

1974-1975 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW*

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INTRODUCTION

This issue of the Survey marks the first year in which the *Law Review* has formally acknowledged that the scope of the Annual Survey of Labor Relations Law has been expanded to include significant developments in the area of Employment Discrimination. This is not merely a pro forma acknowledgment, reflecting the fact that the Survey has in the past included comments on important developments in Employment Discrimination Law. Rather, by expanding the scope of the Survey, the *Law Review* recognizes that a current understanding of the substantive body of Labor Relations Law requires both the student and practitioner to examine the complex interplay of individual and collective rights and responsibilities arising under the Labor Management Relations Act and Title VII of the Civil Rights Act of 1964. The Supreme Court's Survey Year decision in *Emporium Capwell v. Western Addition Community Organization* vividly demonstrates the importance of this statutory interplay.

It should be emphasized that under the new title, Annual Survey of Labor Relations and Employment Discrimination Law, the authors have merely expanded upon and not changed the existing Survey format. Like its thirteen predecessors, this year's Survey reports those decisions which consolidate, add substance to, expand upon or depart from prior policy in the application of the Labor-Management Relations Act, the Norris-LaGuardia Act and other relevant statutes. In addition, it discusses important discrimination cases under Title VII, as well as under the Civil Rights Act of 1866 and the Fourteenth Amendment. The subject matter of the Survey now comprises decisions of the National Labor Relations Board, the Equal Employment Opportunity Commission and the state and federal courts reported during the Survey year—April 1, 1974 to March 31, 1975.

I. PREEMPTION

A. *Validity of Court Jurisdiction over Disputes Affecting Foreign Commerce: Primary Disputes—Windward Shipping; Secondary Disputes—Mobile Steamship*

In two related Survey year decisions, *Windward Shipping Ltd. v. American Radio Association*¹ and *American Radio Association v. Mobile Steamship, Inc.*,² the United States Supreme Court affirmed state court jurisdiction over certain primary and secondary labor

¹ 415 U.S. 104 (1974).

² 419 U.S. 215 (1974).

disputes involving peaceful informational picketing by domestic maritime unions of foreign-flag ships in American ports. In each case the Court ruled that since the labor disputes were not even "arguably" within the jurisdiction of the NLRB, because the disputes did not involve activity "in commerce" within the meaning of sections 2(6)³ and 2(7)⁴ of the Act, the doctrine of preemption could not be applied to oust the state court of jurisdiction.⁵ In both cases the unions were picketing to publicize the decrease in available union jobs caused by what they considered an unfair competitive advantage enjoyed by the foreign vessels due to wage disparities between foreign and domestic seamen.⁶

In *Windward Shipping*, the foreign owners of the picketed ships brought suit in a Texas state court to enjoin the picketing on the grounds that it constituted tortious interference with pre-existing contracts with their foreign crews.⁷ Basically, the question was whether the picketing was primary activity protected by section 7 of the NLRA.⁸ The Texas Court of Civil Appeals found that the state courts lacked jurisdiction over the complaint because the picketing constituted, "at least arguably, a protected activity under section 7" of the Act.⁹ That court concluded that the dispute was "arguably"

³ 29 U.S.C. § 152(6) (1970). Section 2(6) provides:

The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

⁴ 29 U.S.C. § 152(7) (1970). Section 2(7) provides:

The term "affecting commerce" means in commerce, or burdening commerce, or obstructing the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

⁵ *Windward Shipping*, 415 U.S. at 105-06; *Mobile Steamship*, 419 U.S. at 228.

⁶ The Court in *Mobile Steamship* noted:

As in *Windward*, this case arises from picketing designed to publicize the adverse impact on American seamen of the operations of foreign-flag carriers which employ foreign crewmen at wages substantially below those paid to American seamen. As in *Windward*, the picketing occurred during 1971, but in this case it took place in Mobile, Alabama, and was directed against the *Aqua Glory*, a ship of Liberian registry. The pickets displayed the same signs and distributed the same literature as they did in *Windward*, and they were subject to the same instructions.

The picketing in each case also had similar results. In *Windward*, we observed that "The picketing, though neither obstructive nor violent, was not without effect. Longshoremen and other port workers refused to cross the picket lines to load and unload . . . vessels." 415 U.S., at 108.

419 U.S. at 217-18.

⁷ See 415 U.S. at 105.

⁸ 29 U.S.C. § 157 (1970).

⁹ *Windward Shipping Ltd. v. American Radio Ass'n*, 482 S.W.2d 675, 682 (Tex. Ct. Civ. App. 1972).

