. at 3267-68.

⁴² 496 F.2d at 331-32, 86 L.R.R.M. at 2461. The Court did not specifically state that *Schum* could maintain actions against both his employer and his union in the same suit. However, this result can be implied from the Second Circuit's removal to the district court whereby the employee's wrongful discharge action against his employer would stand along with the DFR claim against his union. *Id.* As noted in *Vaca v. Sipes*, 386 U.S. 171, 197 (1967), the employee may sue the employer and the union in separate actions or join both parties as defendants in the same lawsuit.

⁴³ The *Schum* court relied mainly on *Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967), where the Court stated with regard to the exhaustion requirement:

It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statu-

concluded that the aggrieved employee must merely make a good-faith "attempt" to exhaust the administrative procedures provided in the RLA or the collective bargaining agreement before seeking a judicial resolution of his grievances.⁴⁴ Such an "attempt," the court stated, could be demonstrated by Schum's reasonable reliance on his union to prosecute his grievances.⁴⁵ Thus, in effect, the *Schum* court found that an employee could be excused from the exhaustion requirements of the RLA when the employee's failure to exhaust was the result of his reasonable reliance on his union to prosecute his claim. The Second Circuit, therefore, would not have viewed Harrison's claim against Belt Line as "extinguished" and consequently, would not have held Harrison's union liable for compensatory damages. Instead, it would have allowed Harrison to attempt to recover his lost wages in the same or in a separate action against Belt Line; as a result, Harrison's federal DFR action against his union would be limited to recovering his "costs of suit."⁴⁶

That the Second and Fourth Circuits reached different results in *Schum* and *Harrison* rests on the two circuits' differing interpretations of the requirements of the exhaustion of remedies doctrine enunciated in *Andrews*. The Second Circuit relied on cases under the RLA and the NLRA which held that exhaustion of remedies was not required when either the employer repudiates the private grievance machinery; the union breaches its duty of fair representation; or the

tory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.

Id. Vaca v. Sipes was an action arising under the NLRA. Nevertheless, the *Schum* court found it appropriate to apply the rationale of *Vaca* and related NLRA cases to actions commenced by railroad employees pursuant to the provisions of the RLA, reasoning that the principles enunciated in this line of cases had been applied to RLA actions in similar contexts. 496 F.2d at 330, 86 L.R.R.M. at 2460. The Second Circuit also relied greatly on *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 329-31 (1969), wherein it was recognized that a railroad employee would be excused from the exhaustion requirements in certain circumstances. See text at note 47 *infra*.

⁴⁴ 496 F.2d at 332, 86 L.R.R.M. at 2461-62. The Second Circuit's reference to an "attempt" should be read in light of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). See note 26 *supra*.

⁴⁵ 496 F.2d at 332, 86 L.R.R.M. at 2462.

⁴⁶ See notes 33-36 and accompanying text *supra*. Harrison could also recover punitive damages from his union if he proved it acted with "malice." See note 6 *supra*. The *Schum* court did not clearly indicate whether it would allow the employee to consolidate his claims against his employer and union into one action, though this seems to be the case. See note 42 *supra*. Judge Winter, dissenting in *Harrison*, would allow the employee's claim against his employer to be treated as "pendent" to his DFR claim against his union. See note 61 *infra*. The jurisdictional bases of Harrison's claims are set out at note 15 *supra*.

employee's pursuit of the administrative remedies would be futile.⁴⁷ It should be noted, however, that under the NLRA, the union can retain the sole power to pursue the various steps in the grievance procedure, while the RLA allows the employee to appeal to the NRAB as an individual.⁴⁸ Because of this distinction, the railroad in *Schum* argued that the exception to the exhaustion requirement that generally applies when a union breaches its duty of fair representation⁴⁹ should not apply in RLA actions. The railroad argued that even if the union did wrongfully fail to process a claim, the employee could still technically process his own claim through the grievance mechanisms provided in the collective bargaining agreement and the statute.⁵⁰ However, the *Schum* court found that this difference in the two statutory schemes was insignificant, because it did not believe that an employee acting without the support of his union would have the knowledge, experience, or political clout to process his claim successfully before the NRAB.⁵¹ In effect, the *Schum* court found that the employee's right under the RLA to petition the NRAB individually was meaningless because it seldom could be exercised in a fruitful manner. It therefore rejected the railroad's argument that this right of individual appeal eliminated the DFR exception to the exhaustion requirements in the RLA area. In so doing, it allowed the aggrieved employee to maintain his action for wrongful discharge against his employer and thus prevented the union from being held for compensatory damages.⁵²

The *Harrison* court, on the other hand, interpreted the exhaustion requirements of *Andrews* strictly. In so doing, it rejected the notion that in RLA cases, there is an exception to the exhaustion requirements when an employee proves that his union breached its duty of fair representation towards him in handling his claim. The *Harrison* majority attributed controlling significance to the fact that there was an RLA provision allowing employees to file their own claims individually with the NRAB regardless of union conduct. Unlike the

⁴⁷ See *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 329-31 (1969); notes 43-44 and accompanying text *supra*. See also *Nemitz v. Norfolk & Western Railway Co.*, 436 F.2d 841, 849-50, 76 L.R.R.M. 2340, 2347 (6th Cir. 1971).

⁴⁸ See note 11 *supra*.

⁴⁹ See text at notes 43-44, 47 *supra*.

⁵⁰ 496 F.2d at 331, 86 L.R.R.M. at 2461.

⁵¹ *Id.* The court stated:

As a general rule, grievances do not succeed without the full support of the union. Normally, employees do not have the expertise, knowledge or experience to interpret the complicated substantive and procedural provisions of a collective bargaining agreement. In addition, specialized skill and insight are required at the higher levels of the grievance procedures to investigate and marshal the relevant facts and law, to prepare adequate petitions and briefs, to comply with the intricate limitations, periods common to all labor contracts, and to present persuasive arguments to the board of arbitration.

Id.

⁵² *Id.* at 331-32, 86 L.R.R.M. at 2461-62.

Schum court, the *Harrison* court believed that the existence of this provision was not insignificant: it was seen to give employees under the RLA a remedy against their employers without the necessary participation of a union. As such, the *Harrison* court found justification for the elimination of the exhaustion of remedies exception that exists when an employee shows a DFR breach by his union.⁵³

Judge Winter, in a persuasive dissent,⁵⁴ asserted that a union could not be held responsible for the lost wages of its members unless it was somehow implicated in the employer's wrongful conduct.⁵⁵ He believed that the majority erred when it construed the exhaustion requirements in *Andrews*⁵⁶ as essentially overruling the *Czosek* finding that a union can be held only for damages which "flowed" from its own misconduct.⁵⁷ First, Judge Winter found no mention in *Andrews* of an intent to limit or overrule *Czosek*.⁵⁸ Second, he believed that it was the employer's own breach of the contract of employment and not the union's failure to process the claim properly which gave rise to the employee's lost earnings.⁵⁹ Essentially, Judge Winter did not find that Harrison's lost earnings "flowed" from UTU's failure to represent him fairly. Therefore, Judge Winter, following *Schum*, found that Harrison would not be prevented from suing Belt Line for wrongful discharge⁶⁰ and UTU for breach of its duty of fair representation, where Harrison's failure to pursue the NRAB procedure was due to the union's breach of its duty of fair representation.⁶¹ Judge Winter therefore found that UTU should not be held for dam-

⁵³ The *Harrison* court also rejected the *Schum* approach for policy reasons. The *Harrison* court emphasized that the "theory and purpose" of the RLA required submitting grievances founded upon contract claims to the NRAB. The court found that the employee should not in fairness suffer the loss of his right of action if the loss was not the result of his own conduct. The court believed it more appropriate to hold the union for the consequences of a loss resulting from its own misconduct, than to "stretch the statute" by allowing the employee to maintain his original cause of action against the railroad. 530 F.2d at 563, 90 L.R.R.M. at 3269.

⁵⁴ Judge Winter dissented only on the issue of compensatory damages but concurred in all other respects. See 530 F.2d at 564, 90 L.R.R.M. at 3270 (Winter, J. concurring in part and dissenting in part).

⁵⁵ *Id.* at 565-66, 90 L.R.R.M. at 3271-72 (Winter, J. dissenting in part).

⁵⁶ See text at notes 24-29 *supra*.

⁵⁷ See text at notes 33-36 *supra*.

⁵⁸ 530 F.2d at 565, 90 L.R.R.M. at 3271 (Winter, J. dissenting in part).

⁵⁹ *Id.* at 564-65, 90 L.R.R.M. at 3271 (Winter, J. dissenting in part), citing *Vaca v. Sipes*, 386 U.S. 171, 197 (1967).

⁶⁰ Harrison would be able to sue his employer in state court if his cause of action was based on state law. See note 15 *supra*. However, federal court would be the proper forum for grievances arising under the RLA. See *Cunningham v. Erie Railroad Co.*, 266 F.2d 411, 414-15 (2d Cir. 1959). Note that in *Andrews*, the employer successfully removed the employee's action for wrongful discharge under the RLA from state court to federal court. 420 U.S. at 320-21. See note 25 *supra*.

⁶¹ 530 F.2d at 565, 90 L.R.R.M. at 3271 (Winter, J. dissenting in part). Judge Winter would allow a wronged employee to bring all his claims in one federal court action, treating the employee's action against his employer as "pendent" to his federal DFR action against his union. *Id.* at 566, 90 L.R.R.M. at 3272. The jurisdictional bases of such claims are set out at note 15 *supra*.

ages for wrongful discharge.⁶²

It is submitted that the analysis of both the dissent in *Harrison* and the Second Circuit in *Schum* is the correct resolution of the interplay between the exhaustion requirements of *Andrews* and the liability language of *Czosek*.⁶³ The *Harrison* majority read *Andrews* as eliminating, at least in the RLA area, the well-established exception to the exhaustion requirement that exists when the employee can demonstrate that his union breached its duty of fair representation.⁶⁴ However, the facts of *Andrews* are significantly different from the facts of *Harrison* and *Schum* in terms of the employee's responsibility for failing to satisfy the exhaustion requirements. In *Andrews*, the employee went directly to the courts in his action against his employer for wrongful discharge.⁶⁵ There was neither an attempt to utilize the NRAB procedures nor a concurrent DFR claim against the union.⁶⁶ Thus, there was reason to require the employee to exhaust his remedies before the NRAB, since there was no possibility that his claims had been prejudiced by union misconduct. In contrast, the employees in both *Harrison* and *Schum* actively attempted to utilize the grievance machinery provided in the collective bargaining agreement. In both instances, the employees' failure to exhaust the administrative remedies of the NRAB was due solely to their union's misconduct in failing to notify them within the time limit provided in their collective bargaining agreement of the decision not to prosecute their claims. In short, as the *Schum* court seems to recognize, *Andrews* is simply not controlling authority in situations where the employee can demonstrate that he attempted to follow the statutory procedures but was prejudiced by his union's misconduct.⁶⁷

Further, the *Harrison* majority flatly ignores the language in *Czosek* that a union will not be held for compensatory damages.⁶⁸ The result is that the union is held liable for damages arising from a discharge for which it was not initially responsible, while the employer, the actual wrongdoer, escapes liability merely because of the union's subsequent misconduct. It is submitted that Congress could not have intended that an employer evade the natural consequences of his

⁶² 530 F.2d at 566, 90 L.R.R.M. at 3272 (Winter, J., dissenting in part).

⁶³ The *Czosek* court indicated that a union can be held only for "damages that flowed from [its] own conduct." 397 U.S. at 29.

⁶⁴ See notes 43-44, 47 and accompanying text *supra*.

⁶⁵ 406 U.S. at 320-21.

⁶⁶ *Id.* at 321. It may have been that the plaintiff in *Andrews* was not a union member.

⁶⁷ The *Schum* court cites *Andrews* merely for the general proposition that a railroad employee must exhaust the administrative remedies of the RLA, noting that there are exceptions. 496 F.2d at 330, 86 L.R.R.M. at 2460. The exceptions are set forth in the text at note 47 *supra*.

The *Schum* position is fortified by the post-*Harrison* Supreme Court decision of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). In *Hines* the Court reaffirmed the exception to the exhaustion requirement that exists under the NLRA when the employee's union breaches its duty of fair representation. *Annual Survey of Labor Law*, see 17 B.C. IND. & COM. L. REV. 1042 (1976).

⁶⁸ See text at notes 33-36 *supra*.

breach of contract by so fortuitous a circumstance.⁶⁹ The better result in these cases is to follow *Schum* and to eliminate the exhaustion requirements when it is the union's misconduct or negligence which is the reason for the employee's failure to exhaust the NRAB procedures. The employee's claim against his employer, whether based on a federal or state cause of action, could be treated as pendent to his DFR claims against his union.⁷⁰ In this manner, all issues can be handled conveniently in one trial, multiplicity of suits is avoided, and responsibility for damages is more easily apportioned.⁷¹

The one welcome effect of *Harrison* may be to put strong pressure on unions to exercise due diligence in informing their members of decisions not to "progress" their grievances. In addition, "closed-door" deals with employers will be more scarce. On the other hand, *Harrison* will have one unwelcome effect: once each union has recognized and accepted its responsibility to notify each member of its refusal to prosecute claims, cases like *Harrison* will be rare. Then the employee whose union refuses to process his claim will be forced to go before the NRAB alone with all the attendant difficulties to which the *Schum* court rightly pointed.⁷² Further, the employee will have the added burden of maintaining a second action in federal court against his union to recover his legal costs and expenses. It is probable that there will be few employees with the determination and financial ability needed to pursue this multiple litigation, especially in cases where the employee wishes to work for the same employer and to remain a member of the same union.

Harrison also fortifies the exhaustion doctrine enunciated in *Andrews*. After *Harrison*, an employee bringing suit against his employer cannot avoid the exhaustion requirements merely by suing his union in federal court for breach of its duty of fair representation.⁷³

⁶⁹ See *Vaca v. Sipes*, 386 U.S. 171, 195-98 (1967). In *Vaca*, an employee sued his union for breach of its duty of fair representation. The employee sought back pay as damages. *Id.* at 195. Although the Court dismissed the DFR claim on the merits, *id.* at 193-95, with regard to the damages issue it stated in dictum that it did not think "an award against a union [should] include . . . damages attributable solely to the employer's breach of contract." *Id.* at 197. The Court also stated that although the "union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which caused this portion [lost wages] of the employee's damages." *Id.*

⁷⁰ This is the view of Judge Winter, dissenting in part in *Harrison*. See note 61 *supra*.

⁷¹ If the employee's state claims against his employer are not treated as pendent to his federal DFR claims against his union, then the employee would have to sue his employer in state court unless he could show some independent basis for federal jurisdiction such as diversity with \$10,000 in controversy under 28 U.S.C. § 1332 (1970). See note 15 *supra*.

⁷² See note 51 *supra*.

⁷³ In fact, if the *Schum* view were followed, the employee, to survive an employer's motion to dismiss for failure to exhaust administrative remedies, would merely have to make sufficient allegations of a breach by the union of its duty of fair representation. See *Czosek*, 397 U.S. at 27. In *Czosek*, the Court also stated that complaints against a union for breach of the duty of fair representation should be con-

Instead, he must proceed against his employer before the NRAB; otherwise his sole remedy for lost wages is against his union.

Harrison should please RLA employers who, under *Schum*, would lose their right to the arbitration procedures of the NRAB⁷⁴ even though they were in no way implicated in the union's breach of its duty of fair representation. Nevertheless, *Harrison's* shift of liability to the union works a windfall for the employer who can now escape the legal consequences of his wrongful acts merely because the union fails to represent the wronged employee fairly.

There appears to be no way to reconcile the different analyses and conclusions of the Second Circuit in *Schum* and the Fourth Circuit in *Harrison*. However, both courts share the same concern in making certain that aggrieved employees receive a minimum fair representation and a complete remedy for the wrongs they suffer.

II. UNFAIR LABOR PRACTICES

A. Sex-Segregated Locals: Glass Blowers

In *NLRB v. Local No. 106, Glass Bottle Blowers Association*,¹ the United States Court of Appeals for the Sixth Circuit affirmed a Board decision which found that a union breaches its duty of fair representation under section 8(b)(1)(A)² where it (1) maintains two locals which

strued liberally to avoid dismissals and that plaintiffs should be allowed to file supplemental pleadings unless it is clear that they cannot state a good cause of action. *Id.*

⁷⁴ Employers would seemingly prefer the arbitration procedures of the NRAB to a direct action in federal court in that half of the NRAB arbitrators are selected by the carriers. See §§ 3, First (a) and (b), 45 U.S.C. §§ 153 First (a) and (b) (1970).

¹ 520 F.2d 693, 89 L.R.R.M. 3020 (6th Cir. 1975).

² Section 8(b)(1)(A) of the National Labor Relations Act provides that it is an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7." 29 U.S.C. § 158(b)(1)(A) (1970). Section 7 in turn provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

29 U.S.C. § 157 (1970).

Under section 8(b)(1)(A), the Board and the courts have imposed upon unions the duty to represent fairly all employees both in negotiating and enforcing collective bargaining agreements. See *Hines v. Anchor Motor Freight, Inc.*, 96 S. Ct. 1048, 1056-57 (1976); *Miranda Fuel Co.*, 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). This duty includes the obligation to represent the interests of all of its employees "without hostility to any" and its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). In *Miranda Fuel*, *supra*, a split Board held for the first time that a union's breach of its statutory duty of fair representation constitutes an unfair labor practice under section 8(b)(1)(A) of the NLRA. 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587. The Board's majority held that section 7 of the NLRA:

[G]ives employees the right to be free from unfair or irrelevant or invidious

are segregated on the basis of sex; or (2) processes employee grievances in a segregated manner.³ The circuit court further found that in ordering a merger of the two segregated locals, the Board had acted within the scope of its discretion in formulating the appropriate remedy.⁴

The facts in *Glass Blowers* are quite simple. In 1949, Glass Bottle Blowers Association, AFL-CIO, was certified by the Board as the collective bargaining representative of a unit consisting of the production and maintenance employees of Owen-Illinois, Inc.⁵ This "parent" union maintained two different locals at Owen-Illinois which were segregated on the basis of sex.⁶ Representatives of both locals participated with the "parent" in negotiating the collective bargaining agreement. However, in practice, the two locals administered the agreement separately: the "male" local investigated and handled only male grievances, while its "female" counterpart investigated and handled only female grievances.⁷ Additionally, the "male" local refused to admit female employees who sought membership in that local.⁸

With respect to the employer, the male and female locals were treated equally.⁹ Seniority lists were merged. All jobs were open to bidding by all employees without regard to sex. Further, neither the collective bargaining agreement nor the union constitution discriminated on the basis of sex.¹⁰

Acting on an individual complaint,¹¹ the NLRB Regional Director filed unfair labor practice charges against the two locals, alleging that by maintaining separate locals, by separating the processing of grievances of male and female unit members, and by refusing to process employee grievances on the basis of sex, both locals violated sec-

treatment by their exclusive bargaining agent in matters affecting their employment . . . 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 considerations or classifications which are irrelevant, invidious, or unfair.

Id. Although the Board's *Miranda Fuel* decision was denied enforcement by a divided Second Circuit, 326 F.2d 172 (2d Cir. 1963), the Supreme Court has approved the Board's holding. See *Vaca v. Sipes*, 386 U.S. 171, 182, 186 (1967). The Fifth Circuit has also followed the Board's *Miranda Fuel* doctrine. *Local 12, Rubber Workers v. NLRB*, 368 F.2d 12, 19-20, 63 L.R.R.M. 2395, 2400 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

³ 520 F.2d at 696, 89 L.R.R.M. at 3022.

⁴ *Id.* at 697, 89 L.R.R.M. at 3022-23. In reaching its holding the court cited *Fibreboard Paper Prod. Corp. v. NLRB*, 307 U.S. 203, 216 (1964).

⁵ 520 F.2d at 694, 89 L.R.R.M. at 3020.

⁶ *Id.* The reason that the unions maintained segregated locals does not appear in the opinions of the Board or the Court of Appeals. The population involved included approximately 800 male employees and approximately 370 female employees.

⁷ *Id.* at 695, 89 L.R.R.M. at 3021.

⁸ *Id.* at 696, 89 L.R.R.M. at 3022.

⁹ See *id.* at 695, 89 L.R.R.M. at 3021. The Administrative Law Judge found that the male and female employees received equal, through separate treatment. *Id.*

¹⁰ *Id.* at 694-95, 89 L.R.R.M. at 3020-21.

¹¹ See the decision of the full Board, *Local No. 106, Glass Bottle Blowers Ass'n*, 210 N.L.R.B. 943, 86 L.R.R.M. 1257 (1974).

tion 8(b)(1)(A).¹² The Board, in a split decision, agreed with the Regional Director on all three charges.¹³

All five members of the Board agreed that both the refusal to process grievances due to the sex of the employee and the separate processing of grievances violated the union's duty of fair representation under section 8(b)(1)(A) by interfering with the employees' section 7 rights to have a voice in the settlement of grievances.¹⁴ They reasoned that the employees whose local did not process the grievance had been denied their section 7 right to participate in the resolution of matters affecting the terms and conditions of their employment since the settlement of a grievance can affect the working conditions of both male and female employees, regardless of which local processes the grievance.

Four members of the Board also found that the maintenance of separate locals on the basis of sex in itself constituted a violation of section 8(b)(1)(A).¹⁵ Chairman Miller viewed the violation as a breach

¹² *Id.*, 86 L.R.R.M. at 1258. The complaint also alleged that the union violated § 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2) (1976), by attempting to cause the employer to discriminate against its employees solely because of their sex. *Id.* at 943 & n.1, 86 L.R.R.M. at 1258 & n.1. Four members of the Board dismissed this charge with little discussion stating merely that the union's discrimination "did not cause or attempt to cause the employer to engage in any activity, much less to discriminate against its employees." *Id.* at 944, 86 L.R.R.M. at 1269 (Chairman Miller and Member Fanning). *See id.* at 945, 86 L.R.R.M. at 1260 (Member Penello concurring and Member Kennedy concurring). Member Jenkins, who dissented on this point alone, argued somewhat circuitously that the employer's role in entering into a collective bargaining agreement with the separate locals was a form of discrimination against the employees. Therefore, the locals violated § 8(b)(2) "by causing the Employer to discriminate against its employees." *Id.* at 945, 86 L.R.R.M. at 1260 (Member Jenkins dissenting). The section 8(b)(2) issue was not raised in the circuit court.

The Board considered an analogous issue in *Bell & Howell Co.*, 213 N.L.R.B. 407, 87 L.R.R.M. 1172 (1974). In *Bell & Howell*, a split Board refused to entertain an employer's precertification complaint of union sex discrimination. *Id.* at 408, 87 L.R.R.M. at 1174. Member Kennedy, writing the pivotal opinion in *Bell & Howell*, did not believe that a post-election precertification investigation of union sex discrimination was constitutionally mandated. *Id.*, 87 L.R.R.M. at 1174-75 (Member Kennedy concurring). He argued that since the Supreme Court has not found sex to be a 'suspect' classification the Board should "not view an allegation of unlawful sex discrimination in a precertification proceeding." *Id.*, 87 L.R.R.M. at 1174 (Member Kennedy concurring). Member Kennedy also refused to sanction what he termed an attempt to "litigate the lawfulness of an alleged discriminatory hiring hall in a representational proceeding." *Id.* at 409, 87 L.R.R.M. at 1174.

It would appear that since the employer is under a statutory duty to bargain with the union under § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), and would not be able to refrain from such bargaining merely because it believes the union engages in sex discrimination against the unit employees, *see Bell & Howell Co.*, 213 N.L.R.B. at 408, 87 L.R.R.M. at 1172-73, he cannot be said to have participated in the unions' discriminatory practices. *Bell & Howell* is surveyed in 1974-75 Annual Survey of Labor Relations Law, 16 B.C. IND. & COM. L. REV. 991-94 (1975).

¹³ 210 N.L.R.B. at 944, 86 L.R.R.M. at 1259.

¹⁴ *Id.* at 944, 86 L.R.R.M. at 1259 (Chairman Miller and Member Fanning); *id.* at 945-46, 86 L.R.R.M. at 1259-60 (Members Penello, Jenkins, and Kennedy concurring separately).

¹⁵ *See id.* at 944, 86 L.R.R.M. at 1259 (Chairman Miller and Member Fanning); *id.* at 945, 86 L.R.R.M. at 1259-60 (Members Penello and Jenkins concurring separately)

of the locals' duty of fair representation.¹⁶ He found that "separate but allegedly equal representation" is not the fair representation established by the Board in its *Miranda Fuel Co.*¹⁷ decision.¹⁸

Members Fanning and Jenkins likewise found that the maintenance of separate locals on the basis of sex is a per se violation of section 8(b)(1)(A).¹⁹ However, in finding that the locals breached their duty of fair representation, they pointed to factors traditionally discussed in equal protection cases. Citing *Brown v. Board of Education*,²⁰ Member Fanning stated that "separate but equal treatment on the basis of sex is as self-contradictory as separate but equal on the basis of race."²¹ He determined that this type of segregation necessarily created feelings of inferiority among females as to their work status.²² Chairman Miller and Member Fanning pointed to the existence of separate grievance mechanisms to substantiate their claims that separate locals are inherently unequal.²³ However, it seems clear that they, along with Member Jenkins, would find that segregated locals *inherently* interfere with employees' section 7 rights, even where grievances were not processed separately.²⁴

Member Penello, the fourth Board member to find a violation of section 8(b)(1)(A), differed with the above reasoning and stated that there must be an "actual nexus between the discriminatory conduct" and the "interference with, and restraint of, employees in the exercise of rights protected under the Act" before an 8(b)(1)(A) violation can be found.²⁵ Since Member Penello found such a nexus between the separate grievance mechanisms and an interference with employees' section 7 rights, he concurred in the result reached by the Board.²⁶ It is clear however, that without prior proof of an impact upon employees' section 7 rights, Member Penello would not be willing to find that the fact of segregation itself violates section 8(b)(1)(A).

Only Member Kennedy dissented. Member Kennedy agreed with Member Penello that the employee must demonstrate a "nexus"

¹⁶ See *id.* at 944 & n.5, 86 L.R.R.M. at 1259 & n.5 (Chairman Miller). Chairman Miller and Member Fanning formed the majority. However, Chairman Miller also sets out his personal position separately. See *id.* at 944 n.5, 86 L.R.R.M. at 1259 n.5. Member Penello wrote a concurring opinion. *Id.* at 945, 86 L.R.R.M. at 1259-60. Members Jenkins and Kennedy wrote separate opinions wherein each concurred in part and dissented in part. *Id.* at 945-46, 86 L.R.R.M. at 1260-61.

¹⁷ 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). See note 2 *supra*.

¹⁸ 210 N.L.R.B. at 944 n.5, 86 L.R.R.M. at 1259 n.5 (Chairman Miller).

¹⁹ *Id.* at 944, 86 L.R.R.M. at 1259 (Member Fanning). *Id.* at 945, 86 L.R.R.M. at 1260 (Member Jenkins concurring in part).

²⁰ 347 U.S. 483 (1954).

²¹ 210 N.L.R.B. at 943, 86 L.R.R.M. at 1259 (Member Fanning).

²² *Id.* at 943-44, 86 L.R.R.M. at 1259 (Member Fanning).

²³ *Id.* (Chairman Miller and Member Fanning).

²⁴ See *id.* at 943-44, 86 L.R.R.M. at 1259 (Chairman Miller and Member Fanning); *id.* at 945, 86 L.R.R.M. at 1260 (Member Jenkins concurring in part).

²⁵ *Id.* at 944, 86 L.R.R.M. at 1259 (Member Penello concurring).

²⁶ *Id.* at 945, 86 L.R.R.M. at 1259-60 (Member Penello concurring).

between the union's discriminatory conduct and the interference with his section 7 rights.²⁷ However, Member Kennedy believed that it had not been adequately proven that the "mere maintenance of separate locals" adversely affected the "employment relationship".²⁸ Further, he did not believe that a nexus between the alleged discriminatory conduct and an interference with employees' section 7 rights existed.

The United States Court of Appeals for the Sixth Circuit, quoting extensively from the Board's majority decision, affirmed that holding in all respects. The court gave the Board decision "its proper weight" and agreed that the mere maintenance of segregated locals on the basis of sex interfered with employees' section 7 rights.²⁹

Significantly, the court rejected the union's argument that segregation by sex is justified if a majority of females preferred a separate local.³⁰ The court stated that such majority preference would not provide a defense for the refusal of locals to admit those employees who desired membership.³¹ The court believed that the separation of workers into different locals defeats a national labor policy which is based on the notion that employee unity is the best method to achieve better working conditions.³²

The development in *Glass Blowers* of a per se rule in sex discrimination cases appears to be both good law and constructive policy-making. It is submitted first that separate grievance mechanisms per se offend the employees' statutory right to participate through their exclusive bargaining agent in matters affecting their working conditions. Further, no legitimate purpose is served by separate grievance process mechanisms. Such separate processing can subtly create the potential for disparate treatment by an employer whose willingness amicably to settle a grievance in favor of an employee may be strongly tempered by his perception of the political strength of the local which processes the grievance.³³ Unified processing of grievances guarantees equal treatment of all employees. As is pointed out by the court of appeals, the interests of minority employees are not prejudiced by forced merger since their rights are protected by the union's statutory duty to represent fairly all employees in the bargaining unit without discrimination.³⁴

Second, the elimination of all sex-segregated locals curtails certain employment practices that are discriminatory and illegal under

²⁷ *Id.* at 946, 86 L.R.R.M. at 1260 (Member Kennedy dissenting in part).

²⁸ *Id.* 520 F.2d at 696, 89 L.R.R.M. at 3022.

²⁹ *Id.* at 697, 89 L.R.R.M. at 3022.

³⁰ *Id.* Women employees who had requested membership in the male local were all rejected. *Id.* at 696, 89 L.R.R.M. at 3022.

³¹ *Id.* at 697, 89 L.R.R.M. at 3022, citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

³² In fact, the local unions asserted that a majority of the women employees preferred a separate local because it gave them "clout." See 520 F.2d at 697, 89 L.R.R.M. at 3022.

³³ See *id.*; see also *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185, 51 L.R.R.M. 1584, 1587 (1962); note 2 *supra*.

federal law. The Civil Rights Act of 1964 clearly prohibits a labor organization from segregating its membership on the basis of sex where the segregation adversely affects an employee's work status.³⁵ Merged locals help insure that neither sex will be subjected to disparate treatment by the union or the employer. Finally, per se rules such as the one developed in *Glass Blowers* generally result from the Board's repeated exposure to practices that are rarely, if ever, justifiable.³⁶ At some point the Board concludes that a certain rule of practice so often detrimentally affects statutory rights that a demonstration of such an effect will no longer be required.³⁷ It is suggested that the development of a per se rule in sex segregation cases, based on the notions that separate is inherently unequal and that the harmful effects of sex discrimination can be presumed, is quite appropriate. The Board and the courts should closely scrutinize sex classifications and strike down per se those which have the potential to impede employee's section 7 rights.³⁸

Further, no legitimate purpose is served by segregating locals on the basis of sex. Political "clout" or employee preference is not a valid basis for segregating locals, since inevitably those without "clout" or those without such a preference are prejudiced in their right to have the full and fair representation of their exclusive bargaining agent—a right which is guaranteed by the *Miranda Fuel* holding that all employees must be free from unfair, irrelevant, or invidious treatment.³⁹ In addition, the federal labor policy seeking to promote industrial peace and improve wages and working conditions by fostering employee organization⁴⁰ is hindered when unions are separated into

³⁵ See Civil Rights Act of 1964, § 703(c)(2), 42 U.S.C. § 20003(e)-2(c)(2) (Supp. III, 1973), which provides:

It shall be an unlawful employment practice for a labor organization . . . to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . or . . . adversely affect his status as an employee . . . because of such individual's . . . sex . . .

³⁶ *Id.* For example, the Board has developed a policy of striking down overly-broad no-solicitation rules without regard to their actual application and enforcement. See, e.g., *Joseph Horne Co.*, 186 N.L.R.B. 754, 75 L.R.R.M. 1426 (1970).

³⁷ See *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961). In *Local 357*, the Supreme Court held that exclusive hiring agreements are not unlawful per se because unions can be presumed to administer hiring halls in an unlawful manner. *Id.* at 675. However, the Court also stated that certain conduct could by its very nature contain the implications of the required intent—and that therefore the existence of discrimination could at times be inferred by the Board by drawing on its experience in factual inquiries. *Id.*, citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

³⁸ In fact, the courts and the Board have in the past closely scrutinized and struck down sex classifications. See, e.g., *Kahn v. Shevin*, 416 U.S. 351 (1974). See also *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471, 82 L.R.R.M. 2608 (9th Cir. 1973), where it was held that the Board, as an instrument of the federal government, is prohibited from directly or indirectly sanctioning discrimination. *Id.* at 473. 82 L.R.R.M. at 2610.

³⁹ *Miranda Fuel Co.*, 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587. See note 2 *supra*.

⁴⁰ See National Labor Relations Act, § 1, as amended, 29 U.S.C. § 151 (1970).

segregated locals. One local's numeric strength may lead to disparate treatment by an employer, creating divisiveness and animosity between the locals. It is collective action through consolidation, not separation, that is more likely to guarantee improved working conditions for employees.

The ultimate significance of *Glass Blowers* is still uncertain. Although Members Fanning and Jenkins are willing to find all discrimination by unions on the basis of sex as violative of section 8(b)(1)(A),⁴¹ Members Penello and Kennedy require proof of a detrimental impact on section 7 rights.⁴² Even where such an impact is demonstrated, it appears that Member Kennedy would apply Board sanctions only so far as there is an impact but would not rule the mere separation of the locals as violative of the Act.⁴³ The crucial vote in future complaints like the complaint in *Glass Blowers* will be that of Chairwoman Murphy. The bare 3-2 majority which found a per se violation in *Glass Blowers* was lost when chairman Miller was replaced by Chairwoman Murphy on the Board. Until her position is made clear, the status of the per se rule with the Board is very uncertain.

Nonetheless, the Sixth Circuit's clear acceptance of the Board's position in *Glass Blowers* could have a significant impact on the Board's future decisions. The ever-growing judicial scrutiny of sex-based classifications could influence the Board by encouraging it to attempt to eliminate a union's sexually discriminatory practices.

One area which could be immediately affected by the court's affirmance of the Board's per se rule is that involving precertification examinations when allegations of union sex discrimination are made. In the period between the Board's decision in *Glass Blowers* and the Sixth Circuit's affirmance of that decision, the Board held in *Bell & Howell Co.*⁴⁴ that the Board is not required to make a precertification examination into employer allegations that a labor organization discriminates against its employees on the basis of sex.⁴⁵ Yet the Board had earlier in the same year held that the Board is required to entertain similar employer complaints of union racial discrimination.⁴⁶ Although there may be a reason to scrutinize sex discrimination less carefully at the precertification level, given the strong labor policy to begin the bargaining relationship without delay or impediment,⁴⁷ the circuit courts should not follow the rationale. The affirmance of the Board's holding in *Glass Blowers* both points to the courts' willingness

⁴¹ 210 N.L.R.B. at 944, 86 L.R.R.M. at 1259 (Member Fanning); 210 N.L.R.B. at 945, 86 L.R.R.M. at 1260 (Member Jenkins concurring in part).

⁴² *Id.* at 945, 86 L.R.R.M. at 1259 (Member Penello concurring); *id.* at 946, 80 L.R.R.M. at 1260 (Member Kennedy dissenting in part).

⁴³ *Id.* at 946, 86 L.R.R.M. at 1260 (Member Kennedy dissenting in part).

⁴⁴ 213 N.L.R.B. 407, 87 L.R.R.M. 1172 (1974).

⁴⁵ *Id.* at 408, 87 L.R.R.M. at 1174. See note 12 *supra*.

⁴⁶ *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138, 139, 86 L.R.R.M. 1323, 1325 (1974).

⁴⁷ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-13 (1969).

to see harmful and invidious effects of sex discrimination, and supports a rejection of the Board's hands-off policy articulated in *Bell & Howell*.

Finally, the willingness of the Board to strike down sex-based classifications may encourage Title VII-type litigation before the Board. It may be said that such a development may not be completely desirable in light of the Board's relative inexperience in handling cases which are more typically handled by the Equal Employment Opportunity Commission.⁴⁸ On the other hand, where employees have entrusted the representation of their interests to an exclusive bargaining agent, the Board should be careful to protect those interests. The Board should not abdicate its responsibility of eliminating union discrimination against employees merely because it believes another federal agency is better able to protect those interests. Instead, the Board should take the opportunity presented by cases like *Glass Blowers* to enforce the federal labor laws in a manner which complements the Equal Employment Opportunity Commission's enforcement of the Civil Rights Act of 1964.⁴⁹

B. Hospital Amendments—Notice Provisions: Lein-Stenberg/Mercy Hospitals, Casey & Glass

In extending the coverage of the NLRA to employees of non-profit health care institutions,¹ Congress accounted not only for "the very legitimate rights [of over 1.4 million employees]² to organize and bargain [collectively],"³ but also for the need to maintain uninterrupted public access to health care.⁴ To accomplish these two goals, Congress both extended the protections of the NLRA to non-profit hospital employees⁵ and developed a special regulatory scheme for

⁴⁸ See Civil Rights Act of 1964 § 705, 42 U.S.C. § 2000e-4 (1970), as amended, 42 U.S.C. § 2000e-4 (Supp. III, 1973).

⁴⁹ See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69-70 (1975).

¹ National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1973) as amended by 29 U.S.C. §§ 152 (2), 152(14), 158(d), 158(g) (1974) [hereinafter referred to as the Hospital Amendments].

² 120 Cong. Rec. S22574 (1974) (remarks of Sen. Williams).

³ *Id.* at S12945 (remarks of Sen. Taft). See also S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949, which states that "the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society . . ."

⁴ 120 Cong. Rec. S12945 (1974) (remarks of Sen. Taft). See also S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3951; 120 Cong. Rec. S22574-75 (1974) (remarks of Sen. Williams); 120 Cong. Rec. S12940 (1974) (remarks of Sen. Javits).

⁵ See 29 U.S.C. § 152(2), where the words "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual," are stricken. See also 29 U.S.C. § 152(14), which provides: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or

settling labor disputes involving health care institutions.⁶

other institution devoted to the care of sick, infirm, or aged person."

⁶ The last sentence of 29 U.S.C. § 158(d) was amended to read:

Any employee who engages in a strike within any notice period specified in this section, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act . . .

29 U.S.C. § 158(d) was also amended by adding the following provisions for the regulation of labor relations in the health care industry:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Further, 20 U.S.C. § 158 was amended by adding the following provision:

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

In addition, Title II of the Labor Management Relations Act of 1947, 29 U.S.C. § 171 *et seq.* was amended by addition of the following provisions:

CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY

Sec. 213. (a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) (which is required by clause (3) of such section 8(d)), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

(b)(1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without com-

One of the elements in this scheme, section 8(g), prohibits a labor organization from engaging in "any strike, picketing, or other concerted refusal to work at any health care institution" without first giving notice both to the health care institution and to the Federal Mediation and Conciliation Service.⁷ Failure to give the required notice constitutes an unfair labor practice remediable under section 10 of the Act.⁸ In addition, a worker who violates the notice requirement by striking within the period specified by 8(g) is exposed to the loss of "employee" status, and is thereby subject to the loss of the protections of the Act.⁹

The Senate Report accompanying the Hospital Amendments outlined the objectives of section 8(g).¹⁰ First, the ten-day notice period was intended to give the NLRB an opportunity to determine the legality of any potential strike or picketing activity before it occurred.¹¹ Even more importantly, the advance notice was intended

pensation but shall be reimbursed for travel, subsistence, and other necessary expense incurred by them in carrying out its duties under this section.

(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of title 5, United States Code, including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

These unique procedural requirements were designed "to facilitate the collective bargaining process, reduce the opportunity for negotiation impasses, and provide recognition of the need for continuity of patient care." 120 Cong. Rec. S22574 (1974) (remarks of Sen. Williams).

⁷ 29 U.S.C. § 158(g).

⁸ 29 U.S.C. § 160. In light of the Congressional concern for insuring continuous public access to health care, § 160(j) was considered particularly significant. S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949. Under § 160(j), the Board has the power, upon issuance of a complaint, to petition the district court "for appropriate temporary relief or restraining order."

⁹ See 29 U.S.C. § 158(d) as amended. There are two situations in which the 10-day notice requirement of § 8(g) does not apply: S. REP. NO. 93-766 points out that a labor organization will not be required to serve 10 days' notice where the employer has committed an unfair labor practice. Further, § 8(g) itself specifies that the notice provisions will not apply where the parties are in the process of bargaining for an initial agreement following certification or recognition. In this case, provisions of § 8(a)(1)(B) apply. 29 U.S.C. § 158(d)(1)(B).

¹⁰ See S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949.

¹¹ *Id.*

to give the health care institution sufficient warning of a planned strike, picket, or work stoppage so that it could make other arrangements for continuing patient care.¹²

During the Survey year, in *Plumbers Local 630 (Lein-Steenberg)*,¹³ *Laborers Local 1057 (Mercy Hospital of Laredo)*,¹⁴ and *Casey & Glass, Inc.*,¹⁵ the Board for the first time applied the regulatory provisions of the Hospital Amendments to determine whether the section 8(g) notice requirement was to be read literally to apply to any picketing conducted on the premises of a health care institution, or whether the notice requirement was intended to apply only to picketing directed against the health care institution itself.¹⁶ *Casey & Glass, Inc.* raised the additional question whether the section 8(d) sanction of loss of employee status should apply to any employee who had picketed his employer on hospital premises or whether the penalty applied only to concerted activities directed against a hospital.¹⁷

The facts of the three cases presented a similar pattern. In both *Lein-Steenberg* and *Mercy Hospital*, employees of contractors doing construction work on the premises of non-profit hospitals picketed their employers at their hospital jobsites. The picketing was clearly directed against the subcontractors,¹⁸ and did not disrupt the work of the hospital employees.¹⁹ In unfair labor practice proceedings brought both by the hospitals and by the Board, the Board held that the notice requirement of section 8(g) applied to any strikes or picketing conducted on the premises of a health care institution, even where the hospital was not a party to the labor dispute, and where hospital ser-

¹² *Id.* See also 120 Cong. Rec. S22574 (1974) (remarks of Sen. Williams).

¹³ 219 N.L.R.B. 837, 89 L.R.R.M. 1770 (1975).

¹⁴ 219 N.L.R.B. 846, 89 L.R.R.M. 1777 (1975).

¹⁵ 219 N.L.R.B. 698, 89 L.R.R.M. 1779 (1975).

¹⁶ *Lein-Steenberg*, 219 N.L.R.B. at 837, 89 L.R.R.M. at 1772; *Mercy Hospital*, 219 N.L.R.B. 846, 89 L.R.R.M. 1777; *Casey & Glass, Inc.*, 219 N.L.R.B. 698, 89 L.R.R.M. 1779.

¹⁷ 219 N.L.R.B. 698, 89 L.R.R.M. 1779.

¹⁸ *Lein-Steenberg*, 219 N.L.R.B. at 838, 89 L.R.R.M. at 1771; *Mercy Hospital*, 219 N.L.R.B. at 847, 89 L.R.R.M. at 1778. In *Lein-Steenberg*, the Board found that the union limited its picketing activity to the gate reserved solely for the subcontractor's employees. Further, picket signs included a notice that the union had no dispute with any other employer, and that the picketing was not intended to stop work or deliveries.

¹⁹ *Lein-Steenberg*, 219 N.L.R.B. at 838, 89 L.R.R.M. at 1771; *Mercy Hospital*, 219 N.L.R.B. at 847, 89 L.R.R.M. at 1778. The Board indicated that although the *Lein-Steenberg* picketing was visible to some of the hospital employees, hospital workers did not use the gate reserved for the subcontractor's employees, and were not required to cross any picket lines to gain access to the hospital. From time to time, employees of the general contractor and certain other subcontractors involved in the construction project honored the picket line established by the union. However, "no hospital employees engaged in a work stoppage or other refusal to work as a result of the picketing, and there has been no disruption of any of the services offered by the hospital." 219 N.L.R.B. at 838, 89 L.R.R.M. at 1771. In *Mercy Hospital*, the Board noted that "[there was] no allegation that any hospital employees ceased work or that Respondent's picketing had any adverse impact on the Hospital's ability to provide its customary medical care." 219 N.L.R.B. at 847, 89 L.R.R.M. at 1778.

vices had not been impaired by union conduct.²⁰

In addition, in *Casey & Glass*, the contractor involved in *Mercy Hospital* challenged election ballots cast by employees whose union had failed to give advance notice before picketing the hospital construction site.²¹ The Board held that since 8(d) provided that any employee engaged in a strike in violation of 8(g) lost his employee status,²² such employee was not eligible to vote in a union representation election.²³

In all three cases, a majority composed of Chairman Murphy and Members Kennedy and Penello considered three factors in determining that section 8(g) applied to all picketing at a hospital site. First, the Board examined the literal language of the section prohibiting "any strike, picketing, or other concerted refusal to work at any health care institution."²⁴ According to the majority, the word "at" necessarily meant "on the premises of" any health care institution.²⁵ In addition, the majority felt that "any strike, picketing, or other concerted refusal to work" referred to *all* such activity, whether or not directed against the health care institution.²⁶

The Board next looked to the legislative history, where it found "ample support"²⁷ for its literal reading. The majority pointed to remarks of Senator Taft, who had explained that section 8(g) applied "[n]ot only to bargaining strikes or pickets, but also to any picket or strike,"²⁸ and of Senator Javits, who stated that the notice requirement applied to "any strike or picketing, including stranger picketing."²⁹ The Board further relied on Senator Williams' caveat that because the amendments were the result of compromise, "the Labor Board should use extreme caution not to read into this act by implication or general logical reasoning—something that is not contained in the bill, its report, and the explanation thereof."³⁰

From these congressional statements, the Board reasoned that Congress' failure to use language that narrowed the literal scope of section 8(g) suggested that a broad application of that section was appropriate.³¹ To buttress this conclusion, the Board noted that in another section of the Hospital Amendments, Congress had carefully specified that the provision applied only to hospital employees.