"within commerce,"¹⁰ and that the complaint therefore fell within the exclusive jurisdiction of the National Labor Relations Board under the doctrine of preemption established by the Supreme Court in *San Diego Building Trades Council v. Garmon*.¹¹

The United States Supreme Court in 1974 reversed the Texas court, in a six to three decision written by Justice Rehnquist.¹² The Court held that the picketing did not constitute activity "in commerce" within the meaning of sections 2(6) and 2(7) of the Act, and therefore could not fall within the jurisdiction of the NLRB.¹³ The Court did not reach the preemption question in *Windward Shipping* because it found that the picketing did not meet the threshold jurisdictional requirements set out in sections 2(6) and 2(7).¹⁴ In deciding the jurisdictional question, the Court examined the effects of the picketing and the degree of interference that it would have on the operations of the picketed foreign vessels and on international trade as a whole.¹⁵ The Court found that the picketing sufficiently intruded into the affairs of foreign ships to remove it from the scope of domestic labor law and the exclusive jurisdiction of the Board,¹⁶ and state courts could assume jurisdiction over such complaints by foreign shipowners.¹⁷ As a result, it is now clear that the Board's jurisdiction does not extend to labor disputes that affect the internal operations of foreign ships, even though the domestic unions may be employing tactics that would otherwise be protected by the Act if their activity were "in or affecting commerce" within the meaning of the NLRA.¹⁸ In effect, the Court found that disputes affecting the internal operation of foreign vessels not employing domestic seamen were outside the Act's definition of commerce.¹⁹

The picketing in *Mobile Steamship* was for all practical purposes identical to the *Windward Shipping* picketing.²⁰ However, the plaintiff in *Mobile Steamship* was an organization of American

¹⁰ *Id.*

¹¹ 359 U.S. 236 (1959). Under the doctrine of preemption, state and federal courts cannot exercise jurisdiction over labor disputes that are either "arguably" protected under § 7 or "arguably" prohibited by § 8 of the Act because the NLRB has both primary and exclusive jurisdiction over the resolution of such disputes. *Id.* at 244-45. For a more thorough analysis of *Garmon* and the numerous exceptions which have arisen to the doctrine of preemption, see the discussion of *Buckley v. American Fed'n of Television and Radio Artists*, 496 F.2d 305, 86 L.R.R.M. 2103 (2d Cir. 1974), cert. denied, 419 U.S. 1093 (1975), in 16 B.C. Ind. & Com. L. Rev. 306 (1975).

¹² 415 U.S. at 106.

¹³ *Id.* at 115.

¹⁴ *Id.*

¹⁵ *Id.* at 113-15.

¹⁶ *Id.*

¹⁷ *Id.* at 115-16.

¹⁸ See *id.* at 110-11.

¹⁹ See *id.* at 109-16.

²⁰ See note 6 *supra*.

stevedoring and shipping companies, rather than the foreign ship-owners.²¹ As a result of the picketing, American longshoremen and other workers employed by the member companies of the Mobile Steamship Association refused to cross the American Radio Association member unions' picket lines to service the foreign registered ship, *Aqua Glory*, in the port of Mobile, Alabama.²² The Mobile Steamship Association obtained an injunction in the Alabama state courts, contending that the picketing constituted tortious interference, unlawful under state law, with its members' rights to conduct business in Mobile.²³

On appeal to the United States Supreme Court, the domestic unions, represented by the American Radio Association, attacked the injunction on both jurisdictional and First Amendment grounds.²⁴ The unions, having failed to persuade the United States Supreme Court in *Windward Shipping* that similar picketing against a foreign vessel owner was activity "in commerce" and protected by section 7 of the Act,²⁵ now alleged that their picketing "arguably" constituted a secondary boycott prohibited by section 8(b)(4)(B) of the Act²⁶ because it had given rise to a new dispute, between the American seamen represented by the unions and the contracting stevedores represented by the plaintiff, which was independent of the primary dispute between the unions and the foreign vessel owner.²⁷

According to the unions, since their picketing now "arguably" involved an unfair labor practice involving an 8(b) (4) (B) secondary boycott, the complaint fell within the exclusive jurisdiction of the Board.²⁸ Further, the unions noted that since the plaintiff in *Mobile Steamship* was not the foreign shipowner, but in fact an organiza-

²¹ 419 U.S. at 219.

²² Id. at 236.

²³ Id. at 236-38.

²⁴ See 419 U.S. at 217. While the Court noted that the Alabama Supreme Court had merely validated a temporary injunction issued by the lower court and had remanded the First Amendment and tortious interference question to the trial court, the Court upheld the validity of a permanent injunction after concluding that such an injunction would not violate either the First or Fourteenth Amendment rights of the picketing union members. Id. at 217 n.1, 228-32. See note 30 infra.

²⁵ 415 U.S. at 115.

²⁶ 29 U.S.C. § 158(b)(4)(B) (1970), which is designed "to shield neutral third parties from the adverse impact of labor disputes in which they are not involved," *Mobile Steamship*, 419 U.S. at 236-37 (Stewart, J., dissenting).

Specifically, this section makes it an unfair labor practice for a union: to induce or encourage any individual employed by any person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities . . . where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person. . . .

²⁷ 419 U.S. at 220-21.

²⁸ Id. at 220-22.

tion representing domestic employers, the dispute clearly concerned activities within the Act's definitions of "commerce" or "affecting commerce."²⁹

The United States Supreme Court rejected the unions' arguments and upheld both the jurisdiction and the injunction of the Alabama state courts.³⁰ First, the Court held that a finding that the Act's jurisdiction extended to this secondary dispute would be "wholly inconsistent"³¹ with its prior holding in *Windward Shipping*, because it

would result in a rule whereby a state court had jurisdiction over a complaint for injunction filed by a foreign shipowner claiming that picketing activities of a union were interfering with his business relationships with a contract stevedore, but that the same court would have no jurisdiction where the contract stevedore sought an injunction on precisely the same grounds.³²

Secondly, the Court held that even if the secondary dispute between the unions and the domestic stevedoring companies constituted an independent dispute in "some semantic sense," this dispute, like the primary dispute, failed to meet the Board's jurisdictional requirement.³³ The Court found that the secondary effects of the picketing—the refusal of the longshoremen and the dockworkers to cross the union's picket line—was integrally related to the internal maritime operations of the foreign ship and, like the picketing itself, was not "commerce" and was, therefore, outside the scope of the Act.³⁴

In *Mobile Steamship* the Court did not appear to be concerned with the domestic status of both parties to the suit; it made the "commerce" or "affecting commerce" jurisdictional requirement depend entirely upon the jurisdictional status of the union's primary

²⁹ See *id.* at 220-21.

³⁰ *Id.* at 232. The Court reached the First Amendment issue after it concluded that the state court had jurisdiction to issue the injunction. The unions had argued that their picketing constituted protected expressive conduct. Relying on its decision in *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957), the Court found that the picketing was not protected. 419 U.S. at 229-30. Since the picketing compromised a valid state policy in insuring freedom of contract, under the reasoning of *Vogt* a state "could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Id.* at 230 quoting *Vogt*, 354 U.S. at 293.

³¹ 419 U.S. at 224.

³² *Id.* at 221.

³³ See *id.* at 221-23. The Court emphasized that no cases have ever held that the Board can take jurisdiction over an unfair labor practice complaint where the activity disputed does not "affect commerce" within the meaning of § 2(7) of the Act. *Id.* at 221. For the text of § 2(7), see note 4 *supra*.

³⁴ 419 U.S. at 224-25.

activity.³⁵ The implication of *Mobile Steamship* is that the Court will deny the Board jurisdiction over a labor dispute between domestic unions and employers if the dispute arises in conjunction with, or "arguably" affects, a primary dispute that falls outside the scope of the Act as defined by *Windward Shipping*. In so doing, the Court will subject union conduct directed against foreign flagships to the inconsistent and varying laws and remedies of state courts.

In a dissent to *Mobile Steamship*, Justice Stewart suggested that:

[t]he Court would thus make the determination whether an American stevedoring company was "engaged in an industry affecting commerce," the § 8(b) (4) (B) jurisdictional requirement, depend entirely on whether in a particular case a primary labor dispute to which the stevedoring company was not privy was between an American union and an American-flag shipowner or an American union and a foreign-flag shipowner.³⁶

The Court's decision in *Mobile Steamship* is, nonetheless, a logical extension of *Windward Shipping*. *Windward Shipping* itself reaffirmed a line of cases,³⁷ beginning with the Court's 1957 decision in *Benz v. Compania Naviera Hildalgo, S.A.*,³⁸ which "recognize [d] that Congress, when it used the words 'in commerce' in the LMRA [Labor Management Relations Act],"³⁹ simply did not intend the Act to extend beyond domestic labor disputes or "to erase longstanding principles of comity and accommodation in international maritime trade."⁴⁰ In *Benz*, the Court did uphold federal court jurisdiction over a damage claim brought by the owner of a foreign-flag ship against American unions, for picketing in support of striking foreign crewmen employed under foreign contracts.⁴¹ *Benz* and subsequent cases held that the history of the NLRA demonstrates that Congress clearly intended to limit the boundaries of domestic labor law to the "workingmen of our country and its possessions."⁴²

In applying *Benz*, the Court in *Windward Shipping* measured the secondary effects of the picketing on the internal operations of

³⁵ See *id.*

³⁶ *Id.* at 238 (Stewart, J., dissenting).