²⁰ *Lein-Steenberg*, 219 N.L.R.B. at 839, 89 L.R.R.M. at 1772; *Mercy Hospital*, 219 N.L.R.B. at 847, 89 L.R.R.M. at 1778.

²¹ 219 N.L.R.B. 698, 89 L.R.R.M. 1779.

²² 29 U.S.C. § 158(d), set forth in note 6 *supra*.

²³ 219 N.L.R.B. 698, 89 L.R.R.M. 1779.

²⁴ 29 U.S.C. § 158(g) (emphasis added).

²⁵ *Lein-Steenberg*, 219 N.L.R.B. at 840, 89 L.R.R.M. at 1772.

²⁶ *Id.*, 89 L.R.R.M. at 1772-73.

²⁷ *Id.*, 89 L.R.R.M. at 1772.

²⁸ *Id.*, quoting 120 Cong. Rec. S12945 (1974) (remarks of Sen. Taft) (emphasis added).

²⁹ *Lein-Steenberg*, 219 N.L.R.B. at 839, 89 L.R.R.M. at 1772, quoting 120 Cong. Rec. S12939 (1974) (remarks of Sen. Javits).

³⁰ *Id.*, quoting 120 Cong. Rec. S22575 (1974) (remarks of Sen. Williams).

³¹ *Id.* at 840, 89 L.R.R.M. at 1773.

Therefore, the Board reasoned that since Congress indicated from the language of one section that it knew how to limit the Amendments to hospital employees, Congress could have clearly limited the notice requirements of section 8(g) to picketing against a health care institution, had Congress desired such a result.³²

The third element governing the majority's interpretation of 8(g) was a policy concern involving the Board's assessment of when, in applying the Hospital Amendments, a general rule of broad applicability was preferable to an individual, case-by-case approach. The majority read the legislative history of the Hospital Amendments to indicate that a crucial concern of Congress was to minimize the possibility of disrupting necessary health services.³³ The Board pointed out, however, that the potential disruption of health care was a factor that necessarily varied with the facts of each case. If section 8(g) were to be applied narrowly to cover only those labor disputes that involved potential disruptions in health care, the Board feared that the scope of 8(g) would have to be determined on a case-by-case basis *after* a strike or picketing on hospital premises had already taken place. The Board felt that this situation would "set a troubling precedent" and was "not convinced that such a case-by-case analysis was within the intent of Congress."³⁴ Rather, the Board majority perceived that, due to congressional fear that *any* strike or picketing on hospital premises posed a threat to the health care institution, a general rule of broad applicability was required. The general rule seen by the Board to be most consistent with legislative intent was one which triggered 8(g)'s notice requirements whenever *any* strike or picketing occurred on hospital premises.

Finally, the majority declared that its reading of section 8(g) would not impose an undue hardship on labor organizations engaged in construction work on hospital premises. Rather, "as labor organizations gain awareness of their obligations in this area, the giving of notice will become a pro forma procedure"³⁵

Members Fanning and Jenkins in dissent took issue with each element of the majority's analysis. First, the dissent disagreed with the majority's conclusion that the phrase "any strike, picketing, or concerted refusal to work at a health care institution" necessarily referred to all such activity conducted "on the premises of" a health care institution.³⁶ Unlike the majority, the dissent did not give the word "at" a substantive significance. They read "at" merely as a preposition necessary for grammatical fluency, and not as an indicator of congressional design to expand the Hospital Amendments to reach disputes

³² *Id.*

³³ See 219 N.L.R.B. at 840, 89 L.R.R.M. at 1772. *Accord*, S. REP. NO. 93-776, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3948.

³⁴ 219 N.L.R.B. at 840, 89 L.R.R.M. at 1773.

³⁵ *Id.*

³⁶ *Id.* at 841, 89 L.R.R.M. at 1774 (Members Fanning and Jenkins, dissenting).

not involving hospitals and their employees.³⁷

Second, the dissenters pointed out that much of section 8(g) clearly purports to govern only the notice required of hospital employees who picket or strike in connection with a labor dispute with the hospital.³⁸ Therefore, the dissenters reasoned that the more ambiguous language in the section should likewise be limited to the expressed congressional concern with labor disputes between hospitals and their employees.³⁹

In addition, Members Fanning and Jenkins pointed to language in the Committee Report accompanying section 8(g) from which they inferred that 8(g) was intended only to apply to a union striking or picketing against a health care institution.⁴⁰ The dissent noted the Committee Report's statement that section 8(g) did *not* apply where the employer had committed an unfair labor practice.⁴¹ The dissent reasoned that if the term "employer" referred to parties other than the hospital itself, such a statement would lead to anomalous results. For example, following the language of the Committee Report as well as the majority's view of the scope of 8(g), the unions in the present cases would have been relieved of the section 8(g) requirement had the contractors committed an unfair labor practice. As such, the health care institution would have been deprived of the intended benefits of advance notice through the actions of an "employer" working on hospital premises, but beyond the hospital's control. Accordingly, the dissent noted that "it . . . seems strange that Congress, in its interest to give an added protection to the health care institution's delivery capabilities, would allow a construction contractor's unfair labor

³⁷ *Id.* at 842, 89 L.R.R.M. at 1774-75.

³⁸ *Id.* at 843, 89 L.R.R.M. at 1775. The dissenters pointed out that the remaining language in § 8(g), stating that "[w]henver the collective bargaining involves *employees of a health care institution*, the provisions of this section shall be modified as follows . . .," specifically refers only to disputes between health care institutions and their employees. 29 U.S.C. § 158(g). 219 N.L.R.B. at 843, 89 L.R.R.M. at 1775. Therefore, reading the phrase in question as applicable to *all* labor disputes in which striking or picketing occurred on the premises of a health care institution leads to a somewhat anomalous result:

First, *any* labor organization, no matter whom it represents or seeks to represent, must file a 10-day notice before picketing "at" any health care institution, even though the employer being picketed is not a health care facility or involved in providing patient care. The second part of section 8(g), . . . is clearly limited . . . to labor organizations representing health care institution employees. Finally, the third part of section 8(g) applies, once again, to *all* labor organizations In sum, the majority concludes that Congress wrote section 8(g) with *all* labor organizations in mind for the first 45 and final 14 words of that section, but limited the intervening 59 words to *some* labor organizations.

Id. at 843, 89 L.R.R.M. at 1775.

³⁹ *Id.*

⁴⁰ *Id.* at 844, 89 L.R.R.M. at 1775-76.

⁴¹ *Id.* See S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949.

practices to overcome that design."⁴²

Furthermore, Members Fanning and Jenkins found significance in the facts that only the hospital industry had testified before the Committee and that no mention was made in the legislative history of the effect of the Amendments on the well-developed rules governing common-situs picketing.⁴³

We cannot conceive Congress intended the result reached here not only without seeking the testimony of the building trades, but without commenting at all on the Board's *Moore Dry Dock* standards, without a mention of the monumental increase in the workload of the FMCS caused by the result reached here, and without any indication that Congress intended, practically speaking, to impose a new requirement on all the labor organizations who represent or seek to represent employees of the countless employers who might transact business 'at the premises' of all the 'health care institutions' across the country.⁴⁴

The dissent's strongest disagreement with the majority, however, turned on a difference in perception of the proper role of the Board in interpreting statutes imposing conditions or limits upon the rights of workers to engage in concerted protest activities. The majority read section 8(g) broadly, refusing to restrict its scope where Congress had adopted no specific limitations. The dissent, on the other, hand, insisted that the command of section 13 that the NLRA be construed, wherever possible, to preserve the right to strike,⁴⁵ required the Board to interpret section 8(g) of the Hospital Amendments narrowly.⁴⁶

⁴² 219 N.L.R.B. at 844, 89 L.R.R.M. at 1776.

⁴³ *Id.* See also S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3950-52. In *Moore Dry Dock*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950), the Board developed four criteria to determine whether legitimate primary picketing may occur on the premises of a secondary employer, where the situs of the primary employer is ambulatory. In order for such picketing to be valid: (1) The picketing must be limited to the times when the situs of the dispute was located on the secondary employer's premises; (2) The primary employer must be engaged in normal business at the situs; (3) Picketing must take place reasonably close to the situs; and (4) Picketing must clearly disclose that the dispute was only with the primary employer. 92 N.L.R.B. at 549, 27 L.R.R.M. at 1110.

In *Electrical Workers v. NLRB*, 366 U.S. 677 (1961), the Supreme Court commented upon these standards, noting that they apply "to limit the picketing effects to the employees of the employer against whom the dispute is directed. This carries out the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from the pressures in controversies not their own." *Id.* at 679.

⁴⁴ 219 N.L.R.B. at 844, 89 L.R.R.M. at 1776-77.

⁴⁵ 29 U.S.C. § 163(1973). Section 13 provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."

⁴⁶ 219 N.L.R.B. at 845, 89 L.R.R.M. at 1777. The dissent viewed § 13 as a rule of

It is submitted that the dissent's conclusion is based on a sounder assessment of the structure of the statute, the legislative history, and the policy considerations involved. It must be noted that neither the internal structure of section 8(g), nor its placement within the larger procedural framework of the Hospital Amendments clearly or persuasively supports the notion that the phrase "any strike, picketing, or other concerted refusal to work at any health care institution" was intended to apply outside the context of a dispute between a health care institution and its employees. Thus, from the literal language of section 8(g), the inferences drawn by both the majority and the dissent may be logically supportable.⁴⁷ However, much of section 8(g) itself is specifically applicable only to labor relations in which the employer is the health care institution. As such, the appropriateness of a reading which greatly broadens the scope of only one portion of the statute is suspect.

Further, section 8(g) was consistently presented on the Senate floor and in the Committee Reports as only one item in an entire statutory scheme⁴⁸ applicable to labor disputes involving hospitals and their employees. Reading a portion of 8(g) to impose requirements on industrial relations outside of the health care industry not only is inappropriate in the context of the entire statutory scheme focused solely on labor relations between health care institutions and their employees, but also, as pointed out by the dissent,⁴⁹ leads to results inconsistent with its overall design. If one Congressional concern in enacting 8(g) had been to prevent disruptions in essential medical services,⁵⁰ it is questionable that such a concern could be defeated by the commission of an unfair labor practice by an employer whose actions lie wholly outside of the hospital's control.

While these arguments may not in themselves be sufficient to indicate that the result urged by the dissent was affirmatively mandated by Congress, they at least raise serious questions as to the propriety of the majority's "literal" reading of section 8(g). It is a familiar

a statutory construction "cautioning . . . against expansive reading . . . which would adversely affect the right to strike, unless the Congressional purpose to give it that meaning persuasively appeared either from the structure or history of the statute. *Id.*, quoting *NLRB v. International Brotherhood of Teamsters, Local 639 [Curtis Bros., Inc.]*, 362 U.S. 274, 282 (1960). *Accord*, *NLRB v. International Rice Milling Co.*, 341 U.S. 655, 673 (1951).

⁴⁷ The majority's result may be reached by inferring from the language of 8(g) that this section addressed generally the problem caused by any disruptive activity at a health care institution. Thus the provision should be read broadly. The second part of § 8(g) which isolates a narrow class of contract renewal strikes is but an exception to the general rule, and does not *define* the scope of the general rule. Equally persuasively, the dissent's result may be reached by inferring from the language of the provision that Congress was focused solely on hospital labor problems. Therefore, the inadvertently broad language should be read narrowly.

⁴⁸ See, e.g., 120 Cong. Rec. S12934 (1974) (remarks of Sen. Cranston); S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3946.

⁴⁹ See text at note 40 *supra*.

⁵⁰ See text at notes 1-4 *supra*.

rule of statutory construction that where the "plain language" of a statute is questionable or ambiguous, legislative history should be consulted to ascertain congressional intent. In such circumstances, it is the legislative history, and not merely the literal words of the statute, which gives meaning to the statute.⁵¹

The general thrust of the Hospital Amendments' legislative history seems to indicate that section 8(g) was intended to apply only to disputes between health care institutions and their employees. First, the remarks of Senators Taft and Javits on which the majority relied are inconclusive on the question of the appropriate scope of section 8(g). When put into their original context,⁵² these statements could support the position either of the majority or the dissent. For example, Senator Taft's remark cited by the majority indicating that "[t]his subsection applies not only to bargaining strikes or pickets, but also . . . to 'any picket or strike'" is followed in the Congressional Record by his statement: "As examples, this subsection would apply to recognition strikes, area standard strikes, secondary strikes, jurisdictional strikes, and the like."⁵³ Thus, Senator Taft's reference to "any picket or strike," when placed in context, does not necessarily mean that the section covers any strike at all, regardless of whether or not the labor dispute is between the hospital and its employees. Rather, it could mean that section 8(g) applies to any type of strike in which hospital employees could engage.

The majority's use of Senator Javits' remarks is equally questionable. The majority read Javits' statement that Section 8(g) applied to "any strike or picketing, including stranger picketing" to mean that the provision governed the labor disputes between any employer and employee working on the hospital premises.⁵⁴ However, the term "stranger picketing" has been defined in ways which do not support this reading. The dissent notes that several sources define stranger picketing as picketing by union members who are not employees of the company being picketed.⁵⁵ Using this definition, Javits may have been indicating that section 8(g) applied to any employee who pickets *the hospital*, and not that it applied to any employee who pickets *any employer* on the hospital premises. Thus, the statements used by the majority to support its literal reading of section 8(g) are in no way inconsistent with a reading of section 8(g) which limits its application to labor disputes within the health care industry.

More significantly, there are statements in the legislative history—statements not mentioned in the majority opinion—that strongly support the use of 8(g) urged by the dissent. For exam-

⁵¹ 2A STATUTES AND STATUTORY CONSTRUCTION § 45.05 (C. Dallas Sands, 4th ed., 1973).

⁵² See 120 Cong. Rec. S12945 (1974) (remarks of Sen. Taft); 120 Cong. Rec. S12939 (1974) (remarks of Sen. Javits).

⁵³ 120 Cong. Rec. S12945 (1974) (remarks of Sen. Taft).

⁵⁴ See text at notes 27-29 *supra*.

⁵⁵ See 219 N.L.R.B. at 845, 89 L.R.R.M. at 1776.

ple, Senator Cranston noted that the objective of the procedural provisions of the Hospital Amendments, including the ten-day notice requirement, was to "bring about peaceful and just settlements of labor disputes in the health care industry."⁵⁶ Senator Taft likewise commented that "these safeguard procedures will substantially aid *health care institutions and their employees* settle their disputes responsibly and peacefully, while not significantly restricting either party's freedom of action."⁵⁷

Additionally, the Committee Report clearly indicated that the scope of 8(g) encompasses only labor disputes between health care institutions and their employees: "[T]he Committee approved an Amendment adding a new section 8(g), which generally prohibits a labor organization from *striking or picketing a health care institution* without giving advance notice."⁵⁸ The legislative history also contains strong language emphasizing the manner in which the Hospital Amendments should be interpreted by the Board. Senator Williams warned that the Committee "went as far as it decided to go and no [further]."⁵⁹ As such, the Labor Board should use "extreme caution not to read into this act . . . something that is not contained in the bill, its report, and the explanation thereof."⁶⁰

Although the majority found that the above quoted statement justified a literal reading of 8(g), it is submitted that the statement is more accurately read to support the opposite result. Senator Williams was not urging that the statute be read literally. Rather, his concern was that the procedural requirements not be applied by the Board "to intrude upon otherwise protected activity, except as provided by Congress."⁶¹ Senator Williams expressed the hope that "the NLRB and the General Counsel [will not treat this legislation] as an excuse to search out and litigate all possible situations, or substitute its will for that of the Congress."⁶² These statements do not indicate a single-minded insistence on a literal reading of the statute, regardless of the result. Rather, the caution urged by Senator Williams was against applying the Amendments outside the realm specifically considered by Congress.

The weight of the legislative history supporting the contentions of the dissent is given even more force by the rule of statutory construction mandated by section 13 of the Act.⁶³ Where courts have been faced with statutory language which, read literally, sweeps broadly over otherwise protected activities, section 13 has been seen to require that such language be construed narrowly.⁶⁴

⁵⁶ 120 Cong. Rec. S22577 (1974) (remarks of Sen. Cranston) (emphasis added).

⁵⁷ *Id.* at S22579 (1974) (remarks of Sen. Taft) (emphasis added).

⁵⁸ S. REP. NO. 93-766, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949.

⁵⁹ 120 Cong. Rec. S22575 (1974) (remarks of Sen. Williams).

⁶⁰ *Id.*

⁶¹ *Id.* at S27576.

⁶² *Id.*

⁶³ 29 U.S.C. § 163 (1973), set forth at note 45 *supra*.

⁶⁴ See, e.g., *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627 (1967)

Finally, a narrow interpretation of section 8(g) which would apply the section only to labor disputes between hospitals and their employees does not expose interested parties to the after-the-fact, case-by-case analysis that troubled the majority. An interpretation limiting section 8(g) to hospitals and their employees is itself a general rule which is capable of application any time employees of a hospital plan to picket or strike as the result of a labor dispute.

In extending 8(g)'s application to all labor unions representing employees working on the premises of a health care institution, the Board has insured the institutions, their patients, and the public the added protection of advance notice of any concerted protest to be conducted on their premises. In so doing, however, the majority has dismissed the applicability of well-developed standards governing common-situs picketing.⁶⁵ Guided by a highly questionable reading of legislative history, the majority has followed a rule of statutory construction that "[l]ies] . . . in the face of the unaltered section 13 of the Act."⁶⁶ Moreover, by placing unions representing employees working on hospital premises on notice that 8(g) will apply to them, the Board's holding raises the additional question whether and to what extent other sections of the procedural scheme designed by Congress for governing labor relations in the health care industry will be applied to labor disputes arising outside this field.

C. Duty to Bargain — Retroactive Bargaining Orders: Trading Port

The NLRA provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."¹ Section 9(a) defines such representatives as workers who are "designated or selected" by a majority of the employees in a unit appropriate for such purposes.² Although section 9 is entitled "Representatives and Elections," the provision contains no requirement that representatives be selected pursuant to Board election under section 9(c)(1).³ Thus, in *NLRB v. Gissel Packing Co.*,⁴ the Supreme Court held that a union may establish majority status by means other than an election, such as by

(construing § 8(b)(4)(B)); *Electrical Workers v. NLRB*, 366 U.S. 667, 672 (1961) (interpreting § 8(b)(4)(A)); *NLRB v. International Brotherhood of Teamsters, Local 639*, 362 U.S. 274, 281-82 (1960) (construing § 8(b)(1)(A)); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284-89 (1956) (construing both a no-strike clause in a collective bargaining agreement and § 8(d)); *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 673 (1951) (interpreting § 8(b)(4)).

⁶⁵ See note 43 *supra*.

⁶⁶ 219 N.L.R.B. at 845, 89 L.R.R.M. at 1777.

¹ 29 U.S.C. § 158(a)(5) (1970).

² 29 U.S.C. § 159(a) (1970).

³ Section 9(c)(1) is codified at 29 U.S.C. § 159(c)(1) (1970) and provides in detail the procedure for a Board election.

⁴ 395 U.S. 575 (1969).

possessing cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.⁵ The Court nevertheless acknowledged that an election is the Board's preferred route for ascertaining the employees' choice of bargaining representative⁶ and held that an employer has the right to insist on an election provided he does not commit unfair labor practices which are likely to destroy majority strength and impede the election process.⁷ Under *Gissel*, however, if the employer is found to have engaged in such unfair practices, then he forfeits his right to demand an election and must bargain with the union on the basis of other clear indicia of employees' desires, such as the union authorization cards.⁸

This *Survey* year, the full Board broadened the obligations of an employer under a card based remedial bargaining order. In *Trading Port, Inc.*,⁹ the Board held that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the union's majority status."¹⁰ As such, the *Trading Port* decision represents a much needed and significant departure from the policies enunciated in the 1974 case of *Steel-Fab, Inc.*,¹¹ where a split Board held that such a bargaining order would date as of issuance of the Board's decision that the

⁵ *Id.* at 596-97, 600. In *Gissel*, the Supreme Court upheld bargaining orders directed at employers who had rejected union demands for recognition based on authorization cards signed by a majority of employees and had engaged in contemporaneous unfair labor practices likely "to undermine majority strength and impede the election process." *Id.* at 614.

⁶ *Id.* at 596 & n.8, citing *Aaron Brothers Co.*, 158 N.L.R.B. 1077, 1078, 62 L.R.R.M. 1160, 1161 (1966).

⁷ 395 U.S. at 600.

⁸ *Id.* at 614-15. Specifically, the Court stated:

In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Id.

The broad remedial philosophy presented in *Gissel* was narrowed somewhat in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974). There it was held that an employer who refrains from interfering with a fair election has an absolute right to refuse to bargain with a union presenting evidence of majority support and may instead require the union itself to file a petition for an election under § 9(c)(1)(a), 29 U.S.C. § 159(c)(1)(a) (1970). 419 U.S. at 309-10. Further, the employer need not himself petition for the election. *See id.*

Linden Lumber is criticized in 1974-75 Annual Survey of Labor Relations and Employment Discrimination Law, 17 B.C. IND. & COM. L. REV. 1013-18 (1975).

⁹ 219 N.L.R.B. 298, 89 L.R.R.M. 1565 (1975).

¹⁰ *Id.* at 301, 89 L.R.R.M. at 1569.

¹¹ 212 N.L.R.B. 363, 86 L.R.R.M. 1474 (1974).

employer's practices had undermined the union's majority status or had prevented the holding of a fair election.¹² *Trading Port* departs from *Steel-Fab* by making the bargaining order retroactive to the date at which the employer commenced his unlawful campaign, where the union has already presented evidence of majority status. Where majority status is not ascertained until after the employer commenced the unlawful campaign, *Trading Port* makes the bargaining order retroactive to the time the union presented evidence of majority status.¹³

In *Trading Port, Inc.*, three employees at a wholesale and retail grocery business commenced an organizational campaign on behalf of Teamsters Local 294.¹⁴ Within a short time thereafter, they succeeded in persuading 43 employees out of a possible 49 to sign union authorization cards. After the employer refused to recognize the local on the basis of the signed authorization cards, and declined to petition for a Board election, 39 of the employees struck, ostensibly for recognition purposes.¹⁵ Prior to, during, and after the strike, the employer harassed, threatened and interrogated its employees. Subsequent to the strike, the union lost 25 to 3 in an election held pursuant to its petition for Board certification as representative of the Trading Port employees.¹⁶

The Board found that the employer's conduct before, during and after the strike constituted unfair labor practices under section 8(a)(1).¹⁷ The Board also found that the "nature and pervasiveness" of these unfair labor practices had dissipated "the union's overwhelming majority status among employees" and had rendered impossible the holding of a fair election.¹⁸ As a result, the Board set aside the election and issued a bargaining order "to best protect the employees'

¹² *Id.* at 366, 86 L.R.R.M. at 1478.

¹³ 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569.

¹⁴ See *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 35, 89 L.R.R.M. 2513 (2d Cir. 1975), a related action brought by the NLRB regional director under § 10(j) of the NLRA, 29 U.S.C. § 160(j) (1970). See note 40 *infra*.

¹⁵ 219 N.L.R.B. at 298, 89 L.R.R.M. at 1566. However, because the Board found that the strike for recognition was "prompted", "prolonged", and "aggravated" by the employer's unlawful practices, the Board found the strike to be an unfair labor practice strike and not a recognition strike. *Id.* at 299, 89 L.R.R.M. at 1568.

¹⁶ *Id.* at 298-300, 89 L.R.R.M. at 1566-68. Employer's unlawful pre-strike conduct consisted of interrogation, threats of job loss, and illegal solicitations to discourage union activity. *Id.* at 298-99, 89 L.R.R.M. at 1566-67. Employer's unlawful conduct during strike consisted of threats of plant closure, job loss and seniority loss, as well as prolonging and aggravating the strike. *Id.* at 299-300, 89 L.R.R.M. at 1567-68. Employer's unlawful post-strike conduct consisted of illegal solicitation to discourage union activity, interrogation, threats of reprisal, and a coercive inquiry and promise of job benefit. *Id.* at 300, 89 L.R.R.M. at 1568.

¹⁷ *Id.* at 298, 89 L.R.R.M. at 1566. Section 8(a)(1) provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1970). Section 157, better known as § 7, guarantees to employees various organizational rights. See 29 U.S.C. § 157 (1970).

¹⁸ 219 N.L.R.B. at 300, 302, 89 L.R.R.M. at 1568, 1570.

rights."¹⁹ Although the employer had "embarked on a clear course of unlawful conduct" several days before the recognitional demand, the bargaining order was made retroactive to the day at which the union presented evidence of majority status.²⁰ In addition, the Board found that the employer's refusal to "recognize and bargain with the union as the majority representative of its employees" constituted conduct violating section 8(a)(5).²¹ Because the employer's bargaining obligation accrued as of the date of the union's recognitional demand, the Board held that the employer's unilateral changes instituted after the union's recognitional demand constituted independent section 8(a)(5) violations.²²

The Board made the bargaining orders retroactive because it found that its *Steel-Fab, Inc.*²³ decision failed to meet the suggestion in *Gissel* that the only fair way to effectuate employee rights is to "re-establish the conditions as they existed before the employer's unlawful campaign."²⁴ In *Steel-Fab*, former Chairman Miller joined by Members Penello and Kennedy refused to make the bargaining order retroactive. They concluded that a retroactive order would penalize the employer for failing to divine that the Board would later rule that a bargaining obligation existed.²⁵ As such, the *Steel-Fab* majority found that the employer's conduct after the recognition demand could not constitute an 8(a)(5) violation because the Board had not yet determined that a bargaining obligation existed.²⁶ Significantly, the *Steel-Fab* majority announced that it would predicate future remedial bargaining orders only on an 8(a)(1) violation and not on an 8(a)(5) violation.²⁷ This meant that in future determinations as to whether to issue a bargaining order, the Board would examine only the seriousness of the employer's misconduct and its impact upon the election process,²⁸ and not the existence or the timing of the union's recognitional demand. If the Board found that the employer's misconduct had dissipated the union's majority by making a fair election impossi-

¹⁹ *Id.* at 300, 89 L.R.R.M. at 1568.

²⁰ *Id.* at 301, 89 L.R.R.M. at 1569.

²¹ *Id.* For the language of § 8(a)(5), see text at note 1 *supra*.

²² 219 N.L.R.B. at 302, 89 L.R.R.M. at 1569-70. The post-recognitional demand conduct that the Board found violative of § 8(a)(5) included: employer elimination of certain jobs, and encouragement of the formation of an independent employee grievance committee to deal directly with the employees. *Id.*

²³ In *Steel-Fab, Inc.* the employer rejected the union's proof of majority status through authorization cards and then caused the union narrowly to lose the Board election by means of extensive unfair labor practices. The employer had commenced its unlawful campaign even prior to the union's recognitional campaign. 212 N.L.R.B. at 372. 86 L.R.R.M. at 1475.

²⁴ 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569, citing *Gissel*, 395 U.S. at 612. See text at notes 4-8 *supra*.

²⁵ 212 N.L.R.B. at 364, 86 L.R.R.M. at 1476.

²⁶ *Id.* at 363, 86 L.R.R.M. at 1476.

²⁷ *Id.*

²⁸ *Gissel* criteria determine when a bargaining order is necessary to remedy the employer's unfair labor practices. See text at notes 4-8 *supra*.

ble, it would issue a non-retroactive bargaining order without reference to the union's recognitional demand.²⁹ In effect, *Steel-Fab* would appear to indicate that where card-carrying majority status was demonstrated prior to the employer's unilateral changes, a bargaining order would be issued only to counteract the irremediable effects of the employer's acts upon the union's majority status or upon a fair election and not to accord the union its right as majority representative to negotiate changes in wages and working conditions.³⁰

The Board in *Trading Port* found that the *Steel-Fab* decision allowed an employer to delay his bargaining obligation by engaging in unfair labor practices which could cause the union to lose the election.³¹ In the period prior to a Board decision, the employer was insured a substantial period of time³² during which he would not have to deal with the union.³³ During this period the employer could institute changes in working conditions which, under the *Steel-Fab* rule,³⁴ would be left unremedied by a purely prospective bargaining order.³⁵ The Board in *Trading Port* pointed out that under the rule of *Linden Lumber Division, Summer & Co. v. NLRB*,³⁶ an employer forfeits his right to an election and triggers his bargaining obligation when he commits unfair labor practices that impede the election process.³⁷ Thereafter, he must bargain with the union based on other indicia of the employees' desires such as the signed union authorization cards.³⁸ The Board found that in issuing purely prospective bargaining orders, it was failing to recognize that where the employer has forfeited his right to an election, the union's majority status is deter-

²⁹ 212 N.L.R.B. at 363-65, 86 L.R.R.M. at 1476-78.

³⁰ Two separate dissents in *Steel-Fab* by Members Fanning and Jenkins would have made the bargaining order retroactive to the date of the union's recognitional demand. *See id.* at 366, 86 L.R.R.M. at 1478 (Member Fanning dissenting in part). *See id.* at 369, 86 L.R.R.M. at 1482 (Member Jenkins dissenting in part). Further, both Fanning and Jenkins disagreed with the majority view that § 8(a)(5) analysis was unnecessary. Instead, they would find that the employer violated § 8(a)(5) when it denied recognition to the union after the latter presented proof of majority status through the cards. *See id.* at 366, 86 L.R.R.M. at 1478 (Member Fanning dissenting in part) & *id.* at 369, 86 L.R.R.M. at 1482 (Member Jenkins dissenting in part). Further they would find that the employer's subsequent unilateral changes constituted additional § 8(a)(5) violations. *See id.* at 366-67, 86 L.R.R.M. at 1478-79 (Member Fanning dissenting in part) & *id.* at 369, 86 L.R.R.M. at 1482 (Member Jenkins dissenting in part). Any other result, they believed, would cause these changes to go unremedied. *Id.* As Member Jenkins pointed out, failure to so find would allow the employer "to escape with the fruits of its unlawful behavior." *Id.* at 371, 86 L.R.R.M. at 1483 (Member Jenkins dissenting in part).

³¹ 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569.

³² The *Trading Port* decision was issued almost two years after the union's recognitional demand. *Id.* at 298, 89 L.R.R.M. at 1565-66.

³³ *Id.* at 301, 89 L.R.R.M. at 1569.

³⁴ *See* text at note 12 *supra*.

³⁵ 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569.

³⁶ 419 U.S. 301 (1974). *See* note 8 *supra*.

³⁷ 219 N.L.R.B. at 301 & n.8, 89 L.R.R.M. at 1569 & n.8.

³⁸ *Id.*

mined by the date the union presents its authorization cards. This date could precede the Board's decision by a substantial length of time.³⁹ Therefore, only a retroactive order would guarantee the full bargaining rights that arise upon the union's proof of its majority status.⁴⁰

The *Trading Port* decision indicates that the Board has rejected the view announced in *Steel-Fab* that a section 8(a)(5) analysis is unnecessary in defining the appropriate remedy for an employer's unfair labor practices.⁴¹ Like the *Steel-Fab* majority, the Board in *Trading Port* analyzed the employer's section 8(a)(1) misconduct and its effect upon the election. It concluded that a bargaining order was necessary to protect the interests of the union as majority representative of the employees.⁴² Unlike the *Steel-Fab* majority, however, the *Trading Port* majority went a step further and found that the employer's rejection of the union's card-based recognition demand, coming after he had already forfeited his right to a fair election by engaging in unfair labor practices, was in itself an independent section 8(a)(5) violation.⁴³ This gave the Board a convenient timing mechanism by which it made bargaining orders retroactive to the date of the union's recognition

³⁹ See *id.*

⁴⁰ See *id.* Interestingly, the NLRB regional director also brought an action in federal district court on behalf of the union for injunctive relief under § 10(j) of the Act, 29 U.S.C. § 160(j) (1970), seeking among other things an interim bargaining order to protect the union in the period before the Board's decision. *Seeler v. Trading Port, Inc.*, 88 L.R.R.M. 3293 (N.D.N.Y. 1974). The district court granted an injunction restraining the employer's unfair labor practices but refused to issue the bargaining order because it felt that, under *Gissel*, the Board should first determine whether the employer's unfair labor practices were sufficient to undermine the election. The United States Court of Appeals for the Second Circuit reversed the district court's denial of the interim bargaining order and in language substantially identical to the Board's language in *Trading Port* held that such a bargaining order would issue where the NLRB regional director could prove that the union at one point had a "clear majority" and that the employer then engaged in "such egregious and coercive unfair labor practices as to make a fair election virtually impossible." *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 40, 89 L.R.R.M. 2513, 2517 (2d Cir. 1975). The Circuit Court thus remanded the case to the district court for a factual determination of whether the employer's unfair labor practices were "so serious as to warrant the issuance of an interim bargaining order." *Id.*

The "egregious and coercive" standard of the Second Circuit may be more difficult to meet than the Board's conduct "sufficient to undermine the union's majority status" standard. In addition, the "clear majority" specified by the Second Circuit may contemplate more than a showing of a simple or "bare" majority.

⁴¹ Note the distinction between those § 8(a)(5) violations which consist of an employer's outright refusal to recognize the union, 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569, and those which consist of an employer instituting unilateral changes in working conditions. 219 N.L.R.B. at 302, 89 L.R.R.M. at 1569-70. Both can occur only after a bargaining obligation arises—either through a Board election or through presentation of evidence of majority support. Yet each involve different substantive acts by the employer.

⁴² Compare *Steel-Fab*, 212 N.L.R.B. at 363-64, 86 L.R.R.M. at 1476, with *Trading Port*, 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569.

⁴³ 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569.

demand. This timing mechanism served two purposes. First, the Board fully protected the union's interests by granting it bargaining rights from the date it proved majority status. Second, the Board did not grant the union bargaining rights for a period in which it had not proved its majority status—a result which would have followed if the bargaining order were made retroactive to the pre-recognitional demand date on which the employer commenced his unlawful campaign.⁴⁴

In the *Steel-Fab* and *Trading Port* situations, the employer's unlawful campaign commences *prior* to the union's presentation of evidence of majority status.⁴⁵ In these situations, the employer has forfeited his right to an election and must bargain with the union on the basis of the cards.⁴⁶ His refusal to so bargain violates section 8(a)(5). A slightly different situation is presented where the employer undermines the election by the commencement of an unlawful campaign *after* the union's presentation of majority status. The strict holding of *Trading Port* would make the bargaining order in the latter situation retroactive only to the date upon which the employer "embarked on a clear course of unlawful conduct" and not to the date upon which the union presented evidence of majority support.⁴⁷ In addition, under these circumstances, the employer's prior refusal to recognize the union would not violate section 8(a)(5), since at that time the employer had not forfeited his right to an election.⁴⁸ In this situation, the result of the *Trading Port* decision would be that in the time between the union's show of majority status and the commencement of the employer's unfair labor practices, the employer would still be free to undermine the union's position by instituting unilateral changes. Thus, while the rule in *Trading Port* serves to guarantee the full bargaining rights that arise when the union's proof of its majority status is made *after* the commencement of the employer's unlawful practices, it does not fully protect the union which proves its majority status *before* the employer's unlawful campaign. This result seems contrary to the policy enunciated in *Gissel* that when an employer makes a fair election impossible, the union's majority status is determined by its presentation of the authorization cards.⁴⁹ The better view would be to broaden the rule in *Trading Port* so that bargaining orders are made retroactive to the date the union presented evidence of majority support, and not to the date the employer commenced his unfair labor

⁴⁴ This analysis is supported by a subsequent Survey decision, *Ann Lee Sportswear*, 220 N.L.R.B. No. 153, 90 L.R.R.M. 1352 (1975), where the Board interpreted *Trading Port* as "substantially" modifying the *Steel-Fab* rule that it is unnecessary to find a violation of § 8(a)(5) as a predicate to ordering bargaining. *Id.* at 1353 n.6.

⁴⁵ *Steel-Fab*, 212 N.L.R.B. at 372, 86 L.R.R.M. at 1475; *Trading Port*, 219 N.L.R.B. at 298, 89 L.R.R.M. at 1565.

⁴⁶ See *Linden Lumber*, 419 U.S. at 309-10. See note 8 *supra*.

⁴⁷ 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569.

⁴⁸ *Linden Lumber*, 419 U.S. at 309-10. See note 8 *supra*.

⁴⁹ See *Gissel*, 395 U.S. at 614-15. See text at notes 4-8 *supra*.

practices. This result would have the beneficial effect of eliminating the problem of defining the exact point at which the employer's unfair labor practices sufficiently undermined the election once the Board determines that the totality of the unfair labor practices was sufficient.⁵⁰ This approach would not seem unduly unfair to an employer who has been put on notice of the union's majority status yet nonetheless proceeds to undermine the Board's election machinery by committing unfair labor practices.

Notwithstanding the difficulties that may arise by limiting retroactive issuance of a bargaining order to the date as of which an employer commences an unlawful course of conduct, the Board's decision in *Trading Port*, viewed in its remedial sense, is essentially correct. From a remedial viewpoint, purely prospective bargaining orders do not sufficiently protect the union. An employer can freely undermine the union by instituting unilateral changes throughout the period before the Board's decision. Given the Board's slow-working adjudicative process, this period could last as long as two years.⁵¹ As the Supreme Court in *Gissel* pointed out, by the time the Board makes its decision, the employer may see no need to engage in further unlawful activity.⁵² At this point the damage will have been done. Giving retroactive effect to a bargaining order may not be a complete remedy in itself, but it does go a long way towards redressing any unfair advantages an employer may obtain while the union seeks its remedy before the Board. It allows the Board to apply its broad remedial machinery to offset as far as possible the employer's unilateral changes in working conditions.⁵³ Also, it could have the type of deterrent effect on future employer misconduct contemplated by the *Gissel* Court.⁵⁴

The practical application of the *Trading Port* decision will probably fall short of the caveat in *Gissel* that "perhaps the only way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign."⁵⁵ As the Senate Report stated in regard to the need for effective remedies:

Time is usually of the essence in these matters, and conse-

⁵⁰ *Gissel* contemplates that the Board evaluate the totality of the employer's unfair labor practices to determine whether a bargaining order is appropriate, 395 U.S. at 614, and recognizes that there could be less extensive unfair labor practices which, because of their minimal impact on the election machinery, would not sustain a bargaining order. *Id.* at 615. The *Trading Port* decision contemplates determining the exact date when the employer's unfair labor practices reached the point when the bargaining order must issue, 219 N.L.R.B. at 301, 89 L.R.R.M. at 1569, so that the bargaining order can be made retroactive to that date. Making the order retroactive to the date of the union's recognition demand obviates the need for such a determination.

⁵¹ In *Trading Port*, the union presented the cards on September 4, 1973. The Board decision was issued July 18, 1975. See 219 N.L.R.B. at 298, 89 L.R.R.M. at 1565-66.

⁵² 395 U.S. at 612.

⁵³ See 29 U.S.C. § 160 (1970). See *Gissel*, 395 U.S. at 612 n.32.

⁵⁴ 395 U.S. at 612.

⁵⁵ *Id.*

quently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and *encouragement of the practice and procedure of free and private collective bargaining*.⁵⁶

By the time a union gains a retroactive bargaining order, the employer's unfair labor practices may have undermined the majority status of the union and its ability to act prospectively as the employees' bargaining representative in an effective manner.⁵⁷ If the union is so undermined, the employer might succeed in a decertification petition after the union's guaranteed one year bargaining period expires.⁵⁸ The *Trading Port* remedy also lacks complete effectiveness, since a union can not realistically seek to remedy those unilateral changes that have benefited employees such as wage increases and promotions. However, this type of deficiency is inherent in all Board remedies. That a remedy is incomplete is no basis for its rejection, particularly where even incomplete remedies can have a deterrent effect upon future employer misconduct. Therefore, notwithstanding some deficiencies in the decision, *Trading Port* represents a significant and much needed departure from the policies enunciated in prior Board decisions.

D. Super-Seniority: Dairylea Cooperative, Inc.

It is well-recognized that "[b]ecause a labor agreement assumes the proper adjustment of grievances at their source, . . ."¹ union chairmen, or stewards, play a crucial role in the process of collective bargaining.² In order to protect the grievance procedure from the po-

⁵⁶ S. REP. NO. 105, 80th Cong., 1st Sess. 8 (1947) (emphasis added) (in regard to the Board's injunction remedies under § 10(j), 29 U.S.C. § 160(j) (1970).)

⁵⁷ See *Gissel*, 395 U.S. at 611 n.31, where it was pointed out how interest in the union wanes over time.

⁵⁸ 29 U.S.C. § 159(c)(3) (1970). A promising avenue to more complete relief is foreshadowed in the Circuit Court version of *Trading Port*. See *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 89 L.R.R.M. 2513 (2d Cir. 1975). See note 40 *supra*. The district court opinion in *Seeler* came only nine months after the union's recognition demand and seven months after the election. See *Seeler v. Trading Port, Inc.*, 88 L.R.R.M. 3293, 3294 (N.D.N.Y. 1974). In the future, speedy action by the NLRB regional director to obtain a preliminary injunction against the employer's unfair labor practices and an interim bargaining order will help protect the union in the period before the Board's decision.

¹ See *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 528 (1949).

² *Id.* Although grievance procedures, and hence the role of the union steward, differ from one labor contract to another, the position of union steward may be described generally as follows: As a representative of employees in his bargaining unit, the union steward handles the initial steps in process of grievance adjustments. If disputes between employee and supervisor cannot be settled by the parties themselves, it is the union steward's responsibility to attempt settlement and, if no agreement is reached, to

tential discontinuity caused by layoffs and recalls of union stewards, many collective bargaining contracts grant top seniority status to individuals serving as union chairmen, irrespective of the time they have served on the job.

The Supreme Court legitimized the use of "superseniority" provisions in *Aeronautical Industrial District Lodge 727 v. Campbell*,³ reasoning that:

One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. To that end, provision is made . . . against laying them off merely on the basis of temporal seniority. Because [these employees] are union chairmen, they are not regarded as merely individual members of the union; they are in a special position in relation to collective bargaining for the benefit of the whole union. To retain them as such is not an encroachment on the seniority system but a due regard of union interests which embrace the system of seniority rights.⁴

During the *Survey* year, the Board faced the problem of defining the point at which this legitimate manipulation of the union steward's seniority status becomes discriminatory encouragement of union activity violative of sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) of the Act.⁵

submit the grievance to higher levels in the grievance arbitration process. See Neil W. Chamberlain, SOURCEBOOK ON LABOR, ch. 9 (1964); Neil W. Chamberlain, COLLECTIVE BARGAINING, ch. 5 (1951). Chamberlain describes the grievance procedure as one which

is to most unionists, the heart of collective bargaining. The day to day applications of the terms of the agreement determine whether a person receives the wage rate to which he is entitled, is given first refusal of a job opening to which his seniority gives him claim, is not laid off out of turn, can call his foreman to account for discriminatory treatment or unwarranted discipline. Any "gripe" over his treatment can have its outlet in a recognized process in which his union representative takes the matter up with his supervisor. If the issue is unresolved at this stage and if the union believes his complaint is well founded, management people at several higher levels can be required to reexamine the matter in conferences with union officials. If these bilateral discussions fail to produce agreement on whether the employee has been fairly treated, the union may demand arbitration. For John Jones, the man at the bench, the grievance process is the subject's right to dispute the king; it is the means by which management's exercise of power can be made reasonable and responsible.

Chamberlain, SOURCEBOOK ON LABOR at 191.

³ *Campbell*, 337 U.S. at 528.

⁴ *Id.* at 527.

⁵ 29 U.S.C. § 158(a)(1), (a)(3), (b)(1)(A), (b)(2) (1973). Section 158 provides in pertinent part that:

(a) It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or

In *Dairylea Cooperative, Inc.*,⁶ a collective bargaining agreement granted top seniority to union chairmen, or stewards, regardless of their length of service.⁷ Pursuant to this superseniority provision, however, the union steward obtained top seniority status not only with respect to layoff and recall, "but also with respect to *all* contractual benefits where seniority is a consideration."⁸ With top seniority, the union chairman received such on-the-job advantages as preference in the assignment of overtime; the opportunity to select shifts, hours, vacation periods, and days off; and preference on assignment to various desirable positions in the plant.⁹

In *Dairylea*, the dispute arose after the company had invited employee bids for a new driver route. After the bidding had occurred, the company awarded the route to the union steward, even though an employee who was senior in length of service had also submitted a bid. Both parties agreed that were it not for the steward's superseniority status, the route would have been awarded to the employee who had served the company the longest.¹⁰

In unfair labor practice charges filed against the employer and the union, it was asserted that since selection for the union steward

any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

and that:

(b) It shall be an unfair labor practice for a labor organization or its agents

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

§ 157 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such a right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

⁶ 219 N.L.R.B. 656, 89 L.R.R.M. 1737 (1975), *aff'd sub. nom.* NLRB v. Milk Drivers & Dairy Emp., Local 338, 531 F.2d 1162, 91 L.R.R.M. 2929, 2d Cir., 1976. The Board's decision was affirmed by the Court of Appeals for the Second Circuit on the grounds that the inferences drawn by the Board when deciding the case were reasonable. *See* 531 F.2d 1162, 1165, 91 L.R.R.M. 2932 (2d Cir., 1976).

⁷ The provision in question required that "the steward shall be considered the senior employee in the craft in which he is employed." 219 N.L.R.B. at 657, 89 L.R.R.M. at 1737.

⁸ 219 N.L.R.B. at 657, 89 L.R.R.M. at 1737 (1975) (emphasis added).