³⁷ See 415 U.S. at 109-15.

³⁸ 353 U.S. 138 (1957).

³⁹ 415 U.S. at 112.

⁴⁰ *Id.* at 112-13.

⁴¹ 353 U.S. at 139.

⁴² 415 U.S. at 110, quoting *Benz*, 353 U.S. at 144. See, e.g., *McCulloch v. Sociedad Nacional*, 372 U.S. 24 (1963); *Incres S.S. Co. v. Maritime Workers Union*, 372 U.S. 24 (1963).

the foreign vessel.⁴³ The Court disregarded the fact that the alleged purpose of the primary picketing was to protect the jobs of American workingmen, in its determination of whether the picketing fell within the ambit of the Act.⁴⁴ Instead, the Court measured the amount of interference that the picketing had on the operations of the foreign vessel, and concluded that the picketing substantially interfered and therefore fell outside of the protection of the NLRA.⁴⁵

Windward Shipping minimizes the alleged purpose of the picketing; it tests the Board's jurisdiction by weighing the impact of the union's activity on foreign commerce. In *Mobile Steamship*, the Court extended the *Windward Shipping* "effects test" to a secondary dispute between two domestic organizations, because the dispute initially arose as a result of picketing of a foreign vessel and had an ultimate, if somewhat tangential effect, on the internal operations of the picketed foreign vessel.

The *Benz-Windward Shipping-Mobile Steamship* line of cases does not exempt all American union activity against a foreign-flag shipowner from the jurisdiction of the Act.⁴⁶ The leading case affirming Board jurisdiction over such activity, decided in 1974, is *Longshoremen's Local 1416 v. Ariadne Co.*⁴⁷ There the Court held that picketing of foreign vessels to protest the lower wages paid by their respective owners to non-union American longshoremen was "'in commerce' within the meaning of § 2(6), and thus might have been subject to the regulatory power of the National Labor Relations Board."⁴⁸

The purpose of the primary picketing in both *Windward Shipping* and *Mobile Steamship* was to improve indirectly the jobs of domestic workingmen. The Court might have found that the picketing was at least "arguably" within the jurisdiction of the Act. However, by rejecting such an argument, the Court has apparently limited the *Ariadne* case to situations where picketing at the foreign vessel is aimed at gaining wage or organizational benefits directly for American workingmen employed on the foreign vessel. Neither *Windward Shipping* nor *Mobile Steamship* directly involved the wage or organizational rights of domestic employees, and the Court refused to expand the *Ariadne* doctrine in those cases.

Furthermore, while the Court in both cases emphasized the adverse effect that the picketing would have on the foreign vessel

⁴³ See 415 U.S. at 113-15.

⁴⁴ Id. at 106-07.

⁴⁵ Id. at 115.

⁴⁶ Id. at 112.

⁴⁷ 397 U.S. 195 (1970).

⁴⁸ Id. at 200. See discussion at *Windward Shipping*, 415 U.S. at 112.

and foreign trade, it deemphasized the possible adverse effects that conflicting rules of substantive state law might have on the operations of the foreign ships or international trade.⁴⁹ It is suggested here that a finding by the NLRB that the secondary effects of the unions' picketing violated section 8(b) (4) (B)⁵⁰ would not necessarily interfere with international maritime trade. Such a finding would merely result in a Board-ordered injunction against the picketing, rather than a state court injunction.⁵¹ Nor would a Board finding that the picketing did not violate section 8(b) (4) (B) seriously endanger the interests of the foreign vessel owners, because *Windward Shipping* clearly permits foreign shipowners to seek an injunction in the state courts.⁵² In short, *Mobile Steamship*, in circumscribing the Board's jurisdiction over a secondary labor dispute, did not provide the foreign vessel owners with any more protection from the adverse effects of the union picketing than was already available under the *Windward Shipping* decision. On the other hand, the Court in *Mobile Steamship* has removed both legitimate and illegitimate secondary activity from the Board's jurisdiction, by using the jurisdictional status of the primary activity to determine the jurisdictional status of the secondary activity. Under the *Mobile Steamship* decision, the secondary dispute may be between domestic unions and employers, but the Board is denied jurisdiction to protect the union activity specifically exempted from the Act's proscription, simply because the primary dispute does not meet the jurisdictional requirements of the Act.⁵³

B. State Regulation of Supervisors' Concerted Activities: Beasley

Sections 2(3) and 2(11) of the NLRA, as amended in 1947, exclude supervisors from the protective scope of the Act.¹ In addi-

⁴⁹ See *Windward Shipping*, 415 U.S. at 109-15; *Mobile Steamship*, 419 U.S. at 222-28.