⁹ *Id.*

¹⁰ *Id.*

position was based on the degree of involvement in union activity,¹¹ the broad superseniority clause discriminated against those employees choosing to refrain from active union involvement.¹² The union countered that the superseniority clause was valid, regardless of the purpose it served, because it was a provision created by the collective bargaining contract and ratified by union employees. Further, the union argued that before the Board could reach the issue of discrimination, it had to find that the superseniority clause was written into the contract in order to effectuate some discriminatory design.¹³

A majority of the Board agreed with the General Counsel and held that the superseniority clause constituted an unlawful encouragement of union activism.¹⁴ The Board found that under the arrangement in *Dairylea*, actual seniority was not enough to afford an employee the opportunity to acquire the wide range of on-the-job benefits and privileges accorded stewards. It was noted that, realistically, the only way to become a union steward and gain such on-the-job benefits was to be "a good, enthusiastic unionist," whereby the employee could "[recommend] himself to the union hierarchy for appointment to the office of steward."¹⁵ An employee who refrained from union activity would permanently preclude himself from obtaining the broad benefits available to the union steward through superseniority. Since the superseniority provision thus made the availability of certain job rights and benefits dependent upon union activities, the Board found the clause to violate sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the Act.¹⁶ The majority saw in the superseniority provision an "inherent tendency . . . to discriminate against employees for union-related reasons, and thereby to restrain and coerce employees with respect to the exercise of their rights protected by section 7 of the Act."¹⁷

¹¹ *Id.*

¹² *Id.* Following the mandate of § 7 of the NLRA set forth in note 4 *supra*, courts have been watchful of the manner in which employers and unions maintain a separation between the grant of on-the-job benefits and preferences, and union involvement. In *Radio Officers v. NLRB*, 347 U.S. 17 (1954), for example, the Court sustained a Board order directing the union to reimburse an employee who had lost his seniority benefits for delinquency in the payment of his union dues. The Court explained that:

The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union with imperiling their livelihood.

Id. at 40. See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963); *Jones v. TWA*, 495 F.2d 790, 86 L.R.R.M. 2086 (2d Cir. 1974); *Steelworkers Local 1070*, 86 L.R.R.M. 2086 (2d Cir. 1974); *Steelworkers Local 1070*, 171 N.L.R.B. 945, 946-47, 68 L.R.R.M. 1215, 1216-17 (1968).

¹³ 219 N.L.R.B. at 657, 89 L.R.R.M. at 1738.

¹⁴ *Id.*

¹⁵ The Board found that: "There is nothing a unit employee can do, apart from being a steward, to acquire such preferences for himself." *Id.*

¹⁶ 219 N.L.R.B. at 657, 89 L.R.R.M. at 1738. See note 11 *supra*.

¹⁷ 219 N.L.R.B. at 658, 89 L.R.R.M. at 1739.

In so holding, the majority dismissed the union's suggestion that because the clause had been ratified by the whole unit, the provision was purely a matter of contract, and as such, should be free from the Board's scrutiny as to purpose and effect.¹⁸ "Because seniority affects conditions of employment, there can be no real question but that it must conform to the requirements of the Act."¹⁹ The majority also rejected the argument that the clause served the lawful purpose of recognizing and encouraging service as a union steward.²⁰ It viewed the encouragement of employees to serve as stewards to be the union's problem, pointing out that there were other ways to encourage union service short of "requiring that rank-and-file employees, whether or not they support the union, subsidize its stewards by surrendering to them certain job benefits or privileges in return for the steward's union activity."²¹

According to the majority, the only acceptable justification for maintaining a superseniority clause lay in the narrow circumstance in which the grant of top seniority status was clearly related to the steward's duties as an adjuster of employee grievances. The majority found that such a view was mandated by *Campbell*, where the union stewards were insulated from layoffs only because job continuity was necessary for the proper discharge of their responsibilities as stewards, which in turn was necessary for the enforcement of the collective bargaining agreement.²² The Board recognized that a superseniority clause that is limited to layoff and recall may be proper "even though it, too, can be described as tying . . . an on-the-job benefit to union status."²³ It reasoned, however, that where superseniority privileges have no relation to the effective functioning of the union steward in his role in the collective bargaining process, there is no justification for maintaining such seniority. Thus, the board concluded that superseniority clauses which were not expressly confined to layoff and recall were presumptively invalid. The presumption of invalidity may be rebutted only by showing how a broader clause is necessary for the performance of the union steward's job.²⁴

Member Fanning, in dissent, took issue with the manner in which the majority presumed a violation of the Act from the existence

¹⁸ Such an argument was suggested in *Campbell*, where the Court found that: . . . seniority rights derive their scope and significance from union contracts. . . . There are great variations in the use of the seniority principle . . . bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. 337 U.S. at 526.

¹⁹ 219 N.L.R.B. at 659, 89 L.R.R.M. at 1739.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* See *Campbell*, 337 U.S. 521, 527-29 (1949).

²³ 219 N.L.R.B. at 658, 89 L.R.R.M. at 1738.

²⁴ *Id.* at 658, 89 L.R.R.M. at 1739.

of the superseniority clause. Fanning pointed out that there was no evidence in the record that stewards were selected on the basis of union involvement or support. He also asserted that no evidence demonstrated any relationship between the benefits associated with steward service and employees' choices to support or refrain from supporting the union.²⁵ This lack of evidence, according to the dissent, should have resulted in a dismissal of the claim:

To find a violation of the law when both the apparent purpose and effect of the act are lawful, it is not enough that there could be some hidden and unlawful purpose or possible unlawful effect. That hidden purpose must be bared, the likelihood of that conjectured effect be proven. . . . [I]t is unjust and unreasonable to clothe outwardly lawful conduct with a semblance of illegality woven wholly from conjecture and supposition.²⁶

Fanning also differed with the majority on the significance of *Campbell*.²⁷ Fanning read *Campbell* as illustrating the importance of the role of union steward in effectuating the policies of the NLRA. According to the dissent, "service as a steward is a 'public service' in the context of the NLRA."²⁸ Encouraging such service encourages and fosters the collective bargaining process. Therefore, the dissent argued that:

As there is no evidence of any discrimination in the selection of stewards, and no basis for concluding that measuring seniority, in the first instance, by service to the union as a steward violates the Act as a matter of law . . . there is clear failure of proof of any violation of the Act.²⁹

In sum, Member Fanning would give controlling weight to the public interest in fostering the collective bargaining process by encouraging service as a union steward, and would thus place a presumption of validity upon superseniority clauses. Further, Fanning would place the evidentiary burden on the challenging party to prove that the provision has the purpose and effect of encouraging or rewarding union activity.

It is submitted that the differences between the majority and the dissent turned on their respective willingness to perceive the issue of discrimination as operative in this case. In *Dairylea*, the majority found that it was called upon to balance *two* competing policies presented by the superseniority issue. One is the policy mandating that, where possible, the collective bargaining process should be encouraged and

²⁵ *Id.* at 662, 89 L.R.R.M. at 1740.

²⁶ *Id.*

²⁷ See *Id.* at 662-63, 89 L.R.R.M. at 1740-41.

²⁸ *Id.* at 663, 89 L.R.R.M. at 1741, following *Campbell*, 337 U.S. 521 (1949) and *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

²⁹ 219 N.L.R.B. at 663, 89 L.R.R.M. at 1741.

fostered.³⁰ To the extent, then, that the role of union steward is a necessary part of that process, public policy demands that the position of union steward be maintained and encouraged. The second policy consideration is that expressed by section 7, which demands that the fact of union activity or non-activity be completely irrelevant to the decision to grant or withhold on-the-job benefits.³¹

According to the dissent, however, *Dairylea* raised issues concerning only one of these policies: that of fostering the collective bargaining process. Member Fanning refused to consider the possibility of discrimination on the basis of union involvement unless a discriminatory motive and effect were alleged and proved.³²

It is submitted that the dissent's perspective on the issues presented by the case is an unnecessarily narrow one. In previous cases in which an employer's or union's intent to discriminate in a section 8(a)(1), 8(a)(3), 8(b)(1) or 8(b)(2) claim was placed in issue,³³ it has been recognized that "specific evidence of such subjective intent is not an indispensable element of proof."³⁴ For example, in *NLRB v. Erie Resistor Corp.*,³⁵ the Supreme Court explained that

some conduct may by its very nature contain the implications of the required intent; the natural and foreseeable consequences of certain action may warrant the inference. . . . The existence of discrimination may at times be inferred by the Board, for it is permissible to draw on experience in factual inquiries.³⁶

Aside from the fact that the Board's inference of discrimination was legally permissible in light of *Erie Resistor*, it is also clear that the inference is logically supportable. Where access to a wide range of on-the-job benefits and preferences is preconditioned upon top seniority, where top seniority is granted to union stewards alone, and where selection as a union steward is based upon the quality and amount of union involvement, a simple process of deduction suggests that a clause granting top seniority to union stewards is actually a

³⁰ See *id.* at 658, 89 L.R.R.M. at 1738. Cf. *Vaca v. Sipes*, 386 U.S. 514 (1967); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

³¹ 219 N.L.R.B. at 658, 89 L.R.R.M. at 1738. See also cases cited in note 11 *supra*.

³² See 219 N.L.R.B. at 662, 89 L.R.R.M. at 1740.

³³ E.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 224 (1963); *Radio Officers v. NLRB*, 347 U.S. 17, 45 (1954).

³⁴ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963). This reasoning was crucial to the court of appeals' affirmation. *NLRB v. Milk Drivers & Dairy Emp.*, Local 338, 531 F.2d 1162, 1165-66, 91 L.R.R.M. 2929, 2930-31, 2d Cir. (1976), *aff'g* *Dairylea Corporation, Inc.*, 219 N.L.R.B. 656, 89 L.R.R.M. 1737 (1975).

³⁵ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

³⁶ *Id.* at 227, quoting *Teamsters Local v. NLRB*, 365 U.S. 667, 675 (1961). See also *Radio Officers v. NLRB*, 347 U.S. 17 (1954), where the Court indicated that: "an employer's protestations that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement." *Id.* at 45.

provision which reserves job preferences to a small group selected on the basis of union involvement. Therefore, it appears to have been entirely proper for the Board to reach the issue of the discriminatory effect of the superseniority clause and to attempt to strike a balance between the conflicting policies of allowing employers and unions to make provisions insuring the effectiveness of the union steward and of maintaining a distinct separation between an employee's opportunity to receive job benefits and his or her union involvement.

It is further submitted that the result reached by the Board constitutes a flexible balance of the two competing interests involved. Employers and unions may still include broad superseniority clauses in their contracts. Further, such clauses may be as broad as is necessary to insure the proper functioning of a union steward within a bargaining unit. It is only where the benefits received are unnecessary to the maintenance of the union steward's role that the clauses become an encroachment upon the section 7 rights of other employees.

III. ENFORCEMENT OF LABOR INJUNCTIONS—MUNIZ; PARTIN

Section 11 of the Norris-LaGuardia Act insures a jury trial to any person charged with contempt "[i]n all cases arising under this Act."¹ The provision was enacted in response to the wide-spread judicial practice of citing strikers for contempt rather than prosecuting them for criminal violations, thereby circumventing defendants' right to trial by jury.² In 1948, pursuant to a revision of the criminal code,³ section 11 of Norris was repealed. It was replaced by 18 U.S.C. § 3692, which provides that:

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a trial by an impartial jury of the State and district wherein the contempt shall have been committed.⁴

In this revision, specific references to the Norris-LaGuardia Act contained in section 11 were deleted, and the protection of a jury trial was made to cover "all cases of contempt . . . in any case involving or growing out of a labor dispute."

Despite the broad language of the recodification, section 3692 was construed very narrowly in two cases decided during the *Survey* year. In *Muniz v. Hoffman*,⁵ the Supreme Court refused to apply sec-

¹ 29 U.S.C. § 111 (1947), repealed and recodified as 18 U.S.C. § 3692 (1970).

² See A. COX & D. BOK, *LABOR LAW CASES AND MATERIALS* 75 (7th ed. 1969). See also *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 250-51 (1970).

³ Criminal violations of federal law are codified generally in Title Eighteen of the United States Code.

⁴ 18 U.S.C. § 3692 (1970).

⁵ 422 U.S. 454 (1975).

tion 3692 where the criminal contempt citation arose from disobedience of an injunction issued under section 10(l) of the NLRA.⁶ Following *Muniz*, the Fifth Circuit further narrowed the scope of section 3692⁷ by denying the defendant a jury trial where the criminal contempt involved violation of an injunction allowable under section 301 of the Labor Management Relations Act.⁸

A. *Muniz v. Hoffman*

In *Muniz*, the Board, pursuant to its injunctive powers under section 10(l),⁹ sought to enjoin secondary picketing by a typographers' union against a newspaper publishing plant.¹⁰ When two successive temporary injunctions failed to halt this activity, the district court cited several union officials and the local for civil contempt.¹¹ Subsequently, however, the proscribed activity increased, as other unions, including that of the petitioner, participated. In response to this additional activity, various unions and officials were ordered to show cause why they should not be held in civil and criminal contempt.¹² On the basis of section 3692, the defendants requested a jury trial in the criminal contempt proceeding. The district court denied the request and found the defendants guilty.¹³ The court of appeals affirmed.¹⁴

In affirming the judgment of the court of appeals on the issue of whether the defendants' had a right to a jury trial, the Supreme Court narrowly applied section 3692 and HELD: The provision affords defendants no statutory right to a jury trial upon citation for criminal contempt of a 10(l) injunction.¹⁵

⁶ 29 U.S.C. § 160(l) (1970). This section provides, in pertinent part, that if, after preliminary investigation of certain unfair labor practice charges, there exists "reasonable cause to believe such charge[s] are true, 'the investigator shall,' on behalf of the Board, petition any U.S. district court . . . for appropriate injunctive relief pending the final adjudication of the Board." *Id.*

⁷ *United States v. Partin*, 524 F.2d 992, 90 L.R.R.M. 3299 (5th Cir. 1976), *cert. denied*, —U.S.—91 L.R.R.M. 2794 (1976).

⁸ Labor Management Relations Act § 301, 29 U.S.C. § 185 (1970). Section 301(a) provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy . . .

In *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, the Supreme Court established that despite the strong language of § 4 of the Norris LaGuardia Act prohibiting federal courts from issuing injunctions "in any case involving or growing out of any labor dispute," 29 U.S.C. § 104 (1970), the policies underlying § 301 required that injunctive relief be available to implement the arbitration process as a peaceful method of settling labor disputes. *Id.* at 249-53.

⁹ The pertinent sections of 10(l) are set forth in note 6 *supra*.

¹⁰ 422 U.S. 454, 456 (1975).

¹¹ *Id.* at 457.

¹² *Id.*

¹³ *Id.*

¹⁴ 492 F.2d 929, 931, 85 L.R.R.M. 2353, 2353, (9th Cir. 1974).

¹⁵ 422 U.S. at 461. Defendants also raised issues concerning their constitutional

The majority found two factors to be controlling in its interpretation of section 3692. First, the Court found pivotal significance in the fact that section 3692 was a recodification of pre-existing law rather than a new enactment with its own independent substance.¹⁶ Second, the Court found it necessary to "accommodate" the broad language of section 3692 with the enforcement provisions of the Wagner and Taft-Hartley Acts in order to preserve the remedial powers granted to the courts by these statutes.¹⁷

As a recodification of pre-existing law, section 3692 was seen to require the application of two special rules of statutory construction. The first of these rules mandated that a revision was not to be considered a change in substantive law, but rather was to be considered the result of "substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions."¹⁸ Accordingly, the Court read section 3692 simply as a restatement of section 11 which, in the majority's opinion, provided the procedural protection of a jury trial only where the contempt involved injunctions arising under the Norris-LaGuardia Act.¹⁹ The Court then pointed to a second rule stating that no change in law or policy was to be presumed from the plain language of the revision unless there appeared in the legislative history an explicit intention to do so.²⁰ Thus, in that the legislative history and the Revisors' Notes accompanying section 3692 were very sparse, containing no discussion of an intention to broaden the scope

right to a jury trial in a criminal contempt proceeding. The Court applied the well-established common law rule that the constitutional right to a trial by jury does not extend to criminal contemnors where the penalty imposed is "light" enough to characterize the contempt as a "petty offense." *See id.* at 475-77, following *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States* 395 U.S. 147 (1969); *Bloom v. Illinois*, 391 U.S. 194 (1968). The court was reluctant to determine the point at which the imposition of a fine without a prison sentence becomes serious enough to warrant the procedural safeguard of a jury trial, but found in this case that "although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to jury trial it might have under the Sixth Amendment." *Id.* at 477.

¹⁶ 422 U.S. at 468-69.

¹⁷ *Id.* at 458-67. In so doing, the court evidently assumed that the ability to punish violations of Board orders by criminal contempt without a jury trial gave these orders a force which they would not otherwise have.

¹⁸ *Id.* at 469, quoting H.R. REP. NO. 304, 80th Cong., 1st Sess. 2 (1947). *See also* C. DALLAS SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 28.10 (4th ed. 1972). *Cf.* *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 256 (1952).

¹⁹ 422 U.S. at 463-64.

²⁰ *Id.* at 470, quoting *U.S. v. Ryder*, 110 U.S. 729, 740 (1884). *See also* C. DALLAS SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 28.10 (4th ed. 1972); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972); *Fourco Glass v. Trans mirra Corp.*, 353 U.S. 222, 227 (1957). *Cf.* *Ex Parte Colletti*, 337 U.S. 55, 70 (1948); *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 255 (1952). The Court further noted that as an exception to the "historic rule" that a jury trial was not required in the case of either civil or criminal contempt, section 3692 was to be read no more broadly than was specifically indicated. 422 U.S. at 462.

of section 11,²¹ the majority refused to read the reenactment as having any applicability broader than its predecessor, section 11. Viewing the instant case as one "arising under" the NLRA, and not under the Norris-LaGuardia Act, the Court found section 11 to be inapplicable.²²

The Court's second ground of decision, its "accommodation" theory, was based on the general observation that in certain circumstances, "exceptions to the applicability of a statute's otherwise all-inclusive language [which] are not contained in the enactment itself [may be] found in another statute dealing with particular situations to which the first statute might otherwise apply."²³ To illustrate, the majority pointed to *Boys Markets, Inc. v. Retail Clerks*, where the Court implied an exception to Norris-LaGuardia's strict limitations on the power of federal courts to issue injunctions in labor disputes in order to effectuate the policies of section 301 of the Labor Management Relations Act.²⁴

In *Muniz*, as in *Boys Markets*, an exception to Norris-LaGuardia's strict limitations on the power of federal courts was not explicit in the later statute. While section 10(l) of the NLRA clearly presumes that Norris's jurisdictional anti-injunction provisions do not apply to Board orders, the section does not so presume as to Norris-LaGuardia's procedural safeguards.²⁵ Thus, the Court faced the question "whether in enacting the Wagner and Taft-Hartley Acts, congress not only intended to exempt injunctions they authorized from Norris-LaGuardia's limitations, but also intended that civil and criminal contempt proceedings enforcing those injunctions were not to afford contemnors the right to a jury trial."²⁶ The Court asserted that such an exception could be so implied.

The Court first examined section 10(h) of the National Labor Relations Act, which provides, in pertinent part, that: "when granting appropriate temporary relief . . . enforcing . . . an order of the Board . . . the jurisdiction of the courts sitting in equity shall not be limited by . . . 29 U.S.C. §§ 101-115 (Norris-LaGuardia)." Although arguably the section 10(h) exemption of the Norris-LaGuardia Act applies only to questions of federal court jurisdiction in enforcing a Board order,²⁷ the Court read the provision as intending to exclude all of the provisions of Norris, including its procedural protections, when enforcement of a Board order was involved.

In support of this reading of 10(h), the Court cited legislative history

²¹ See H.R. REP. NO. 304, 80th Cong., 1st Sess. 2 (1947).

²² 422 U.S. at 463.

²³ *Id.* at 458.

²⁴ *Id.* at 459-61. See note 8 *supra* for a discussion of the *Boys Markets* analysis of § 301.

²⁵ See note 6 *supra*, where the text of § 10(l) is set forth.

²⁶ 422 U.S. at 461.

²⁷ See *id.* at 486 (Stewart, J., dissenting).

which strongly suggested that Congress intended to make inapplicable all of the provisions of the Norris-LaGuardia Act in such enforcement proceedings.²⁸

Additionally, the Court asserted that an exception to section 11 could be implied from a common understanding of the mechanics of each statute.²⁹ The majority pointed out that, historically, no serious argument could be made "that, at the time of enactment of the Wagner and Taft-Hartley Acts, civil or criminal contempt charges arising from violations of injunctions authorized by those statutes were to be tried by jury."³⁰ First, the historic rule at the time of the enactment of Wagner and Taft-Hartley was that "absent contrary provision by rule or statute, jury trial was not required in the case of either civil or criminal contempt."³¹ Second, section 11 was limited by its own terms and by case law to contempts arising under the Norris-LaGuardia Act.³² According to case law, injunctions issued under the authority of the Wagner or Taft-Hartley Acts were not issued "under," but rather, "in spite of" Norris-LaGuardia.³³ Therefore, section 11 was, on its face, inapplicable to 10(l) injunctions.³⁴

The dissenters in *Muniz* took issue both with the Court's reading of section 3692 in light of its legislative history, and with its efforts to

²⁸ For example, the majority pointed to language in the House Conference Report on the Taft-Hartley Act which indicated that section 10(h) effectively made the Norris LaGuardia Act "inapplicable." 422 U.S. at 464, *quoting* H.R. REP. NO. 510, 80th Cong., 1st Sess. 57 (1947). The majority further noted statements in the congressional debates on the Taft Hartley Act which, in their view, illustrated a general understanding that "the . . . Norris-La Guardia Act is *completely suspended* . . . in the current National Labor Relations Act whenever the Board goes into court to obtain an enforcement order for one of its decisions." 93 CONG. REC. 4835 (1947) (remarks of Sen. Ball) (emphasis added).

²⁹ See 422 U.S. at 462-64.

³⁰ 422 U.S. at 462.

³¹ *Id.*

³² *Id.* at 463. The Court accurately states that the language of section 11 limits that provision to cases arising under the Norris LaGuardia Act. However, the majority then assumes that this statutory language refers only to *injunctions* arising under the Act. This may be a safe assumption, since many cases which invoke the Norris LaGuardia Act do so in order to question the propriety of the issuance of a labor injunction. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258 (1947). It is submitted however, that this assumption views too narrowly the scope of the Norris LaGuardia Act. The Norris LaGuardia Act is protective legislation designed to foster union organization and activity "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102 (1970); *United States v. Hutcheson*, 312 U.S. 219, 231, 234-36 (1941). Its provisions have been invoked not only to shield organized labor from unwarranted injunctions but also to protect it from judicial intrusion generally. *United States v. Hutcheson*, 312 U.S. 219, 234-36 (1941). To determine whether these general protections apply, courts have looked not to the nature of the injunction involved, but to the nature of the underlying labor dispute: A case is found to "arise under" Norris when it grows out of a "labor dispute" as defined by § 13 of the Act, 29 U.S.C. § 113 (1970). Cf. *United States v. United Mine Workers*, 330 U.S. 258, 298 (1947), *United States v. Hutcheson*, 312 U.S. 219, 234-36 (1941). See text at notes 60-65 *infra*.

³³ 422 U.S. at 463. But see note 32 *supra*.

³⁴ *Id.*

"accommodate" section 3692 to the policies of other labor statutes. Justices Stewart, Marshall, and Powell asserted that the repeal of section 11, and its subsequent reenactment as section 3692, was not without substantive significance.³⁵ The dissenting Justices argued that according to the plain language of the statute, section 3692 "encompasses *all* cases of contempt arising under any of the several *laws* of the United States governing the issuance of injunctions in cases of a 'labor dispute,'"³⁶ including cases arising under 10(l). Justice Douglas, agreeing with this conclusion, stressed in a separate dissent that section 3692 simply reaffirmed the original purpose of section 11, which was "to shield the organized labor movement from the intervention of a federal judiciary perceived by some as hostile to labor."³⁷

The dissent perceived nothing in the legislative history which was inconsistent with a literal reading of section 3692. They pointed out that the section 3692 Revisors' Notes simply indicated, without more, that the section was "based on" section 11.³⁸ By contrast, where the revisors had intended recodifications to simply restate prior law, they explicitly stated their intent by noting that changes in phraseology did not signify changes in substance.³⁹ Accordingly, the dissent inferred that a literal reading of section 3692 was preferable.

The dissent also reasoned that it was unnecessary to read section 3692 more narrowly in light of sections 10(l) and 10(h), because the provisions in question were "entirely compatible."⁴⁰ The dissent pointed out that section 10(l) provides a *jurisdictional* basis for a district court to grant injunctive relief, notwithstanding any other provision of law.⁴¹ The requirement of providing a contemnor with a jury trial is, by contrast, a *procedural* right which in no way limits the jurisdiction allowed under 10(l). Like 10(l), 10(h) was also seen as concerned merely with the jurisdiction of the federal court, and not with the procedural rights granted by Norris.⁴² Thus, a literal reading of section 3692 was viewed by the dissent as consistent with the National Labor Relations Act's authorization of injunctions in certain cases.⁴³

Further, according to the dissent, there was no persuasive policy

³⁵ *Id.* at 481 (Stewart, J., dissenting).

³⁶ *Id.* at 482.

³⁷ *Id.* at 478. (Douglas, J., dissenting).

³⁸ *Id.* at 484. (Stewart, J., dissenting).

³⁹ *Id.* See, e.g., Revisors' Notes on the Recodification of 18 U.S.C. § 406, H.R. REP. NO. 304 80th Cong., 1st Sess. (1947).

⁴⁰ 422 U.S. at 485.

⁴¹ *Id.* at 496. For the text of §10(l), 29 U.S.C. § 160(l) (1970), see note 6 *supra*.

⁴² 422 U.S. at 486. The dissent posited two reasons for this interpretation of § 10(l). First, the dissenters argued that in denominating all of the sections of the Norris-LaGuardia Act in 10(h), Congress did not intend to suspend the entire Act. This listing was merely intended as a means to identify the Act. Second, the dissenters pointed out that in cases where Congress had intended to exempt the entire Norris-LaGuardia Act, it did so not by stating that the subsequent enactment "should not be limited by Norris," but by affirmatively providing that, with respect to the subsequent enactment, all of the provisions of the Norris-LaGuardia Act were *inapplicable*. *Id.*

⁴³ *Id.* at 485.

argument for a limited reading of section 3692. The guarantee of the right to a jury trial in cases of criminal contempt arising out of a 10(l) injunction does not restrict the ability to obtain the injunction and does not interfere with the enforcement power of the district courts to issue strong civil contempt sanctions. Criminal sanctions are still available as well. According to the dissent's reading of section 3692, the statute "would only require that prior to the imposition of criminal punishment for violation of a court order the necessary facts must be found by an impartial jury, rather than by the judge whose order has been violated."⁴⁴

Lastly, viewing 18 U.S.C. § 3692 as part of the Criminal Code, the dissent pointed out that where any ambiguity existed, canons of statutory construction indicated that the ambiguity was to be resolved in favor of the defendant.⁴⁵ Thus, the dissent concluded that section 3692 should be read literally to protect the contemnor in all cases arising out of a labor dispute.

It is submitted that the weight of authority supports the majority's conclusion that section 3692 must be read as co-extensive with its predecessor.⁴⁶ Since the Revisors' Notes did not specifically delineate the reach of section 3692, the canons of statutory interpretation cited by the Court clearly suggest that section 3692 should not be applied any more broadly than section 11 would have been.⁴⁷ However, in limiting the scope of section 3692 to the scope of its predecessor section 11, there is the additional question of the appropriate interpretation of section 11.⁴⁸ It is submitted that the Court's analysis of the reach of section 11, both standing alone and in the context of subsequent labor statutes, is open to question for two reasons.

First, as a restatement of section 11 of Norris, the legislative history of section 3692 indicates that an attempt was made to preserve the original intent of Congress.⁴⁹ The *original* intent of Congress in providing a jury trial to labor injunction contemnors was to place the institution of a jury between the contemnor and the judge.⁵⁰ Arguably, in order to preserve this congressional intent, it is necessary to require a jury trial in criminal contempts of labor injunctions generally. The fact that the injunction was sought under the authority of the Norris, Wagner, or Taft-Hartley Acts is irrelevant in effectuating the original purpose of section 11.⁵¹

⁴⁴ *Id.* at 488.

⁴⁵ *Id.* at 487, citing *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Smith v. United States*, 360 U.S. 1, 9 (1959).

⁴⁶ See authority cited in notes 18 and 20 *supra*.

⁴⁷ *Ibid.*

⁴⁸ See text at notes 49-67 *infra*.

⁴⁹ See S. REP. NO. 1620, 80th Cong., 2d Sess. 1 (1948).

⁵⁰ See text and note at 2 *supra*. Cf. *United States v. Hutcheson*, 312 U.S. 219, 324-36 (1941). See also *In re Union Nacional de Trabajadores*, 502 F.2d 113, 120 87 L.R.R.M. 2237, 2241-42 (1st Cir. 1974), where the court discussed the dangers of a non-jury trial in criminal contempt proceedings.

⁵¹ This reasoning formed the basis of Douglas' dissent. 422 U.S. 478-79 (Douglas,

This view was adopted by the First Circuit in *In re Union Nacional de Trabajadores*,⁵² where contemnors of a 10(l) injunction were found to have a right to a jury trial under section 3692. The court in *Union Nacional* pointed out that "since a section 10(h) injunction may be obtained without the high threshold of a showing of harm required by [section 7 of Norris], we fail to see why the need for a jury to decide criminal contempt issues arising out of such proceedings is diminished."⁵³ According to the First Circuit, "reposing sole dispositive power in the judge seems as inappropriate as ever. The Judge, who granted the injunction at the request of the Board, would be asked to mete out punishment if he finds that his order has been deliberately flouted."⁵⁴ Thus, in *Union Nacional*, the First Circuit found that even when an injunction was sought by the Board acting on the basis of public rather than individual employer interests, the policy considerations underlying the necessity for the protections of a jury trial were still present.

Second, the Court's willingness to imply a complete exception to the Norris-LaGuardia Act by statutory accommodation stretches the accommodation process beyond its legitimate scope. This process was originally developed in response to the realization that:

"As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones."⁵⁵

The Court recognized in its *Boys Markets* decision that this process involved the consideration of the "total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."⁵⁶ In so doing, however, the Court viewed its responsibility as "seek[ing] out that ac-

J., dissenting). It should be noted that in other cases where limitations or exceptions to Norris have been found, the Court was not faced with the task of preserving the *original intent* of the Congress. For example, in *Boys Markets, Inc., v. Retail Clerks*, 398 U.S. 235 (1970), the Court held that injunctive relief could be obtained under § 301 of the L.M.R.A., 29 U.S.C. § 185 (1970), despite the anti-injunction provisions of Norris. In so doing, it explicitly departed from the original intent of the Act, stating that "the Norris-LaGuardia Act was responsive to a situation totally different from that which exists today." 398 U.S. at 250. *See also id.* at 251-53.

⁵² 502 F.2d 113 87 L.R.R.M. 2237 (1st Cir. 1974).

⁵³ *Id.* at 119-20, 87 L.R.R.M. at 2241.

⁵⁴ *Id.* at 120, 87 L.R.R.M. at 2241.

⁵⁵ *Boys Markets Inc. v. Retail Clerks*, 398 U.S. 235, 251 (1970).

⁵⁶ *Id.* at 250.

commodation of the two [conflicting statutory provisions] which will give the fullest possible effect to the central purposes of both."⁵⁷

In *Muniz*, the Court faced the task of accommodating the policy that labor injunction contemnors must have the procedural protection of a jury trial, with the policy that the courts must have the power to enforce Board orders and collective bargaining agreements. It is submitted that both the language and the policies of the sections "accommodated" in *Muniz* are compatible, for it is possible to construe section 11 of the Norris-LaGuardia Act as operable even when the labor dispute involves an injunction issued under section 10(l) or section 10(h) of the NLRA.

First, as the dissent suggests, 10(l) and 10(h) deal with the equity jurisdiction of the federal courts.⁵⁸ Strictly speaking, in criminal contempt proceedings brought against a contemnor of a labor injunction, the court does not proceed in equity.⁵⁹ Therefore, the exceptions to Norris which are contained in sections 10(l) and 10(h) may not apply.

Second, the language of section 11 which states that the protection of a jury trial is afforded to contemnors in "cases arising under this Act" need not be limited to situations in which *injunctions* are imposed under the Norris-LaGuardia Act.⁶⁰ To determine whether cases "arise under" Norris it is appropriate to look to section 13 of that Act which defines the type of labor dispute to which its various protec-

⁵⁷ See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 216 (1962) (Brennan, J., dissenting) (emphasis added), upon which the decision in *Boys Markets* was based. 398 U.S. 235, 249 (1970).

⁵⁸ 422 U.S. at 486 (Stewart, J., dissenting).

⁵⁹ It has been generally recognized that even though a contempt proceeding may "sound in" equity, a criminal contempt proceeding stems from the inherent power of the court to vindicate its authority. Therefore, it is neither legal nor equitable but is *sui generis*. See *Green v. United States*, 356 U.S. 165, (1958); *United States v. Barnett*, 346 F.2d 99, 100 (5th Cir. 1965); *In re Manufacturers' Trading Corp.*, 194 F.2d 948 (7th Cir. 1952).

⁶⁰ The majority disposes of this theory in a footnote, where it cites several cases which, according to the Court, dismiss the possibility that the Norris LaGuardia Act has any sphere of operation at all except in cases where the injunction is imposed pursuant to Norris. 422 U.S. 463, n.5, and cases cited at 422 U.S. 474, n.12. It is submitted that the cases cited by the Court do not authoritatively decide this question. For example, in *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Court did find that none of the provisions of Norris applied where the injunction was issued outside the framework of the Act. *Id.* at 289, 298. However, the crucial finding supporting the inapplicability of Norris was not the fact that the injunction was issued outside the framework of Norris, but rather, that the dispute in issue was not a labor dispute within the meaning of § 13. Therefore, the pivotal factor in determining whether or not a case "arises under" the Norris LaGuardia Act is whether the case is a labor dispute within the meaning of § 13.

The same rationale was used in two of the cases cited by the majority in note 12: *United States v. Robinson*, 449 F.2d 925 78 L.R.R.M. 2663 (9th Cir. 1971). *Mitchell v. Barbee Lumber Co.*, 35 F.R.D. 544 (S.D. Miss. 1964). Additional cases cited, such as *Schauffer v. Local 1291*, 189 F. Supp. 737 47 L.R.R.M. 2171 (E.D. Pa. 1960) and *Brotherhood of Local Firemen & Enginemen v. Bangor & Aroostook R.R.*, 380 F.2d 570 65 L.R.R.M. 2246 (D.C. Cir. 1967), § 3692 was found not to apply where strikers were held in *civil* not *criminal* contempt.

tions against undue judicial intervention apply.⁶¹ For example, in *United States v. United Mine Workers*, the Court found Norris to be entirely inapplicable where the injunction which was violated by defendants was issued outside of the framework of Norris.⁶² In so holding, the Court looked beyond the source of the injunction and examined the nature of the underlying labor dispute. In *Mine Workers*, Norris was found inapplicable not because the injunction was not issued under Norris, but because the labor dispute in question did not fall within the terms of section 13.⁶³ Thus when an injunction is issued under 10(l), that *injunction* is properly considered to issue not "under," but "in spite of" Norris.⁶⁴ However, the underlying *labor dispute* might still be considered to "arise under" the Norris-LaGuardia Act for the purposes of insuring its procedural protections. Even where the injunction was imposed pursuant to a statute other than Norris, the procedural protections afforded by Norris might still be applicable, as long as the dispute falls within the terms of section 13.

Finally, it could be argued that Norris-LaGuardia is totally inapplicable because it was aimed at the abuses which occurred when *private individuals* resorted to the courts to squelch labor organization. In this situation, the Board is acting in the public interest,⁶⁵ and as such, should have enforcement powers extending beyond those afforded by Norris. However, as the *Muniz* dissent suggests, the grant of a jury trial in criminal contempt proceedings does not undercut the jurisdiction of the courts to issue temporary restraining orders, injunctions, or civil or criminal contempt sanctions.⁶⁶ Enforcement power is retained. A proper accommodation, then, would be to give the fullest possible effect to both provisions. Such a result would

... leave to the Board full power to request temporary relief, and, in the event of noncompliance, to coerce obedience through civil contempt proceedings, without delay or interposition of a jury. But it also leaves available, for rare cases when punitive measures are after the fact deemed necessary, the historic protection of a jury trial."⁶⁷

B. *United States v. Partin*

In *United States v. Partin*,⁶⁸ the Fifth Circuit faced the issue of whether the *Muniz* holding could be extended to deny a jury trial to a contemnor of a privately-sought injunction. In *Partin*, a union busi-

⁶¹ See note 32 *supra*. See also *United States v. United Mine Workers*, 330 U.S. 258, 289 (1947); *United States v. Hutcheson*, 312 U.S. 219, 234-36 (1941).

⁶² 330 U.S. 258, 289 (1941).

⁶³ *Id.*

⁶⁴ The majority makes this suggestion at 422 U.S. at 463.

⁶⁵ See S. REP. NO. 105, 80th Cong., 1st Sess. 8 (1947).

⁶⁶ 422 U.S. at 487-88 (Stewart, J., dissenting).

⁶⁷ *In re Union Nacional De Trabajadores*, 502 F.2d 113, 121 87 L.R.R.M. 2242 (1st Cir. 1974).

⁶⁸ 524 F.2d 992, 90 L.R.R.M. 3299 (5th Cir. 1975).

ness agent was cited for criminal contempt for disobeying a temporary restraining order issued by the district court under section 301 of the Labor Management Relations Act.⁶⁹ The defendant claimed the right to a jury trial on the basis of section 3692.⁷⁰ Contending that the injunction and subsequent contempt charged arose out of a labor dispute within the meaning of section 3692, the appellant argued that *Muniz* should be limited to its facts. He asserted first that the *Muniz* decision was appropriate only where the injunction was sought by the Board, a governmental body obligated to act in the public interest, and not where it was sought by a private individual.⁷¹ Secondly, the appellant argued that the *Muniz* Court, deciding in the context of a 10(l) injunction, relied heavily on section 10(h) in order to find an exception to section 3692. In *Partin*, the source of the injunction was section 301 of the Labor Management Relations Act, to which section 10(h) is "clearly inapplicable."⁷² The court found appellant's distinctions to be valid, yet it found that the *Muniz* decision rested upon grounds which were equally applicable to a section 301 injunction.

First, the court stated that the most compelling reason against applying section 3692 in *Muniz* was not that the injunction had been issued by the Board, but that section 3692 was a re-enactment of section 11. As such, it was explicitly limited to injunctions "arising under" Norris.⁷³ As the injunction in question in *Partin* was issued under section 301 of the Labor Management Relations Act, the protections afforded in section 3692 could not apply.

Second, the court considered the importance of section 10(h) to the *Muniz* analysis. Although the Fifth Circuit recognized that the Court in *Muniz* relied heavily on section 10(h) to conclude that all of the provisions of Norris were suspended in a 10(l) injunction, it suggested that even without section 10(h), the Court would have reached the same result.⁷⁴ The critical factor, according to the Fifth Circuit was the Court's reading of legislative intent in enacting exceptions to the jurisdictional provisions of Norris.⁷⁵ Citing *Mine Workers*, the *Partin* court concluded that where the injunction arose outside the framework of Norris, the entire Act was to be viewed as inapplicable.⁷⁶

Further, the court rejected the argument that a jury trial for contemnors of a section 301 injunction would be compatible with national labor policy. Such a view would, according to the court, "amount to an unjustified encroachment on the power of the federal courts to enforce injunctions issued under the Labor Management Relations Act."⁷⁷

⁶⁹ 29 U.S.C. § 185 (1970). 524 F.2d at 994-95, 90 L.R.R.M. at 3300.

⁷⁰ 524 F.2d at 995, 90 L.R.R.M. at 330.

⁷¹ *Id.* at 996, 90 L.R.R.M. at 3301.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 996-97, 90 L.R.R.M. at 3301-02.

⁷⁵ *Id.*

⁷⁶ *Id.* at 997, 90 L.R.R.M. at 3302.

⁷⁷ *Id.*

It is submitted that the court's extension of *Muniz* to a contempt of a section 301 injunction is improper. The majority's holding in *Muniz* relied heavily on the statutory interplay of 10(l), 10(h), and section 11. The conclusion that the Norris-LaGuardia Act was suspended in *Muniz* was reached by examining the language and the legislative history of 10(l) and 10(h).⁷⁸ There is no comparable language or legislative history in section 301.⁷⁹ Thus, the argument that the entire Norris-LaGuardia Act is suspended where a 301 injunction has been violated is tenuous.

Further, the Fifth Circuit itself recognized that parts of the Norris-LaGuardia Act do remain applicable, even where the source of the injunction arises from section 301.⁸⁰ The question for the courts has been to determine *which* sections of the Act may be operative, consistent with maintaining the effectiveness of collective bargaining agreements.⁸¹ Thus, even according to its own terms, the Fifth Circuit's exemption of section 11 in a section 301 injunction is not the inevitable result of *Muniz*.

CONCLUSION

In deciding that section 3692 did not apply to injunctions sought under section 10(l) or under section 301, the courts essentially made a policy decision that the effectiveness of national labor statutes would be furthered by protecting the injunctive powers of the courts rather than by protecting the criminal contemnor. Therefore, the underlying rationale of *Muniz* and *Partin* is based on a policy decision that the 10(l) and section 301 injunction should have the added clout of a non-jury contempt process, in spite of the plain words of section 3692 and the central purpose of section 11. As a result of this policy choice, the courts have totally exempted the protections of the Norris-LaGuardia Act where enforcement of a 10(l) or a 301 injunction is at issue. As such, they have confined the right to a jury trial to cases where an "obsolescing kind of injunction,"⁸² available only under the Norris-LaGuardia Act, is violated.

IV. ORGANIZATIONAL RIGHTS—DEFINITION OF "EMPLOYEES" UNDER THE NLRA: *Cedars Sinai*

The question of who is an "employee" within the meaning of the NLRA¹ is a crucial one. Workers who are considered "employees"

⁷⁸ 422 U.S. at 461-67. See text at notes 27-34 *supra*.

⁷⁹ For the text of § 301, 29 U.S.C. § 185 (1970), see note 8 *supra*.

⁸⁰ 524 F.2d at 997, n.12, 90 L.R.R.M. at 3302, n.12.

⁸¹ *Id.*

⁸² *In re Union Nacional de Trabajadores*, 502 F.2d 113, 119 87 L.R.R.M. 2241 (1st Cir. 1974).

¹ See 29 U.S.C. § 152(3) (1970) which defines "employee" as including: [A]ny employee, and shall not be limited to the employees of a particular

under the Act have the statutory right to organize and bargain collectively, while those who do not fall within the definition have no such statutory protection.² Instead, they may exercise only such rights of self-organization as their employer may wish to allow them.³

The NLRA definition of "employee," at the outset, includes "any employee . . . unless [the Act] explicitly states otherwise."⁴ The Act then quite explicitly lists those categories of workers who are not to be considered "employees:" agricultural laborers, domestic servants, independent contractors, supervisors, and those employed by employers subject to the Railway Labor Act.⁵ Furthermore, the term "employee" is limited not only by the express statutory language of the NLRA; both the courts and the NLRB, in interpreting the Act, have also developed certain common law exclusions which, for example, bar certain "managerial" and "confidential" employees from the Act's protection.⁶ The courts and the Board have reasoned that the in-

employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

² See 29 U.S.C. § 157 (1970).

³ 29 U.S.C. § 164(a) (1970) gives supervisors the right to join a labor organization but states that "no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." *Id.* The Act merely seeks to regulate those who fall within its terms; those who do not fall within the terms of the Act handle their labor affairs on a voluntary basis.

⁴ 29 U.S.C. § 152(3) (1970). Whether an individual is an "employee" is determined primarily from the "history, terms and purposes" of the NLRA. See *NLRB v. Hearst Publications, Inc.*, 322 U.S.C. 111, 124 (1944). Contrary to the position taken by the respondents in *Hearst*, the definition of employee is not a matter of state law. *Id.* at 122-24.

⁵ 29 U.S.C. § 152(3) (1970). Persons employed by any other person who is not an "employer" within the meaning of § 2(2), 29 U.S.C. § 152(2) (1970), are also not "employees." Additionally, § 2(2) defines "employer" by a method of exclusion: the United States or any wholly owned Government corporation, any Federal Reserve Bank, any State or local government, and several other minor exceptions are not included within the definition of 'employer.' *Id.*

⁶ See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-89 (1974); *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, 17 L.R.R.M. 394, 395 (1946). See also H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947).

"Managerial employees" are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Bell Aerospace*, 416 U.S. at 288, citing *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4, 21 L.R.R.M. 1039 n. 4 (1947). "Confidential employees" are those "who receive from their employers information that not only is confidential but also that is unavailable to the public, or to competitors, or to employees generally." H.R. REP. NO. 245, 80th Cong., 1st Sess. 23 (1947). "Confidential employees" are not, however, merely

terests of such employees, like the interests of "supervisors" who are specifically excluded by the terms of the Act itself, align too closely with the interests of management to warrant the protection of the Act.⁷

This *Survey* year, the NLRB again considered the proper definition of "employee" under the NLRA. In *Cedars-Sinai Medical Center*,⁸ the Board addressed the issue of whether medical residents, interns, and certain "clinical fellows" associated with a hospital ["housestaff"] came within the Act's definition.⁹ *Cedars-Sinai* came before the Board as a petition for certification under section 9(c)(1)(A).¹⁰ The petition was brought by the Cedars-Sinai Housestaff Association, an organization which sought to represent a unit of the medical center's housestaff for the purposes of collective bargaining.¹¹ The employer-medical center opposed the petition, claiming that the association was not a "labor organization" within the meaning of the Act because it did not purport to represent "employees."¹² A split Board agreed with the employer¹³ and dismissed the petition.¹⁴

The majority concluded that the housestaff members were not "employees" because it found that the housestaff were "primarily students" engaged in graduate educational training.¹⁵ The majority ad-

those who work in the employer's labor relations departments. See *Bell Aerospace*, 416 U.S. at 283-84 & n.12. For a discussion of *NLRB v. Bell Aerospace Co.*, see 1974-1975 Annual Survey of Labor Relations and Employment Discrimination Law, 16 B.C. IND. & COM. L. REV. 977-82 (1975).

⁷ These non-statutory exclusions reflect Congressional intent to assure management of "faithful agents" who are "not subject to influence or control of unions" in performing their work. H.R. REP. NO. 245, 80th Cong., 1st Sess. 16 (1947).

⁸ 223 N.L.R.B. No. 57, 91 L.R.R.M. 1398 (1976).

⁹ The Board stated that an intern is a "medical school graduate serving his first period of graduate medical training in a hospital." 91 L.R.R.M. at 1399. A resident is a "physician who has completed an internship and serves a period of more advanced training, lasting from one to five years, in a specialty." *Id.* A clinical fellow is a "physician who has completed an internship and a residency" and is taking additional courses to "qualify for certification in an identifiable sub-specialty of medicine." *Id.*

¹⁰ 29 U.S.C. § 159(c)(1)(A) (1970).

¹¹ 91 L.R.R.M. at 1398. The petitioner presumably sought to represent a unit of professional employees under NLRA § 2(12), 29 U.S.C. § 152(12) (1970).

¹² 91 L.R.R.M. at 1398. A "labor organization" is defined as "any organization of any kind . . . in which employees participate and which exists for the purpose . . . of dealing with employers . . ." 29 U.S.C. § 152(5) (1970).

¹³ 91 L.R.R.M. at 1400. The Board decided the case 4-1, with Member Fanning dissenting.

¹⁴ *Id.* Under § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970), whenever a petition for certification is filed with the Board by an employee, employer, or "labor organization," the Board, absent a consent election, will investigate the petition to determine whether a "question of representation affecting commerce exists." If, after a hearing, the Board finds that such a question of representation exists, it will direct an election. *Id.*

In *Cedars-Sinai*, the Board determined that no "question of representation" existed because it found that the party filing the petition, the Housestaff Association, was not a "labor organization" under the NLRA since it did not represent "employees." 91 L.R.R.M. at 1400.

¹⁵ 91 L.R.R.M. at 1399.

mitted that the housestaff possessed certain "employee characteristics":¹⁶ the housestaff performed duties normally performed by professional medical personnel such as direct patient care; further, the housestaff received employee-like compensation consisting in part of an annual stipend graduated according to each member's tenure at the hospital.¹⁷ However, the Board found that the patient care activities constituted "an integral part of a physician's educational training"¹⁸ and as such, were merely the "means by which the learning process is carried out"—not the means by which these members of the housestaff earned a living.¹⁹ Further, the Board found that the compensation received was more in the nature of a scholarship or living allowance than compensation for services rendered.²⁰ In reaching these conclusions, the majority attached great importance to the fact that these patient care activities constituted prerequisites to the licensing and certification requirements for specialties and subspecialties in the practice of medicine.²¹ On the basis of these factors, the majority concluded that the housestaff were "primarily students," "not employees," and thus dismissed the petition for certification.²²

In a lengthy and well-documented dissent, Member Fanning took issue with the majority's conclusion that the categories of "student" (or "primarily student") and "employee" are mutually exclusive.²³ First, the statutory definition of "employee" does not explicitly exclude students as it does other groups.²⁴ Second, the policy

¹⁶ *Id.*

¹⁷ *Id.* at 1399-1400. These patient care activities consist of "taking medical histories, performing examinations, preparing medical records and charts, and developing diagnostic and therapeutic plans." *Id.* at 1399. In general, according to a study initiated by the Association of American Medical Colleges, approximately 80% of a housestaff member's time is spent on direct patient care activities. *See id.* at 1403 (Member Fanning dissenting). The housestaff receive graduated stipends, annual vacations, and paid holidays, as well as free health care. The housestaff also receive such fringe benefits as uniforms, free meals while on duty, and malpractice insurance. *Id.* at 1400.

¹⁸ *Id.* at 1399-1400.

¹⁹ *Id.* at 1400.

²⁰ *Id.* In making these findings, the Board relied heavily upon manuals entitled *ESSENTIALS OF AN APPROVED INTERNSHIP* and *ESSENTIALS OF APPROVED RESIDENCIES*. These manuals, prepared by the Council on Medical Education and approved by the AMA, prescribe the standards for internships and residencies. *Id.* at 1399. They indicate that the primary function of the housestaff's duties is educational, and characterize the housestaff member's compensation as a scholarship. *See* 91 L.R.R.M. at 1400.

²¹ *Id.* at 1399, 1400. The Board majority also emphasized the short tenure of most of the members of the proposed unit at the medical center, finding that the average stay of residents and interns at Cedars-Sinai was less than two years. "Only a few interns, residents, or clinical fellows can expect to, or do, remain to establish an employment relationship with Cedars-Sinai." *Id.* at 1400.

²² *Id.* at 1400.

²³ *Id.* at 1401-03 (Member Fanning dissenting). Member Fanning stated that the simple fact that "an individual is learning while performing . . . cannot possibly be said to mark that individual as 'primarily a student and, therefore, not an employee' for purposes of our statute." *Id.* at 1403, quoting *id.* at 1400.

²⁴ *Id.* at 1401 (Member Fanning dissenting). *See* text at note 4 *supra*.

reasons underlying the nonstatutory exclusions do not apply, since presumably the employment interests of students would not be aligned with those of management.²⁵ Finally, Member Fanning pointed out that by excluding students, the Board was deviating from its previous decisions which had included students in a bargaining unit.²⁶ Member Fanning therefore concluded that housestaff members *could* be considered "employees" under the NLRA, even if they were also students.²⁷

Member Fanning then set forth three reasons why he believed that these particular 'students' *were* "employees" under the Act. First, he found that the housestaff members were "employees" in a definitional sense. Member Fanning pointed out that the Congressional definition of "employee" implicitly includes "someone who works or performs a service for another from whom he or she receives compensation."²⁸ Member Fanning interpreted this definition literally, and found that the nature of the consensual arrangement between the hospital and the housestaff, whereby housestaff members received salaries, vacations, and other benefits while performing prescribed duties for specified periods, denoted a sufficient employment status to dispel any inference that their relationship with the hospital was solely educational.²⁹ In effect, while Member Fanning did not deny that there was a certain educational aspect to the housestaff's relationship with the hospital, he believed that the "exhaustive indicia" of employment status were sufficient to find that the housestaff members were also "employees" under the NLRA.³⁰

Secondly, Member Fanning also felt that the language of the NLRA and its accompanying legislative history supported his conclusion that the housestaff members were employees. Section 2(12) of the

²⁵ See text at notes 6-7 *supra*.

²⁶ *Id.* at 1401 (Member Fanning dissenting) citing *Macke Company* (II), Case 2 RC-16725 (unreported). The *Macke II* students were those originally excluded from the unit found appropriate in *Macke Company*, 211 N.L.R.B. 90, 86 L.R.R.M. 1404 (1974).

²⁷ *Id.* at 1401 (Member Fanning dissenting).

²⁸ *Id.* at 1402. To support this proposition, Member Fanning cited LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 309 (1947) wherein "employees" are defined as those who "work for wages or salaries under direct supervision." Congress explicitly instructed the courts to interpret "employee" according to the "ordinary meaning" of the word. See *id.*

²⁹ 91 L.R.R.M. at 1402-04.

³⁰ See *id.* Member Fanning also found it significant that the housestaff members voluntarily paid a federal income tax on their stipend. See *id.* at 1402-03 & n.17. Under § 117 of the Internal Revenue Code of 1954, as interpreted in *Bingler v. Johnson*, 394 U.S. 741, 751-54 (1969), Member Fanning noted, housestaff members would not have to pay a tax on stipends that are "relatively disinterested, 'no strings' educational grants." 91 L.R.R.M. at 1403 n.17 (Member Fanning dissenting). The fact that the housestaff members did pay this tax, Member Fanning argued, indicated that a certain quid pro quo was involved in their compensation for services rendered. Therefore, he believed that their stipend was not a taxfree, "no strings" scholarship, but a regular salary. *Id.*

Act defines a "professional employee" as:

(a) any employee engaged in work . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital . . . or (b) any employee who (i) *has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).*³¹

The House Conference Report accompanying the 1947 amendments to the Act stated that the purpose of section 2(12) was to include "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants."³²

Member Fanning found that the express definition of a professional employee under section 2(12)(b)—one who has completed courses of specialized instruction and is now performing related work under the supervision of section 2(12)(a) professionals—"fit precisely" the housestaff members. He therefore concluded that the definition of "professional employee" must in part have been "designed to cover housestaff."³³ In addition, Member Fanning believed that the reference in the House Conference Report to "junior professional assistants" was intended to refer explicitly to housestaff members.³⁴

Having determined that Congress intended housestaff members to fall within the statutory definition of professional employees, Member Fanning inferred that Congress must have intended that the housestaff members fall within the definition of "employees" generally.³⁵ Thus, Member Fanning concluded that section 2(12) merely clarified the scope of the definition of "employee" itself. It did not, as the majority apparently thought,³⁶ operate only after determi-

Member Fanning also pointed out that traditional tests for determining vicarious liability at common law showed that the housestaff members were "employees" in terms of the medical center's legal responsibility for their act of negligence. *Id.* at 1042 & n.16 (Member Fanning dissenting).

³¹ 29 U.S.C. § 152(12) (1970) (emphasis added).

³² 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT 540 (1947) (emphasis added).

³³ 91 L.R.R.M. at 1405 (Member Fanning dissenting).

³⁴ *Id.* See note 32 *supra*. Member Fanning did not specifically indicate how he reached his conclusion that the housestaff members were such "junior assistants," though presumably he was referring to the usual medical hierarchy whereby residents and interns perform their duties at the direction of senior physicians at the hospital.

³⁵ 91 L.R.R.M. at 1405 (Member Fanning dissenting).

³⁶ The majority found "no merit" in the argument that the housestaff were "professional employees" under § 2(12). See *id.* at 1400 n.4. Although the majority did not set out their reasoning, Member Fanning presumed the majority felt that § 2(12) called for a two-step test to determine whether proposed unit members were professional employees. See *id.* at 1405 (Member Fanning dissenting). The first step required proof that

nation was made that such professional personnel were "employees." A different result, Member Fanning believed, led to the illogical conclusion that Congress explicitly defined professional employees for the purposes of unit determination even though it believed that such personnel were to be excluded from the protection of the Act in the first instance.³⁷

Finally, Member Fanning felt that the 1974 Congressional debates regarding proposed amendments to the definition of "supervisor" contained in section 2(11) indicated a clear and explicit congressional recognition that housestaff personnel were covered under the Act.³⁸ Various organizations representing health care professionals had urged an amendment to section 2(11) which would clearly exclude medical professionals from the definition of supervisor. The Senate Committee concluded that the proposed amendment was unnecessary, not because it believed that the health care professionals were not "employees," but because the Committee already perceived them as "employees" whose interests were protected by past Board decisions.³⁹

It is suggested that Member Fanning's conclusion that the housestaff members are "employees" under the NLRA is correct. According to the legislative history of the 1947 amendments to the NLRA, the term "employee" is to be defined according to its ordinary meaning. According to Fanning,

An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire . . . [one working] for wages or salaries under direct supervision.⁴⁰

At a minimum, then, the legislative understanding of the term implies the performance of work in return for compensation.⁴¹ The majority admits that the elements of work and compensation exist but it characterizes the work performed as "educational" and views the compensation received as a "scholarship."⁴² While the term "educational activities" does imply the attendance of the housestaff members at seminars, lectures, or lab instructions, it does not seem to include

the members were "employees." Absent such proof, considerations of "professionalism" would not be required: since the housestaff members were "employees" in the first instance, it was not necessary to consider whether they were professionals. *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1405-06 (Member Fanning dissenting). Member Fanning relied on S. REP. NO. 766, 93d Cong., 2d Sess. 6 (1974).

³⁹ *Id.* at 1405 (Member Fanning dissenting). The Senate Committee found that the Board had in the past refused to exclude medical professionals as supervisors. S. REP. NO. 766, 93d Cong., 2d Sess. 6 (1974).

⁴⁰ LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 309 (1947).

⁴¹ *Id.*

⁴² 91 L.R.R.M. at 1400.

the direct patient care activities commonly performed by the housestaff for about 80% of their time at the hospital.⁴³ These patient care activities are services which the hospital "sells" to the public in terms of providing medical care to patients for a fee. The nature of their service is the same, whether provided by a housestaff member or a senior physician of the hospital.⁴⁴ Activities which are "primarily educational" do not usually contemplate a process so economically and contractually oriented.

Similarly, the majority suggests that the stipend received by the housestaff is a scholarship and not a regular salary.⁴⁵ Yet a common understanding of the term "scholarship" would not seem to contemplate, in addition to the monetary payment, such accompanying employee-like benefits as paid holidays, annual vacations, or free medical and dental care.⁴⁶ Further, even though the majority indicates that the "stipends" are given to all housestaff members without regard to need or merit,⁴⁷ "scholarships" are not commonly awarded to all members of an institution indiscriminately. Finally, most people would agree that "scholarships" are not usually graduated according to one's tenure at the institution, yet the majority indicates that this is the case at the medical center.⁴⁸ In sum, mere characterization of activities as "educational" or stipends as "scholarships" should not negate the exhaustive indicia of employment status enjoyed by the housestaff members.

Another compelling reason supporting Member Fanning's opinion is that a finding that housestaff were employees would further policies of the NLRA. The Supreme Court in *NLRB v. Hearst Publications, Inc.*⁴⁹ indicated that the proper legal standard to use in determining whether an individual is an "employee" is to determine "whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."⁵⁰ One of the primary purposes of the Act is to forestall strikes, pickets, and other disruptions in interstate commerce.⁵¹ It was believed that by protecting the rights of labor to organize and elect representatives for the purposes of collective bar-

⁴³ See notes 16-19 and accompanying text *supra*.

⁴⁴ 91 L.R.R.M. at 1402 (Member Fanning dissenting).

⁴⁵ *Id.* at 1400. See notes 16-20 and accompanying text *supra*.

⁴⁶ See notes 16-20 and accompanying text *supra*.

⁴⁷ 91 L.R.R.M. at 1400.

⁴⁸ See notes 17 and accompanying text *supra*.

⁴⁹ 322 U.S. 111 (1944). In *Hearst*, the Supreme Court upheld an NLRB decision that merchants who purchased newspapers from a publisher and sold them on the street were "employees" of the publisher under the Act. *Id.* at 131-32. Although Congress nullified this holding in the 1947 Taft-Hartley amendments to the NLRA, see LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 309 (1947), the Supreme Court's approach to interpreting "employee" under the Act is still sound. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

⁵⁰ 321 U.S. at 131-32.

⁵¹ See 29 U.S.C. § 151 (1970).

gaining, the peaceful adjustment of industrial disputes would be encouraged. Employees organized into unions could bargain on an equal level with employers and would not have to resort to the unsettling weapons of economic warfare.⁵² The national exclusion of housestaff members from this process of peaceful adjustment will, as Member Fanning notes,⁵³ defeat this statutory purpose by insuring that such health care professionals resort to repeated strikes and picket lines which could have a debilitating impact upon the delivery of health care services to the public. The correct approach towards meeting the directive in *Hearst*⁵⁴ would be to bring such medical personnel within the protection of the Act, so that the procedures and sanctions of the Act can be utilized to settle disputes peacefully and to minimize the potential for disruption of health care delivery to the public.

It is unlikely, however, that the Board's decision in *Cedars-Sinai* will be reversed. Review of Board decisions with regard to representation petitions is available in the circuit courts only in the context of an unfair labor practice complaint where the party charged with the unfair practice defends on the grounds that the Board's certification of the union as bargaining representative is inappropriate.⁵⁵ Thus, the Medical Center could have obtained judicial review of a Board decision which certified the Housestaff Association merely by refusing to bargain with the Association. This refusal to bargain would lead to an unfair labor practice charge against the Medical Center under section 8(a)(5).⁵⁶ The center could admit to the refusal to bargain charge at the Board hearing and contest the Board's petition for enforcement⁵⁷ at the circuit court level by claiming that the Board's certification of the Association as bargaining representative was inappropriate because the Association was not a "labor organization" entitled to act as bargaining representative. Admittedly the judicial review would be limited as, under *Hearst* standards, a circuit court will review the Board's determination of what constitutes a "labor organization" only to determine whether it has "warrant in the record" or a "reasonable basis in law."⁵⁸

⁵² See *id.* As stated in *Hearst*, Congress sought to "bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established." 322 U.S. at 125.

⁵³ 91 L.R.R.M. at 1406 (Member Fanning dissenting).

⁵⁴ See text at notes 49-50 *supra*.

⁵⁵ See 29 U.S.C. §§ 160(c) & (e) (1970).

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

⁵⁷ 29 U.S.C. § 160(e).

⁵⁸ *Hearst*, 322 U.S. at 130-31 (1944). The Supreme Court stated in *Hearst* that the Board has broad authority to make these determinations because that agency has developed through "everyday experience in the administration of the statute" a "familiarity with the circumstances and backgrounds of employment relationships in various industries." *Id.* at 130.

An association which is denied certification as bargaining representative, on the other hand, has no standing under the NLRA to secure review at the Circuit Court level.⁵⁹ Only a "labor organization" can commit an unfair labor practice under NLRA section 8(b).⁶⁰ Once the Board concluded that the Cedars Sinai Housestaff Association was not such a "labor organization," it was statutorily impossible for the Association to commit the unfair labor practice which would trigger a process of review.⁶¹ Thus it would seem that while an employer can secure the limited judicial review provided in *Hearst* for Board decisions allowing certification of a union, an association which is denied "labor organization" status cannot.⁶² While this anomalous framework of review seems unfair, the statute, unfortunately, provides no answer. With avenues to judicial review foreclosed and the likelihood of a change in the Board's position with respect to residents and interns slight,⁶³ those who would seek to overturn the *Cedars-Sinai* decision must look to state labor boards,⁶⁴ state legislatures, and the Congress to reach a different conclusion—namely, that national labor policy is better served by including housestaff personnel within the protection of the labor laws than by leaving them to their own devices.

V. NLRB OBLIGATIONS UNDER THE FREEDOM OF INFORMATION ACT: *NLRB v. Sears*

The Survey Year saw significant judicial development of the law governing the NLRB's disclosure obligations under the Freedom of

⁵⁹ See *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 306 (1943).

⁶⁰ Section 8(b) makes it an unfair labor practice for a "labor organization" to commit certain acts. 29 U.S.C. §§ 158(b) *et seq.* (1970).

⁶¹ Cf. *Adams v. Federal Express Corp.*, No. 75-2340 (6th Cir. 1976) (uncertified labor organization does not have implied right of action under Railway Labor Act).

⁶² The justification for the lack of judicial review for an organization whose petition for recognition is dismissed by the Board is explained in H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 344-46 (1973). Professor Hart indicates that an employee who is denied an "advantage" by the agency created for his special protection has less of a claim for judicial review than the employer who is forced to do something to his disadvantage. Professor Hart cites *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943) for the proposition that Congress in enacting the NLRA intended to preclude an unsuccessful union in the Board's certification proceedings from securing judicial review. *Id.* at 345.

An unsuccessful union might look to *Leedom v. Kyne*, 358 U.S. 184, 189 (1958) to secure judicial review in a United States district court if it could show that the Board ignored a specific prohibition of the NLRA. However, while some may dispute the Board's factual determination in *Cedars-Sinai*, the Board's ultimate decision seems to fall within its statutory discretion. See note 58 *supra*.

⁶³ The Board subsequently denied the Housestaff Association's motion for reconsideration. *Cedars-Sinai Medical Center*, 224 N.L.R.B. No. 90, 92 L.R.R.M. 1302 (1976). The Board has consistently refused to modify its *Cedars-Sinai* holding. See *Barne's Hospital*, 224 N.L.R.B. No. 83, 92 L.R.R.M. 1366 (1976); *St. Clove's Hospital*, 223 N.L.R.B. No. 163, 92 L.R.R.M. 1001 (1976).

⁶⁴ However, the Board has indicated that it did intend its decision in *Cedars-Sinai* to preempt state labor board jurisdiction over representation petitions presented by associations seeking to represent interns and residents. *Kansas City General Hospital*, 225 N.L.R.B. No. 14A, 93 L.R.R.M. 1362 (1976).

Information Act (FOIA).¹ In *NLRB v. Sears, Roebuck & Co.*,² the Supreme Court considered whether certain Advice and Appeals Memoranda and related documents³ prepared by the Board's General Counsel in deciding whether to file an unfair labor practice complaint⁴ were subject to disclosure under the FOIA. The Court

¹ 5 U.S.C. § 552 (1970), as amended, 5 U.S.C. § 552 (Supp. V, 1975).

² 421 U.S. 132 (1975).

³ In order to understand the judicial approach to determining which Board documents must be disclosed or withheld under the FOIA, an understanding of both the function that these documents serve and the process by which they are produced is necessary. The generation of documents begins with the filing of a "charge" with one of the Board's thirty-one Regional Directors. 29 U.S.C. §§ 153(d), 160(b) (1970); 29 C.F.R. § 101.2 (1974). See generally *Sears*, 421 U.S. at 138-42. The Regional Director's office informally investigates the complaints by interviewing witnesses and gathering evidence. This process eventually generates an investigatory file. 29 C.F.R. § 101.4 (1974). See *Sears*, 421 U.S. at 139. Much recent litigation has centered around gaining access to the materials contained in these files. See generally Samoff and Falkin, *The Freedom of Information Act and the NLRB*, 15 B.C. IND. & COM. L. REV. 1267, 1278-80 (1974) [hereinafter cited as Samoff & Falkin]. When the investigation is complete the Regional Director will do one of three things. If the complaint raises novel and unusual legal issues, the director may voluntarily or at the direction of the General Counsel, submit a memorandum summarizing the facts and issues in the case and a recommendation to the General's Advice Branch in Washington. See *Sears*, 421 U.S. at 141. An Advice Branch staff attorney will research the legal issues and report to an Advice Committee. The Committee will then form a recommendation which is communicated to the General Counsel along with any dissenting views. The General Counsel, after considering the recommendation, will send an Advice Memorandum summarizing the facts and the legal and policy issues to the director with instructions for the final handling of the case. The Regional Director will routinely follow the "advice" of the General Counsel as to whether or not he should file the unfair labor practice charge. See *id.* at 142. See Samoff & Falkin, *supra* at 1273-74.

If the "advice" is not to file the complaint, the charging party may yet appeal the decision to the General Counsel's Appeals Branch. Samoff & Falkin, *supra* at 1273-74. An Appeals Branch staff attorney researches the case and prepares a memorandum which is called an Agenda Minute. The Minute contains a summary and analysis of the pertinent law and facts and a conclusion. The Minute then serves as the basis for discussion by the Appeals Committee, who thereafter issues an Appeals Memorandum containing its decision and the reasons for it. See *Sears*, 421 U.S. at 140. The Appeals Branch in this capacity seldom reverses the Advice Branch's conclusions. See *id.* at 158-59 n.25. After clearance through the General Counsel, the decision whether to file a complaint or not is communicated to the Regional Director, who again routinely follows the decision. See *id.* at 140.

A different situation is presented when the charge does not raise unusual or novel legal issues. In these instances the Regional Director will, depending on whether the charge has merit, himself decide whether to issue or refuse to issue a complaint. See *id.* at 139. The charging party may appeal a Director's refusal to issue a complaint to the Appeals Branch and the same process of producing an Appeals Memorandum is commenced. See *id.* at 139-40. If the Regional Director is reversed and instructed to issue a complaint, the Appeals Memorandum will usually offer litigation strategy and settlement advice. See Samoff & Falkin, *supra* at 1274.

⁴ Congress has delegated to the General Counsel the unreviewable authority to determine whether to file an unfair labor practice complaint. 29 U.S.C. § 153(d) (1970). See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). This authority may have been limited by the *Survey* year decision of *Dunlop v. Bachowski*, 421 U.S. 560 (1975). In *Dunlop*, an action arising under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* (1970), the Supreme Court held that the Secretary of Labor's refusal

unanimously held that Advice and Appeal Memoranda explaining the General Counsel's decision *not to file* such a complaint must be disclosed pursuant to the FOIA's provision for disclosing "final opinions" made in the "adjudication of cases."⁵ However, the Court also held that those memoranda explaining the General Counsel's decision *to file* such a complaint are *not* "final opinions,"⁶ but rather are protected from disclosure as part of the General Counsel's "work product."⁷

A complete understanding of the Court's result requires a short preliminary exposition of the FOIA and its principal objectives. The FOIA was enacted July 4, 1966 as part of Congress's broad plan "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."⁸ FOIA section 552(a)⁹ requires federal agencies to make available to any member of the public¹⁰ all documents that are not excluded

to file suit on behalf of an unsuccessful union candidate *was* reviewable in federal district court. 421 U.S. at 566. The Court further held that the scope of review is limited to determining whether the Secretary's decision was "arbitrary and capricious." *Id.* at 572-73. However, *Dunlop* could be read as not limiting the General Counsel's discretion whether to file an unfair labor practice charge under the NLRA since the LMDRA provision the Court considered in *Dunlop*, 29 U.S.C. § 482(b) (1970), does not specifically give the Secretary of Labor the "final authority" left to the General Counsel under the NLRA. *See* 29 U.S.C. § 153(d) (1970).

⁵ 421 U.S. at 155-59. The Court found that the memoranda fell within 5 U.S.C. § 552(a)(2)(A) (1970), which provides that the agency shall make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . ."

The Court also found that such memoranda did not fall within Exemption 5 of the FOIA. *See id.* at 158-59. Exemption 5 is codified at 5 U.S.C. § 552(b)(5) (1970), and protects from disclosure matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

⁶ 421 U.S. at 159-60. The Court found that such memoranda are not final dispositions of the complaints by the General Counsel who still, by law, must advocate the charging party's position before the Board. The General Counsel's duty to advocate the charging party's position before the NLRB is codified in 29 U.S.C. § 153(d) (1970).

⁷ 421 U.S. at 160. The Court reasoned that the memoranda are prepared "in contemplation of the upcoming litigation" before the Board and thus would contain litigation strategy and settlement advice within the scope of the attorney work-product privilege. The Court thus found that the memoranda explaining decisions to file a complaint did fall within Exemption 5, 5 U.S.C. § 552(b)(5) (1970), since this exemption incorporates the work-product privilege. *See* 421 U.S. at 160. As the Court stated, the attorney's work-product privilege was "clearly incorporated" by Congress into Exemption 5. 421 U.S. at 160. *See generally* EPA v. Mink, 410 U.S. 73, 85-86 (1973). Exemption 5 is quoted at note 5, *supra*.

In addition, the Court held that documents incorporated by reference in the non-exempt Advice and Appeals Memoranda lost any exemption they might previously have held as "intra-agency memoranda" under Exemption 5, unless they were covered by one of the other exemptions of the FOIA. 421 U.S. at 161.

⁸ S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter S. REP. NO. 813]. *See also* EPA v. Mink, 410 U.S. 73, 79-80 (1973).

⁹ 5 U.S.C. § 552(a) (1970), *as amended*, 5 U.S.C. § 552(a) (Supp. V, 1975).

¹⁰ The Act makes no distinction between members of the public who may or may not have a special interest in the material sought to be disclosed. *See* S. REP. NO. 813,

under one of the nine enumerated exemptions.¹¹ Section 552(b) sets out the nine exemptions which limit the broad disclosure requirements of subsection (a).¹² In general, the purpose of the exemptions is to protect from disclosure certain confidential agency records and processes.¹³ The exemptions, which are intended to set up concrete

supra note 8, at 5; H.R. REP. NO. 1497, 89th Cong., 2d Sess. 1 (1966) [hereinafter H.R. REP. NO. 1497]. See *EPA v. Mink*, 410 U.S. 73, 92 (1973).

¹¹ *EPA v. Mink*, 421 U.S. 73, 79 (1973). 5 U.S.C. § 552 (c) (1970) explicitly makes the nine exemptions exclusive.

In particular, section 552(a)(1) directs that the agency publish certain documents such as "rules of procedure" in the Federal Register. See generally 5 U.S.C. §§ 552(a)(1)(A)-(E) (1970). In addition, subparagraph (a)(2) requires that all "(A) final opinions . . . made in the adjudication of cases; (B) statements of policy and interpretations . . . not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public . . ." be indexed and made available to the public on demand. 5 U.S.C. §§ 552(a)(2)(A)-(C) (1970). Finally, and most broadly, subparagraph (a)(3) provides for public access to all records which are reasonably described by the party seeking disclosure. 5 U.S.C. § 552(a)(3) (Supp. V, 1975).

5 U.S.C. §§ 552(a)(4)(B)-(D) (Supp. V, 1975), sets out the procedural mechanisms for private actions in federal district court to compel agency disclosure. In particular, § 552(a)(4)(D) (Supp. V, 1975) gives FOIA cases a precedence on the docket over all cases except those the district or appeals courts consider of greater importance.

¹² 5 U.S.C. § 552(b) (1970), as amended, 5 U.S.C. § 552(b) (Supp. V, 1975) states that the Act does not apply to matters:

- (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the purpose of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning wells.

¹³ S. REP. NO. 813, *supra* note 8, at 3. H.R. REP. NO. 1497, *supra* note 9, at 6.

workable standards for determining whether material must be disclosed or may be withheld,¹⁴ are narrowly defined and strictly construed.¹⁵ In addition, the burden is on the agency to demonstrate that the documents sought may be withheld under any of the exemptions set forth in subsection (b).¹⁶ The courts' ultimate task when addressing a section 552 disclosure case is to balance the agency's need to maintain the confidentiality of certain information against the public's right to know, paying particular attention to the latter. As the Congressional Report accompanying the FOIA stated, "success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."¹⁷

Against this background, the Supreme Court decided *NLRB v. Sears, Roebuck & Co.*¹⁸ In *Sears*, the respondent had filed an unfair labor practice charge with the NLRB regional director alleging that the Retail Clerks' International Union had violated section 8(b)(3) of the National Labor Relations Act.¹⁹ Prior to the issuance of a complaint, Sears had requested that the NLRB General Counsel make available all Advice and Appeals Memoranda issued over the previous five years which related to similar unfair labor practice charges.²⁰ The General Counsel refused, claiming that the memoranda were exempt from disclosure under Exemption 5,²¹ which protects agency memoranda or letters that would not be discoverable by a private party in litigation with the agency.²² Consequently, Sears brought suit under the FOIA to compel the disclosure of the memoranda and "certain other materials incorporated by reference therein."²³

The district court concluded that all Advice and Appeals Memoranda and all documents incorporated by reference therein

¹⁴ *EPA v. Mink*, 410 U.S. 73, 79 (1973).

¹⁵ *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

¹⁶ 5 U.S.C. § 552(a)(4)(B) (Supp. V, 1975) amending 5 U.S.C. § 552(a)(4) (1970).

¹⁷ S. REP. NO. 813, *supra* note 8, at 3. H.R. REP. NO. 1497, *supra* note 9, at 6.

¹⁸ 421 U.S. 132 (1975).

¹⁹ 346 F. Supp. 751, 753, 80 L.R.R.M. 3428, 3429 (D.D.C. 1972). Section 8(b) (3) provides that "it shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer." 29 U.S.C. § 158(b)(3)(1970).

²⁰ 421 U.S. at 142-43. Specifically, *Sears* sought Memoranda on the subjects of employer-union withdrawal from multi-employer bargaining units, commencement date of negotiations, contract successorships, and lockouts occurring in multi-employer bargaining situations. *Id.* at 142-43 & n.9.

²¹ 346 F. Supp. at 753, 754, 80 L.R.R.M. 3429, 3431.

²² 5 U.S.C. § 552 (b) (5) (1970). The text of Exemption 5 is set out at note 5 *supra*.

²³ 346 F. Supp. at 752, 80 L.R.R.M. at 3429. Meanwhile the General Counsel had announced that he would make available all Advice and Appeals Memoranda with certain deletions of names of witnesses and other "sensitive" matter when the case involved was completed. *Id.* at 752-53 n. 2, 80 L.R.R.M. at 3429 n. 2. See 421 U.S. at 145. However, he refused to disclose memoranda related to cases which had not been completed ("open cases"). *Id.* Sears moved for summary judgment to compel disclosure of memoranda in 'open' cases and to put an end to the practice of deleting materials from 'closed' cases. The General Counsel also moved for summary judgment. *Id.*

must be disclosed.²⁴ The United States Court of Appeals for the District of Columbia Circuit affirmed²⁵ on the basis of its decision in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*.²⁶ The Supreme Court granted certiorari to the Board.²⁷ Reversing the Circuit Court in part, the Supreme Court HELD: memoranda explaining decisions of the General Counsel to file a complaint are exempt from disclosure due to the protection afforded intra-agency memoranda under Exemption 5.²⁸ Conversely, memoranda explaining decisions

²⁴ The district court's reasoning on this point is somewhat unclear. The district court took the correct approach in analyzing whether the documents fell within one of the exemptions, for documents which did not fall within the exemptions would have to be made available under the broad disclosure requirements of section 552 (a). 346 F. Supp. at 753-54, 80 L.R.R.M. at 3430-31. The General Counsel had claimed that the Advice and Appeals Memoranda fell within Exemption 5's protection of "inter-agency memoranda." The district court, expressing the fear that a broad interpretation of the exemption might engulf the rule, held that Exemption 5 did not apply to a "final determination of the General Counsel's staff of the disposition of a charge." *Id.* at 754, 80 L.R.R.M. at 3430 (emphasis supplied). The district court found that the Advice Memoranda were final determinations since they contained instructions which were "mandatory in substance" and which the Regional Directors routinely followed. *Id.* at 753, 80 L.R.R.M. at 3430. See note 3 *supra*.

The district court further found that the Advice Memoranda were "instructions to staff that affect a member of the public," and thus must be disclosed under section 552 (a) (2) (C) of the FOIA. *Id.* See note 11 *supra*. However, this latter finding was unnecessary since, once having determined that the exemptions did not apply, the memoranda would have to be disclosed. See notes 9-17 and accompanying text *supra*. Similarly, the district court found that the Appeals Memoranda should be disclosed as "'final opinions' within the meaning of the Act" (presumably referring to § 552(a) (2) (A) of the FOIA), and thus, outside the protection of Exemption 5. 346 F. Supp. at 754, 80 L.R.R.M. at . Finally, the district court held that "documents incorporated by reference" in the memoranda lost whatever exempt status they may have had previously by reason of incorporation. *Id.*, citing *American Mail Line, Ltd. v. Gulick*, 411 F. 2d 696, 703 (1968).

The district court's relief was broad. It mandated: disclosure of all Advice and Appeals Memoranda ever issued and all documents expressly incorporated by reference; production and compilation, if necessary, of indices of the memoranda; explanation of vague references in the memoranda; and termination of the practice of deleting information from the memoranda without written justification. 346 F. Supp. at 755, 80 L.R.R.M. at 3431.

²⁵ 480 F. 2d 1195, 83 L.R.R.M. 3045 (D.C. Cir. 1973).

²⁶ 482 F. 2d 710 (D.C. Cir. 1973). In *Grumman*, a contractor invoked the FOIA to compel disclosure of documents generated by the Renegotiation Board and its Regional Boards in performing their task of deciding whether certain government contractors must refund excessive profits from their federal contracts. *Id.* at 711. The Court of Appeals for the District of Columbia held that the documents explaining the decisions of the Regional and National Board to seek or not to seek refunds must be disclosed pursuant to 5 U.S.C. § 552 (a)(2)(A) (1970) as "final opinions." *Id.* at 712. The Supreme Court ultimately reversed the Circuit Court, holding that the documents were protected from disclosure under FOIA Exemption 5. 421 U.S. 168, 183-90 (1975).

²⁷ 417 U.S. 907 (1974).

²⁸ 421 U.S. at 159-60. The Supreme Court affirmed the Circuit Court with respect to the disclosure of memoranda which explained the General Counsel decision not to file a complaint, *id.* at 155-59, and the disclosure of documents incorporated by reference in non-exempt memoranda. *Id.* at 161. However, the Supreme Court reversed the Circuit Court affirmation of the district court order to the Board to produce

not to file a complaint must be disclosed under the FOIA.

The Supreme Court grounded its holding on its view of the proper construction and scope of Exemption 5. In light of the FOIA's legislative history, the Court found it reasonable to conclude that Exemption 5 was designed to protect only those documents normally privileged in the civil discovery context.²⁹ The privileges claimed by the government to be relevant in *Sears*—the government's executive privilege³⁰ and the work-product privilege available to all attorneys in litigation³¹—were found to be among the type of privileges normally operative in the civil discovery context. Hence, these privileges were found to be within the scope of Exemption 5.³²

The Court then explained the relevance of both of these privileges within the context of Exemption 5. First, the Court noted that the exact scope of the executive privilege in the context of the FOIA was less than clear.³³ Citing legislative history as well as prior case law, the Court found that the purpose of the privilege was to encourage "frank discussion of legal or policy matters."³⁴ The Court pointed out that the requirement of public disclosure of all communications would cause many "to temper candor with a concern for appearances . . . to the detriment of the decision-making process."³⁵ However, applying a distinction drawn by the lower courts in the civil discovery context,³⁶ the Court found that the only situations in which the decision-making process would be inhibited by disclosure were those in which the communication was received by the decisionmaker prior to the time the decision was made.³⁷ Thus, the Court determined that pre-decisional communications which provide the input for a final decision are protected under the government's executive privilege; communications made *after* the decision and designed to explain it are not.³⁸ In other words, the Court determined that within the confines of Exemption 5, the scope of the government's executive privilege extends only to those confidential intra-agency opinions which form the "ingredients of the decisionmaking process."³⁹ The disclosure of post-

or create explanatory material for certain vague references in all the memoranda. *Id.* at 161-62.

²⁹ *Id.* at 149.

³⁰ See generally *EPA v. Mink*, 410 U.S. 73, 85-87 (1973); *Kaiser Aluminum & Chemical Corp.*, 157 F. Supp. 939, 946 (1958).

³¹ See *Hickman v. Taylor*, 329 U.S. 495, 510-14 (1947).

³² 421 U.S. at 150-55. The Court relied heavily on the relevant passages in the legislative history of the FOIA. See S. REP. NO. 813, *supra* note 8, at 9; H.R. REP. NO. 1497, *supra* note 9, at 10.

³³ 421 U.S. at 150.

³⁴ *Id.* at 150, citing S. REP. NO. 813, *supra* note 8, at 9.

³⁵ 421 U.S. at 150-51, citing *United States v. Nixon*, 418 U.S. 683, 705 (1974).

³⁶ 421 U.S. at 151-52, citing, e.g., *Sterling Drug Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971) (non-privileged post-decisional communications); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960) (privileged predecisional communications).

³⁷ 421 U.S. at 151.

³⁸ *Id.* at 151-53 (emphasis supplied).

³⁹ *Id.* at 151.

decisional information is justified, the Court explained, because, unlike the disclosure of predecisional information, it would have no detrimental impact on the quality of the decision.⁴⁰ Further, the Court found a strong public interest in knowing the reasons for an agency decision, since such reasons constitute the "working law" of the agency.⁴¹ Thus, the Court concluded that the correct application of Exemption 5 in light of the government's executive privilege required disclosure of all opinions and interpretations which embody the agency's effective law and policy and allowed protection of all papers "which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."⁴²

The Court's discussion of attorney's work-product privilege was somewhat limited. However, the Court did determine that, at a minimum, the work-product rule clearly protected memoranda and documents which set forth the agency attorney's theory of the case and his litigation strategy.⁴³

Having identified the factors that were relevant to determine the scope of Exemption 5, the Court addressed the issue of whether that Exemption applied to the Advice and Appeals Memoranda sought by the respondent in *Sears*.⁴⁴ With respect to this issue, the Court found

⁴⁰ *Id.* at 152.

⁴¹ *See id.* at 152-53.

⁴² *Id.* at 153, citing Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967).

⁴³ 421 U.S. at 154. The Court relied on the Senate Report which explained Exemption 5 as including "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." S. REP. NO. 813, *supra* note 8, at 2.

⁴⁴ The Supreme Court refused to rule on the General Counsel's claim that the memoranda were protected under the FOIA's Exemption 7. 5 U.S.C. § 552(b)(7) (1970) (amended 1974). At the time respondent *Sears* filed suit, Exemption 7 protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7)(1970). Some time after the General Counsel filed his brief but before the Supreme Court decided the case, Congress amended Exemption 7. 5 U.S.C. § 552(b)(7) (Supp. V, 1975). The amended version of Exemption 7 is far more limited and specific, protecting:

[i]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

Id. However, the General Counsel did not raise the Exemption 7 claim until he reached the United States Court of Appeals for the District of Columbia. 421 U.S. at 163. Since that court affirmed without an opinion, the Supreme Court was left without a lower court determination of the legal issues and the factual question of whether the memoranda contained "information the disclosure of which would offend the purposes of Exemption 7." *Id.* at 163. Under those circumstances, the Supreme Court declined to consider the claim and it remained for the Court of Appeals to determine whether the General Counsel's failure to raise the claim in the district court foreclosed further consideration of the issue. *See id.* at 164-65 § n.30. For the same reason, the Court refused to consider the General Counsel's claim that the memoranda were protected under Ex-

three important differences between memoranda which concluded that no complaint shall be issued ("closed" cases) and those which directed the issuance of a complaint with the Board ("open" cases).⁴⁵ The remainder of this section will examine the Court's three distinctions between "closed" and "open" cases in establishing the disclosure requirements for Board memoranda. It will then discuss whether or not the distinctions as developed and applied by the Supreme Court are workable and appropriate. It will ultimately be submitted that such distinctions create too broad a sphere of protection for Board documents, which results in an unnecessarily restricted public access to important agency documents.

A. *Final Dispositions*

The Court found that memoranda explaining the General Counsel's decisions not to file complaints constitute "final dispositions" within the meaning of the FOIA, since they chronologically represent

emption 2, 5 U.S.C. § 552(b)(2) (1970), which exempts documents "related solely to the internal personnel rules and practices of an agency." See 421 U.S. at 165.

Despite this "hands-off" policy, the Court in dicta made several significant observations on the purposes and scope of the amended and unamended versions of Exemption 7. The Court noted that the amended version of Exemption 7 was less favorable than the former version for the General Counsel's claim, 421 U.S. at 165 n.30. The Court then indicated an unfavorable disposition towards the merits of the General Counsel's claim even under the unamended version. *Id.* at 163 n.28. The Court stated that the purposes of the former version were "to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information." *Id.*, citing *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir.), cert. denied 409 U.S. 889 (1972). The Court then pointed out that the purpose of allowing the Government to present its strongest case in court was "plainly inapplicable" when the General Counsel decides not to file a charge. Secondly, the Court indicated that the purpose of maintaining the confidentiality of agency investigative techniques is only speculatively impeded absent proof by the General Counsel that the memoranda reveal some confidential information. 421 U.S. at 163 n.28.

The Court also stated in dicta that documents protected by Exemption 7, unlike those protected by Exemption 5, do not lose their exempt status merely by incorporation in nonexempt memoranda. *Id.* at 166. The Court found that the purposes in protecting "investigatory files" under the original version and the amendments are as equally applicable to documents incorporated in the memoranda as they are to documents which are not.

The Court's return of the Exemption 7 issues to the Circuit Court merits little comment. The 1974 amendment to the exemption is narrowly defined. The exemption either applies or it does not; balancing the public's interest in disclosure against the agency's need for confidentiality is not appropriate here. See text at note 17 *supra*. Further, it would seem that there is even a greater need for strict application of Exemption 7 than there is for Exemption 5. Disclosure of Exemption 5 material may only inhibit the decision-making process while disclosure of Exemption 7 information could in the future deter witnesses from coming forward, thereby frustrating Board investigations. The Survey year saw a wealth of cases arise under Exemption 7. See note 83 *infra*.

⁴⁵ See 421 U.S. at 153-55, 158-59 (final dispositions); *id.* at 151-53, 155-57 (agency versus public interest); *id.* at 159-60 (work-product privilege applicability).

the last agency action on a charge filed by the private party.⁴⁶ By contrast, memoranda directing the issuance of complaints are not chronologically final dispositions. In this situation, the General Counsel still has the statutory duty to advocate the charging party's position before the Board in the subsequent unfair labor practice proceedings.⁴⁷

The characterization of closed memoranda as "final dispositions" is important, the Court noted, in light of the language of the FOIA. FOIA section 552(a)(2)(A) requires that "final opinions" which are made in the "adjudication of cases" be made available to the public.⁴⁸ Under the Administrative Procedure Act (APA) of which the FOIA is a part, an "adjudication" is defined as an "agency process for the formulation of an order."⁴⁹ An "order" is defined as "the whole or a part of a *final disposition* . . . of an agency in a matter."⁵⁰ Since the Court determined that the General Counsel's decision not to issue a complaint was a "final disposition" within the meaning of the APA,⁵¹ such decisions must be disclosed pursuant to section 552(a)(2)(A). The Court reasoned that since Advice and Appeals Memoranda explain the reasons for the "final disposition" they qualify as "opinions" made in the "adjudication of cases," and therefore Exemption 5 "can never apply."⁵² The General Counsel's decision to issue a complaint, on the other hand, is not a "final disposition" since the General Counsel still must advocate the charging party's position before the Board.⁵³ Therefore, since such a decision is not a "final disposition," the memorandum explaining the decision does not qualify as an "opinion" made in the "adjudication" of a case within the statutory definition of the APA.⁵⁴ Thus, section 552(a)(2)(A) is inapplicable and Exemption 5 protects disclosure of these "open" memoranda. This means that section 552(a)(2)(A)'s disclosure requirements will always be limited to "closed" cases, since "open" cases will, by definition, never be "final dispositions."