⁵⁰ 29 U.S.C. § 158(b)(4)(B) (1970).

⁵¹ 419 U.S. at 240-42 (Stewart, J., dissenting). Justice Stewart argued that since *Windward Shipping* fully protects that interests of the foreign shipowners in state courts, American employers who enjoy the protection of § 8(b)(4)(B) should be "limited to securing injunctive relief through the Board." *Id.* at 243.

⁵² 415 U.S. at 115. Cf. *Mobile Steamship*, 419 U.S. at 243 (Stewart, J., dissenting).

⁵³ See 419 U.S. at 242-44 (Stewart, J., dissenting).

¹ Section 2(11), 29 U.S.C. § 152(11) (1970) defines a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action" Section 2(3), 29 U.S.C. § 152(3) excludes "supervisors" from the class of employees afforded organizational rights elsewhere in the Act. Section 14(a), 29 U.S.C. § 164(a), disclaims any prohibition of supervisors' organizational activities, but provides 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."

tion, section 14(a) provides in part that "no employer subject to this subchapter shall be compelled to deem . . . supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."² Whether the limited language of section 14(a) or the statutory scheme of the NLRA as a whole preempts state attempts to guarantee organizational rights to supervisors was an unanswered question until the Supreme Court's *Survey* year decision, *Beasley v. Food Fair of North Carolina, Inc.*³

The petitioners in *Beasley* were meat department supervisors who were discharged for their union activities.⁴ The Board dismissed unfair labor practice complaints filed by the discharged meat managers on the grounds that, as supervisors, the petitioners were without federally protected organizational rights.⁵ The supervisors then filed suit in state court seeking damages under the North Carolina right to work law which prohibits the discharge of any "person" for membership in a labor organization.⁶

In deciding for the employer, the North Carolina Supreme Court reasoned that federal law preempted state regulation of employers' labor relations with supervisors where the regulation frustrated policies established by the NLRA.⁷ While organizational activities by supervisors were neither protected nor prohibited by federal law, preemption would operate in an area of labor relations where the NLRA fairly indicated that Congress had "occupied this field and closed it to state regulation."⁸ The state court concluded that the 1947 amendments to the NLRA evidenced a "congressional determination to leave [the] weapon of self-help to the employer."⁹ Under preemption principles, then, state laws which penalized employer discrimination against unionized supervisors frustrated the purposes of federal labor law and were unenforceable.¹⁰

The United States Supreme Court agreed that the legislative history of the 1947 amendments indicated a congressional intent to relieve employers of any obligation to recognize or to bargain with

² 29 U.S.C. § 164(a) (1970).

³ 416 U.S. 653 (1974).

⁴ *Id.* at 655.

⁵ *Id.* at 655-56.

⁶ *Beasley v. Food Fair of N.C., Inc.*, 282 N.C. 530, 531, 193 S.E.2d 911 (1973). N.C. Gen. Stat. § 95-81 (1965) provides that "no person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment." N.C. Gen. Stat. § 95-83 (1965) provides that a person "deprived of continuation of his employment" in violation of § 95-81 may recover damages from his employer.

⁷ 282 N.C. at 541, 193 S.E.2d at 918.

⁸ *Id.* at 540, 193 S.E.2d at 917, quoting *UAW v. O'Brien*, 339 U.S. 454, 457 (1950).

⁹ 282 N.C. at 541, 193 S.E.2d at 918.