The Court did evidence some confusion in its application of a "finality" standard to determine which Board documents must be disclosed as FOIA "final dispositions." In a note, the Court pointed out that an Advice Memorandum decision stating that a complaint should not be issued would, on rare occasion, be overturned in an Appeals Memorandum. In this situation, the original Advice Memorandum

⁴⁶ *Id.* at 158-59 n.25, 160.

⁴⁷ *Id.* at 159-60. The Court did not explicitly set out this "finality" standard since at times it confused its discussion of FOIA "final dispositions" with language indicating that final dispositions could also be those decisions that do not represent the last agency action in a matter but nonetheless have "real operative effect." *Id.* at 155. However, the Court's intention can fairly be inferred. See text at notes 55-57 *infra*.

⁴⁸ 5 U.S.C. § 552(a)(2)(A) (1970) (emphasis supplied).

⁴⁹ *Id.* at § 551(7).

⁵⁰ *Id.* at § 551(6) (emphasis supplied).

⁵¹ 421 U.S. at 158-59.

⁵² *Id.* at 153-54.

⁵³ *Id.* at 160.

⁵⁴ See *id.* at 158.

would lose its temporal finality because the General Counsel would now have the duty to bring the charge before the Board. The Court then stated that this possibility of appeal would not affect the obligation of the Board to disclose the initial Advice Memorandum: "The decision reached in the Advice Memorandum, in the absence of an appeal filed by the charging party, has *real operative effect*, as much as does every order issued by a United States district court which might, if appealed, be overturned by a United States Court of Appeals."⁵⁵ Thus, while an Advice Memorandum directing non-issuance of a complaint may lose its temporal "finality" if it is overturned by an Appeals Memorandum, it nonetheless may be a "final disposition" because it has "real operative effect."

However, it is clear that the Court did not want a "real operative effect" standard to determine whether a Board document is a FOIA "final disposition." For example, the Court admitted that open memoranda have "operative effect" since they permitted litigation before the Board.⁵⁶ Nonetheless, this operative effect did not lead the Court to conclude that open memoranda must be disclosed. Instead the Court concluded that they were not disclosable "final dispositions" since they did not constitute the chronologically "final" agency action with respect to the unfair labor practice charge.⁵⁷ The resolution of this confusion may lie in viewing the "real operative effect" standard as limited to the cases of closed Advice Memoranda which may later be overturned by an Appeals Memorandum, and in interpreting "finality" in a chronological sense.

B. *Agency v. Public Interest*

The second major distinction discerned by the Court between the memoranda in "closed" and "open" cases was the difference in the nature of the public interests at stake.⁵⁸ The Court found a greater public interest in disclosing memoranda in "closed" cases since the decisions not to file and the reasons for them have precedential impact and, as such, constitute "agency law with which the public is vitally interested and which Congress sought to prevent the agency from keeping secret."⁵⁹ In addition, the Court stated that disclosure of these memoranda would not infringe upon the government's executive privilege. Disclosure of "closed" memoranda could have no impact on the predecisional process because by the time they are communicated to the Regional Director the decision-making process has been completed.⁶⁰ On the other hand, the public interest in disclosure of memoranda in "open" cases, the Court found, was reduced by the fact

⁵⁵ *Id.* at 158-59 n.25 (emphasis supplied).

⁵⁶ *See id.* at 160.

⁵⁷ *Id.*

⁵⁸ *Id.* at 151-53, 155-57.

⁵⁹ *Id.* at 155-56.

⁶⁰ *Id.* at 155.

that the underlying "subject matter, theory, and interpretation [of the case] will ultimately be ventilated" through the litigation process.⁶¹ Further the Court found that the disclosure of "open" memoranda would violate the government's executive privilege by revealing the agency's "group thinking in the process of working out its policy and determining what its law shall be."⁶²

The Court's concern with impeding the predecisional process seems somewhat misplaced. The Court did not indicate how disclosure of memoranda in "open" cases could have a detrimental impact on the decision-making process. Advice and Appeals Memoranda do not contain dissenting views. Thus, it is difficult to see how an agency employee would be inhibited from expressing his views and recommendations since they would not only be made public if the General Counsel chose to adopt the views as his own in the memorandum.

The Court's decision that documents incorporated by reference in non-exempt memoranda should be disclosed indicates the inconsistency in the Court's approach to protecting the Government's executive privilege. Documents incorporated by reference in non-exempt memoranda must be disclosed despite independent Exemption 5 protection, the Court held, because such disclosure would not inhibit the decision-making process:

If an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.⁶³

Agency employees, the Court believed, would be "encouraged rather than discouraged" by the public knowledge that their views were adopted by the agency.⁶⁴ For these same reasons, it is submitted that the purpose of Exemption 5's executive privilege protecting the confidentiality of the decision-making process is not furthered by a blanket exemption in "open" cases. Rather, the inquiry should be whether disclosure of the contested documents would be "injurious to the consultative functions of government."⁶⁵ The burden should be on the

⁶¹ The Court quoted with approval from 2 ABA LABOR RELATIONS LAW SECTION 7 (1970).

⁶² 421 U.S. at 151-53, citing Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967).

⁶³ 421 U.S. at 161. However, the Court, in a very terse paragraph, reversed the circuit court's affirmation of the district court order to the Board to produce or create explanatory material in those instances in which a memorandum refers to the "circumstances of the cases." The Court indicated that the FOIA compelled disclosure of documents in existence but did not require agencies to write opinions where they were not otherwise statutorily obligated to do so. *Id.* at 161-62.

⁶⁴ *Id.* at 161.

⁶⁵ See *EPA v. Mink*, 410 U.S. 73, 87 (1973).

agency to demonstrate the specific impact,⁶⁶ for surely the FOIA was not intended to allow blanket exemptions across-the-board merely upon an assumed impact. It is only in this manner that the least restrictive method of protecting confidential agency information can be accomplished while allowing the greatest possible access to information with which the public has a vital concern.

C. Work-Product Privilege

The third distinction noted by the Court relates to the operation of the attorney work-product privilege in Exemption 5.⁶⁷ Memoranda in "open" cases are prepared in contemplation of upcoming litigation. As such, they will "inexorably" contain privileged material under the work-product rule. Such material includes the General Counsel's theory of the case, litigation strategy, and settlement advice. Since the General Counsel must become a litigating party in the case before the Board, the Court held that he is entitled to claim that the material in the memoranda are a part of his work-product.⁶⁸

Having found the privilege applicable, the Court held that "open" memoranda may be withheld in their entirety.⁶⁹ This result ignores the nature and function of the Advice and Appeals Memoranda. These memoranda contain more than admittedly privileged trial strategy; they also contain arguably non-privileged summaries of the facts of the case.⁷⁰

In *EPA v. Mink*,⁷¹ the first Supreme Court case to construe Exemption 5, the Court stated that the "public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such

⁶⁶ Support for this allocation of the burden of proof is found within the terms of the FOIA itself. See 5 U.S.C. § 552(a)(4)(B) (1970), as amended, 5 U.S.C. § 552(a) (Supp. V, 1975).

⁶⁷ 421 U.S. at 159-60. The Supreme Court first recognized the work-product privilege in the civil discovery context in the landmark case of *Hickman v. Taylor*, 329 U.S. 495 (1947). There the Court held that documents and memoranda containing an attorney's interviews with witnesses, correspondence, briefs and mental impressions were privileged from discovery under the Federal Rules of Civil Procedure. *Id.* at 508-11.

⁶⁸ 421 U.S. at 159-60. No claim was advanced by the Board that the work-product rule applied to protect memoranda in "closed" cases. Presumably, there is no need to protect an attorney's work-product for a case that will never be tried. A more interesting question is whether the Board could claim that "closed" Memoranda are exempt from disclosure under the attorney-client privilege. The Senate Report indicates that Exemption 5 incorporates this privilege. S. REP. NO. 813, *supra* note 8, at 2 (treating documents of agency attorneys for purposes of the privilege the same as documents of private attorneys). The Court's broad holding that "closed" memoranda are "final opinions" not within Exemption 5, see text at notes 46-54 *supra*, probably forecloses any judicial resolution of this issue.

⁶⁹ 421 U.S. at 160.

⁷⁰ See note 3 *supra*.

⁷¹ 410 U.S. 73 (1973).

documents involved in litigation with Government agencies."⁷² Thus, the *Mink* Court, in considering the applicability of the Government's executive privilege in Exemption 5, stated that Exemption 5 did not protect from disclosure "purely factual material" appearing in otherwise privileged documents, provided the factual data could be severed from the documents without compromising the privileged remainder.⁷³ Any other result, the Court believed, would permit the withholding of non-privileged material simply because it was placed in a document which contained "matters of law, policy, and opinion."⁷⁴

It is submitted that the "commonsense approach" employed in *Mink* should be applied to Government claims of privilege under the work-product rule. As the *Mink* Court noted, Congress intended to "delimit" Exemption 5 "as narrowly as consistent with efficient government operation."⁷⁵ Consistent with this purpose, Congress provided that the district court examine *in camera* the contents of agency records "to determine whether such records or any part thereof may be withheld under any of the exemptions."⁷⁶ The statutory language and the *Mink* opinion suggest that memoranda in "open" cases need not be withheld entirely. Those portions of the memoranda which the agency can demonstrate to be within the work-product privilege⁷⁷ should clearly be protected; the remainder should be disclosed.⁷⁸

It should further be noted that parties seeking disclosure of NLRB memoranda are usually not doing so in the same way a private litigant seeks to discover certain information from his opponent. The courts should recognize that the interests in FOIA suits are different from those in typical discovery motions. In particular, an FOIA plaintiff may be seeking to discern the "agency law" made by the General Counsel's decisions to issue complaints. For example, a union or employer, in order to determine more readily the legality of a particular course of conduct or policy which seems to fall within the so-called "grey area" of the law, might simply wish to know the current General Counsel's practice with respect to filing charges based on similar conduct or policies. In bringing its FOIA suit, such a plaintiff also represents the interests of the public at large in seeking to gain access to information which is useful to similarly-situated unions or employers. Traditional rules of discovery, however, are geared more towards balancing the interests of the immediate parties to the litigation. Thus

⁷² *Id.* at 91.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 89, citing S. REP. NO. 813, *supra* note 8, at 9; H.R. REP. NO. 1497, *supra* note 9, at 10.

⁷⁶ 5 U.S.C. § 552(a)(4)(B) (Supp. V, 1975) (emphasis supplied).

⁷⁷ The burden of proof is on the agency to demonstrate that one of the exemptions applies. *Id.*

⁷⁸ The Court in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), recognized that "relevant, non-privileged facts" would not be protected by the work-product or any privilege. In *Mink*, the Court noted that Exemption 5 was never intended to protect from disclosure factual material in Government files. 410 U.S. at 89-90.

it would seem that these rules should be only guidelines for determining disclosure and not inflexible shields behind which an agency can create secret agency "law." Courts accepting this view should well be willing to allow disclosure of fact summaries in "open" memoranda when such disclosure could not offend the purposes of the privileges incorporated in Exemption 5.⁷⁹

The principal objection to partial disclosure of "open" memoranda is the administrative burden of making available the summaries from all "open" cases. These summaries would have to be distilled from the memoranda. There would also be the added burden of deleting the names and the identifying characteristics of witnesses who may have made statements to Board investigators only after promises of confidentiality. Finally, disagreements over disclosure would necessitate an *in camera* inspection by the district court. Since such cases have a priority on the docket,⁸⁰ there would be a grave potential for wasting court time with unworthy claims, thereby setting back even further the already clogged federal docket.⁸¹ On the other hand, the General Counsel could meet this problem by revamping its procedures to provide for the disclosure of the non-privileged information in the memoranda in separate documents as a concomitant element of the process of preparing the memoranda. This would involve some duplication but would go far towards meeting the Congressional goal of full agency disclosure. In addition, the disclosure of such information would serve a useful purpose, for disclosure of those summaries in cases where complaints have been issued informs the public quickly of trends which the agency may be taking in its prosecution of complaints. Management and labor are also put on immediate notice of practices which the General Counsel believes violate the federal labor laws. Nor should it be an answer that these facts will eventually be made public in the course of the litigation. Such litigation may not take place for months and may last for years, while concerned labor interests may rely on the day-to-day practice of the General Counsel in issuing complaints. A welcome by-product of the disclosure of the summaries in "open" cases would be that the party actually involved in the case could make a more realistic assessment of the strength of the General Counsel's charge. This could lead to more settlements.

⁷⁹ Indeed courts might even consider whether disclosure of the legal and policy issues contained in open memoranda, though seemingly privileged under the work-product rule, see *Hickman v. Taylor*, 329 U.S. 495, 508-11 (1947), might yet be disclosed when the interests of the public in knowing this form of "agency law" outweigh the General Counsel's work-product interests.

⁸⁰ 5 U.S.C. § 552(a)(4)(D) (Supp. V, 1975).

⁸¹ See, e.g., *Harvey's Wagon Wheel v. NLRB*, 91 L.R.R.M. 2410, 2414-15 (N.D. Cal. 1976), where the court rejected the *in camera* process as inadequate and a great burden on the court's time.

CONCLUSION

The future development of litigation under *Sears* standards will probably involve definitional problems of determining which Board documents have the requisite finality to require disclosure. The critical line between "final opinions" and internal recommendations and conclusions will probably be a much litigated point. As the Court itself notes, "the line between [exempt] predecisional documents and [disclosable] postdecisional documents" is not a "bright one."⁸² The *Sears* decision will probably lead to changes in the General Counsel's procedures. More careful drafting of memoranda can be expected, especially with regard to "incorporated" references in non-exempt memoranda. Ultimately, the tug-of-war over contested documents will subside and hopefully the balance between the public's right to know and the agency's right to statutorily-described confidentiality will be achieved.⁸³

⁸² 421 U.S. at 152 n.19.

⁸³ A second area of future development under *Sears* is in the applicability of Exemption 7 to NLRB documents. See note 44 *supra*. The *Survey* year saw a significant increase in the number of FOIA suits involving application of Exemption 7. In particular, many employers who were defendants in separate unfair labor practice suits brought actions to compel disclosure of material in the investigatory files compiled by Board agents in their investigation of the unfair labor practice complaint. The courts split over whether Exemption 7's protection of investigatory records applied. Those courts which ordered disclosure based their decision mainly on the Board's failure to prove specific harm to a specific interest protected by the exemption. See *NLRB v. Hardeman Garment Corp.*, 406 F. Supp. 510, 512-13, 91 L.R.R.M. 2055, 2056-57 (W.D. Tenn. 1975) (purpose of amendment was to limit exemption to instances where government can prove specific harm); *Poss v. NLRB*, 91 L.R.R.M. 2232, 2233-34 (D.D.C. 1975) (action by union employee — Board failed to prove that disclosure of factual evidence in files would jeopardize the confidentiality of the Board's investigative procedures); *Title Guarantee Co. v. NLRB*, 407 F. Supp. 498, 503-05, 90 L.R.R.M. 2849, 2852-54 (S.D. N.Y. 1975), *rev'd*, 534 F.2d 484 (2d Cir. 1976) (no specific harm demonstrated, injunction to issue if material not disclosed prior to unfair labor practice hearing). Two federal district courts applied Exemption 7 in similar FOIA actions. A federal court in California seemingly ignoring the dicta in *Sears* that the 1974 amendment was intended to limit application of the exemption, *see* 421 U.S. at 164-65 & n.30, held that the scope of Exemption 7 in labor cases was not affected by the amendment. *Harvey's Wagon Wheel v. NLRB*, 91 L.R.R.M. 2410, 2413-14 (N.D. Cal. 1976). The court followed the pre-amendment rule that statements made during the course of Board investigations would not be released prior to trial, *see Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 85 L.R.R.M. 2260 (4th Cir. 1974), fearing that disclosure before trial would inevitably inhibit employees to volunteer information for fear of employer reprisal. 91 L.R.R.M. at 2414. The federal court in Colorado, noting the danger of a deluge of FOIA cases with precedence on the docket, found that Exemption 7(A) applied since production of the documents would interfere with Board enforcement proceedings. *Climax Molybdenum Co. v. NLRB*, 407 F. Supp. 208, 209, 90 L.R.R.M. 3126, 3126-27 (D. Col. 1975). However, that court seems to have erred by refusing to put the burden on the Board to produce evidence proving such interference. *Id.* at 209; 90 L.R.R.M. at 3127.

VI. EMPLOYMENT DISCRIMINATION REMEDIES

A. Back Pay—Albemarle Paper Co. v. Moody¹

Although the availability of back pay as a remedy in Title VII class actions is well established,² there has been a conflict in the circuits regarding the standards governing such awards.³ During the *Survey* year, the Supreme Court attempted to resolve this conflict by articulating a new standard to be used in determining when an award of back pay is appropriate.

In *Albemarle Paper Co. v. Moody*,⁴ the Court was confronted with the issue of whether a lack of "bad faith" non-compliance with Title VII constituted grounds for refusal of a back pay award.⁵ The Court held that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."⁶

In *Albemarle*, present and former employees of the defendant corporation brought a class action requesting injunctive relief against alleged Title VII violations in the plant's seniority system and program of employment testing.⁷ Although the plaintiffs originally represented that they did not intend to seek back pay, they added a claim for class-wide back pay five years after the complaint in the case was filed.⁸ The district court found that the employer's job seniority system constituted a violation of Title VII⁹ and ordered the implementation of a plant-wide system of seniority.¹⁰ However, plaintiffs' claim for back pay was denied on two grounds. First, the district court

¹ 422 U.S. 405 (1975).

² See *Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 1086-87 (1975).

³ Compare, e.g., *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240, 247-48, 5 FEP Cas. 1166, 1170-71 (3d Cir. 1973) (an award or denial of back pay is left to the discretion of the district court to be exercised in light of the circumstances) with *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 252-53, 7 FEP Cas. 1115, 1147-48 (5th Cir. 1974) and *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876, 6 FEP Cas. 813, 817 (6th Cir. 1973) (an award of back pay is mandatory unless exceptional circumstances are present).

⁴ 422 U.S. 405 (1975).

⁵ *Id.* at 413. Whereas "bad faith" non-compliance would be an intentional failure to conform to Title VII requirements, violations may also result when an employer attempts in "good faith" to conform to Title VII but does not, in fact, do so. See text at n. 28-33, *infra*.

⁶ *Id.* at 421.

⁷ *Moody v. Albemarle Paper Co.*, 4 FEP Cas. 561, 562 (E.D.N.C. 1971).

⁸ *Id.* at 570.

⁹ *Id.*

¹⁰ *Id.* at 571-72. The district court found that the personnel tests were not violative of Title VII. *Id.* at 570. The Supreme Court, however, agreed with the court of appeals and ruled that the testing program also constituted a violation of Title VII. 422 U.S. at 436.

found no evidence of bad faith on the part of the defendants.¹¹ Second, the court concluded that the defendants would be substantially prejudiced by such an award where the claim for back pay was not filed until five years after the institution of the action.¹²

The Court of Appeals for the Fourth Circuit reversed, ruling that back pay should have been awarded.¹³ On appeal to the Supreme Court, the petitioners argued that such an award is solely within the discretion of the district court and that the district court's denial of back pay was not an abuse of that discretion.¹⁴ The Supreme Court, agreeing with petitioners, reasoned that since back pay is not an automatic or mandatory remedy, but one which courts "may" invoke¹⁵ the exercise of some discretion by the district courts is permissible.¹⁶ However, the Supreme Court ruled that this discretion must be exercised consistently with the statutory purposes of Title VII.¹⁷ In that the primary objective of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"¹⁸ the Court articulated the purposes of the back pay provision as: (1) deterring illegal employment practices by encouraging employers to police their own employment policies; and (2) making

Holding

¹¹ *Id.* at 570, 572. The district court reasoned that since judicial decisions had only recently focused on the discriminatory impact of seniority systems, and since the defendant had taken some affirmative recruitment steps on its own, there was no bad faith non-compliance with Title VII. *Id.* at 570.

¹² *Id.* at 570.

¹³ The court of appeals ruled that back pay should not be denied unless special circumstances would render an award unjust. *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 142, 5 FEP Cas. 613, 618 (4th Cir. 1973). In fashioning this standard, the court of appeals relied on *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) which had set forth guidelines governing discretionary awards of attorney's fees under Title II of the Civil Rights Act. 42 U.S.C. § 2000a-3(b) (1970). That section appears to leave Title II fee awards to the discretion of the trial court. In *Piggie Park*, however, the Supreme Court reasoned that fees should be awarded in all but very unusual circumstances in order to serve the public interest in having injunctive actions brought by individual plaintiffs. 390 U.S. at 402. Thus, in *Albemarle*, the Supreme Court noted that the court of appeals' reliance on *Piggie Park* was misplaced. 422 U.S. at 415.

¹⁴ 422 U.S. at 414.

¹⁵ 42 U.S.C. § 2000e-5(g) (Supp. V 1975) provides in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission (emphasis added).

¹⁶ 422 U.S. at 415-16.

¹⁷ *Id.* at 417-18.

¹⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

persons whole for injuries suffered due to unlawful employment practices.¹⁹

The Court concluded that in light of these statutory purposes, the discretion granted to the district courts by Congress was intended to facilitate affording the most complete relief possible.²⁰ Thus, the compensatory purpose of back pay was properly met when the district court was given authority to grant relief equal to the injury.²¹ The deterrent purpose of the back pay provision was best served when the equitable powers of the district court included the reasonably certain prospect of a back pay assessment as well as injunctive orders.²² Furthermore, a denial of back pay would be upheld only where the reasons for denial, if generally applied, were found to be consistent with Title VII's twin objectives of deterrence and compensation.²³

Examining the district court's denial of back pay in light of these considerations, the Supreme Court ruled that a lack of bad faith is not an appropriate reason for refusing to award back pay.²⁴ The Court reasoned that if evidence of bad faith by an employer were a prerequisite to an award of back pay, the remedy would serve primarily to punish egregious violators of the Act without also serving to compensate those who suffered from discrimination. The "make whole" purpose of the Title VII back pay provision would thus be eliminated.²⁵ Furthermore, since the Act is concerned with the consequences of employment practices rather than the motivations of employers,²⁶ it

¹⁹ 422 U.S. at 417-18.

²⁰ *Id.* at 420-21.

²¹ *Id.* at 418-19. The Court quoted from *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94 (1867):

The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

Id. at 99.

²² 422 U.S. at 417-18.

²³ *Id.* at 421. In developing its guidelines to aid the district court in the exercise of its discretion, the Supreme Court emphasized the similarities between the back pay provisions of Title VII and those of the National Labor Relations Act. Compare 29 U.S.C. § 160(c) (1970) (If the National Labor Relations Board finds a violation, "then the Board shall . . . take . . . affirmative action including reinstatement of employees with or without back pay . . .") with 42 U.S.C. § 2000e-5(g) (Supp. V 1975) (If a Title VII violation is found, "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . .") The Court reasoned that Congress, in modeling the back pay provisions of Title VII on the NLRA, was aware that under the NLRA, the NLRB had awarded back pay as a matter of course. 422 U.S. at 419-20. See, e.g., *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965) where the court stated, "(t)he finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer." *Id.* at 178, 60 L.R.R.M. at 2583.

²⁴ 422 U.S. at 422.

²⁵ *Id.* at 422-23.

²⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

BP is a matter for discretion of D.Ct. in terms of purposes of Tit. 7.

would be improper to distinguish between injunctive and back pay relief by conditioning only the back pay remedy upon a showing of bad faith.²⁷

Although the Court did not weigh the defense of a lack of bad faith against the deterrent purpose of Title VII's back pay provision, it is submitted that the purpose of eradicating discrimination through employer self-evaluation would also be frustrated by requiring a showing of bad faith. Employers would not be motivated to comply fully with Title VII if back pay assessments were made only in cases of bad faith violations of the Act. An approach closer to strict liability for violations, on the other hand, would be likely to induce full employer self-compliance. Therefore, in addition to the problem envisioned by the Supreme Court with respect to the subordination of the compensatory purpose of the Title VII back pay provision, the allowance of a defense based on a lack of bad faith would frustrate that provision's deterrent purpose as well.

While the *Albemarle* decision settles the issue of whether a showing of bad faith non-compliance is necessary to hold an employer responsible for back pay, the decision does not appear to settle the issue of whether, and under what circumstances, a showing of a good faith attempt to comply with Title VII would be a permissible factor in considering whether to relieve an employer of back pay liability. The "good faith" issue may often arise where employers are found to have violated Title VII while attempting to comply in good faith with presumptively constitutional state statutes.²⁸ If the general *Albemarle* test for awarding back pay were applied in such situations, a determination would have to be made with respect to whether a good faith exception would frustrate either the deterrent purpose or the compensatory purpose of Title VII.

In *Albemarle*, Justice Blackmun, in a concurring opinion, argued that good faith should be a relevant consideration in such cases. He reasoned that although an award of back pay would serve the statutory purpose of compensating the discriminatee, it would do so by creating a hardship on an employer who may have had no alternative under state law and who derived no economic benefit from the questioned employment policy or practice.²⁹ Chief Justice Burger, in a separate opinion, reasoned that under the guidelines of the majority, the statutory purpose of encouraging self-evaluation would not be frustrated by denying back pay where a good faith attempt to conform to Title VII is shown, and thus good faith should be recognized

²⁷ 422 U.S. at 423.

²⁸ Some courts, for example, have denied back pay where an employer discriminated on the basis of sex in reliance on state "female protective" statutes which limited hours women were allowed to work. See e.g., *Manning v. International Union*, 466 F.2d 812, 816, 4 FEP Cas. 1282, 1286 (6th Cir. 1972); *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228, 1229, 4 FEP Cas. 818, 819 (5th Cir. 1972). In *Albemarle*, the Supreme Court expressed no opinion on such cases. 422 U.S. at 423 n. 18.

²⁹ *Id.* at 448 (Blackmun, J., concurring).

as a defense.³⁰ Otherwise, for example, if employers were assessed back pay even when they had attempted in good faith to conform to the law, they would have little incentive to eliminate marginal practices until required to do so by a court.³¹

If the arguments of Chief Justice Burger and Justice Blackmun were accepted, however, the compensatory purpose would clearly be frustrated and would be subordinated to the deterrent purpose, since employees would not be "made whole" when the Act had been violated. It is submitted, therefore, that an allowance of a good faith defense would not be acceptable under the majority's guidelines since it would frustrate the compensatory purpose of Title VII. Furthermore, as the majority in *Albemarle* recognized, Title VII provides a narrow good faith defense for employers who rely on EEOC opinions.³² Since the legislature chose to give only a narrowly defined defense for good faith,³³ it would appear that the courts should limit any such defense to the statutory exemption rather than extending it to situations that Congress did not choose to include.

The second ground on which the district court denied back pay was that of the plaintiffs' belated and inconsistent claim for back pay.³⁴ Testing this second ground against the compensatory and deterrent purposes of Title VII, the Court had more difficulty. The Federal Rules of Civil Procedure provide that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."³⁵ However, the Court reasoned that a party may not be "entitled" to relief if its procedural conduct has substantially prejudiced the other party.³⁶ The Court stated that a denial of back pay in a particular case for the reason that the claim was prosecuted in such a manner as to prejudice the other party would not necessarily frustrate the dual purposes of Title VII.³⁷ Thus, the issue was remanded to the district court for a specific determination of whether the defendants were in fact prejudiced by any detrimental reliance on

³⁰ *Id.* at 450-51 (Burger, C.J., concurring in part and dissenting in part).

³¹ *Id.* at 451.

³² 42 U.S.C. § 2000e-12(b) (1970) provides:

In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . Such a defense, if established, shall be a bar to the action of proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect . . .

³³ 422 U.S. at 423 n.17.

³⁴ 4 FEP Cas. at 570.

³⁵ Fed. R. Civ. P. 54(c).

³⁶ 422 U.S. at 424.

³⁷ *Id.* at 424-25.

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the plaintiffs' representations that they were not seeking back pay and whether the plaintiffs' conduct was excusable.³⁸ Therefore, where particular procedural matters are at issue, a comparison with the broad aims of Title VII will require a case-by-case determination.³⁹

Applications of *Albemarle*

During the Survey year, *Albemarle* was applied in decisions in the Fourth,⁴⁰ Fifth,⁴¹ Eighth,⁴² and Tenth⁴³ Circuits. These decisions developed the *Albemarle* guidelines in three areas. One category of cases involved the proper scope of a class action award where, although promotional and transfer policies were found to be discriminatory, some members of the employee class had not specifically requested promotions or transfers.⁴⁴ Another area of decisions dealt with allocation of back pay awards between the employer and the union.⁴⁵ A third category in which *Albemarle* was applied involved cases where good faith efforts had been made to comply with Title VII.⁴⁶

In a Fourth Circuit case, *Hairston v. McLean Trucking Co.*,⁴⁷ the lower court found extensive violations of Title VII in promotional and transfer policies but awarded back pay only to two members of

³⁸ *Id.* In concurrence, Justice Marshall stated that the bar of laches, based on any prejudice to the defendants from the plaintiffs' late claim for back pay should be particularly difficult to establish. The doctrine of laches, which is usually invoked on the ground that passage of time has put necessary evidence beyond reach, should not apply where all relevant information remains in the defendants' files. *Id.* at 440-41 (Marshall, J., concurring).

³⁹ See n. 61, *infra*.

⁴⁰ *United Transp. Union Local 974 v. Norfolk & W. Ry.*, 11 FEP Cas. 410 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1664, 12 FEP Cas. 1089, 1090 (1976); *Russell v. American Tobacco Co.*, 528 F.2d 357, 11 FEP Cas. 395 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1666, 1667, 12 FEP Cas. 1090 (1976); *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 11 FEP Cas. 91 (4th Cir. 1975).

⁴¹ *United States v. United States Steel Corp.*, 520 F.2d 1043, 11 FEP Cas. 553 (5th Cir. 1975).

⁴² *Rogers v. International Paper Co.*, 526 F.2d 722, 11 FEP Cas. 1000 (8th Cir. 1975) (*per curiam*).

⁴³ The Tenth Circuit, in *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 11 FEP Cas. 211 (10th Cir. 1975) noted that *Albemarle* determines that back pay in class actions under Fed. R. Civ. P. 23(b)(2) as well as under Fed. R. Civ. P. 23(b)(3) must be governed by discretion that is exercised to accomplish the objectives and purposes of Title VII. 522 F.2d at 342, 11 FEP Cas. at 218.

⁴⁴ *United States v. United States Steel Corp.*, 520 F.2d 1043, 11 FEP Cas. 553 (5th Cir. 1975). *United Transp. Union Local 974 v. Norfolk & W. Ry.*, 11 FEP Cas. 410 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1664, 12 FEP Cas. 1089, 1090 (1976); *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 11 FEP Cas. 91 (4th Cir. 1975).

⁴⁵ *United Transp. Union Local 974 v. Norfolk & W. Ry.*, 11 FEP Cas. 410 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1664, 12 FEP Cas. 1089, 1090 (1976); *Russell v. American Tobacco Co.*, 528 F.2d 347, 11 FEP Cas. 395 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1666, 1667, 12 FEP Cas. 1090 (1976).

⁴⁶ *Rogers v. International Paper Co.*, 526 F.2d 722, 11 FEP Cas. 1000 (8th Cir. 1975) (*per curiam*); *United States v. United States Steel Corp.*, 520 F.2d 1043, 11 FEP Cas. 553 (5th Cir. 1975).

⁴⁷ 520 F.2d 226, 11 FEP Cas. 91 (4th Cir. 1975).

the affected class.⁴⁸ In *Hairston*, the two plaintiffs awarded back pay had sought and had been illegally denied positions for which they were qualified. However, there was no evidence that other members of the plaintiff class had sought any change in employment.⁴⁹ In fact, some members of the class had rejected offers of transfer or promotion.⁵⁰ Thus, the court of appeals had to consider whether under *Albemarle* the twin purposes of the back pay provision of Title VII would be frustrated by a denial of back pay relief where: (1) an employee had not requested promotions or transfers; (2) an employee had refused a promotion or a transfer.⁵¹

In examining the lack of requests for employment changes, the court of appeals found that, in addition to a policy of hiring blacks only as janitors and garagemen, the employer did not ordinarily post vacancies and had a "no-transfer," "no-rehire" policy. Under that policy, plaintiffs could not in practice seek better jobs since they could neither transfer nor resign and seek employment in better paying departments.⁵² The court reasoned that the purposes of Title VII articulated in *Albemarle* would be frustrated by allowing an employer to avoid back pay liability through this policy which made futile any attempt by employees to gain better jobs.⁵³

The court next considered whether an employee's refusal of a promotion would excuse an employer's back pay liability.⁵⁴ If the refusal had been based on an employee's reluctance to forego seniority and to expose himself to other discriminatory employment practices and policies, the court ruled that the refusal should not be given any weight in back pay consideration. Likewise, an employee who refuses a particular promotion for personal reasons should not be denied back pay for an employer's discriminatory policies against that employee in other promotions or transfers.⁵⁵ In another Fourth Circuit decision, *United Transportation Union Local 974 v. Norfolk & Western Ry.*,⁵⁶ both the defendant employer and the defendant union were found to have engaged in illegal hiring practices at two racially segregated railroad yards.⁵⁷ The district court denied back pay since (1) the rate of pay at the two yards was the same, and (2) although fewer promotional opportunities arose at the mainly black yard, the plaintiffs chose to remain there.⁵⁸

⁴⁸ *Id.* at 230, 11 FEP Cas. at 94.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 231-32, 11 FEP Cas. at 95.

⁵² *Id.* at 231, 11 FEP Cas. at 95.

⁵³ *Id.* at 231-32, 11 FEP Cas. at 95.

⁵⁴ *Id.* at 232, 11 FEP Cas. at 95.

⁵⁵ *Id.*

⁵⁶ 11 FEP Cas. 410 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1664, 12 FEP Cas. 1089, 1090 (1976).

⁵⁷ 11 FEP Cas. at 411.

⁵⁸ *Id.* at 412.

In awarding back pay, the circuit court ruled that a general application of any of the lower court's reasons would frustrate the purposes of Title VII as set forth in *Albemarle*.⁵⁹ The court first noted that although the rates of pay in the two yards were identical, the evidence tended to show that there was significantly less opportunity for work and promotion and a greater possibility of layoff at the predominantly black yard. In that, under Title VII, compensation must be measured by total income rather than rate of pay, and since the total income levels of employees at the two yards would be unequal, the court concluded that the record reflected discrimination in compensation.⁶⁰

With respect to the promotional opportunities, the court of appeals reasoned that the lack of requests for promotion or transfer does not preclude an award of back pay. Under the employer's system, an employee would have been required to forfeit seniority in order to transfer to the mainly white yard. The court concluded that requiring discriminatees to forfeit accrued benefits in order to remain eligible for possible back pay awards would frustrate the purposes of Title VII.⁶¹

Albemarle was also applied by the Fifth Circuit in *United States v. United States Steel Corp.*⁶² where some members of the employee class had not requested transfers or promotions. Although violations of Title VII had been found, the district court had denied back pay to members of the plaintiff class, giving a variety of reasons.⁶³ On review, the court of appeals first ruled that neither the lack of bad faith non-compliance with Title VII, absence of unjust enrichment by the employer, grant of broad injunctive relief, nor the difficulty of ascertaining the amount of employee economic injury were adequate reasons for denying back pay.⁶⁴ Furthermore, although the defendant corporation had offered evidence that some members of the employee class had refused to request advancement to higher paying positions, such an advancement often entailed loss of seniority. The court ruled that such refusals might have some bearing on individual back pay

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* The plaintiffs in *United Transportation Union* had also claimed that certain minimum wage guarantees made to some employees should be extended to them. *Id.* Since the wage adjustment claim had not been raised until final argument on remand from a first appeal of the case, the district court had declined to consider any wage adjustment on the ground that the claim was untimely. *Rock v. Norfolk & W. Ry.*, 11 FEP Cas. 407 (E.D. Va. 1974). Citing *Albemarle's* ruling that the purposes of Title VII would not necessarily be frustrated by denial of back pay relief where a particular cause has been prosecuted in a manner substantially prejudicial to the other party, the court of appeals remanded this issue to the lower court to consider whether the defendants would in fact be prejudiced. 11 FEP Cas. at 417. See text at n. 37 *supra*.

⁶² 520 F.2d 1043, 11 FEP Cas. 553 (5th Cir. 1975).

⁶³ *United States v. United States Steel Corp.*, 371 F. Supp. 1045, 1062-63, 7 FEP Cas. 322, 334-35 (N.D. Ala. 1973).

⁶⁴ 520 F.2d at 1052-53, 11 FEP Cas. at 560.

claims. However, a blanket denial to the class for that reason was not appropriate.⁶⁵

The results reached in *Hairston*, *United Transportation Union*, and *United States Steel Corp.* seem appropriate in light of *Albemarle's* mandate. If the court were to preclude an award of back pay because the employee had failed to use the employer's discriminatory promotional or transfer system, that employee would be denied his compensatory award not because he or she was not disadvantaged by discrimination, but because of a peculiar method by which the discrimination was implemented. Thus, it is submitted that the purpose of Title VII would be frustrated by conditioning an award of back pay on an employee's actual attempts at promotion or transfer.

A second area where *Albemarle* guidelines were found applicable involved the allocation of back pay awards between employees and unions. Although the back pay issue in *Albemarle* involved the liability of employers, Title VII additionally provides that back pay must be assessed against a labor organization that has engaged in unlawful discrimination.⁶⁶

In *United Transportation Union*, the court of appeals was confronted with the possible allocation of a back pay award between the union and the railroad.⁶⁷ The court reasoned that it would not be inconsistent with *Albemarle* to consider good faith efforts in resolving the question of whether the employer or the union should bear a particular share of a back pay assessment.⁶⁸ The court stated that to maintain consistency with the purposes of Title VII, however, any judgment should be against the employer and the union jointly and severally, or the employer solely with a partial indemnity right from the union, so as to insure both the incentive voluntarily to eliminate discrimination and the compensation of employees by both the employer and the union.⁶⁹

Another case involving the allocation of back pay awards between the employer and the union was *Russell v. American Tobacco Co.*,⁷⁰ where the Court of Appeals for the Fourth Circuit reviewed a district court decision which awarded back pay against both the employer and the union. The union had argued that the employer alone should be liable for the back pay since it could better afford it.⁷¹ The court reasoned that this argument ignored the fact that back pay awards are not only compensatory but are designed to induce full compliance with Title VII. In affirming the lower court, the court of appeals reasoned that under *Albemarle*, the reasonably certain prospect

⁶⁵ *Id.* at 1057-58, 11 FEP Cas. at 564-65.

⁶⁶ See note 15 *supra*.

⁶⁷ 11 FEP Cas. at 414.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 528 F.2d 347, 11 FEP Cas. 395 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1666, 1667, 12 FEP Cas. 1090 (1976).

⁷¹ *Id.* at 366, 11 FEP Cas. at 402.

of a back pay award was designed to induce unions as well as employers to voluntarily eliminate discriminatory policies and practices.⁷²

The third area where *Albemarle* guidelines were applied involved cases where a defense of good faith non-compliance with Title VII was raised. In *United States Steel Corp.* the defendant union argued that it should be relieved from back pay liability because it had made good faith efforts to comply with its interpretation of the law regarding seniority systems in the steel industry, even though that interpretation proved to be erroneous.⁷³ The court's rejection of the union's argument appears consistent with the *Albemarle* guidelines since allowance of a defense based on good faith compliance with an erroneous interpretation of the law would frustrate the purposes of Title VII.

Similarly, in *Rogers v. International Paper Co.*,⁷⁴ the district court for the eastern district of Arkansas had denied back pay because the employer had demonstrated good faith efforts at compliance⁷⁵ and because a previous Eighth Circuit decision stated that the law regarding back pay had been too uncertain to provide employers with adequate notice of possible back pay liability.⁷⁶ This ruling was appealed, and the Eighth Circuit upheld the denial of back pay.⁷⁷ The employees then appealed to the Supreme Court which remanded to the court of appeals for further consideration in light of *Albemarle*.⁷⁸ Thus, the appeals court in *Rogers*, following the mandate of the Supreme Court, ordered the district court to reconsider its prior denial of back pay in light of the *Albemarle* guidelines.⁷⁹ It would appear that the reason set forth by the district court would not withstand the test of *Albemarle*, since, as in *United States Steel Corp.*, reliance on good faith compliance with an erroneous interpretation of the law should not be a defense to back pay liability.

Based on these decisions from the circuit courts, it seems that in attempting to follow *Albemarle's* test of measuring an award of back pay against the broad objectives of Title VII, the courts will probably find that few defenses exist to an assessment of back pay which would not frustrate the dual statutory purposes of deterrence and compensation. Thus, with very few exceptions,⁸⁰ back pay should henceforth be the rule.

⁷² *Id.*

⁷³ 520 F.2d at 1058-59, 11 FEP Cas. at 565-66.

⁷⁴ 526 F.2d 722, 11 FEP Cas. 1000 (8th Cir. 1975) (*per curiam*).

⁷⁵ *Rogers v. International Paper Co.*, 10 FEP Cas. 388, 401 (E.D. Ark. 1973).

⁷⁶ *Id.* at 402, relying on *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 380, 5 FEP Cas. 823, 843-44 (8th Cir. 1973).

⁷⁷ *Rogers v. International Paper Co.*, 510 F.2d 1340, 1357, 10 FEP Cas. 404, 418 (8th Cir. 1975).

⁷⁸ *Rogers v. International Paper Co.*, 423 U.S. 809 (1975).

⁷⁹ 526 F.2d at 723, 11 FEP Cas. at 1001.

⁸⁰ As set forth in *Albemarle*, exceptions may be given where a particular case has been prosecuted with procedural irregularities that may have substantially prejudiced the other party. See text at note 37 *supra*.

B. *Seniority Relief: Franks v. Bowman Transportation Co.*

With the emergence of organized labor, seniority systems established through collective bargaining have become increasingly important as a means of allocating employment benefits.¹ Typically, seniority systems are based upon the length of time an employee has worked in a company ("plant seniority") or in a specific department within a company ("departmental seniority"). Since these systems are usually governed by the objective criterion of length of service, most seniority systems do not overtly discriminate against minority workers.² However, if a company in the past has denied employment or promotions because of discrimination, a facially neutral seniority system may in fact perpetuate or exacerbate these prior discriminatory practices. For example, a company may initially discriminate in its hiring, but later reform its employment policies and hire minority workers. Despite the later good intentions of the employer, an economic downturn followed by layoffs on a last hired-first fired basis could have a disproportionate adverse effect upon the newly hired minority workers.³ Another problem that may be perpetrated by a facially neutral seniority system arises when a minority employee has been forced to remain in a low-paying department within a company because of discrimination in promotional policies. If the company does change its practices and permit advancement, the minority worker's seniority in the new department will not be an accurate reflection of his or her proper status.⁴

While Congress in enacting Title VII recognized that seniority systems may thus perpetuate discriminatory practices, the question of what seniority relief should be provided for aggrieved minority workers has posed several significant problems. The courts have generally been willing to grant seniority relief to minority employees who, once hired, have been discriminatorily denied promotion to better paying

¹ See Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1601-1607 (1969).

² The exception would be a seniority system which specifically enumerates seniority benefits as to black and white workers such as a collective bargaining agreement which explicitly stated that black workers should be laid off prior to white workers. See 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark).

³ See Comment, *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J. LAW & SOC. PROB. 343, 343-45 (1975). The problems inherent in a last hired-first fired seniority system must also be considered in the context of how such systems have perpetuated this country's historic discrimination against minority workers in terms of denial of employment and confinement to low paying jobs. See Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 1-9 (1975).

⁴ If the employer in this hypothetical situation had not established discriminatory transfer policies, a minority worker would have been able to transfer to the better department at an earlier date than under the discriminatory system. This would have allowed the employee to accumulate a greater degree of departmental seniority.

or more prestigious departments.⁵ In these "departmental seniority" cases, the courts have ordered that minority workers be permitted to use their "plant seniority" instead of "departmental seniority" in bidding for new positions.⁶ In contrast, the courts have been reluctant to grant seniority relief to individuals who were initially denied any employment by a company and who were later hired by the same employer.⁷ These employees are harmed by the initial hiring policies, not by the transfer policies which affect employees only after they are hired. In a "plant seniority" situation, the minority worker seeks "fictional" or retroactive seniority from the date of his initial job application, on the theory that he would have earned the seniority but for the discriminatory acts of the employer in originally denying him employment. The analytical basis employed by several courts to justify their refusal to grant fictional seniority is illustrated by the Fifth Circuit's statement in *Local 189, Papermakers and Paperworkers v. United States*:⁸

Problem -
Giving Seniority
to those who
were not hired
cause of disc.
Have now
been ordered
into job by it.

It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for

⁵ See, e.g., *Franks v. Bowman Transportation Co.*, 495 F.2d 398, 414-17, 8 FEP Cas. 66, 77-79 (5th Cir. 1974), *rev'd in part*, 424 U.S. 747 (1976); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 660-61, 3 FEP Cas. 589, 594-95 (2d Cir. 1971); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505, 519-21, 1 FEP Cas. 260, 271-74 (E.D. Va. 1968).

⁶ See, e.g., *Franks*, 495 F.2d 398, 415-17, 8 FEP Cas. 66, 78-79 (5th Cir. 1974). The basis for this remedy originated in a student note wherein the author outlined three interpretations of the degree to which relief should be provided under Title VII: (1) under the "status quo" doctrine, an employer would be required to refrain from further discrimination and the seniority of white and minority workers would remain unaffected, (2) under the "rightful place" approach, a minority worker would be permitted to use plant seniority in bidding for positions within a department which were normally subject to departmental seniority bidding, and (3) under the "freedom now" interpretation, a minority worker would be permitted to displace a white worker if the minority worker would have qualified for the position "but for" the prior discrimination. Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268-69 (1967). The "rightful place" doctrine was adopted by the Fifth Circuit in *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 988, 1 FEP Cas. 875, 881 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The court rejected both the "status quo" approach, since it did not provide a remedy for past discrimination, and the "freedom now" approach since it would result in the displacement or "bumping" of white workers. Under the "rightful place" doctrine, a minority worker receives the seniority that would have been rightfully due "but for" prior discrimination. This beneficial result is accomplished without the adverse effect of automatically displacing other employees.

⁷ See, e.g., *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1319-20, 8 FEP Cas. 577, 585 (7th Cir. 1974); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 994-95, 1 FEP Cas. 875, 886-87 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *Contra*, *Acha v. Beame*, 531 F.2d 648, 651-55, 12 FEP Cas. 257, 259-62 (2d Cir. 1976).

⁸ 416 F.2d 980, 1 FEP Cas. 875 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guarantee that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment.⁹

The result of such a rationale, which places emphasis on a demonstration by the Title VII plaintiff that he suffered a clear and continuing harm, has resulted in a narrow construction of the remedial purposes of Title VII to exclude fictional seniority relief.¹⁰

In addition to the problem of demonstrating a continuing harm, another major hurdle in granting fictional seniority is created by the language of section 703(h) of Title VII¹¹ which provides in part:

[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .¹²

The legislative history of this section is "singularly uninformative on seniority rights,"¹³ since the subject was not treated in a committee report prior to the addition of the section to the Senate's version of Title VII.¹⁴ Furthermore, the statute fails to define adequately the scope of the term "bona fide seniority system." As a result, several courts have had to grapple with the question of whether the seniority system at issue in a particular case meets the criteria of section 703(h).¹⁵

⁹ *Id.* at 995, 1 FEP Cas. at 886. Under § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) (1970), an employer cannot be required to grant preferential treatment to a minority worker.

¹⁰ *See, e.g.,* *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1318-19, 8 FEP Cas. 577, 584-85 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976); *Quarles v. Philip Morris, Inc.* 279 F. Supp. 505, 519, 1 FEP Cas. 260, 272 (E.D. Va. 1968).

¹¹ 42 U.S.C. § 2000e-2(h) (1970).

¹² *Id.*

¹³ *Papermakers*, 416 F.2d 980, 987, 1 FEP Cas. 875, 880 (5th Cir. 1969).

¹⁴ *See* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 443-57 (1966).

¹⁵ *See, e.g.,* *Jersey Central Power & Light Co. v. I.B.E.W.*, 508 F.2d 687, 705-710, 9 FEP Cas. 117, 128-132 (3d Cir. 1975), *vacated and remanded, sub nom., EEOC v. Jersey Central Power & Light Co.*, 96 S. Ct. 2196 (1976); *Watkins v. Steelworkers*, 516 F.2d 41, 46-52, 10 FEP Cas. 1297, 1301-1307 (5th Cir. 1975); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1317-1320, 8 FEP Cas. 577, 583-585 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976); *Papermakers*, 416 F.2d 980, 986-997, 1 FEP Cas. 875, 879-887

This Survey year the Supreme Court in *Franks v. Bowman Transportation Co.*¹⁶ considered for the first time the appropriateness of seniority relief under Title VII. The Court held that the use of fictional seniority is an appropriate remedy and within the scope of a court's power to grant equitable relief under section 706(g) of Title VII.¹⁷ In sanctioning the use of fictional seniority to make whole a minority worker who had faced job discrimination in hiring, the Court also concluded that the seniority provisions of section 703(h) of Title VII do not "modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved . . ."¹⁸ The result of this holding is that a job applicant who has been denied employment because of discrimination may now sue for injunctive, back pay, and seniority relief.¹⁹ Therefore, the position taken by the Court in *Franks* with respect to fictional seniority relief expands the remedies available to aggrieved employees under Title VII.²⁰

Franks arose out of a claim of racial discrimination in various hiring and promotional practices of the Bowman Transportation Co.²¹ Petitioner Lee intervened on behalf of himself and other black individuals who had applied for positions as over-the-road (OTR) drivers, asserting that they were denied employment because of discriminatory hiring practices.²² The district court found that Bowman had discouraged or prohibited its black workers from transferring to OTR positions. Further, the court found that black applicants from outside the company who were interested in OTR positions were denied any serious consideration.²³ The court separated the class represented by Lee into two distinct subdivisions: all black Bowman employees who had applied to transfer to an OTR position; and all non-employee black applicants who applied for positions as OTR drivers.²⁴ Even though

(5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516-18, 1 FEP Cas. 260, 269-71 (E.D. Va. 1968).

¹⁶ 424 U.S. 747 (1976).

¹⁷ *Id.* at 762-80. Section 706(g), 42 U.S.C. § 2000e-5(g) (Supp. III, 1973), is quoted in the text at note 61 *infra*.

¹⁸ 424 U.S. at 761-62.

¹⁹ Injunctive and back pay relief are specifically provided for in § 706(g) of Title VII. 42 U.S.C. § 2000e-5(g) (Supp. III, 1973).

²⁰ In the subsequent case of *United States v. Elevator Constructors*, 13 FEP Cas. 81, 87-88 (3d Cir. 1976), the Third Circuit interpreted *Franks* as justifying the use of preferential remedies under Title VII.

²¹ *Franks v. Bowman Transportation Co.*, 5 FEP Cas. 421, 422-23 (N.D. Ga. 1972).

²² Bowman maintained several departments within the company. The OTR drivers department, which was almost exclusively white, received higher wages than the other departments. On the whole the black workers were frozen into the lower paying departments. *Id.* at 423-25.

Lee also claimed that Bowman's refusal to permit him to transfer to an OTR position and his subsequent discharge from the company were based on discriminatory practices. *Id.* at 423.

²³ *Id.* at 424-25.

²⁴ *Id.* at 430.

the district court found a pattern of racial discrimination, it denied any backpay or retroactive seniority relief to the two subclasses, reasoning that it could not give backpay or seniority relief to an entire class, when the class could not demonstrate "a vacancy, qualification, and performance by every member."²⁵ On appeal,²⁶ the Fifth Circuit reversed the district court's holding as to the denial of back pay to the two subclasses and remanded the judgment for the district court to determine the appropriate back pay relief for each class member.²⁷ Relying on the departmental seniority cases,²⁸ the circuit court also ordered retroactive seniority relief for the black employees who had attempted to transfer to OTR positions.²⁹ However, the appeals court, in relying on its prior reasoning in *Papermakers*,³⁰ refused to grant fictional or retroactive seniority to the black applicants who had not actually worked for Bowman during the time for which seniority relief was claimed.³¹ This refusal to grant seniority relief to the non-employee black applicants was reversed on appeal, when the Supreme Court found fictional seniority to be an appropriate form of relief under Title VII.³²

This note will first analyze the divergence between the Fifth Circuit and the Supreme Court in their interpretation of section 703(h). While the Court's holding that the provision does not preclude seniority relief is correct, it will be submitted that the Supreme Court failed to resolve whether section 703(h) is directly applicable to situations where the operation of a seniority system and not a company's hiring policies is at issue. This note will then discuss the Court's holding that seniority relief is an appropriate form of relief under section 706(g) of Title VII. It will be concluded that despite the fact that retroactive seniority as a remedy may deprive individual nonminority workers of their employment expectations, such a result may be necessary in order to provide adequate relief for minority workers who have been denied employment because of discrimination.

1. Bona Fide Seniority Systems—Section 703(h).

The analysis used by the Fifth Circuit in *Franks* serves as an example of the approach utilized by several federal courts in confronting the issues of seniority relief and the significance of section 703(h)

²⁵ *Id.* at 426. The court did find, however, that members of the two classes should receive priority in consideration for any future positions as OTR drivers. *Id.* at 425.

²⁶ 495 F.2d 398, 8 FEP Cas. 66 (5th Cir. 1974).

²⁷ *Id.* at 421-22, 8 FEP Cas. at 83-84.

²⁸ See note 5 *supra*.

²⁹ 495 F.2d at 414-17, 8 FEP Cas. at 77-79.

³⁰ 416 F.2d at 995, 1 FEP Cas. at 886. *Papermakers* is quoted in the text at note 9 *supra*.

³¹ 495 F.2d at 417-18, 8 FEP Cas. at 79-80.

³² 424 U.S. 747, 779 (1976).

of Title VII.³³ The Fifth Circuit first distinguished between the class of minority workers who as Bowman employees were denied transfers to OTR positions and the class of job applicants who were initially denied any employment with Bowman.³⁴ The court found that the departmental seniority system perpetuated the effects of prior discrimination by forcing minority employees of Bowman to remain in inferior departments.³⁵ To prevent the minority employee from being "locked in" to the inferior departments, the court permitted the minority workers to use their plant seniority when transferring to new positions, reasoning that the employer's departmental seniority system perpetuated the effects of past discrimination and was, therefore, an unlawful employment practice proscribed by and remediable under Title VII.³⁶

The Fifth Circuit applied a different approach to the minority job applicants who sought fictional seniority relief. As to the job applicants, the court utilized a two pronged test. It found first that the minority applicants had suffered a wrong in being denied employment because of race.³⁷ The court then turned to the question of whether Title VII permits the use of fictional seniority as relief under these circumstances. To resolve this question the court focused on section 703(h),³⁸ which pertains to the use of different standards in the distribution of employment benefits under bona fide seniority systems. The Fifth Circuit found that section 703(h) implicitly prevents the use of fictional seniority, stating that "[t]he discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as 'not an unlawful employment

³³ See cases cited at note 15 *supra*.

³⁴ 495 F.2d at 417-18, 8 FEP Cas. at 79-80.

³⁵ *Id.* at 414-15, 8 FEP Cas. at 77-78. By discouraging transfers to other better paying departments, Bowman had prevented the minority workers from being able to accumulate any departmental seniority in the more desirable departmental positions. This means that once the discriminatory transfer policy is abolished, the minority employee is faced with a difficult decision. If he does transfer to a better department, he will be unable to transfer his seniority from his old department. This will place him at the bottom of the ladder when competing for assignments in the new department. Conversely, if the minority worker remains in his old department, he may receive lower pay, but he will still maintain his departmental seniority and be able to compete on a better level within that department. This conflict effectively "locks" an employee into the lower paying department.

³⁶ *Id.* at 414, 8 FEP Cas. at 77.

³⁷ *Id.* at 417, 8 FEP Cas. at 80.

³⁸ 42 U.S.C. § 2000e-2(h) (1970). Section 703(h) is quoted in the text at note 12 *supra*. It should be noted that the court did not refer to § 703(h) in concluding that the black Bowman employees were entitled to seniority relief. It would appear, however, that the Court assumed that the departmental seniority system, coupled with the discriminatory transfer policy, created a seniority system which was not bona fide. 495 F.2d at 414-15, 8 FEP Cas. at 77-78.

practice'.³⁹ Therefore, while the court found that the applicants were the subject of wrongful discrimination, section 703(h) prevented the use of fictional seniority as a remedy, since the discrimination had not affected the bona fide nature of the seniority system.

The Supreme Court dismissed this analysis as "clearly erroneous."⁴⁰ The Court initially adopted the view of the lower court that the wrong affecting the job applicants in *Franks* was not the operation of the seniority system but the discriminatory hiring practices of the company. However, the majority went on to point out that the plaintiffs did not seek to modify the seniority system directly, but instead, sought an award of rightful seniority status.⁴¹ Hence, according to the Court, the appellants were not using section 703(h) as a method of establishing a violation of Title VII or as a means of modifying the seniority system.⁴²

The decision that section 703(h) did not form the statutory basis for the cause of action in *Franks* raises the question of what, if any, relevance section 703(h) had to the questions presented in the case. If the appellants did not need to utilize the section as a means of establishing a violation or remedy under Title VII, then section 703(h) had no bearing on the appellants' claim. To resolve this issue, the Court turned to the legislative history of that section in order to clarify its meaning and effect.

While conceding that the history of the provision does not provide a clear definition, the Court did find that "[t]here is no indication in the legislative materials that §703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire."⁴³ Based on this reading of the legislative history, the Court found that section 703(h) was intended by Congress to define those situations where the operation of a seniority system constitutes an illegal discriminatory practice. Therefore, if some illegal practice, such as discriminatory hiring,⁴⁴ is apparent, there is no need to base the cause of action upon section 703(h) which only applies where discriminatory seniority systems are in issue.

The Court's interpretation of section 703(h) would appear to be sound. The language of the provision is clearly intended to provide a

³⁹ 495 F.2d at 417, 8 FEP Cas. at 80. See Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 506 (1975).

⁴⁰ 424 U.S. at 757.

⁴¹ *Id.* at 757-58.

⁴² The Court stated:

Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. It is this context that must shape our determination as to the meaning and effect of § 703(h).

Id. at 758.

⁴³ *Id.* at 761-62.

⁴⁴ See 42 U.S.C. § 2000e-2(a)(1) (1970).

definition of an "unlawful employment practice" in a seniority system.⁴⁵ This language should be confined to defining an illegal act under Title VII, since there is no expression of an intent to extend the section to a definition of appropriate remedies. However, the Court's opinion in *Franks* falls far short of providing guidance for future cases where a plaintiff claims that the seniority system, and not a firm's hiring practices, is violative of section 703(h). In that the *Franks* Court found that a cause of action lay in the company's hiring practices governed by section 703(a)⁴⁶ and not in the discriminatory operation of the seniority system prohibited by section 703(h), the Court did not specifically deal with the question of what constitutes a section 703(h) violation. In presenting its analysis of this section, the Court also failed to mention the extensive treatment given the provision by several lower courts.⁴⁷ In so doing, the Court thereby avoided any discussion of the problem faced by lower courts in distinguishing between departmental and plant seniority cases. As a result, the scope of the Court's interpretation is not immediately clear.⁴⁸

⁴⁵ 42 U.S.C. § 2000e-2(h) (1970). Section 703(h) is quoted in the text at note 12 *supra*.

⁴⁶ 42 U.S.C. § 2000e-2(a) (1970).

⁴⁷ See note 15 *supra*.

⁴⁸ Further, it is unclear whether, in analyzing § 703(h), the Court meant to deal with the question of the extent to which pre-Title VII discriminatory employment practices can invalidate the post-Act operation of a facially neutral seniority system. This issue occupied much of the Senate's debate on Title VII in terms of whether "[T]itle VII would undermine vested rights of seniority" that were established prior to the effective date of the Act. 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark). The floor leaders responded to this concern by stating that Title VII would have a prospective effect and would leave vested rights unchanged. See *id.* at 7213 (Memorandum of Senators Clark and Case); *id.* at 7207-7217 (remarks of Sen. Clark). Thus, section 703(h) was inserted into Title VII. See, *id.* at 12, 723 (remarks of Sen. Humphrey).

After reviewing this legislative history, the Supreme Court in *Franks* stated: Accordingly, whatever the exact meaning and scope of section 703(h) in light of its unusual legislative history and the absence of the usual legislative materials . . . , it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

424 U.S. at 761. In stating that the section is directed "toward defining *what is and what is not* an illegal discriminatory practice" in terms of pre-Act policies, the Court appears to imply that there may be instances in which pre-Act discriminatory acts may invalidate present seniority systems. Such an interpretation is in direct conflict with the remarks of Senator Clark that Title VII would not affect a seniority system "even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes." 110 CONG. REC. 7207 (1964). See Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1613 (1969). However, it is most likely that the Court did not intend to permit pre-Act discriminatory practices to invalidate present seniority systems, despite the Court's rather puzzling wording. For example, Justice Powell interpreted the majority's opinion as holding "the 'thrust' of § 703(h) of Title VII to be the insulation of an otherwise bona fide seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effect of pre-Act discrimination." 424 U.S. at 781 (Powell J., dissenting).

The failure of the Court to define the scope of section 703(h) adequately is demonstrated by the subsequent case of *EEOC v. Jersey Central Power & Light Co.*⁴⁹ in which the Supreme Court vacated and remanded a circuit court decision which had sustained a seniority system even though it perpetuated past discriminatory practices.⁵⁰ *Jersey Central* arose out of a request for a declaratory judgment in which the employer power company attempted to resolve an apparent conflict between a conciliation agreement with the EEOC and a collective bargaining agreement.⁵¹ Under the conciliation agreement, the employer agreed to take affirmative action to increase the percentage of minority and female workers in the company. By contrast, the collective bargaining agreement called for lay-offs on a last hired-first fired basis regardless of minority status. The Third Circuit first held that the agreements were not in conflict since the conciliation agreement applied to hiring policies, while the labor contract governed layoffs.⁵² In terms of whether the collective bargaining seniority system violated Title VII, the Third Circuit stated that "a facially neutral company-wide seniority system, *without more*, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females or minority groups as a result of past employment practices."⁵³ The Supreme Court in a three line opinion vacated and remanded the case "for further consideration in light of *Franks v. Bowman Transportation Co.* . . ."⁵⁴

It would appear that the Supreme Court's action was based on the lower court's reasoning that past employment practices cannot serve to invalidate the present operation of a seniority system. If a violation can be found in the employment practices of a company, *Franks* would appear to permit a remedy despite the validity of the seniority system. This initially would appear to be the correct result, since as the Court pointed out,⁵⁵ the use of seniority relief to restore an employee to his rightful place would not be restricted by the presence of a facially neutral seniority system. However, *Franks* and *Jersey Central* are distinguishable in one important respect—the type of relief sought. *Franks* concerned the use of fictional seniority to make whole those job applicants who were denied employment because of discriminatory hiring practices. In *Jersey Central*, the power company sought a declaratory judgment as to the validity of the conciliation agreement and the collective bargaining contract. On remand, the question in *Jersey Central* will not be whether the employees should receive seniority relief, but whether the collective bargaining seniority system is a violation of section 703(h). Unlike *Franks*, where the ques-

⁴⁹ 96 S. Ct. 2196 (1976).

⁵⁰ 508 F.2d 687, 710, 9 FEP Cas. 117, 132 (3d Cir. 1975).

⁵¹ *Id.* at 691-93, 9 FEP Cas. at 118-19.

⁵² *Id.* at 701-04, 9 FEP Cas. at 125-27.

⁵³ *Id.* at 710, 9 FEP Cas. at 132.

⁵⁴ 96 S. Ct. at 2196 (1976).

⁵⁵ See text at notes 41-42 *supra*.

tion of a violation of section 703(h) did not arise, the Third Circuit in *Jersey Central* will have to consider whether the seniority system is bona fide. Despite the holding of the Court, *Franks* does not provide any direct guidance on the issue. However, *Franks* does establish by implication a general method of interpretation.

Where the seniority system on its face specifically singles out minority workers for discriminatory treatment, there is little doubt that the system is not bona fide and, hence, is an illegal employment practice under Title VII.⁵⁶ The same result would also be achieved if it were found that the seniority system was the direct result of an intention to discriminate.⁵⁷ The harder question is the one presented by *Jersey Central*, which concerns a facially neutral seniority system which perpetuates past discriminatory practices. *Franks* could be interpreted as holding that for a seniority system to be invalid under section 703(h) the illegality must flow from the seniority system itself and not any other employment practice. For example, if a facially neutral seniority system perpetuates the effects "of past hiring practices," the violation is not in the seniority system, but in the hiring policies which are specifically covered in section 703(a).⁵⁸ Hence, it is arguable that the *Jersey Central* seniority system is valid under section 703(h) and should not be modified as a result of the declaratory judgment.⁵⁹ An alternative interpretation of *Jersey Central* would be that the *Franks* Court implied that a seniority system should be invalidated if it perpetuates past discriminatory practices. However, *Franks* dealt with a situation where the plaintiffs did not seek to modify the seniority system. As a result *Franks* does not hold that discriminatory hiring practices may act as a basis for invalidating a seniority system.

2. Fictional Seniority as Appropriate Equitable Relief—Section 706(g).

Having determined that section 703(h) does not restrict the granting of fictional seniority,⁶⁰ the Court next turned to the question of whether seniority relief is an appropriate remedy under Title VII. Section 706(g) provides in part that:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent . . . , and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay

⁵⁶ See note 2 *supra*.

⁵⁷ Section 703(h) provides that an employer may apply different standards under a bona fide seniority system "provided that such differences are not the result of an intention to discriminate" 42 U.S.C. § 2000e-2(h) (1970).

⁵⁸ 42 U.S.C. § 2000e-2(a)(1) (1970).

⁵⁹ Relief from the discriminatory hiring practices would still be available in a subsequent suit brought by aggrieved employees.

⁶⁰ See text at notes 43-44 *supra*.

..., or any other equitable relief as the court deems appropriate.⁶¹

The central issue presented by section 706(g) is whether fictional seniority relief is within the scope of the section's provision for the granting of such "equitable relief as the court deems appropriate."

In another *Survey* year decision, *Albemarle Paper Co. v. Moody*,⁶² the Supreme Court emphasized that "the purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination."⁶³ Although the issue in *Albemarle* was the appropriateness of an award of back pay, the Court in *Franks* again stressed the principle of compensating persons injured by past discrimination. The thrust of the Court's reasoning in *Franks* was that seniority benefits are of such importance that a minority worker "will never obtain his rightful place in the hierarchy of seniority" unless fictional seniority is utilized as a remedy.⁶⁴ Therefore, the Court found that fictional seniority is an appropriate remedy under section 706(g), since the relief is an effective means of making whole the minority worker.⁶⁵

Justice Powell, dissenting in *Franks*,⁶⁶ noted that the Court in *Albemarle* had stressed not only the principle of making employees whole but also the need "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."⁶⁷ Justice Powell argued that the granting of fictional seniority did little to meet the objective of eradicating discrimination. The employer who is responsible for the discriminatory employment practices would not be penalized by such relief since there is "only a rearrangement of employees along the seniority ladder without any resulting increase in cost."⁶⁸ The Justice noted that relief such as back pay is far more effective, since the employer would be directly affected by such a remedy. The majority argued against Powell's interpretation stressing that the removal of discriminatory barriers as well as making employees whole could be accomplished by the granting of fictional seniority.⁶⁹ The use of back pay was viewed by the Court as a limited form of relief which only compensated the employee for past wrongs. Conversely, the use of fictional seniority gives the minority worker a greater degree of power in competing for future work assignments in the company. While an employer may not be directly "punished" by

⁶¹ 42 U.S.C. § 2000e-5(g) (Supp. III, 1973).

⁶² 422 U.S. 405 (1975).

⁶³ 422 U.S. at 418.

⁶⁴ 424 U.S. at 768-69.

⁶⁵ *Id.* at 767.

⁶⁶ *Id.* at 782-85 (Powell, J., dissenting).

⁶⁷ 422 U.S. at 417, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

⁶⁸ 424 U.S. at 787 (Powell, J., dissenting).

⁶⁹ *Id.* at 768 n.28.

an award of fictional seniority, the Court correctly noted that fictional seniority does further the goal of eradicating employment discrimination by giving the aggrieved employee a potent means of advancing toward his or her employment objectives.

The other consideration relevant to a determination of the appropriateness of fictional seniority relief under section 706(g) is whether the granting of such relief would be equitable if one consequence would be to take away the employment expectations of white workers whose seniority is based solely on actual length of service. Justice Powell argued that the effects of fictional seniority might be to penalize employees who were not responsible for the initial discriminatory refusal to hire.⁷⁰ White workers who expected to use their seniority to avoid plant layoffs, might find themselves unemployed because of a court's award of fictional seniority to minority workers. Because of this "penalty," Justice Powell submitted that the use of fictional seniority to compete for employment benefits was not an "appropriate" affirmative action under section 706(g).

The majority recognized that the use of fictional seniority would affect both discriminatee and nondiscriminatee employees.⁷¹ However, the Court also noted that notwithstanding the use of fictional seniority, minority employees may still not be able to obtain complete relief. Due to the employer's initial refusal to hire minority workers, it is possible that several white workers were given jobs they might not have received but for the discrimination. After an award of fictional seniority these white workers would not lose the seniority that was accumulated because of discriminatory practices. This means that the minority worker, even with his fictional seniority, will still find himself competing on the basis of a seniority list that reflects the prior discrimination. As a result, a minority employee may never receive "complete relief" from past wrongs, while at the same time a nondiscriminatee employee may have to delay some of his or her employment expectations because of the sudden shift in the seniority system. The Court concluded that:

We are of the view, however, that the result which we reach today—which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.'⁷²

⁷⁰ *Id.* at 788-89 (Powell, J., dissenting).

⁷¹ *Id.* at 777.

⁷² *Id.* at 777-78, quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941).

The argument with respect to fashioning appropriate equitable relief formed the central area of disagreement between the majority and dissent in *Franks*. In terms of the individual employees involved, it is questionable whether either the majority or the dissent provided a truly equitable solution for the problem of remedying discriminatory hiring practices. Ultimately, it was the Court's decision to favor the national policy of eradicating employment discrimination that tipped the balance in favor of granting fictional seniority relief. If the result of this policy is to deny the employment expectations of nondiscriminatees, it is a loss that must be accepted in order to resolve a greater national dilemma.

VII. PROCEDURE

A. *Tolling of the Statute of Limitations in a Section 1981 Action - The Inter-Relationship Between Title VII and Section 1981: Johnson*

In *Johnson v. Railway Express Agency, Inc.*,¹ the Supreme Court this *Survey* year, held that the timely filing of a charge of employment discrimination under Title VII does not toll the statute of limitations for a cause of action based on the same facts under 42 U.S.C. section 1981.² The petitioner in *Johnson* had filed an action with the EEOC in 1967 claiming that Railway Express Agency, Inc. (REA) discriminated against all of its Black employees with respect to seniority rules and job assignments and that the two unions involved with REA maintained racially segregated memberships.³ Three weeks after the petitioner filed the complaint, the company terminated his employment.⁴ Thereafter, Johnson amended his complaint to include the allegation that REA had discharged him because of his race. Approximately four years later, the EEOC issued a right to sue letter to

¹ 421 U.S. 454 (1975).

² *Id.* at 462-66. 42 U.S.C. § 1981 (1970) provides in part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens

The Court had granted certiorari to resolve "an apparent conflict" among the circuits as to whether a § 1981 statute of limitations was tolled during the pendency of Title VII administrative proceedings. 421 U.S. at 457. See *Johnson v. Railway Express Agency*, 489 F.2d 525, 529-30, 6 FEP Cas. 1163, 1166 (6th Cir. 1973), *rehearing denied*, 489 F.2d 530, 530-31, 7 FEP Cas. 486, 487 (6th Cir. 1974), *aff'd*, 421 U.S. 454 (1975) (statute is not tolled). *Contra*, *Macklin v. Spector Freight Systems*, 478 F.2d 979, 994-95 n.30, 5 FEP Cas. 994, 1005-06 n.30 (D.C. Cir. 1973); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.16, 3 FEP Cas. 99, 103 n.16 (5th Cir. 1971).

³ 421 U.S. at 455.

⁴ *Id.*

Johnson,⁵ who then brought an action against the employer and the two unions under both Title VII and section 1981.⁶ Both the district⁷ and circuit⁸ courts dismissed Johnson's Title VII complaint on procedural grounds.⁹

As to the petitioner's section 1981 claim, the lower courts found that the claim was governed by the applicable state statute of limitations¹⁰ which required that civil actions "for injuries to person [and] civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes . . . shall be commenced within one . . . year after cause of action accrued."¹¹ The district and circuit courts rejected Johnson's argument that this statute of limitations was tolled during the period when his charges were being processed by the EEOC.¹² The Supreme Court affirmed.¹³

The Supreme Court approached the statute of limitation issue by first analyzing the interrelationship between Title VII and section 1981. The *Johnson* Court noted that in enacting Title VII, Congress had stressed the importance of encouraging the business community to comply voluntarily with the goal of eliminating employment discrimination.¹⁴ As a part of this policy, the EEOC was given the power to conciliate employment discrimination disputes in order to avoid litigation and forced compliance.¹⁵ The Court pointed out how-

⁵ *Id.* at 455-56. A right to sue letter informing an individual who has brought charges under Title VII that he or she may bring an action in federal court is issued if (1) the Commission dismisses the individual's complaint, (2) the EEOC or Attorney General have not filed a civil action based upon the charges within a prescribed period, or (3) the individual has refused to join in a conciliation agreement. Once the right to sue letter is given, the aggrieved employee has 90 days in which to bring a civil action. 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973). See

⁶ 421 U.S. at 456.

⁷ 6 FEP Cas. 1160 (W.D. Tenn. 1973). See also 6 FEP Cas. 1159 (W.D. Tenn. 1971); *sub nom.* Thornton v. Railway Express Agency, 6 FEP Cas. 1158 (W.D. Tenn. 1971).

⁸ 489 F.2d 525, 6 FEP Cas. 1163 (6th Cir. 1973), *rehearing denied*, 489 F.2d 530, 7 FEP Cas. 486 (6th Cir. 1974).

⁹ The progress of Johnson's complaint from his initial filing of charges with the EEOC to the final adjudication by the Supreme Court presents a disturbing commentary on the ability of indigent minority employees to seek speedy and fair resolutions of employment disputes. Johnson's Title VII complaint against REA was dismissed by the district court, because the plaintiff failed to refile his complaint within the 30 day filing period. 6 FEP Cas. at 1161-62. The reason for Johnson's failure to properly file was an inability to locate an attorney who would handle his case after the withdrawal of Johnson's original counsel. *Id.* at 1161. The EEOC was also "partially at fault" because of the four year delay between the submission of the complaint to the Commission and the issuance of the right to sue letter. *Id.* at 1163. It should also be noted that the case was not resolved until eight years after the initial complaint was filed in 1967.

¹⁰ 6 FEP Cas. at 1162; 489 F.2d at 529, 6 FEP Cas. 1166.

¹¹ TENN. CODE ANN. § 28-304 (Supp. 1975). See note 44 *infra*.

¹² 6 FEP Cas. at 1162; 489 F.2d at 529-30, 6 FEP Cas. at 1166.

¹³ 421 U.S. at 467.

¹⁴ 421 U.S. at 459. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

¹⁵ 42 U.S.C. § 2000e-5(a) (1970), *amended by*, 42 U.S.C. § 2000e-5(b) (Supp. III, 1973).

ever, that it was not the intent of Congress in enacting Title VII to preclude other avenues of relief, including in particular, relief under section 1981. The Court also noted that while both Title VII and section 1981 provide remedies for discriminatory employment practices,¹⁶ the relief available under the two provisions varies in several respects such as back pay relief and attorney's fees.¹⁷ The Court ultimately concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."¹⁸ Within this framework, the Court turned to the specific question of whether to toll the statute of limitations.

Since section 1981 does not contain its own statute of limitations, the Court in *Johnson* first looked to state law to determine the appropriate limitations period.¹⁹ It found that the one-year state limitation for tort and civil rights actions was the most appropriate.²⁰ The Court further held that the state statute of limitations was not suspended by any of the applicable state tolling statutes.²¹ Having settled the question of which state statute of limitations applied,²² the Court ad-

¹⁶ The Court stated that "[a]lthough this Court has not specifically so held, it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 460.

¹⁷ A backpay award under Title VII is restricted to the two year period prior to the filing of charges, 42 U.S.C. § 2000e-5(g) (Supp. III, 1973), while backpay under § 1981 is restricted by the applicable state statute of limitations. See note 19, *infra*. A party may recover attorney's fees under Title VII, 42 U.S.C. § 2000e-5(k) (Supp. III, 1973), but such a recovery is unavailable under § 1981. *Alaska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 270-71 (1975). The *Johnson* Court also noted that § 1981 provides compensatory and punitive damages implying that such damages are not available under Title VII. 421 U.S. at 460. Since *Johnson* Congress has enacted legislation permitting attorney's fees under § 1981, Pub. L. No. 94-559, 90 Stat. 2641 (1976).

¹⁸ 421 U.S. at 461.

¹⁹ *Id.* at 462. See *O'Sullivan v. Felix*, 233 U.S. 318, 322-23 (1914). The Court also noted that under 42 U.S.C. § 1988 (1970) Congress provided that state law could be applied in fashioning relief under § 1981. Section 1988 provides in part:

[I]n all cases where [the federal civil rights laws] are not adapted to the object [of vindicating a person's civil rights], or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

42 U.S.C. § 1988 (1970).

²⁰ 421 U.S. at 463.

²¹ *Id.*

²² *Id.* at 465. *Johnson* indirectly raises several questions as to the inter-relationship between state and federal law. In his argument the petitioner relied on *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), in which the Court had tolled federal limitation statutes because of a potential conflict with federal policy. The petitioner contended that the state statute of limitations should be tolled on similar grounds, since "a failure to toll the limitation period [would] conflict seriously with the broad remedial and humane

ressed the remaining issue whether the state law should be set aside as inconsistent with the federal policies underlying the Civil Rights Acts.²³

The petitioner argued that a "failure to toll the limitation period in this case [would] conflict seriously with the broad remedial and humane purposes of Title VII."²⁴ While the underlying policy of the Act is to encourage the voluntary eradication of employment discrimination, a decision by the Court not to toll the statute would force an aggrieved employee to enter into litigation during the pendency of conciliation efforts by the EEOC. The Court agreed with the petitioner that the effect of forcing a minority worker into litigation would be to "deter efforts at conciliation,"²⁵ since the threat of court action would severely reduce an employer's willingness to enter freely into a settlement. The Court suggested, however, that a possible solution could be found where the plaintiff filing a claim under section 1981 requested a stay of the 1981 action until the Title VII administrative proceedings were completed.²⁶ While recognizing that this suggestion was not a "highly satisfactory solution,"²⁷ the Court reasoned that the importance of maintaining section 1981 as a separate remedy in discrimination cases outweighs the problems encountered in Title VII conciliation:

[T]he fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII.²⁸

Underlying this conclusion was the basic presumption that if section 1981 is to be accorded separate treatment, then the provision's statute of limitations should run independently from the course of administrative proceedings. In effect, then, the petitioner, in relying exclusively on the administrative remedies available under Title VII, had

purposes of Title VII," 421 U.S. at 465. The Court found that contrary to the petitioner's reasoning a failure to toll would not conflict with federal policy. *Id.* at 465, 467 n. 13. This avoided any consideration of whether the Court, if it had found a conflict, could still have tolled the state limitation statute. If the statute were tolled, the Court would have, in effect, created a new federal common law which would supersede state law. While a full discussion of the Court's power to create such a new federal law is beyond the scope of this *Survey*, the lack of any discussion by the majority or, in particular, the dissent on this question is puzzling.

²³ 421 U.S. at 465.

²⁴ *Id.*

²⁵ *Id.* at 461.

²⁶ *Id.* at 465.

²⁷ *Id.*

²⁸ *Id.* at 465-66.

"slept on his § 1981 rights"²⁹ by not filing within the time allotted by applicable statute of limitations.

Although the cornerstone of the Court's opinion is the premise that Title VII and section 1981 must be treated as independent grants of rights and remedies to civil rights plaintiffs, it is questionable whether the tolling of the statute of limitations would seriously affect the independent nature of these two statutes. If the limitation statute were tolled during the pendency of an administrative process, an individual's rights under Title VII and section 1981 would be unaffected, since the same procedures and remedies would still be available.³⁰ The only change would be to permit a claimant more flexibility in bringing a civil action for employment discrimination. Instead, the Court has chosen to favor form over substance by maintaining a strict separation between section 1981 and Title VII.

It is also arguable that the Court's holding in *Johnson* may ultimately restrict the effectiveness of Title VII and section 1981 by impeding the conciliation process and complicating the procedures necessary to bring a civil action for employment discrimination. After *Johnson*, an aggrieved employee would be well advised to institute simultaneous actions under Title VII, under section 1981, and under

²⁹ *Id.* at 466. The Court's use of these words is apparently taken from language in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 429 (1965). In *Burnett* the plaintiff had first filed an action under the Federal Employee's Liability Act, 45 U.S.C. § 51 *et seq.* (1970), in a state court. After the action was dismissed for improper venue, the plaintiff brought a similar action in federal court. The federal court dismissed ruling that the federal statute of limitations had run. In reversing, the Court found that the plaintiff had not slept on his rights under the FELA, since his initial cause of action was the same as his subsequent claim in the federal courts. 380 U.S. at 429. This demonstrates the importance of the Court's interpretation in *Johnson* that Title VII and section 1981 are separate remedies. If the two provisions were treated as one and the same, *Burnett* would apply and the statute of limitations for § 1981 would be tolled. However, as they are separate remedies, the institution of a claim under Title VII has no effect on one's § 1981 rights.

³⁰ In his dissent in *Johnson*, Justice Marshall reasoned that adopting a stand in favor of tolling would not affect the basic principles and interests protected by the statute of limitations. 421 U.S. at 473 (Marshall, J., dissenting). As the Court stated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the purpose of a statute of limitations is:

to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Since a claim under Title VII and § 1981 would be based on the same set of facts, an employer would be put on notice of the § 1981 claims with the filing of charges with the EEOC. 421 U.S. at 473 (Marshall, J., dissenting). Hence, there would be little chance of unfair surprise or a stale claim when the § 1981 claim is brought. If for some reason the aggrieved employee does raise a new claim under § 1981 which is unrelated to the Title VII charges, the statute of limitations should not be tolled as to the new claim. As suggested by Justice Marshall this would prevent an unfair surprise, while still allowing the party to utilize § 1981 for the original charges.

any available collective bargaining grievance procedure.³¹ Due to the immense variation among the state statutes of limitations which apply to section 1981³² and due to *Johnson's* anti-tolling policy, little if any reliance can be placed on the approach of instituting an action only after the previous remedy has failed. Therefore, an employer may suddenly find himself overwhelmed by an aggrieved employee who is demanding simultaneously the right to arbitration, administrative conciliation, and court action. The employer might reason that there is little to be gained in compromise, for, if the employee fails at one remedy, he will only go on to the next. Alternatively, the deluge of potential remedies may force some employers into a premature settlement in order to avoid the drain on time and resources that would be necessary to avoid liability. As the Supreme Court suggested, a partial solution to this problem may be to request a stay of proceedings in the section 1981 action.³³ However, such a stay would do little to lessen the impact on the employer of being divided three ways between the union, the EEOC, and the courts.

It is questionable whether Congress meant to encourage conciliation and settlement by overwhelming employers with the remedies available to an aggrieved employee. It is equally questionable whether Congress, in maintaining separate remedies of arbitration, conciliation, and judicial relief, desired to impose complicated and exacting procedures on aggrieved employees. As Justice Marshall stated in his dissent:

[L]egislative pains to avoid unnecessary and costly litigation by making the informal, investigatory and conciliatory offices of the EEOC readily available to victims of unlawful discrimination cannot be squared with the formal mechanistic requirement of early filing for the technical purpose of tolling a limitation statute.³⁴

Therefore, it is submitted that by forcing an aggrieved employee to institute a legal action during the pendency of Title VII administrative proceedings, the Court in *Johnson* has unnecessarily complicated the process of voluntary conciliation and has significantly impaired the effectiveness of Title VII's general policy of encouraging voluntary settlement.

The Court in *Johnson* was careful to note at several points in the opinion that its decision was limited to the tolling issue.³⁵ As a result

³¹ See text at notes 51-66, *infra*. If the pursuance of collective bargaining grievance procedures does not toll the limitation statutes for Title VII or § 1981, then an aggrieved employee should bring all three actions simultaneously.

³² See text at notes 39-42, *infra*.

³³ 421 U.S. at 465.

³⁴ 421 U.S. at 473 (Marshall, J., dissenting).

³⁵ 421 U.S. at 455, 456-57 n.3, 462 n.7. The Court stated that it would not rule on the issue of "whether a § 1981 claim of employment discrimination is ever subject to a requirement that administrative remedies be exhausted." *Id.* at 456-57 n.3. This issue

several issues remain unresolved as to the choice of an appropriate statute of limitations and the scope of Johnson's application. As mentioned previously,³⁶ section 1981 does not contain a specific statute of limitations and, as a result, a court must refer to state law to determine whether an action is barred.³⁷ In looking to the applicable state statutes, the federal courts have not yet reached a consensus as to which type of state statute of limitation should apply.³⁸ For example, courts have held that section 1981 is governed by limitation statutes that related to torts,³⁹ contracts,⁴⁰ liabilities created by statute,⁴¹ and back wages.⁴²

Although the holding in *Johnson* requires a resolution of this issue, the *Johnson* Court offered no guidelines in this area. In *Johnson*, the Supreme Court was faced with three different statutes of limitations that could have applied to the section 1981 claim:⁴³ (1) a one year limitation on tort and civil rights action,⁴⁴ (2) a six year limitation on contract actions,⁴⁵ and (3) a ten year limitation for actions not ex-

had arisen in the district court where the court dismissed Johnson's case partly because he had failed to exhaust his remedies under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970). 6 FEP Cas. 1160, 1162 (W.D. Tenn. 1973). It is submitted that despite the statement of the Court that it would not decide the exhaustion issue on appeal, the *Johnson* Court inadvertently submitted a strong argument against the requirement of exhaustion. In response to the petitioner's argument that a refusal to toll the statute of limitations would be contrary to the policies of Title VII, the Court suggested that a future complainant under § 1981 request a stay of proceedings until the EEOC administrative process was complete. 421 U.S. at 465. However, the Court failed to note that the claimant in order to submit the request for a stay of proceedings would have had to first surmount the exhaustion issue, since the administrative proceedings would still be in progress. In addition, it is an unavoidable conclusion of *Johnson* that if the statute of limitations for § 1981 is not tolled during the pendency of administrative proceedings, a § 1981 claimant should not be held to the duty of first exhausting his administrative remedies. This would be especially true in a situation such as in *Johnson* where the Court enforced a one year statute of limitations, but the EEOC took four years to complete its administrative procedures. See note 9, *supra*.

³⁶ See text at notes 19-22, *supra*.

³⁷ 421 U.S. at 462.

³⁸ See generally *Warren v. Norman Realty Co.*, 513 F.2d 730, 733-34 (8th Cir.), *cert. denied*, 423 U.S. 855 (1975); Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763 (1969).

³⁹ *Davis v. U.S. Steel Supply.*, 12 FEP Cas. 1, 1-2 (W.D. Pa. 1976); *Smith v. Olin-kraft, Inc.*, 404 F. Supp. 861, 863, 11 FEP Cas. 1188, 1189-90 (W.D. La. 1975).

⁴⁰ *Pittmen v. Anaconda Wire & Cable Co.*, 408 F. Supp. 286, 293, 11 FEP Cas. 9, 14 (E.D.N.C. 1974).

⁴¹ *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 522, 11 FEP Cas. 443, 445 (6th Cir. 1975); *Ross v. General Motors Corp.*, 391 F. Supp. 550, 553, 10 FEP Cas. 306, 309 (N.D. Ga. 1973).

⁴² *Williams v. Sheraton Corp. of America*, 11 FEP Cas. 897, 898 (E.D. La. 1975).

⁴³ 421 U.S. at 462.

⁴⁴ TENN. CODE ANN. § 28-304 (Supp. 1975). Section 28-304 imposes a statute of limitations on actions "brought under the federal civil rights statutes . . ." *Id.* In its decision in *Johnson* the Court refrained from considering whether such a limitation "is an impermissible discrimination against the federal cause of action . . ." 421 U.S. at 462 n.7. See *Bulls v. Holmes*, 11 FEP Cas. 1063, 1065 (E.D. Va. 1975).

⁴⁵ TENN. CODE ANN. § 28-309 (1955).

pressly covered by other statutes.⁴⁶ While accepting the one year limitation for tort and civil rights actions as applicable, the Court specifically stated that, due to the limited nature of the question under consideration, it was not considering whether another statute might be better suited to the section 1981 action.⁴⁷

It is difficult to isolate the area of the law to which section 1981 is related for the purposes of applying the appropriate statute of limitations. At least three alternatives are possible. First, viewing an action under section 1981 as a claim of "tortious interference with a basic statutory right,"⁴⁸ the statute of limitations for actions in tort could apply. Second, in that the relationship between the employer and employee is based on a contract, and that, arguably, an implied condition of any employment contract is that the employer will refrain from illegal discrimination, the statute of limitations applied in actions for breach of contract may be appropriate.⁴⁹ A third alternative is to first isolate the various remedies claimed by the plaintiff under section 1981 and then apply the relevant specific statutes of limitations to each remedy.⁵⁰ For example, that part of a claim which sought injunctive or punitive damages would be governed by the statute of limitations that pertains to torts, and a claim for back wages would be governed by the applicable contract limitation statute.

Because of the lack of any generally accepted interpretation of which statute of limitations should apply to a section 1981 claim, the practitioner will have to refer to the case law of the individual jurisdiction involved. If such case law does not exist, it will be necessary to make an educated guess as to which statute should apply. It is submitted that the proper solution to this conflict is congressional action in the form of a federal statute of limitations for an action under section 1981. This would result in a more consistent treatment of each aggrieved employee's claim and prevent reliance on limitation statutes which later prove to be inapplicable.

Aside from the question of which statute of limitations should apply in a section 1981 action, the Court also left unresolved the problem of whether the Court's anti-tolling stance should be applied to situations where the interaction between Title VII and section 1981 is not at issue. This relates particularly to the case where an aggrieved employee first pursues a remedy through a collective bargaining grievance procedure and then files a charge with the EEOC. Should

⁴⁶ TENN. CODE ANN. § 29-310 (1955).

⁴⁷ 421 U.S. at 462 n. 7.

⁴⁸ *Wilson v. Sharon Steel Corp.*, 399 F. Supp. 403, 408, 11 FEP Cas. 145, 148 (W.D. Pa. 1975).

⁴⁹ In this respect it should be noted that § 1981 specifically protects the right to "make and enforce contracts." 42 U.S.C. § 1981 (1970). See *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.16, 3 FEP Cas. 99, 103 n.16 (5th Cir. 1971).