¹⁰ *Id.* at 541-42, 193 S.E.2d at 918.

unions composed of supervisors.¹¹ However, the Court did not adopt the North Carolina court's reasoning¹² that preemption was required by the NLRA's evident monopolization of the regulation of employers' duties toward supervisors. Instead, the Court held that the limited language of section 14(a),¹³ which appears to preempt local law only with respect to an employer's duty to bargain collectively with supervisors, was to be read broadly so as to shield employers from any duty to employ or to deal with supervisors belonging to labor organizations.¹⁴ Thus, federal preemption was based on the explicit language of section 14(a) rather than on a finding of congressional intent drawn from the statute as a whole.¹⁵

After *Beasley*, states may not regulate employers' labor relations with supervisors in a manner inconsistent with the NLRA's policy of denying organizational protection to supervisors. States evidently remain free, however, to regulate supervisors' concerted activities provided the state regulation does not run afoul of the NLRA's policy of shielding employers from any duty to recognize or bargain with unionized supervisors.¹⁶

C. Affirmation of Court Jurisdiction over Contractual Unfair Labor Practices: *Arnold Co. v. Carpenters*

In *William E. Arnold Co. v. Carpenters District Council*,¹ a unanimous Supreme Court held that preemption principles do not oust state courts of jurisdiction to enjoin a union's violation of a collective bargaining agreement prohibiting jurisdictional strikes, even though the contractual dispute over work assignments is also arguably an unfair labor practice under section 8(b)(4)(i)(D)² of the

¹¹ 416 U.S. at 659-60. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-4 (1947).

¹² 282 N.C. at 541-42, 193 S.E.2d at 918.

¹³ 29 U.S.C. § 164(a) (1970). See text at note 2 supra.

¹⁴ 416 U.S. at 662.

¹⁵ Compare *id.* with *Beasley*, 282 N.C. at 541-42, 193 S.E.2d at 918.

¹⁶ See 416 U.S. at 662. See also *Hanna Mining Co. v. Marine Engineers District 2*, 382 U.S. 181 (1965). In *Hanna*, the Court held that Congress, in enacting § 14(a)'s provision that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . .," did not intend to prohibit state regulation of supervisory organization. Rather, the section was intended to make it clear that the NLRA did not bar supervisors' union activities. *Id.* at 189-90.

¹ 417 U.S. 12 (1974).

² 29 U.S.C. § 158(b)(4)(i)(D) (1970) makes it an unfair labor practice for a labor organization or its agents to strike or induce a strike

forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless

National Labor Relations Act.³ The Court rejected a union contention that state court jurisdiction should be limited to claims for damages,⁴ and held that effective equitable relief in enforcing collective bargaining agreements should be available in state as well as in federal courts.⁵

Arnold involved a jurisdictional (work assignment) dispute at a Florida hospital construction site. The Carpenters Union struck the Arnold Company when one of Arnold's subcontractors assigned work claimed by the Carpenters to a rival union.⁶ The Company brought suit in a Florida state court to enjoin the strike and to require the union to submit to contractually agreed-upon arbitration.⁷ The Florida Supreme Court held that while state courts ordinarily have jurisdiction to enforce collective bargaining agreements, the NLRA preempts their jurisdiction with respect to contractual disputes which also arguably constitute unfair labor practices.⁸

In *Arnold*, the United States Supreme Court reaffirmed its position that the doctrine of preemption is "not relevant"⁹ to actions within the purview of section 301 of the Act.¹⁰ The Court therefore held that the Board does not have exclusive jurisdiction over a section 8(b)(4)(i)(D) dispute where the union's actions allegedly violate the collective bargaining agreement.¹¹ Thus, the fact that the contractual dispute also arguably constituted an unfair labor practice does not destroy the jurisdiction of the state court to resolve the dispute.¹² The Court in *Arnold* also emphasized that application of the doctrine of preemption is particularly inappropriate where the parties have agreed to submit to arbitration.¹³ In such a case, the Board's policy under the *Collyer* doctrine is to refrain from exercising jurisdiction over disputed conduct which is "arguably" both an unfair labor practice and a contractual violation to be resolved

such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work

Id.

³ 417 U.S. at 20.

⁴ Id. at 18.

⁵ Id. at 20.

⁶ Id. at 14-15.

⁷ Id. at 14.

⁸ *Carpenters District Council v. Waybright*, 279 So.2d 300, 302, 83 L.R.R.M. 2033-34 (1973). The doctrine of preemption established in *San Diego Bldg. & Trades Council v. Garmon*, 359 U.S. 236 (1959), holds that suits involving activities which are either "arguably" protected or "arguably" prohibited by the NLRA come within the primary and exclusive jurisdiction of the Board. Id. at 245.

⁹ 417 U.S. at 16, citing *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962).

¹⁰ Section 301 is found at 29 U.S.C. § 185(a) (1970).

¹¹ 417 U.S. at 16.

¹² See id.