⁵⁰ See *Smith v. Olinkraft, Inc.*, 404 F. Supp. 861, 863, 11 FEP Cas. 1188, 1190-91 (W.D. La. 1975).

the statute of limitations for filing a charge of employment discrimination under Title VII be tolled during the grievance procedure? In addressing this issue it should be noted that *Johnson* was decided on the basis of the interrelationship between Title VII and section 1981. No mention was made by the Court as to whether the principles enunciated in *Johnson* should be extended to the area of grievance procedures. Despite this possible limitation on *Johnson*, two *Survey* year cases have applied *Johnson* to the question of whether the statute of limitations for Title VII should be tolled during a grievance proceeding.⁵¹

In *Guy v. Robbins & Meyers, Inc.*,⁵² the plaintiff was discharged from work on October 25, 1971.⁵³ Two days later a grievance was filed under a collective bargaining agreement.⁵⁴ This grievance was rejected by the company and, instead of going to arbitration, the plaintiff filed a charge with the EEOC. The charge was filed 108 days after the discharge—18 days beyond the Title VII statute of limitations in effect at the time of the action.⁵⁵ The Sixth Circuit in *Guy* held that the statute of limitations was not tolled during the grievance proceedings and that the Title VII action was barred.⁵⁶ In reaching this result, the court relied primarily on *Johnson* and *Alexander v. Gardner-Denver Co.*⁵⁷ In *Gardner-Denver*, the Supreme Court considered whether an aggrieved individual was entitled to a trial de novo under Title VII after the completion of final arbitration under a collective bargaining agreement.⁵⁸ In granting a trial de novo, the *Gardner-Denver* Court construed Title VII as a separate remedy which supplemented the grievance procedure.⁵⁹ While the Court in *Gardner-Denver* did not consider the tolling issue, its holding represents the same basic policy of "separate" remedies that the Court later followed in *Johnson*.⁶⁰ The Sixth Circuit in *Guy* interpreted *Gardner-Denver* and *Johnson* as support for the reasoning that the Title VII statute of limitations was not tolled during the grievance proceed-

⁵¹ *Guy v. Robbins & Meyers, Inc.*, 525 F.2d 124, 11 FEP Cas. 641 (6th Cir. 1975), cert. granted, 44 U.S.L.W. 3608 (April 27, 1976); *Bush v. Wood Bros. Transfer, Inc.*, 398 F. Supp. 1030, 11 FEP Cas. 113 (S.D. Tex. 1975).

⁵² 525 F.2d 124, 11 FEP Cas. 641 (6th Cir. 1975), cert. granted, 44 U.S.L.W. 3608 (April 27, 1976). See also *Roberts v. Lockheed Aircraft Corp.*, 11 FEP Cas. 1440 (C.D. Cal. 1975), vacated, 12 FEP Cas. 526 (C.D. Cal. 1976).

⁵³ 525 F.2d at 126, 11 FEP Cas. at 641.

⁵⁴ *Id.* at 126, 11 FEP Cas. at 642.

⁵⁵ *Id.* See 42 U.S.C. § 2000e-5(d) (1970). The filing period was extended under the 1972 amendments from 90 to 180 days. 42 U.S.C. § 2000e-5(e) (Supp. III, 1973).

⁵⁶ 525 F.2d at 128, 11 FEP Cas. at 643-44.

⁵⁷ 415 U.S. 36 (1974).

⁵⁸ *Id.* at 38.

⁵⁹ *Id.* at 47-49.

⁶⁰ See text at note 28, *supra*. In both *Gardner-Denver* and *Johnson* the Court placed great reliance on the principle that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." 421 U.S. at 459, quoting *Gardner-Denver*, 415 U.S. at 48.

ings, since Title VII and the grievance proceedings are regarded as separate remedies.⁶¹

Contrary to the Sixth Circuit's decision in *Guy*, the district court for the Southern District of Texas held in *Bush v. Wood Bros. Motor Transfer, Inc.*⁶² that the 90 day statute of limitations for Title VII did toll during the grievance procedure.⁶³ The court narrowly applied *Johnson* by restricting its scope only to those cases in which the relationship between section 1981 and Title VII was in issue.⁶⁴ Although its reasoning is unclear, the *Bush* court, unlike the court in *Guy*, interpreted *Gardner-Denver* to support its holding that the statute was tolled.⁶⁵

The opinion in *Bush* leads to an incongruous result when compared with the opinions in *Johnson* and *Gardner-Denver*. Read together, the Court's analysis in the two cases stands for the principle that the remedies provided by Title VII, section 1981, and collective bargaining grievance procedures are separate and supplemental. If, under this approach, the statute of limitations for a section 1981 action should not be tolled during a Title VII administrative proceeding, as the Court ruled in *Johnson*, the same should apply for Title VII's statute of limitations during a grievance proceeding. In addition, as the Court stated in *Guy*, the statute of limitations for Title VII is "a clear pronouncement" of a "jurisdictional prerequisite."⁶⁶ To add a tolling exception such as the one established in *Bush* might greatly expand a plaintiff's time limitations far beyond the relatively short limitations imposed by Title VII.

An additional conflict arose during the *Survey* year among the district courts in relation to the scope of *Johnson's* applicability. In concluding that the statute of limitations for section 1981 is not tolled during an administrative proceeding, the Supreme Court in *Johnson* gave no indication as to whether its holding should be applied retroactively. This has led to a conflict among the district courts as to whether *Johnson* should be applied retroactively to deny a section 1981 claim due to the expiration of the applicable statute of limitations.

In *Bush v. Wood Bros. Transfer, Inc.*,⁶⁷ the plaintiff was discharged from his job in 1970. After pursuing his remedies through collective bargaining grievance procedures and Title VII administrative proceedings, the plaintiff brought an action under Title VII and section 1981.⁶⁸ Unless tolled by the Title VII action, the applicable state two year statute of limitations for a section 1981 claim would have barred

⁶¹ 525 F.2d at 128, 11 FEP Cas. at 643.

⁶² 398 F. Supp. 1030, 11 FEP Cas. 113 (S.D. Tex. 1975).

⁶³ *Id.* at 1033-34, 11 FEP Cas. at 116.

⁶⁴ *Id.* at 1033, 11 FEP Cas. at 116.

⁶⁵ *Id.* at 1034, 11 FEP Cas. at 116.

⁶⁶ 525 F.2d 127, 11 FEP Cas. at 642.

⁶⁷ 398 F. Supp. 1030, 11 FEP Cas. 113 (S.D. Tex. 1975). See also *Roberts v. Lockheed Aircraft Corp.*, 12 FEP Cas. 526 (C.D. Cal. 1976); *Hambrick v. Royal Sonesta Hotel*, 11 FEP Cas. 863 (E.D. La. 1975).

⁶⁸ 398 F. Supp. at 1031, 11 FEP Cas. at 114.

the action. The Supreme Court's decision in *Johnson* was handed down subsequent to the institution of the action in *Bush*, but prior to the lower court's ruling.

In relying on the criteria enunciated by the Supreme Court in *Chevron Oil Co. v. Huson*,⁶⁹ the district court in *Bush* held that *Johnson* is not retroactive,⁷⁰ because (1) the plaintiff in delaying his action under section 1981 relied on past precedent,⁷¹ (2) a retrospective application of the anti-tolling rule would frustrate the "policy of encouraging the plaintiff to use every avenue of relief prior to instituting a civil suit,"⁷² and (3) it would be inequitable to deny relief to the plaintiff.⁷³ Without specifically so holding, the court noted that the non-retroactivity of *Johnson* should apply to a plaintiff who has instituted a Title VII administrative proceeding, but who has not yet brought a claim under section 1981.⁷⁴ However, the court qualified this specific result with the condition that the statute of limitations be tolled during the pendency of the EEOC proceedings only if the delay was due to the failure of the EEOC to process the claim rapidly.⁷⁵ The court also implied that the statute of limitations should not be tolled, if the plaintiff, at the time *Bush* was handed down, could still file a section 1981 action before the statute of limitations expired.

It should be noted that contrary to *Bush*, several courts during the *Survey* year applied *Johnson* retroactively and have found that the statute of limitations was not tolled during the pendency of the EEOC administrative proceedings.⁷⁶ In these cases the question of retroactivity was not specifically discussed by the courts. It is submitted that *Johnson* should not be applied retroactively, since, as the court stated in *Bush*, there are "numerous litigants who relied on the rule [that the statute of limitations was tolled] and refrained from instituting theoretically premature § 1981 actions prior to the conclusion of an EEOC proceeding."⁷⁷

B. Consent Decrees-Back Pay Settlements-Intervention: Allegheny-Ludlum

As part of Congress' intention to encourage cooperation and voluntary compliance in eliminating employment discrimination under Title VII, the EEOC is authorized to use "informal methods of conference, conciliation, and persuasion" in resolving employment

⁶⁹ 404 U.S. 97, 106-07 (1971).

⁷⁰ 398 F. Supp. at 1033, 11 FEP Cas. at 116.

⁷¹ *Id.* at 1032, 11 FEP Cas. at 115.

⁷² *Id.* at 1032-33, 11 FEP Cas. at 115.

⁷³ *Id.* at 1033, 11 FEP Cas. at 115-16.

⁷⁴ *Id.* at 1033, 11 FEP Cas. at 116.

⁷⁵ *Id.*

⁷⁶ *Wilson v. Sharon Steel Corp.*, 399 F. Supp. 403, 408, 11 FEP Cas. 145, 148 (W.D. Pa. 1975); *Heath v. Kimberly-Clark Corp.*, 11 FEP Cas. 1152, 1153 (N.D. Ala. 1975); *Turner v. Texas Instruments, Inc.*, 11 FEP Cas. 748 (N.D. Tex. 1975).

⁷⁷ 398 F. Supp. at 1032, 11 FEP Cas. at 115.

disputes.¹ In *United States v. Allegheny-Ludlum Industries, Inc.*,² the Fifth Circuit this *Survey* year considered several arguments challenging the right of the EEOC to negotiate industry-wide conciliation agreements and the right of third parties to intervene in opposition to such agreements.³

The United States, on behalf of the EEOC and the Secretary of Labor, initially brought an action under section 707 of Title VII⁴ and Executive Order 11246⁵ against nine major steel companies and the United Steelworkers of America.⁶ The suit covered a substantial part of the steel industry, as it involved 240-250 plants and 300,000 employees.⁷ The United States charged that "the companies had violated Title VII and Executive Order 11246 by hiring and assigning employees on impermissible grounds, and by restricting ethnic minorities and females to low-paying and undesirable jobs with scant opportunities for advancement."⁸ The charges were ultimately resolved out of court in two consent decrees which provided broad forms of relief throughout the steel industry.⁹ In the agreements, the parties consented to a permanent injunction on discriminatory employment practices; major revisions of the industry's seniority system; affirmative action programs to correct past hiring practices; a review committee to insure observance of the agreement; and a back pay fund of \$30,940,000 to compensate those employees injured by past discrimination.¹⁰

¹ 42 U.S.C. § 2000e-5(b) (Supp. III, 1973). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). If the Commission is unable to reach a settlement, the EEOC may bring a civil action against the employer. 42 U.S.C. § 2000e-5(f) (1) (Supp. III, 1973).

² 517 F.2d 826, 11 FEP Cas. 167 (5th Cir. 1975), *cert. denied, sub nom.*, *N.O.W. v. United States and Harris v. Allegheny-Ludlum Industries, Inc.*, 44 U.S.L.W. 3593 (April 20, 1976).

³ The Fifth Circuit stated that the central issue presented by the case was: whether the responsible government agencies may lawfully conciliate and settle by consent decree charges of discrimination cutting across an entire industry in a manner which assures cooperative defendants that they will not face future government lawsuits on those claims, and which accords the defendants the opportunity to offer final satisfaction to aggrieved individuals who are willing to accept tenders of back pay and execute releases.

517 F.2d at 850-51, 11 FEP Cas. at 185.

⁴ 42 U.S.C. § 2000e-6(e) (Supp. III, 1973).

⁵ 3 C.F.R. 169 (1974).

⁶ 517 F.2d at 834, 11 FEP Cas. at 171-72.

⁷ *Id.* at 834 & n.1, 11 FEP Cas. at 171-72 & n.1. The appellee steel companies estimated that the "complaint reached seventy-three percent of the country's basic steel industry." *Id.* at 834 n.1, 11 FEP Cas. at 171-72 n.1.

⁸ *Id.* at 834, 11 FEP Cas. at 172.

⁹ Under §§ 706(b) and 707(e) of Title VII the EEOC is empowered "to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. §§ 2000e-5(b), 2000e-6(e) (Supp. III, 1973). Under this power the EEOC along with the Justice and Labor Departments entered into the consent decrees with nine major steel companies. The two consent decrees are reprinted in BNA, LAB. REL. REP., FEP Man. 431:125-152.

¹⁰ 517 F.2d at 834-35, 11 FEP Cas. at 172-73.

After the entry of the consent decrees in the district court, several parties, including the National Organization of Women [NOW], sought to intervene and to either stay or vacate the agreements.¹¹ The claimants principally attacked two provisions of the consent decrees: (1) Paragraph 18(g), which provided that a back pay settlement would be tendered to each affected employee upon the execution of a release, relieving the steel industry of any further liability for discriminatory acts occurring on or before the entry of the decrees;¹² and (2) Paragraph C, in which the government agreed to be bound by the principles of *res judicata* and collateral estoppel with respect to all issues within the scope of the decrees.¹³ The claimants argued first that the government, by agreeing to these two paragraphs and others within the consent decrees,¹⁴ exceeded the powers and responsibilities granted to the EEOC, and second, that the agreements infringed upon the right of the individual employee to seek recovery through a civil action.¹⁵ The district court in *Allegheny-Ludlum* overruled these arguments and sustained the consent decrees.¹⁶ The Fifth Circuit affirmed.¹⁷

Prior to addressing the case on its merits, the Fifth Circuit first established the scope of its review. The court concluded that "the scope of our review is narrow and we should interfere with the implementation of the consent decrees only upon a clear showing that the district judge abused his discretion by approving the settlement."¹⁸ In reaching this conclusion, the Fifth Circuit noted that Title VII and

¹¹ 63 F.R.D. 1, 4-5, 8 FEP Cas. 198, 199-200 (N.D. Ala. 1974).

¹² BNA, LAB. REL. REP., FEP Man. 431:144-45. Paragraph 18(g) is quoted in the text at note 24 *infra*.

¹³ BNA, LAB. REL. REP., FEP Man. 431:126. Paragraph C provides in part:

This Decree resolves all issues between plaintiffs and defendants relating to acts and practices of discrimination by the defendants to which this Decree is directed, as well as any future effects of such acts and practices and, with respect to such matters, compliance with this Decree shall be deemed to be compliance with Title VII and Executive Order 11246, as amended, and shall be deemed to satisfy any requirement for affirmative action by defendants or any of them. The doctrines of *res judicata* and collateral estoppel shall apply to all plaintiffs with respect to all issues of law and fact and matters of relief within the scope of the complaint or this Decree. If a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with the systematic relief incorporated in this Decree, the plaintiffs will undertake to advise the Court or other forum in which such private action or proceeding is brought that such relief in that action or proceeding is unwarranted.

Id.

¹⁴ The claimants also attacked paragraphs 15, 16, and 19 of the Consent Decree I. 517 F.2d at 869-75, 11 FEP Cas. at 201-06. See BNA, LAB. REL. REP., FEP Man. 431:142-43 & 145-46.

¹⁵ 63 F.R.D. at 5, 8 FEP Cas. at 200.

¹⁶ *Id.* at 6-7, 8 FEP Cas. at 201. The district court sustained the decrees essentially on the same basis as did the subsequent circuit court opinion.

¹⁷ 517 F.2d at 834, 11 FEP Cas. at 171.

¹⁸ *Id.* at 850, 11 FEP Cas. at 185.

the accompanying case law exhibit a preference for voluntary compliance over litigation in the federal courts.¹⁹ As a result, the court was reluctant to hold consent decrees to the standard of providing the same degree of relief that would be achieved if each individual employee were able to litigate his or her claim fully. The court recognized that the adoption of such a standard would discourage voluntary compliance, since the standards for judicial approval of the consent decree—relief similar to that achievable through litigation—would be difficult to establish. In rejecting this exacting standard, the court adopted a balancing approach between “the affirmative action objectives of Title VII [and] the generally strong congressional policy favoring voluntary compliance.”²⁰ While the consent decrees might not provide complete relief for each aggrieved employee under Title VII, the court found that the decrees did result in voluntary compliance and that this factor served to counteract any weakness in the effectiveness of the agreements.²¹

It appears, however, that despite the court's attempt to adopt a balancing approach, little actual “balancing” occurred. It is submitted that the immense coverage of the consent decrees in providing relief for a substantial number of employees in a major industry was a factor which predisposed the court towards sustaining the decrees even before the merits of the case were considered. For example, at several points in the decision, the court was careful to compare the broad scope of the decrees' coverage and the enormity of the governmental resources involved with the limited interests of the claimants.²² Thus, while expressing the scope of its review in terms of subscribing to a balancing policy, it seems more likely that the court's approach was the result of the peculiar facts of the case,²³ resulting in a situation where the court's view of the merits significantly influenced its perception of the appropriate scope of review. As a result of this reliance on the particular facts in the case, *Allegheny-Ludlum* may not be generally applicable, especially in disputes limited to a company which in itself does not have a significant national impact. Whereas in

¹⁹ *Id.* at 848-49, 11 FEP Cas. at 182-84.

²⁰ *Id.* at 850, 11 FEP Cas. 185. The court also limited its scope of review in stating that it would not interfere with the consent decrees unless there was a clear showing that “the district court failed to satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest.” *Id.*

²¹ *Id.* at 850-51, 11 FEP Cas. at 185-86.

²² The court reasoned that:

Against the overwhelming speculative advantage that might accrue to a small number of aggrieved persons if the decrees were vacated must be weighed the certain loss to all of the immediate injunctive benefits and the unimpeded opportunity to receive some back pay today—instead of after months of years of litigation.

Id. at 851, 11 FEP Cas. at 186. See also, *id.* at 862, 11 FEP Cas. at 195.

²³ The only other consent decree of similar magnitude was signed with American Telephone & Telegraph Co. and provided for broad reforms throughout the industry along with a back pay fund of approximately \$15 million. BNA, LAB. REL. REP., FEP Man. 431:73-124k.

Allegheny-Ludlum the facts mitigated in favor of sustaining the decrees, a subsequent case may involve a consent decree which covers only a few workers and which is achieved without a significant use of government resources. In such a situation, the complaints of individual workers should be given greater weight than that given the claimants in *Allegheny-Ludlum*, since an order vacating the decrees would not have national impact. As a result, the scope of the court's review in *Allegheny-Ludlum* should be given a limited application in situations where a consent decree is confined to only a few aggrieved employees.

In discussing the merits of the case, the court initially centered its attention on arguments challenging the settlement of back pay claims. Paragraph 18(g) of Consent Decree I provides that in order for an employee to receive a back pay award:

[E]ach affected employee shall be required to execute a release . . . of any claims against or liability of the [steel industry] resulting from any alleged violations based on race, color, sex . . . , or national origin, occurring on or before the date of entry of this Decree, of any equal employment opportunity laws, ordinances, regulations, or orders, including but not limited to Title VII . . . , 42 U.S.C. § 1981 . . . , Executive Order 11246 . . . , and any other applicable federal, state, or local constitutional or statutory provisions, orders, or regulations. Such release will also bar recovery of any damages suffered at any time after the date of entry of this Decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Decree.²⁴

The appellants argued that by precluding the employee from utilizing other forms of relief such as Title VII and section 1981,²⁵ the release violated the federal policy of providing independent avenues of relief for employment discrimination.²⁶ They argued, therefore, that the waiver of damages was contrary to the strong Congressional policy of eradicating employment discrimination.²⁷

²⁴ *Id.* at 431:144-45. The claimants argued that this release was an illegal prospective waiver of an employee's rights under Title VII and 42 U.S.C. § 1981 (1970). 517 F.2d at 853, 11 FEP Cas. at 187. In dismissing these arguments, the Fifth Circuit noted that a release executed under Paragraph 18(g) would not completely deprive an employee of the right to further relief, since the worker could still institute an action for any *new* discriminatory acts. *Id.* at 853, 11 FEP Cas. at 187-88.

²⁵ 42 U.S.C. § 1981 (1970).

²⁶ 517 F.2d at 856-57, 11 FEP Cas. at 190. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-61 (1975). The claimants argued that the release only barred the employee from suing the same defendants in a pattern and practice suit based upon the same cause of action. As the court noted, the chances of this occurring were remote. 517 F.2d at 857, 11 FEP Cas. at 190.

²⁷ See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

In dismissing this argument, the Fifth Circuit relied primarily on *Alexander v. Gardner-Denver Co.*,²⁸ where the Supreme Court held that an individual's submission of an employment discrimination claim to a collective bargaining grievance proceeding does not constitute a waiver of the right to bring a subsequent civil action under Title VII.²⁹ *Gardner-Denver* rested on the principle that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."³⁰ The claimants in *Allegheny-Ludlum*, also relying on *Gardner-Denver*, maintained that the principle set forth in that case allowed an employee to bring charges under a conciliation agreement and a subsequent Title VII civil action regardless of a waiver of Title VII rights in the initial settlement. However, the Fifth Circuit correctly pointed out that *Gardner-Denver* referred to the waiver of *collective* rights based on an arbitration agreement and not to a waiver of *personal* rights under Title VII.³¹ In the *Gardner-Denver* situation, an employee pursuing a complaint through a grievance proceeding exercises a right achieved through collective bargaining. If a final decision is reached in arbitration, the only rights affected are those under the employment contract created by the collective bargaining process. By contrast, Title VII rights are derived from an act of Congress and are not dependent on the collective bargaining process for their existence. In addition, an employee's rights under Title VII are personal and vest in the individual employee. Therefore, an employee may waive his personal Title VII rights as part of an arbitration settlement. As the Supreme Court stated in *Gardner-Denver* "an employee may waive his cause of action under Title VII as a part of a voluntary settlement, [but] mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."³² Hence, it is clear from *Gardner-Denver* that an employee may waive his or her personal Title VII rights as part of a back pay settlement of the type offered in *Allegheny-Ludlum*.³³

²⁸ 415 U.S. 36 (1974). See Annual Survey of Labor Law, 15 B.C. IND. & COM. L. REV. 1105, 1187-98 (1974).

²⁹ 415 U.S. at 59-60.

³⁰ *Id.* at 48-49.

³¹ 517 F.2d at 857, 11 FEP Cas. at 191.

³² 415 U.S. at 52.

³³ In a related *Survey* year case the Fourth Circuit held in *Williams v. Norfolk and Western Railway Co.*, 530 F.2d 539, 11 FEP Cas. 836 (4th Cir. 1975), *vacating and remanding* 11 FEP Cas. 403 (E.D. Va. 1974), that a release "in full satisfaction of all claims and demands," 11 FEP Cas. at 404, did not waive rights under Title VII or 42 U.S.C. § 1981. 530 F.2d at 543, 11 FEP Cas. at 840. The case arose out of the merger of the Norfolk and Western Railroad with the Virginian Railroad in 1959. Each railroad had maintained two separate railyards—one for white and another for black workers. Upon merger, the seniority rosters for the white railyards were dovetailed so that a white worker on the Virginian line was able to transfer seniority over to the Norfolk and Western. However, the black railyards, through their unions, were unable to agree on any dovetailing. To resolve the issue, the black workers were offered a settlement in lieu of continued employment on the Norfolk and Western. *Id.* at 541, 11 FEP Cas. at 838. All of the black workers except the two plaintiffs in *Williams* accepted the

Besides attacking the impropriety of the release, the claimants also took issue with the adequacy of the back pay fund that would be disbursed once the waiver was signed. Under paragraph 18(a) of the consent decree in *Allegheny-Ludlum*, the steel industry had agreed to pay up to \$30,940,000 to compensate affected employees for back pay.³⁴ Based on a potential affected class of 60,000 employees,³⁵ the average recovery, if the entire fund were utilized, would be approximately \$500 for each of the affected workers.³⁶ The claimants argued that this recovery was inadequate when compared with the recoveries received by employees at U.S. Steel's Fairfield Works in *United States v. United States Steel Corp. [hereinafter Fairfield]*.³⁷

The *Fairfield* decision was rendered prior to the entry of the steel industry consent decrees, but was based on similar claims of employment discrimination. In *Fairfield*, the court awarded an average back pay recovery of \$3,350 to each plaintiff who ultimately prevailed.³⁸ The claimants in *Allegheny-Ludlum* maintained that this re-

compensation. The Norfolk and Western, after negotiating with the plaintiffs' union, offered to employ the plaintiffs at a guaranteed annual wage for five years along with a lump sum payment of three months pay. In return the plaintiffs agreed that their seniority would not be transferred to the new railroad and signed a release stating that the contract was accepted "in full satisfaction of all claims and demands . . ." 11 FEP Cas. at 404. The plaintiffs later brought an action under Title VII and § 1981 claiming that the railroad, in refusing to allow them to transfer their accumulated seniority, established a discriminatory seniority system. However, the railroad argued that the release was a waiver and full settlement of the plaintiffs' claims. The Fifth Circuit held that the release did not act as a waiver of rights under Title VII or 42 U.S.C. § 1981, since the settlement was not based on the discriminatory acts of the railroad, but upon the merger itself which was not racially motivated. 530 F.2d at 542-43, 11 FEP Cas. at 840. The court reasoned that the "agreement and the compensation paid to Williams and Russell dealt only with their [black railway] seniority, not their relations to white [employees], which is the subject of their present claim." *Id.* at 543, 11 FEP Cas. at 840. It should be noted, however, that the plaintiffs' release did not differentiate between the subject areas of the rights which were waived. The waiver applied to "all claims and demands" against the employer. Thus, contrary to the court's holding, the agreement should have constituted a sufficient waiver of antecedent rights under Title VII and should have barred the action.

To further support its conclusion, the court quoted from *Robinson v. Lorillard*, 444 F.2d 791, 799, 3 FEP Cas. 653, 658 (4th Cir. 1971), in which the Fourth Circuit had reasoned that "[t]he rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." However, the court's reasoning in *Williams* is unclear on this point, since *Robinson* refers to the question of a union's pressure on an employer to adopt discriminatory practices and not to the question of waiver of rights by an employee.

³⁴ BNA, LAB. REL. REP., FEP Man. 431:143.

³⁵ It is not clear how the court arrived at the 60,000 affected employees figure. The court does state that one fifth of the 300,000 persons presently employed by the steel companies are part of the affected class. 517 F.2d at 834, 11 FEP Cas. at 172. However, the consent decree in paragraph 18(c) does not relate solely to present employees.

³⁶ 517 F.2d at 862, 11 FEP Cas. at 195.

³⁷ 371 F. Supp. 1045, 7 FEP Cas. 322 (N.D. Ala. 1973), *dismissed in part, vacated, and remanded*, 520 F.2d 1043, 11 FEP Cas. 553 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1214 (5th Cir. 1976).

³⁸ 517 F.2d at 863, 11 FEP Cas. at 196.

covery demonstrated that the back pay fund in the consent decrees was inadequate. The Fifth Circuit disputed these figures and concluded that the actual recovery in *Fairfield*, taking into account those plaintiffs who were denied any recovery, would be only \$60.³⁹ Thus, according to the court, the back pay fund provided by the steel industry in *Allegheny-Ludlum* was adequate.

The claimants also argued that the parties to the contract had failed to demonstrate that a recovery under the consent decree would be equal to a recovery through successful litigation.⁴⁰ In dismissing this argument, the court noted that the burden was on the claimants to prove that the amount of the back pay fund was inadequate. Moreover, the court again relied upon *Fairfield* to demonstrate that not every affected employee who could recover under the consent decrees might also be successful through litigation.⁴¹

The court's reliance on *Fairfield* is problematic because in dismissing claimant's arguments in *Allegheny-Ludlum*, the court based its decision upon figures provided by the lower court in *Fairfield*. Subsequent to *Allegheny-Ludlum*, the *Fairfield* decision was appealed to the Fifth Circuit, which vacated and remanded the case to the district court for reconsideration of the back pay award.⁴² It is, therefore, questionable whether the Fifth Circuit should have relied upon the district court's original decision in *Fairfield* as an accurate determination of the average back pay recovery in a steel industry discrimination claim. However, the Fifth Circuit in *Allegheny-Ludlum* did not rely exclusively on *Fairfield* to justify its reasoning. The court recognized that while it could not accurately predict the back pay recovery of each individual, any inaccuracy had to be weighed against the consequences of disallowing the settlement.⁴³ While individual litigation might yield a more accurate result in terms of back pay, it would come at the expense of an enormous effort by the government in obtaining the agreement and would nullify the broad based relief that the consent decrees would make available to the steel industry. In addition, the court found that the consent decrees would apply to a potential class of 60,000 individuals,⁴⁴ while the principle claimants in *Allegheny-Ludlum* consisted of only 36 individuals.⁴⁵ As the court stated, "we are concerned . . . with a scale of probabilities: the probable outcome of contested litigation, balanced against its probable costs in time, money, and public resources."⁴⁶ In essence, the consent decrees demonstrated a relative degree of efficiency and fairness in resolving industry-wide discrimination, while the alternative of vacating the settlement prom-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 520 F.2d 1043, 1060, 11 FEP Cas. 553, 567 (5th Cir. 1975).

⁴³ 517 F.2d at 862, 11 FEP Cas. at 195.

⁴⁴ *Id.* at 864, 11 FEP Cas. at 197.

⁴⁵ *Id.* at 839, 11 FEP Cas. at 176.

⁴⁶ *Id.* at 862, 11 FEP Cas. at 195.

ised further delays and a potential recovery for only a limited number of individuals.⁴⁷ The court's argument as to the "scale of probabilities" is far more persuasive than its reliance on the recovery achieved in *Fairfield*. The Fifth Circuit's subsequent action of vacating and remanding *Fairfield* demonstrates that any comparison between possible recoveries through litigation and those obtained through settlement can be misleading. The far sounder course is to consider the efficiency of the consent decrees in providing relief as compared to the problems created by litigation of individual claims.

The claimants also contended that the consent decrees infringed upon an aggrieved employee's right to representation by the EEOC. In Paragraph C of Consent Decree I, the government, and the steel industry agreed that the doctrines of res judicata and collateral estoppel would apply between the parties with respect to the terms of the settlement.⁴⁸ As part of this agreement the parties stipulated that:

If a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with the systemic relief incorporated in this Decree, the plaintiffs will undertake to advise the Court or other forum in which such private action or proceeding is brought that such relief in that action or proceeding is unwarranted.⁴⁹

The claimants argued that Paragraph C denied an employee the right to representation by the EEOC, since the Commission had agreed that the doctrine of res judicata applied to all of the issues within the scope of the agreement.⁵⁰ However, the Fifth Circuit maintained that Title VII does not vest a right to such representation. There is no specific wording in Title VII obligating the EEOC to institute legal actions or to represent individual employees. Upon the filing of a charge with the EEOC, the Commission is required to serve notice on the employer, to make an investigation, and where "reasonable cause" is found, attempt to conciliate the dispute.⁵¹ However, under section 706(f)(1) of Title VII the government "may bring a civil action . . ."⁵² This permits the Commission discretion in deciding whether or not to represent an aggrieved employee. Accordingly, the EEOC is under no

⁴⁷ See *id.* at 851 n.28, 11 FEP Cas. at 186 n.28.

⁴⁸ BNA, LAB. REL. REP., FEP Man. 431:126. See note 13 *supra*.

⁴⁹ BNA, LAB. REL. REP., FEP Man. 431:126. The parties in *Allegheny-Ludlum* also agreed to petition those courts with jurisdiction over pending steel industry discrimination cases to have the relief granted in those cases modified to conform with the consent decrees. *Id.* at 431:130 (Consent Decree I, Paragraph 3(c)(2)). See, *United States v. United States Steel*, 520 F.2d 1043, 1056-57, 11 FEP Cas. 553, 564 (5th Cir. 1975).

⁵⁰ 517 F.2d at 867, 11 FEP Cas. at 199.

⁵¹ 42 U.S.C. § 2000e-5(b) (Supp. III, 1973). In the *Survey* year case *Patterson v. American Tobacco Co.*, 12 FEP Cas. 314, 325 (4th Cir. 1976), the court held that the EEOC may not bring an action in court under § 706 unless it has first attempted to conciliate the issue.

⁵² 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973) (emphasis added).

obligation to give an individual representation in a Title VII action.⁵³ Therefore, the Fifth Circuit's holding that the EEOC is not required to represent all aggrieved employees under Title VII should be followed.⁵⁴

Aside from the claimants' challenge to the validity of the consent decrees, a major question arose as to the right of the National Organization of Women (NOW) to intervene in the case. After the entry of the steel industry consent decrees in *Allegheny-Ludlum*, several indi-

⁵³ Under § 706(b) the EEOC "shall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (Supp. III, 1973). However, under paragraph 19(a) of Consent Decree I of the Commission agreed not to conciliate individual claims within the scope of the decrees. BNA, LAB. REL. REP., FEP Man. 431:145. The claimants contended that paragraph 19(a) was an illegal abdication of the EEOC's duty to conciliate. 517 F.2d at 868-69, 11 FEP Cas. at 200. The Fifth Circuit in rejecting this argument noted that in negotiating the consent decrees, the Commission had fulfilled its duty to conciliate. The court reasoned that the EEOC's failure to negotiate each individual claim, was not illegal, since the Commission is not in a position of lawyer-client in protecting each individual employee. *Id.* at 870, 11 FEP Cas. at 202. In addition, paragraph 19(b) provides that the Commission will still conciliate those claims not wholly within the scope of the Decrees. BNA, LAB. REL. REP., FEP Man. 431:145.

⁵⁴ In the *Survey* year case of *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 11 FEP Cas. 833 (6th Cir. 1975), the Sixth Circuit considered the related question of whether the EEOC is bound by *res judicata* when the Commission brings an action based upon an employee's charge, if the employee has settled his claim prior to the conclusion of the EEOC's action. In *McLean* Brown, a black male, filed a complaint with the EEOC in 1970 claiming that the trucking company had discriminated against him and other black drivers. *Id.* at 1008, 11 FEP Cas. at 833. In 1972 the EEOC brought an action based on Brown's charges against McLean Trucking Co., claiming discrimination against its employees on the basis of race. Brown also filed a separate action against the trucking company which was ultimately settled out of court. The district court dismissed the EEOC action concluding that, since Brown was barred by his settlement from any further action, the Commission was precluded from bringing any claim based on Brown's charges. 64 F.R.D. 643, 645, 7 FEP Cas. 299, 301 (W.D. Tenn. 1974). The Sixth Circuit reversed and remanded. 525 F.2d at 1012, 11 FEP Cas. at 836.

The EEOC argued that it had not consented to the settlement between Brown and McLean Trucking Co. and, therefore, it should not be barred from instituting a separate action. *Id.* at 1010, 11 FEP Cas. at 834. The Commission also considered its action to be separate, since it was brought in the public interest and not for the sole benefit of Brown. In accepting these arguments the Sixth Circuit relied primarily on its earlier decision in *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 10 FEP Cas. 38 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). In that case, the court stated that the "EEOC sues to vindicate the public interest, which is broader than the interests of the charging parties . . . [and] the EEOC is not barred by the doctrine of *res judicata* from basing its complaint on charges of discrimination which it never agreed to settle." *Id.* at 1361, 10 FEP Cas. at 46.

In permitting the EEOC's action to continue, the Sixth Circuit in *McLean* was faced with the additional problem of deciding what relief Brown could receive if the trucking company were found liable. The court found that since Brown had agreed to a settlement, he was not entitled to any further "private benefit," such as back pay, not granted to him under the compromise settlement of his separate action . . . 525 F.2d at 1011, 11 FEP Cas. at 835-36. *See also, Fairfield*, 520 F.2d 1043, 1056-57, 11 FEP Cas. 553, 564 (5th Cir. 1975). However, the Sixth Circuit held that Brown could share in the general benefits that might flow from the EEOC's action, such as improvements in working conditions. 525 F.2d at 1011, 11 FEP Cas. at 835-36.

viduals and groups sought to intervene to stay or vacate the settlement.⁵⁵ The district court permitted several of the individual petitioners to intervene, but denied intervention to three organizations including NOW.⁵⁶ On appeal, the Fifth Circuit dismissed NOW's request to intervene and held that intervention is not conferred as a statutory right under section 707 of Title VII.⁵⁷

Under Rule 24 of the Federal Rules of Civil Procedure, a party may intervene as a matter of right or by permission of the court.⁵⁸ A claimant may intervene as a matter of right if the action is based on a federal statute which "confers an unconditional right to intervene"⁵⁹ or if the action "may as a practical matter impair or impede" the claimant's ability to protect his or her interest in the property or transaction which is the subject of the civil action.⁶⁰

The Fifth Circuit found that NOW did have an interest in the subject matter of the case, but that since the organization was not a party to the consent decrees, it would not be bound by *res judicata* or collateral estoppel if the decrees were sustained. Hence, the court reasoned that NOW should not be permitted to intervene, since the consent decrees would not impair its rights.⁶¹

As to a statutory right of intervention under Rule 24(a)(1), NOW argued that section 706(f)(1) of Title VII⁶² constituted an unconditional statutory right to intervene.⁶³ Section 706(f)(1) does provide that an aggrieved individual may intervene as a matter of right.⁶⁴ However, the Fifth Circuit noted that the government's claim was

⁵⁵ 517 F.2d at 839, 11 FEP Cas. at 176.

⁵⁶ 63 F.R.D. at 4, 8 FEP Cas. at 199-200. NOW was permitted to name three individual women to intervene on behalf of former, present, and future female employees of the defendant steel companies. These women were represented by NOW's counsel throughout the proceedings. In addition, NOW was permitted to submit briefs to the district court judge concerning the effects that the consent decrees might have on female employees. *Id.* at 4 n.1, 8 FEP Cas. at 199 n.1; 517 F.2d at 839 n.11, 11 FEP Cas. at 176 n.11.

⁵⁷ 517 F.2d at 842-46, 11 FEP Cas. at 178-82. See 42 U.S.C. § 2000e-6 (Supp. III, 1973), *amending in part* 42 U.S.C. § 2000e-6 (1970).

⁵⁸ Rule 24(a) states in part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Fed. R. Civ. Pro. 24(a).

⁵⁹ Fed. R. Civ. Pro. 24(a)(1).

⁶⁰ Fed. R. Civ. Pro. 24(a)(2).

⁶¹ 517 F.2d at 845-46, 11 FEP Cas. at 181-82.

⁶² 42 U.S.C. § 2000e-(f)(1) (Supp. III, 1973).

⁶³ 517 F.2d at 841-42, 11 FEP Cas. at 178.

⁶⁴ Section 706(f)(1) provides in part that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission" 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973).

based upon a pattern and practice suit under section 707.⁶⁵ Unlike section 706, section 707 contains no specific language referring to a right of intervention. Section 707(e) does state that all actions under section 707 "shall be conducted in accordance with the procedures set forth in [section 706]."⁶⁶ On its face this statement would imply that the right to intervene in section 706(f) is incorporated into section 707. However, the Fifth Circuit, after examining the relevant legislative history,⁶⁷ concluded that section 707(e) referred only to administrative procedures of the EEOC and not the right to intervene.⁶⁸ As a result, the Fifth Circuit held that there is no statutory right to intervention in section 707.⁶⁹

It is submitted that the court's holding on the statutory right of intervention is sound, since the Fifth Circuit's analysis is supported not only by legislative history, but also by the general policy behind section 707. As the court stated, the purpose of the section is to "provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices . . ."⁷⁰ In contrast to the procedure under section 706(b), in section 707(a) the government may bring charges without first receiving a claim from an individual employee.⁷¹ The government may also request under section 707(b) that the proceedings be expedited.⁷² A denial of the right to intervene is consistent with this purpose, since it relieves the court from the burden of hearing one or more individual complaints that may not be relevant to a broad pattern and practice charge.

Allegheny-Ludlum presented the Fifth Circuit with several novel challenges to the right of the EEOC to enter into industry-wide consent decrees. While the court's scope of review may have been greatly affected by the peculiar facts of the case, the Fifth Circuit did reach the correct result in sustaining the decrees. In providing relief for a vast number of aggrieved employees, the consent decrees demonstrated a far greater ability to remedy industry-wide discrimination problems than would the potential of recovery through individual litigation. In addition, *Allegheny-Ludlum* strengthened the power of the EEOC to conciliate those employment disputes which may have a national impact.

C. *Scope of Private Actions Under Title VII: Sanchez—Gamble—Jenkins*

Before an individual can file a civil action alleging violations of Title VII, the procedures set forth in section 706 of that Title must be

⁶⁵ 517 F.2d at 843, 11 FEP Cas. at 179.

⁶⁶ 42 U.S.C. § 2000e-6(c) (Supp. III, 1973).

⁶⁷ See 1972 U.S. CODE CONG. & ADMIN. NEWS. 2137, at 2164.

⁶⁸ 517 F.2d at 844, 11 FEP Cas. at 180.

⁶⁹ *Id.* at 842-43, 11 FEP Cas. at 178-79. See also *EEOC v. United Air Lines, Inc.*, 515 F.2d 946, 949, 10 FEP Cas. 909, 910-11 (7th Cir. 1975).

⁷⁰ 517 F.2d at 843, 11 FEP Cas. at 179.

⁷¹ 42 U.S.C. § 2000e-6(a) (1970); 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), amending 42 U.S.C. § 2000e-5(a) (1970).

⁷² 42 U.S.C. § 2000e-6(b) (1970).

completed. The employee must first file a charge of unlawful employment discrimination with the EEOC.¹ Within ten days, the Commission must notify the employer of the complaint.² The EEOC must then investigate the charge.³ If, after such investigation, the EEOC does not find reasonable cause to support the allegations, it must dismiss the charge and notify the employee.⁴ However, if the EEOC does determine that there is reasonable cause to believe the allegations, the Commission must attempt to eliminate the unlawful employment practices through informal conciliation.⁵ If the EEOC either dismisses the charge or fails to file a civil action within 180 days after the filing of the initial charge, the aggrieved employee may then bring a civil action against the employer.⁶

In light of this procedural framework, courts have been required to determine the proper relationship between an initial charge filed with the EEOC and a subsequent complaint filed in a civil action under section 706.⁷ In 1970, the Fifth Circuit in *Sanchez v. Standard Brands, Inc.*⁸ had set forth a standard to be used in determining the permissible scope of a civil complaint. In *Sanchez*, an employee filed a charge of sex discrimination with the EEOC.⁹ In its investigation the Commission concluded that reasonable cause did not exist to support a charge of sex discrimination, but reasonable cause did exist to support a charge of discrimination based on national origin.¹⁰ After EEOC conciliation attempts failed, the employee filed a complaint in

¹ 42 U.S.C. § 2000e-5(b) (Supp. V 1975). "Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." *Id.* The Commission requirements are set forth in 29 C.F.R. § 1601.6 - § 1601.8, § 1601.11 (1975).

² 42 U.S.C. § 2000e-5(b) (Supp. V 1975). *See also* 29 C.F.R. § 1601.13 (1975). If the alleged discriminatory act occurred in a state which prohibits such an act and provides for relief, the EEOC must also notify that state authority, which may then proceed under state law. 42 U.S.C. §§ 2000e-5(c) to (d) (Supp. V 1975). *See also* 29 C.F.R. § 1601.12 (1975).

³ 42 U.S.C. § 2000e-5(b) (Supp. V 1975).

⁴ *Id.*

⁵ *Id.*

⁶ 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) provides in pertinent part:

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . .

⁷ *Jenkins v. Blue Cross Mutual Hosp. Ins., Inc.*, 522 F.2d 1235, 11 FEP Cas. 707 (7th Cir. 1975) *rev'd*, 538 F.2d 164, 13 FEP Cas. 52 (1976); *Gamble v. Birmingham S. R.R. Co.*, 514 F.2d 678, 10 FEP Cas. 1148 (5th Cir. 1975).

⁸ 431 F.2d 455, 2 FEP Cas. 789 (5th Cir. 1970).

⁹ *Id.* at 458, 2 FEP Cas. at 790.

¹⁰ *Id.* at 459, 2 FEP Cas. at 790.

district court alleging discrimination because of national origin.¹¹ In allowing the complaint, the court reasoned that allegations in a judicial complaint filed pursuant to Title VII may include any kind of discrimination "like or related to" allegations contained in the EEOC charge and growing out of those allegations during the Commission's investigation.¹² Thus, the allowable scope of an individual action is not defined by the allegations in the EEOC charge, but rather by "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."¹³ Under this test, an employee may seek redress both for grievances described in the EEOC charge and for grievances which are reasonably the subject of the EEOC's relatively broad investigatory and remedial powers with respect to the particular complaint.¹⁴

During the *Survey* year, two circuit courts were required to determine the proper scope of an individual action in a situation somewhat different from the one in *Sanchez*. In a Fifth Circuit case, *Gamble v. Birmingham Southern Railroad Co.*,¹⁵ Black railroad switchmen filed a charge with the EEOC claiming they were not considered for promotions to conductor because of their race.¹⁶ In its investigation, the EEOC found reasonable cause to support the employees' allegations.¹⁷ However, the EEOC apparently did not investigate discrimination in supervisor promotions and thus did not attempt any conciliation on that issue.¹⁸ The employees subsequently filed a civil complaint in district court. The court limited the scope of the trial to discrimination in promotions to conductor and refused to consider discrimination in promotions to supervisor.¹⁹ Although the employees urged that the scope properly included all promotional opportunities, the district court reasoned that the EEOC charge, investigation, and conciliation attempts had contemplated only promotional opportunities to conductor.²⁰

The Fifth Circuit reversed the district court and ruled that the issue of supervisory promotions should have been considered by the trial court.²¹ The court of appeals noted that the *Sanchez* decision did not entirely resolve the problem of the permissible scope of a private action in situations such as the one in *Gamble*.²² In *Sanchez*, both the EEOC investigation and subsequent complaint were claimed to exceed

¹¹ *Id.* at 459, 2 FEP Cas. at 791.