¹³ See id. at 16-17.

through arbitration.¹⁴ The Court noted further that the Board's deferral policy is reinforced in 8(b)(4)(i)(D) jurisdictional disputes by the explicit congressional policy, set out in section 10(k) of the Act,¹⁵ of encouraging voluntary settlement of work assignment disputes.¹⁶

The Court in *Arnold* does not appear to have limited its approval of the Board's *Collyer* doctrine to 8(b)(4)(i)(D) disputes. Rather, the Court noted that:

[t]he Board's practice and policy of declining to exercise its concurrent jurisdiction over arguably unfair labor practices which also violate provisions of collective-bargaining agreements for voluntary adjustment of disputes, highlight the congressional purpose that § 301 suits in state and federal courts should be the primary means for "promoting collective bargaining that [ends] with agreements not to strike."¹⁷

As such, *Arnold* may be read as a specific endorsement of the Board's prearbitral *Collyer* doctrine and as an implicit endorsement of its postarbitral *Spielberg*¹⁸ doctrine.

II.

II. ELECTIONS & ORGANIZATIONAL ACTIVITIES

A. *Organizational Rights—Managerial Employees: Bell Aerospace*

The NLRA specifically excludes "supervisors" from its protections.¹ Until the Survey year, however, it was unclear whether the Act also implicitly excluded all other persons in the managerial hierarchy. In *NLRB v. Bell Aerospace Co.*,² a decision with far-reaching implications, the Supreme Court held that Congress in 1947 intended that the Act exclude not only "supervisors" but all "managerial" personnel.³ While the Board must yet determine, on a

¹⁴ Id. See *Collyer Insulated Wire*, 192 N.L.R.B. 837, 842-43, 77 L.R.R.M. 1931-1937 (1971).

¹⁵ 29 U.S.C. § 160(k) (1970).

¹⁶ 417 U.S. at 17-18.

¹⁷ Id. at 18, quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957).

¹⁸ *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

In *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. No. 110, 87 L.R.R.M. 1211 (1974), the Board read *Arnold* as a "specific endorsement" of the *Collyer* doctrine and argued that the *Arnold* decision should be read broadly as an affirmation of the Board's deferral policies whenever the parties have provided a mandatory contractual settlement procedure for handling disputes which involve both contractual and statutory issues. 87 L.R.R.M. at 1217. For a further discussion of *Electronic Reproduction* see pp. 1041-46 infra.

¹ 29 U.S.C. §§ 152(3), 152(11), 164(a) (1970). See note 1 at p. 973 supra.

² 416 U.S. 267 (1974).

³ Id. at 289.

case-by-case basis, which classes of employees are "managerial,"⁴ it seems clear the *Bell Aerospace* will result in the exclusion of numerous white-collar workers from the Act's organizational and representational protections.⁵

The events leading up to the Court's decision in *Bell Aerospace* are as follows. The United Auto Workers, seeking to represent 25 buyers in Bell Aerospace's purchasing and procurement department, petitioned the Board for an election.⁶ The company opposed the petition on the ground that the buyers, who execute purchase orders up to \$50,000,⁷ were managerial employees and therefore excluded from the NLRA's coverage by the 1947 amendments.⁸ The Board, without deciding whether the buyers were managerial employees,⁹ rejected the company's contention that the Act's exclusion of "supervisors"¹⁰ should be read to divest nonsupervisory managerial employees of organizational rights.¹¹ The Board instead perceived a congressional intent to exclude only those employees whose membership in a labor organization would create a conflict of interest with respect to "the formulation and implementation of labor relations policies."¹² Finding no such conflict of interest among Bell Aerospace's buyers,¹³ the Board ordered the company to bargain.¹⁴

The Board's decision was rejected by the Second Circuit Court of Appeals which held that Congress intended to exclude the entire

⁴ See *id.* at 294-95.

⁵ "[T]he managerial class [will] reach not only vertically, but laterally, to deny 'hundreds of thousands' . . . of buyers and other relatively low-level management employees the organizational benefits and other protections of the Act" *Id.* at 307 n.3 (White, J., dissenting), quoting *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 496, 82 L.R.R.M. 2753, 2761 (2d Cir. 1973).

⁶ 416 U.S. at 269.

⁷ *Id.* at 270.

⁸ *Id.* at 269.

⁹ *Bell Aerospace Co., Div. of Textron, Inc.*, 190 N.L.R.B. 431, 432, 77 L.R.R.M. 1265, 1266 (1971).

¹⁰ See 29 U.S.C. §§ 152(3), 152(11), 164(a) (1970).

¹¹ 190 N.L.R.B. at 432, 77 L.R.R.M. at 1266.