¹² *Id.* at 466, 2 FEP Cas. at 796.

¹³ *Id.*

¹⁴ See 42 U.S.C. § 2000e-9 (1970); 29 C.F.R. §§ 1601.14-1601.18 (1975).

¹⁵ 514 F.2d 678, 10 FEP Cas. 1148 (5th Cir. 1975).

¹⁶ *Id.* at 687, 10 FEP Cas. at 1155.

¹⁷ *Id.*

¹⁸ *Id.* at 688, 10 FEP Cas. at 1156.

¹⁹ Consideration for promotion to supervisor required a prior promotion to conductor. *Id.* at 687, 10 FEP Cas. at 1155.

²⁰ *Id.* at 687-88, 10 FEP Cas. at 1155-56.

²¹ *Id.* at 689, 10 FEP Cas. at 1157.

²² *Id.* at 688, 10 FEP Cas. at 1156.

the original charge to the EEOC, whereas in *Gamble*, the complaint was said to exceed both the charge to the EEOC and the EEOC's investigation.²³ Thus, instead of automatically applying the *Sanchez* standard, the court of appeals evaluated several policy considerations.

First, the court reasoned that charges filed with the EEOC should be liberally construed in order to effectuate the remedial policies of Title VII.²⁴ Otherwise, unsophisticated employees who are unable to describe thoroughly the discriminatory practices to which they have been subjected would be deprived of a remedy.²⁵ Furthermore, the court noted that although the Commission's role in obtaining voluntary compliance with Title VII is important to the statutory scheme, conciliation efforts are not a jurisdictional prerequisite to an individual suit under section 706,²⁶ particularly where attempts to effect compliance on a similar issue have failed.²⁷ In addition, judicial economy would be poorly served by requiring the employees to file a new EEOC charge regarding the supervisor claim where the question was so closely aligned with the conductor claim.²⁸

These policies seemed well served by an application of the same standard used in *Sanchez*. Therefore, the court ruled that the issue of supervisory promotions was properly raised since it was "like or related to" the conductor complaint and an investigation of the supervisor situation could reasonably be expected to grow from the original complaint.²⁹

In other cases during the Survey year, district courts applied the *Sanchez-Gamble* standard which permits the scope of an individual action to include activities which are like or related to the allegations contained in the EEOC charge and which can reasonably be expected to grow out of an investigation of that charge. In *Black News Employees v. Evening News Association*,³⁰ an employee filed charges with the

²³ *Id.*

²⁴ See, e.g., *Tipler v. duPont de Nemours and Co.*, 443 F.2d 125, 131, 3 FEP Cas. 540, 544 (6th Cir. 1971). A liberal construction of a charge that there was no opportunity for promotion to conductor would include the charge that there was no opportunity for promotion to supervisor, since supervisors are chosen from the conductors' ranks. 514 F.2d at 688, 10 FEP Cas. at 1156.

²⁵ The court noted that if a charge filed with the EEOC were required to articulate specifically the "full panoply" of discrimination which had been suffered, the very persons Title VII was designed to protect might lose that protection because they were unable to describe the discriminatory practices thoroughly. *Id.* at 689, 10 FEP Cas. at 1156-67. See *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162, 3 FEP Cas. 858, 860 (5th Cir. 1971).

²⁶ 514 F.2d at 688, 10 FEP Cas. at 1156. See also *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 161, 3 FEP Cas. 858, 860 (5th Cir. 1971).

²⁷ The defendant railroad had argued that it had a right to attempt conciliation on the supervisor issue. In *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 3 FEP Cas. 858 (5th Cir. 1971), however, the court noted that "[i]t is now too well settled to discuss that no EEOC effort to conciliate is required before a federal court may entertain a Title VII action." *Id.* at 161, 3 FEP Cas. at 860.

²⁸ 514 F.2d at 688, 10 FEP Cas. at 1157.

²⁹ *Id.* at 688, 10 FEP Cas. at 1156.

³⁰ 11 FEP Cas. 912 (E.D. Mich. 1975).

EEOC claiming he was subjected to "unbearable working conditions" on account of his race.³¹ In a subsequent civil action, the employee alleged discrimination with respect to terms and conditions of his employment as well as hiring, promotion, transfer, and discharge policies.³² In applying the test from *Sanchez*,³³ the court reasoned that even though no EEOC investigation had been conducted, such an investigation would reasonably have extended to all the areas alleged in the complaint.³⁴

In another district court decision, *Reese v. Alpha Portland Cement Co.*,³⁵ a charge claiming discharge because of race was filed with the EEOC. Although the ensuing EEOC investigation and conciliation efforts concerned only the discharge issue, the employee's complaint in the subsequent civil action also included the issues of hiring, job assignments, and job classification.³⁶ The *Reese* court, citing *Sanchez* and *Gamble*, stated that a civil action may encompass both the original EEOC allegations and "issues which are like or related to the issues before the EEOC and which could reasonably be expected to grow out of the EEOC investigation of the charge."³⁷ In applying this standard, the court found that the allegations regarding hiring, job assignments, and job classifications were not "like or related to" the issue raised by the EEOC charge, and therefore, could not reasonably be expected to grow out of the EEOC investigation, although the issue of discharge generally could be included.³⁸

A standard similar to the *Sanchez-Gamble* rule was adopted by the Seventh Circuit in another *Survey* year decision. In *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*,³⁹ the court of appeals had to determine the permissible scope of an individual action which deviates from the original charge to the EEOC. The plaintiff, a Black woman employee, filed an EEOC charge alleging racial discrimination in that she was denied a promotion for wearing an Afro hairstyle.⁴⁰ After receiving EEOC notice of her right to sue, the employee filed a class action suit alleging a broad pattern and practice of both race and sex discrimination in hiring, assignment, and pay, as well as promotion.⁴¹

In comparing the original EEOC charge with the allegations in the complaint, the court of appeals ruled that "the complaint in the civil action . . . may properly encompass any . . . discrimination like or

³¹ *Id.* at 914.

³² *Id.* at 914-15.

³³ The *Sanchez* standard had been adopted by the Sixth Circuit in *Tipler v. duPont de Nemours and Co.*, 443 F.2d 125, 131, 3 FEP Cas. 541, 544 (6th Cir. 1971).

³⁴ 11 FEP Cas. at 916.

³⁵ 11 FEP Cas. 338 (N.D. Ala. 1975).

³⁶ *Id.* at 339.

³⁷ *Id.*

³⁸ *Id.* at 340.

³⁹ 522 F.2d 1235, 11 FEP Cas. 707 (7th Cir. 1975), *rev'd*, 538 F.2d 164, 13 FEP Cas. 52 (1976).

⁴⁰ 522 F.2d at 1240, 11 FEP Cas. at 711.

⁴¹ *Id.*

reasonably related to the allegations of the charge and growing out of such allegations."⁴² This standard does not explicitly include, as the *Sanchez-Gamble* standard does, provisions for matters developed in a reasonable investigation by the EEOC.

In applying its standard, the *Jenkins* court reasoned that the EEOC charge did *not* form a proper basis for alleging a broad pattern and practice of race and sex discrimination and upheld the district court determination that the permissible scope of the employee's action was limited to the specific issue of denial of a promotion for wearing an Afro hairstyle.⁴³ On rehearing, the entire court agreed that the enunciated standard was correct.⁴⁴ However, the majority of the court reasoned that under this standard, the issues of race and sex discrimination *could* be litigated.⁴⁵ Relying strongly on the policy that courts should be solicitous of the Title VII plaintiff,⁴⁶ the court ruled that the statements made by the plaintiff in her EEOC complaint were sufficient to support her subsequent judicial action for both race⁴⁷ and sex discrimination.⁴⁸

Although the *Jenkins* rule does not specifically provide that matters developed in the EEOC investigation can be included in a subsequent judicial complaint, there may be no difference between the *Jenkins* rule and the *Sanchez-Gamble* rule if the *Jenkins* rule is applied so that discrimination uncovered in the course of the EEOC investigation can be included under *Jenkins* as discrimination "growing out of such allegations."⁴⁹ On the other hand, if the *Jenkins* rule results in a narrower scope than *Sanchez-Gamble* and different results occur in application of the standards, then it is submitted that the broader scope of *Sanchez-Gamble* is preferable. Several reasons support this view. For example, under *Jenkins*, a strict interpretation of "like or reasonably related to" and "growing out of such allegations" might allow little more than the original specific allegation to be included in a subse-

⁴² *Id.* at 1241, 11 FEP Cas. at 712. See *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162, 3 FEP Cas. 858, 860 (5th Cir. 1971) (adopting a similar standard).

⁴³ 522 F.2d at 1241, 11 FEP Cas. at 712.

⁴⁴ 538 F.2d at 167, 13 FEP Cas. at 55.

⁴⁵ *Id.* at 169, 13 FEP Cas. at 56.

⁴⁶ *Id.* at 168, 13 FEP Cas. at 55. See *Gamble*, 514 F.2d at 687-89, 10 FEP Cas. 1156-57; *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 161-2, 3 FEP Cas. 858, 860 (5th Cir. 1971); *Sanchez*, 431 F.2d at 463, 2 FEP Cas. at 793-94.

⁴⁷ The court noted that a charge alleging discrimination stemming from grooming requirements which applied particularly to Blacks constituted a sufficient charge of racial discrimination, particularly when accompanied by other general allegations. 538 F.2d at 168, 13 FEP Cas. at 56.

⁴⁸ Although the plaintiff had not checked off the sex discrimination box on the EEOC complaint form, her charge that her superior accused her of being "a leader of the girls on the floor" was sufficient to support her allegations of sex discrimination. 538 F.2d at 168-69, 13 FEP Cas. at 56.

⁴⁹ Prior to the rehearing of *Jenkins*, one district court had queried whether the *Jenkins* standard is in fact different from the *Sanchez-Gamble* standard. *Ortega v. Construction and General Laborers' Union No. 390*, 396 F. Supp. 976, 980, 11 FEP Cas. 1176, 1179 (D. Conn. 1975).

quent civil action.⁵⁰ In contrast, the application of the *Sanchez-Gamble* standard, which specifically includes issues which could reasonably be expected to grow out of the EEOC investigation of the charge, should provide greater flexibility in the scope of a subsequent civil action which deviates from the original EEOC charge.⁵¹ The allowance of a broad range of issues in a civil action appears to be an appropriate method to serve the Title VII policy of being solicitous of Title VII plaintiffs⁵² as well as insuring that attempts at conciliation will not be hampered.⁵³ A broader scope in a judicial action reinforces the liberal construction which must be accorded to EEOC charges in recognition of the fact that these charges are often filed by lay complainants without assistance of counsel. Furthermore, conciliation would be frustrated where an employer knew a particular issue not specifically mentioned in an EEOC charge could not be pursued in a subsequent civil action. Finally, judicial economy is well-served by including all issues which could reasonably grow out of an EEOC investigation rather than requiring the filing of new specific charges with respect to similar issues. Therefore, a standard which permits a broad scope in a subsequent civil action seems appropriate for serving the policy considerations accompanying Title VII.

VIII. RELIGIOUS DISCRIMINATION—THE REASONABLE ACCOMMODATION RULE

Under Title VII's prohibition of discrimination because of religion,¹ a recurring question has been whether it is discriminatory to discharge or refuse to hire an individual who regularly observes Saturday as the Sabbath, and as a consequence is unavailable for work on that day when such work is required by an employer. During the

⁵⁰ See, e.g., *Jenkins*, 538 F.2d at 169, 13 FEP Cas. at 56-57 (Tone, J., dissenting) where three of the seven justices would limit the action under the articulated standard to racial discrimination due to wearing an Afro hair style.

⁵¹ See, e.g., *Black News Employees*, 11 FEP Cas. at 916.

⁵² See *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 161-62, 3 FEP Cas. 858, 860 (5th Cir. 1971); *Tipler v. duPont deNemours and Co.*, 443 F.2d 125, 131, 3 FEP Cas. 540, 544 (6th Cir. 1971).

⁵³ Although attempted conciliation is not a jurisdictional prerequisite to bringing an action in district court, see note 25, *supra*, the resolving of disagreement through conciliation remains an important aspect of the Title VII framework. See, e.g., *Reese*, 11 FEP Cas. at 339.

¹ 42 U.S.C. § 2000e-2(a) (1970) provides in part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion

Survey year, the Sixth,² Eighth,³ and Tenth⁴ Circuits reported decisions involving such situations. The current statutory and regulatory framework will undoubtedly be the subject of an increasing amount of litigation in the future.

When Congress enacted the equal employment opportunity provisions of the Civil Rights Act of 1964,⁵ it did not define the term "religion" or indicate which acts would constitute religious discrimination in employment. In 1966, however, the EEOC issued guidelines providing that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees, and in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business."⁶ The 1966 guidelines did allow an employer "to establish a normal workweek . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees."⁷ As an example, the regulations noted that an employer who closes for business on Sunday does not discriminate by requiring employees to be available for work on Saturday.⁸

In the following year, the regulations were modified to their present form.⁹ The section providing that an employer may establish a normal work week was deleted entirely. The new regulation provided that the duty not to discriminate because of an individual's religion "includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees *and prospective employees* where such accommodations can be made without undue hardship on the conduct of the employer's business."¹⁰ The regulations noted that undue hardship can occur, for example, "where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."¹¹ The EEOC regulations further provided that due to the sensitive nature of individual beliefs, "the

² *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 11 FEP Cas. 1106 (6th Cir. 1975); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 11 FEP Cas. 129 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (Nov. 16, 1976); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 10 FEP Cas. 974 (6th Cir. 1975), *aff'd by an equally divided court*, 45 U.S.L.W. 4009 (Nov. 2, 1976).

³ *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 11 FEP Cas. 1121 (8th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3359 (Nov. 16, 1976).

⁴ *Williams v. Southern Union Gas. Co.*, 529 F.2d 483, 12 FEP Cas. 5 (10th Cir.), *cert. denied*, 45 U.S.L.W. 3361 (Nov. 16, 1976).

⁵ 42 U.S.C. § 2000e *et seq.* (1970) (amended 1972).

⁶ 31 Fed. Reg. 8370 (1966).

⁷ *Id.*

⁸ *Id.*

⁹ 29 C.F.R. § 1605.1 (1975).

¹⁰ 29 C.F.R. § 1605.1(b) (1975) (emphasis added).

¹¹ *Id.*

employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."¹²

In its 1972 amendments to Title VII, Congress incorporated the substance of the 1967 regulations into Title VII by defining religion as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.¹³

Under the EEOC regulation and subsequent statutory incorporation of the reasonable accommodation rule, two major issues have arisen:¹⁴

¹² 29 C.F.R. § 1605.1(c) (1975). The regulation notes that each case will be reviewed on an "individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1(d) (1975).

¹³ 42 U.S.C. § 2000e(j) (Supp.V 1975).

¹⁴ For those parties whose rights accrued prior to the 1972 amendment, an additional question arises as to whether the 1967 "reasonable accommodation" rule is consistent with the original statutory framework. The effect of holding the rule inconsistent with the statute prior to amendment is to allow only those parties who allege religious discrimination after 1972 to be governed by a reasonable accommodation requirement. The Fifth, Eighth, and Tenth Circuits have all accepted the regulation as valid and consistent with the original legislation. See *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116, 4 FEP Cas. 951, 952-53 (5th Cir. 1972); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 38 & n.5, 11 FEP Cas. 1121, 1124 & n.5 (8th Cir. 1975); *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 488, 12 FEP Cas. 5, 8 (10th Cir. 1976).

The Sixth Circuit has reported conflicting decisions regarding the consistency of the regulation and the statute. In *Cummins v. Parker Seal Co.*, 516 F.2d 544, 10 FEP Cas. 974 (6th Cir. 1975), a three-judge panel concluded that the regulation was consistent with Title VII. It found that the 1972 amendment provided evidence that the regulation expressed the prior intent of Congress. *Id.* at 547, 10 FEP Cas. at 976-77. Relying on *Cummins*, a separate panel in *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 11 FEP Cas. 1106 (6th Cir. 1975), also upheld the consistency of the regulation and the statute. *Id.* at 517 n.1 & n.2, 11 FEP Cas. at 1107 n.1 & n.2. In *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 11 FEP Cas. 129 (6th Cir. 1975), however, another panel held to the contrary. The majority in *Reid* reasoned that the guidelines added for the first time an additional obligation that the employer accommodate religious practices and beliefs. As such, the guidelines were found to proscribe something more than discrimination. *Id.* at 519-20, 11 FEP Cas. at 134-35.

It should be noted that this was the second appeal of *Reid*. See *Reid v. Memphis Publishing Co.*, 468 F.2d 346, 5 FEP Cas. 69 (6th Cir. 1972). The majority of the panel on the second appeal consisted of Judges Weick and Celebrezze, both of whom have expressed doubts regarding the constitutionality of the reasonable accommodation rule. See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334, 2 FEP Cas. 869, 870 (6th Cir. 1970) (Weick, J.) (denial of rehearing), *aff'd by an equally divided court*, 402 U.S. 689 (1971); *Cummins*, 516 F.2d 544, 554, 10 FEP Cas. 974, 983 (6th Cir. 1975) (Celebrezze, J., dissenting).

It is suggested that the rejection of the 1967 EEOC guidelines in *Reid* is incorrect. Although the subsequent adoption of the rule by Congress does not necessarily reflect an earlier intent, the EEOC was given power to promulgate regulations to carry

(1) what constitutes reasonable accommodation without undue hardship,¹⁵ and (2) whether the reasonable accommodation duty violates the establishment clause of the First Amendment.¹⁶

A. Application of the Reasonable Accommodation Rule

The Sixth, Eighth, and Tenth¹⁷ Circuits attempted during the *Survey* year to define what steps will constitute a reasonable accommodation of an employee's religious practices without undue hardship to the employer's business, when those practices include abstention from work on Saturday. The various factors examined by the courts in determining whether efforts have been made to accommodate religious beliefs and practices reasonably, without undue hardship to an employer's business include: (1) the nature of the job,¹⁸ (2) the number of qualified employees capable of performing the duties of the Sabbath observer,¹⁹ (3) the size of the employer's establishment,²⁰ (4) the effects of transferring the employee to a different job,²¹ and

out the provisions of the Act, 42 U.S.C. § 2000e-12(a) (1970), and those regulations are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971). Furthermore, the "reasonable accommodation" rule does not appear *inconsistent* with the original enactment of Title VII and does promote the overall purpose of Title VII to relieve the effects of employment discrimination. Therefore, the statutory and regulatory framework since 1967 could properly be interpreted as requiring employers to attempt a reasonable accommodation of employees' or prospective employees' religious needs unless an undue hardship to the employer would result.

¹⁵ *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 488, 12 FEP Cas. 5, 8 (10th Cir. 1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 517, 11 FEP Cas. 1106, 1107 (6th Cir. 1975); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 37, 11 FEP Cas. 1121, 1123 (8th Cir. 1975); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 513, 11 FEP Cas. 129, 130 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 546, 10 FEP Cas. 974, 976 (6th Cir. 1975).

¹⁶ *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 37, 11 FEP Cas. 1121, 1123 (8th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 546, 10 FEP Cas. 974, 976 (6th Cir. 1975).

¹⁷ See notes 2-4, *supra*.

¹⁸ *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 488, 12 FEP Cas. 5, 9 (10th Cir. 1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 521, 11 FEP Cas. 1106, 1110 (6th Cir. 1975); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 39-40, 11 FEP Cas. 1121, 1125 (8th Cir. 1975); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 515-16, 11 FEP Cas. 129, 131-32 (6th Cir. 1975).

¹⁹ *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 488, 12 FEP Cas. 5, 9 (10th Cir. 1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 521, 11 FEP Cas. 1106, 1109 (6th Cir. 1975); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 39, 11 FEP Cas. 1121, 1125 (8th Cir. 1975); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 516, 11 FEP Cas. 129, 132 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 550, 10 FEP Cas. 974, 980 (6th Cir. 1975).

²⁰ *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 39, 11 FEP Cas. 1121, 1125 (8th Cir. 1975); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 515, 11 FEP Cas. 129, 131 (6th Cir. 1975).

²¹ *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 519-20, 11 FEP Cas. 1106, 1109 (6th Cir. 1975); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 40, 11 FEP Cas. 1121, 1125 (8th Cir. 1975).

(5) the effects of accommodation upon the morale of other employees.²²

In two of the three cases decided by the Sixth Circuit during the Survey year, employers failed to show that an undue hardship would result from accommodation of employees' religious practice of observing Saturday as the Sabbath. In *Cummins v. Parker Seal Co.*,²³ the employee was discharged following complaints from fellow employees who were required to substitute for him on Saturdays. The court of appeals reversed as "clearly erroneous"²⁴ the lower court's finding that the employer could make no further accommodation without creating an undue hardship on his business.²⁵ The court of appeals stated that the system whereby other employees had substituted for the employee for more than a year, in return for which the employee was available to substitute for them, was not creating an undue hardship.²⁶ The court reasoned that the employer could have pursued a more active course of accommodation by scheduling longer hours for the employee on weekdays or Sundays, reducing the employee's salary commensurate with his shorter work week, or taking pains to ensure that the employee substituted for his colleagues on an equitable basis rather than leaving substitutions to individual initiative.²⁷

The court also reasoned that "[u]ndue hardship is something greater than hardship,"²⁸ and stressed the fact that the employer had lived with the situation for more than a year. The court further noted that objections and complaints of fellow employees do not constitute undue hardship.²⁹ The concession was made, however, that employee morale problems could in some cases constitute an undue hardship where, for example, "chaotic personnel problems" arose.³⁰ It appears, therefore, that in *Cummins*, a reasonable accommodation could have been made since the nature of the employee's job was such that a sufficient number of other employees were qualified to perform the duties. Furthermore, a certain amount of discontent by fellow employees arising from such an accommodation was not considered an undue hardship to the employer's business.

²² *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520-21, 11 FEP Cas. 1106, 1110 (6th Cir. 1975); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 516-17, 11 FEP Cas. 129, 132 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 550-51, 10 FEP Cas. 974, 979-80 (6th Cir. 1975).

²³ 516 F.2d 544, 10 FEP Cas. 974 (6th Cir. 1975), *aff'd by an equally divided court*, 45 U.S.L.W. 4009 (Nov. 2, 1976).

²⁴ *Id.* at 551, 10 FEP Cas. at 980. See FED. R. CIV. P. 52(a).

²⁵ 516 F.2d at 546, 10 FEP Cas. at 976, *quoting* District Court Memorandum Opinion, No. 2432 (E.D. Ky. March 20, 1974).

²⁶ 516 F.2d at 550, 10 FEP Cas. 979.

²⁷ *Id.* at 550, 10 FEP Cas. at 980.

²⁸ *Id.* at 551, 10 FEP Cas. at 980.

²⁹ *Id.* at 550, 10 FEP Cas. at 979.

³⁰ *Id.*, 10 FEP Cas. at 979-80. See, e.g., EEOC Decision No. 72-0606, Dec. 22, 1971, 4 FEP Cas. 311, 312; EEOC Decision No. 71-463, Nov. 13, 1970, 3 FEP Cas. 385, 386.

In *Draper v. United States Pipe & Foundry Co.*,³¹ the most recent of the three Sixth Circuit decisions, the lower court's finding that the employer could not further accommodate the employee without undue hardship to its business was again found to be "clearly erroneous."³² The employee in *Draper* was requested to work on Saturdays in violation of his religious beliefs. In attempting an accommodation, the employer offered to aid the employee's transfer to a production job where he would be less likely to be required to work on Saturday.³³ With such a transfer, however, the employee would receive a lower wage and would be unable to use his skill and experience as an electrician. Furthermore, such a transfer was not certain to eliminate conflicts with his religious practices.³⁴ The court ruled that when an employee is thus adversely affected to a substantial degree by a transfer, the employer must first attempt to accommodate the employee within his current job classification.³⁵

The court examined alternative accommodations such as experimentation with shift exchanges and scheduling arrangements such as excused absences combined with overtime during the week, and concluded that a reasonable accommodation of the employee's religious practices was possible.³⁶ Since a reasonable accommodation was found to be feasible, the court considered whether such an accommodation would have imposed an undue hardship on the employer.

Citing *Cummins*, the *Draper* court noted that an employer's burden of proof would not be met by showing administrative difficulties or operating routine disruptions.³⁷ The court also stated that "hypothetical hardships" would not suffice. An employer would be "on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."³⁸

³¹ 527 F.2d 515, 11 FEP Cas. 1106 (6th Cir. 1975).

³² *Id.* at 519, 11 FEP Cas. at 1108. In dissent, Judge Engel argued that the district court findings were not clearly erroneous. He noted that in *Cummins*, the error had been made by not specifying what particular undue hardship would exist. In *Draper*, however, the district court had evidence that each of the suggested accommodations was not feasible. Thus, he argued that particularly where the lower court's record showed no suggestion of religious bias or prejudice, the findings should not be overturned. *Id.* at 524, 11 FEP Cas. at 1112-13 (Engel, J., dissenting). It is well settled, however, that *intent* to discriminate is not a prerequisite to a finding of Title VII violation. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis in original).

³³ 527 F.2d at 518, 11 FEP Cas. at 1108.

³⁴ The court noted that the employer could not assure the plaintiff that Saturday work would not be required. *Id.* at 519, 11 FEP Cas. at 1109.

³⁵ *Id.*

³⁶ The company personnel manager testified that a shift adjustment might not necessarily increase labor costs. Furthermore, under the collective bargaining agreement, the company had the right to make shift assignments. *Id.* at 520, 11 FEP Cas. at 1109.

³⁷ The court quoted from *Cummins* that "[u]ndue hardship is something greater than hardship." *Id.*, quoting 516 F.2d at 551, 10 FEP Cas. at 980.

³⁸ 527 F.2d at 520, 11 FEP Cas. at 1109.

The court conceded, however, that an employer could prove undue hardship without actually having undertaken any of the possible accommodations.³⁹ Again relying on *Cummins*, the court agreed that employee "grumbling" was not sufficient and that something akin to "chaotic personnel problems" should be shown before employee discontent would be considered an undue hardship.⁴⁰ The court noted that in determining whether a proposed accommodation would produce an undue hardship, safety considerations would be highly relevant. In the present case, however, the employer had not shown that the proposed accommodations would jeopardize the safety of the employer's plant.⁴¹

The Sixth Circuit was again confronted with the issue of what constitutes a reasonable accommodation of employees who observe Saturday as the Sabbath in *Reid v. Memphis Publishing Co.*⁴² The district court had found that the employer violated Title VII's prohibition of religious discrimination.⁴³ The court of appeals ruled that the employer's accommodation of the prospective employee's religious practices would have imposed an undue hardship and thus reversed the lower court's finding as clearly erroneous.⁴⁴ The plaintiff in *Reid*, an applicant for a copyreader position on the defendant's newspaper, disclosed at his final interview that he would not be available to work on Saturdays as required. The district court found that although the job was specialized, other employees of similar qualifications were available to perform the work on Saturdays and that the employer made no attempt to accommodate the religious needs of the plaintiff.⁴⁵ Reviewing the evidence, the court of appeals ruled that an undue hardship *would* result by accommodating the plaintiff since requiring senior copyreaders to substitute for him would incur overtime expenses or employment of an additional copyreader, and serious morale problems among the other copyreaders would arise.⁴⁶

³⁹ *Contra*, *Calybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6, 5 FEP Cas. 719, 723 (D. Ore. 1973); *Shaffield v. Northrop Worldwide Aircraft Serv., Inc.*, 373 F. Supp. 937, 941-42, 7 FEP Cas. 465, 468 (M.D. Ala. 1974) where the courts ruled that the employer's burden of showing undue hardship cannot be sustained without actually having made an attempted accommodation.

⁴⁰ 527 F.2d at 520-21, 11 FEP Cas. at 1110.

⁴¹ Under the proposed accommodations, some workers might be required to work longer than 8-hour shifts. Although testimony showed that 16-hour shifts might create safety problems, such shifts were not a necessary result of accommodation. The court also noted that the collective bargaining agreement permitted shifts up to 12½ hours per day. *Id.* at 521, 11 FEP Cas. at 1110.

⁴² 521 F.2d 512, 11 FEP Cas. 129 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (Nov. 16, 1976). *Reid* was decided after *Cummins* and before *Draper*.

⁴³ 369 F. Supp. 684, 690, 7 FEP Cas. 13, 18 (W.D. Tenn. 1973).

⁴⁴ 521 F.2d at 517, 11 FEP Cas. at 133.

⁴⁵ 369 F. Supp. at 689, 7 FEP Cas. at 17.

⁴⁶ 521 F.2d at 517, 11 FEP Cas. at 133. In dissent, Judge Edwards argued that the district court's findings were not clearly erroneous because the majority was in essence shifting the burden of proof from the employer to the employee. *Id.* at 523-24, 11 FEP Cas. at 138 (Edwards, J., dissenting).

It is difficult to reconcile *Reid* with *Cummins* and *Draper*. Although *Cummins* and *Draper* seem to be consistent in requiring specific proof of attempts at reasonable accommodation along with evidence of specific hardship that would result, *Reid* allows hypothetical hardships to suffice. The *Reid* court may have been less exacting with the employer because the plaintiff was a prospective employee, whereas in *Cummins* and *Draper*, the plaintiffs were already employed at the time the alleged discriminatory acts occurred. However, the statute makes no distinction between employees and prospective employees.⁴⁷ Therefore, it is suggested that the reasoning of *Cummins* and *Draper* is preferable to that of *Reid*.

The reasoning employed by the Eighth Circuit appears to align with the reasoning of *Cummins* and *Draper* rather than with *Reid* in requiring specific showing of how accommodation would cause an undue hardship. In *Hardison v. Trans World Airlines, Inc.*,⁴⁸ the employer was found to have violated Title VII's prohibition against religious discrimination. The court of appeals ruled that the lower court's finding that the employer had fulfilled its duty to attempt a reasonable accommodation short of undue hardship was clearly erroneous.⁴⁹ The company argued that the employee's transfer from one position to another was evidence of lack of cooperation on his part since he would have retained sufficient seniority in his original position to protect himself against Sabbath day assignments.⁵⁰ The court ruled, however, that although an employee must be responsive to reasonable accommodation, limiting transfer rights as a condition of accommodation was not appropriate.⁵¹

The court of appeals also found that more than 200 employees were capable of performing the employee's work. Furthermore, under the collective bargaining agreement, the employer could have permitted the employee to work a four-day week, filled the employee's Saturday shift with other available personnel, or made a swap between the employee and other personnel for certain shifts.⁵² Thus, the

⁴⁷ See text at notes 10 and 13, *supra*.

⁴⁸ 527 F.2d 33, 11 FEP Cas. 1121 (8th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3359 (Nov. 16, 1976).

⁴⁹ *Id.* at 39, 11 FEP Cas. at 1125.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 39-41, 11 FEP Cas. at 1125-26. The court also explored the relationship between a bona fide seniority system and the requirement of reasonable accommodation. Although the court was not required to decide the issue of whether employee seniority rights must be modified when no other accommodation can be accomplished since TWA had not even attempted such accommodation, the court did note that, "It would seem that a collective bargaining agreement, the seniority provisions of which preclude any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act." *Id.* at 41, 11 FEP Cas. at 1127. The court further noted that:

If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude [an employer] from ever hiring those [persons] whose religious

Hardison court examined the size of the employer's business, the number of employees available to perform the employee's work, the effects of transfer, and the nature of the job.

The employer contended that such possible accommodations would create an undue hardship to its business by causing administrative problems in finding substitutes, leaving one shift short-handed, or requiring payment of overtime compensation.⁵³ In rejecting the employer's contentions, the court stressed that the burden of proving undue hardship is on the employer, and that some degree of inconvenience or cost to an employer is not precluded by the statutory and regulatory framework. The court also agreed with *Cummins* and *Draper* that employee irritation did not constitute an undue hardship on the employer's business.⁵⁴

The Tenth Circuit in *Williams v. Southern Union Gas Co.*,⁵⁵ affirmed the lower court's findings that the employer had not violated the reasonable accommodation rule. In *Williams*, the employee had informed his supervisor that he would be unable to work on Saturdays due to his religious beliefs.⁵⁶ Initially, no problems arose, since Sunday through Thursday was the employee's regular work week. However, when plaintiff was assigned to work on a pipeline system in an isolated area, he was asked to work one Saturday in order to complete the project on schedule. When the plaintiff did not do so, his supervisor had to delay a long-planned vacation and do the work himself. Plaintiff was subsequently discharged.⁵⁷

Although the court considered the factors of whether other employees were available to perform the plaintiff's work and the nature of the job, the court characterized the issue as a determination of whether the employer had acted reasonably under all the circumstances.⁵⁸ Stressing that the trial court's findings must not be disturbed unless clearly erroneous, the court noted that reasonable minds might differ and affirmed the judgment of the lower court that Title VII had not been violated.⁵⁹ The court of appeals seemed to rely on the fact that prior to the particular Saturday in question, the employer had reasonably accommodated plaintiff's religious practices by not compelling him to do Saturday work as part of his normal work week.

convictions preclude work . . . on Saturday. It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

Id. at 41-42 n.12, 11 FEP Cas. at 1127 n.12.

⁵³ *Id.* at 40-41, 11 FEP Cas. at 1126-27.

⁵⁴ *Id.* at 40-42, 11 FEP Cas. at 1126-27.

⁵⁵ 529 F.2d 483, 12 FEP Cas. 5 (10th Cir.), *cert. denied*, 45 U.S.L.W. 3361 (Nov. 16, 1976).

⁵⁶ Apparently, it was not contrary to the employee's beliefs to work on Saturdays if he believed a true emergency existed. *Id.* at 485, 12 FEP Cas. at 6.

⁵⁷ *Id.* at 486, 12 FEP Cas. at 7.

⁵⁸ *Id.* at 489, 12 FEP Cas. at 9.

⁵⁹ *Id.* at 488-89, 12 FEP Cas. at 9.

It is suggested that under *Cummins*, *Draper*, and *Hardison*, the situation in *Williams* would not have been found to create an undue hardship to the employer's business. Although the court may balance the varying factors,⁶⁰ it would appear that requiring an employee to delay a vacation in order to perform the work of a Sabbath observer does not constitute the type of hardship contemplated by the statute as interpreted in *Cummins*, *Draper*, and *Hardison*.

In the sensitive area of religious accommodation, a case by case determination is necessary.⁶¹ However, certain guidelines can be set forth as relevant considerations. In light of the *Survey* year decisions, it appears that in examining the nature of the job, an employer may discharge⁶² or refuse to hire⁶³ an individual whose religious practices conflict with specialized or unique needs of the employer. This factor is closely aligned with the concept of whether other employees can perform the work. If an employer has a large staff, it may be necessary for him to show why shifts or substitutions are not feasible.⁶⁴ Furthermore, the employer should be prepared to show what effect a transfer of an employee may have as a means of accommodation.⁶⁵

If any such accommodation can be made, the employer must then show specific undue hardship which has resulted or will result. Although an undue hardship will not result from employee grumbling, it may result from "chaotic" personnel morale problems.⁶⁶ Minor economic burdens⁶⁷ or scheduling inconvenience⁶⁸ do not appear sufficient to establish undue hardship.

B. Establishment Clause Challenge to the Reasonable Accommodation Rule

The reasonable accommodation rule has been a subject of dispute not only in terms of its application, but also in terms of its relationship to the First Amendment. The Sixth Circuit was the first court of appeals to voice concern regarding the constitutionality of an imposition on employers of a duty to accommodate religious beliefs and practices of employees. In *Dewey v. Reynolds Metals Co.*,⁶⁹ the court

⁶⁰ See *Hardison*, 527 F.2d at 40, 11 FEP Cas. at 1125.

⁶¹ See note 12, *supra*.

⁶² See *Williams*, 529 F.2d at 489, 12 FEP Cas. at 9.

⁶³ See *Reid*, 521 F.2d at 521, 11 FEP Cas. at 136.

⁶⁴ *Williams*, 529 F.2d at 488, 12 FEP Cas. at 9; *Draper*, 527 F.2d at 521, 11 FEP Cas. at 1109; *Hardison*, 527 F.2d at 39, 11 FEP Cas. at 1125; *Reid*, 521 F.2d at 516, 11 FEP Cas. at 132; *Cummins*, 516 F.2d at 550, 10 FEP Cas. at 980.

⁶⁵ *Draper*, 527 F.2d at 519-20, 11 FEP Cas. at 1109; *Hardison*, 527 F.2d at 40, 11 FEP Cas. at 1125.

⁶⁶ *Draper*, 527 F.2d at 520-21, 11 FEP Cas. at 1110; *Reid*, 521 F.2d at 516-17, 11 FEP Cas. at 132; *Cummins*, 516 F.2d at 550-51, 10 FEP Cas. at 979-80.

⁶⁷ See *Hardison*, 527 F.2d at 40-41, 11 FEP Cas. at 1126-27.

⁶⁸ See *Draper*, 527 F.2d at 520, 11 FEP Cas. at 1109; *Hardison*, 527 F.2d at 40-41, 11 FEP Cas. at 1126-27.

⁶⁹ 429 F.2d 324, 2 FEP Cas. 869 (6th Cir. 1970) (denial of rehearing).

warned that "[t]o construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment."⁷⁰

When confronted with an establishment clause challenge in *Cummins*, the majority of the court rejected the argument that the reasonable accommodation rule was a law "respecting an establishment of religion"⁷¹ and therefore invalid under the First Amendment.⁷² In *Cummins*, the employer argued that the reasonable accommodation rule constituted a governmentally mandated preference for religion that is impermissible under the First Amendment.⁷³ The employer contended that the rule fostered religion by requiring private employers to defer to employee's religious practices. In determining whether the reasonable accommodation requirement could survive this establishment clause challenge, the court applied the three-pronged test outlined by the Supreme Court.⁷⁴ To be constitutional, a law must (1) "reflect a clearly secular legislative purpose," (2) "have a primary effect that neither advances nor inhibits religion," and (3) "avoid excessive government entanglement with religion."⁷⁵

In determining whether the reasonable accommodation rule had an adequate secular purpose, the court found that the rule was intended to bolster the prevention of employment discrimination.⁷⁶ The court reasoned that the rule reflected a legislative judgment to refrain from penalizing those who, as a practical matter, will not compromise their religious beliefs.⁷⁷ The majority, therefore, ruled that the reasonable accommodation rule did meet the requirement of reflecting a secular legislative purpose.⁷⁸

Applying the second part of the Supreme Court's test, the court found that the primary effect of the rule neither advanced nor inhibited religion, but instead guaranteed job security to employees.⁷⁹ The court reasoned that the reasonable accommodation rule restrained employers from enforcing uniform rules that have a discriminatory

⁷⁰ *Id.* at 334, 2 FEP Cas. at 870.

⁷¹ "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

⁷² 516 F.2d at 554, 10 FEP Cas. at 983.

⁷³ The employer argued that under the reasonable accommodation rule, "an employer may be required to excuse an employee from Saturday work to attend church, but an atheistic employee who wishes to go fishing on Saturdays enjoys no similar right . . ." *Id.* at 551, 10 FEP Cas. at 980.

⁷⁴ *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

⁷⁵ *Id.* at 773.

⁷⁶ 516 F.2d at 552, 10 FEP Cas. at 981.

⁷⁷ *Id.* at 552-53, 10 FEP Cas. at 981. The court drew support from *Gillette v. United States*, 401 U.S. 437, 453 (1971), where the Supreme Court ruled a congressional desire to respect conscientious action to be a valid secular purpose.

⁷⁸ 516 F.2d at 552, 10 FEP Cas. at 981.

⁷⁹ *Id.* at 553, 10 FEP Cas. at 981-82.

impact on certain employees. The court also focused on the fact that no direct or indirect financial support for any religion flows from the rule.⁸⁰ Conceding that, for example, churches holding Saturday services may have greater attendance and correspondingly greater income, the court characterized this as an incidental benefit.⁸¹ Although some incidental benefits may thus result from the rule, such benefits do not render the law unconstitutional.⁸² Since the primary effect was to inhibit discrimination, the court thus found that the second prong of the Supreme Court's test was met.⁸³

Thirdly, the court found that the reasonable accommodation rule did not create any excessive government entanglement with religion.⁸⁴ The court relied on the fact that the rule requires little or no contact between governmental agencies and religious institutions. The court rejected the employer's argument that excessive entanglement would result where the EEOC was required to evaluate the tenets of many religions to ascertain whether employee practices were genuinely religious.⁸⁵ Reasoning that this issue would probably not be frequently disputed, the court noted that similar involvement has been upheld by the Supreme Court.⁸⁶

The *Cummins* court drew additional support from Supreme Court cases upholding state Sunday closing laws.⁸⁷ Since such laws have the effect of forcing employers to close on Sundays, thereby accommodating the religious practices of the dominant Christian population, the court reasoned that the reasonable accommodation rule was a lesser interference with religion by the government.⁸⁸

In dissent in *Cummins*, Judge Celebrezze argued that the reasonable accommodation rule grants preference to employees on account of their religion in a manner inconsistent with the First Amendment.⁸⁹ The dissent reasoned that the first two requirements of the Supreme Court's three-part test were not met by the rule. Although the banning of employment discrimination would be a valid secular purpose, the dissent argued that the reasonable accommodation rule did not promote that purpose. Instead, it required em-

⁸⁰ *Id.* See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

⁸¹ 516 F.2d at 553, 10 FEP Cas. at 982.

⁸² *Id.* See, e.g., *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771-72 (1973).

⁸³ 516 F.2d at 553, 10 FEP Cas. at 982.

⁸⁴ *Id.*

⁸⁵ *Id.* at 554, 10 FEP Cas. at 982.

⁸⁶ *Id.* See *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970), where the Court ruled that there was no excessive entanglement between government and religion where the state must determine whether a purported church qualifies for a property tax exemption.

⁸⁷ 516 F.2d at 554, 10 FEP Cas. at 982-83. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961).

⁸⁸ 516 F.2d at 554, 10 FEP Cas. at 983.

⁸⁹ *Id.* at 556, 10 FEP Cas. at 984 (Celebrezze, J., dissenting).

ployers to engage in religious discrimination by giving preferential treatment to persons because of their religion. The dissent reasoned that the purpose behind the reasonable accommodation rule was to protect and advance *particular* religions whose practices conflict with employers' schedules.⁹⁰ In contrast, the constitution would not be offended by a "hands-off" policy, allowing employers and employees to come to terms on their own.⁹¹

The dissent also found that the reasonable accommodation rule lacked a "primary effect that neither advances nor inhibits religion." Judge Celebrezze reasoned that the rule discriminates between religion and non-religion and among religions since only those with religious "practices" would benefit from the rule, thus negating a possible neutral impact.⁹² Since the first two parts of the Supreme Court test were not met, the dissent found it unnecessary to consider whether excessive government entanglement was fostered by the rule.⁹³

An establishment clause challenge was also made and rejected in *Hardison*. The employer contended that the reasonable accommodation rule lacked the required neutrality between religious believers and nonbelievers.⁹⁴ In application of the *Nyquist* three-fold test, the court of appeals agreed with the lower court's findings. First, the statute was found to reflect a secular purpose of assuring employees that they will not be discharged because of their religion. Second, it was found that the primary effect of the rule was to guarantee job security. Third, the court ruled that excessive government entanglement would not result.⁹⁵ The court also cited *Cummins* and agreed that the reasonable accommodation rule required far less government interference than the Sunday closing laws sanctioned by the Supreme Court.⁹⁶

It is suggested that rejection of an establishment clause challenge to the reasonable accommodation rule is appropriate since the rule appears to meet the three requirements of *Nyquist*. Although the dissent in *Cummins* stated that the purpose of the rule was to give preference to certain religions,⁹⁷ the majority in *Cummins*, and the court in *Hardison*, seem more persuasive in their finding the purpose to be prevention of employment discrimination, particularly where the Supreme Court has upheld the desire to respect conscientious action as a valid secular purpose.⁹⁸ Furthermore, in light of the fact that no financial support for any religion results from the rule,⁹⁹ the primary

⁹⁰ *Id.* at 558, 10 FEP Cas. at 986 (Celebrezze, J., dissenting).

⁹¹ *Id.* at 556, 10 FEP Cas. at 984 (Celebrezze, J., dissenting).

⁹² *Id.* at 558-59, 10 FEP Cas. at 986 (Celebrezze, J., dissenting).

⁹³ *Id.* at 559, 10 FEP Cas. at 987 (Celebrezze, J., dissenting).

⁹⁴ 527 F.2d at 43, 11 FEP Cas. at 1128.

⁹⁵ *Id.* at 43-44, 11 FEP Cas. at 1128-29.

⁹⁶ *Id.* at 44, 11 FEP Cas. at 1129. See text at notes 87-88, *supra*.

⁹⁷ 516 F.2d at 588, 10 FEP Cas. at 986 (Celebrezze, J., dissenting).

⁹⁸ See *Gillette v. United States*, 401 U.S. 437, 453 (1971).

⁹⁹ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

effect seems to be to inhibit discrimination¹⁰⁰ rather than to advance religion.¹⁰¹ Finally, under current Supreme Court decisions, "proscribed government entanglement" entails conduct such as "comprehensive, discriminating, and continuing [governmental] surveillance."¹⁰² Since the reasonable accommodation rule results in little or no contact between religious institutions and government agencies, any government entanglement should not be considered impermissibly excessive.

¹⁰⁰ See *Cummins*, 516 F.2d at 553, 10 FEP Cas. at 982.

¹⁰¹ *Id.* at 559, 10 FEP Cas. at 986 (Celebrezze, J., dissenting).

¹⁰² *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).