¹² *Bell Aerospace Co., Div. of Textron, Inc.*, 196 N.L.R.B. 827, 828, 80 L.R.R.M. 1099, 1100 (1972), denying reconsideration of 190 N.L.R.B. 431, 77 L.R.R.M. 1265 (1971). The employer also contended that the buyers were subject to a conflict of interest in that their union membership would induce purchase decisions in favor of unionized vendors. The Board rejected this argument as "unsupported conjecture." 190 N.L.R.B. at 432, 77 L.R.R.M. at 1266.

According to the Board, the "fundamental touchstone" was "whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." 196 N.L.R.B. at 828, 80 L.R.R.M. at 1101.

¹³ 190 N.L.R.B. at 432, 77 L.R.R.M. at 1266.

¹⁴ *Bell Aerospace Co., Div. of Textron, Inc.*, 197 N.L.R.B. 209, 212, 80 L.R.R.M. 1360, 1361 (1972).

class of managerial employees from the Act's protections.¹⁵ According to the court, not only supervisors but all those who are "formulating, determining and effectuating [an] employer's policies or [have] discretion, independent of an employer's established policy, in the performance of [their] duties" are denied the NLRA's protections.¹⁶

The Supreme Court majority's affirmance of the Second Circuit in *Bell Aerospace* was based almost entirely on a confused exercise in statutory interpretation of the 1947 Taft-Hartley amendments. The majority's premise was that Congress did not intend the 1947 amendments to limit the Act's exclusion to the explicitly specified class of supervisors.¹⁷ Instead, as the Conference Report on the 1947 amendments noted, Congress regarded as already excluded "persons working in labor relations, personnel and employment departments" as well as "confidential employees."¹⁸ From this, the Court in *Bell Aerospace* reasoned that "there also were other employees, much higher in the managerial structure, who [Congress] likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary."¹⁹ Since the House Report referred to "executives" as impliedly excluded,²⁰ the Court reasoned that "the inference is plain that 'managerial employees' were paramount among this impliedly excluded group."²¹

While such an inference may possibly be drawn from the House Report, it is suggested that there is no credible evidence that Congress addressed itself to the problem of managerial employees' rights. First, it is difficult to see how the Report's reference to "executives" can be translated into a sweeping exclusion of all managerial employees. Certainly, not all managerial employees are executives. Rather, it appears more logical that executives were regarded as excluded because they were "'super' supervisors."²² Alternatively, executives might have been excluded because their ability to make independent judgments affecting employees' conditions of employment could be compromised by membership in a

¹⁵ *Bell Aerospace Co., Div. of Textron, Inc. v. NLRB*, 475 F.2d 485, 494, 82 L.R.R.M. 2753, 2759-60 (2d Cir. 1973).

¹⁶ *Id.*, quoting *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41, 71 L.R.R.M. 2668, 2670 (7th Cir. 1969).

¹⁷ 416 U.S. at 283.

¹⁸ H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947).

¹⁹ 416 U.S. at 283.

²⁰ H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947). "Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event." *Id.*

²¹ 416 U.S. at 283-84.

²² *Id.* at 307 n.3 (White, J., dissenting).

labor organization.²³ Such an interpretation of the House Report's reference to "executives" is consistent with the committee reports which, taken as a whole, reveal that the evil to which Congress was addressing itself was the threat to employers' retention of "faithful agents" in labor relations.²⁴

Second, the Court's interpretation that all managerial personnel should be excluded is questionable in light of the amendments' inclusion within the Act of time-study personnel²⁵ whose duties as efficiency experts would appear to warrant their classification as managerial employees. Moreover, the Taft-Hartley Act's provision for separate bargaining units for professional employees²⁶ supports the inference that Congress contemplated that at least some of the professionals would be managerial.

Furthermore, there are no pre-1947 Board decisions construing the Act as either protecting managerial employees or excluding them from its guarantees.²⁷ Therefore, it cannot be inferred that Congress

²³ See *Bell Aerospace*, 196 N.L.R.B. at 828, 80 L.R.R.M. at 1101.

²⁴ See, e.g., H.R. Rep. No. 245, 80th Cong., 1st Sess. 16 (1947). The Committee stated that the purpose of the legislation was to assure management of "faithful agents" who are "not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations." *Id.*

"[The amendment excludes] the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

"It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock* case (49 N.L.R.B. 733)." *Id.* at 5. For a discussion of *Maryland Drydock*, see n.27 *infra*.

²⁵ H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947) (time study personnel were to be dealt with as "professional" employees under § 9(b)(1)). See *Bell Aerospace*, 416 U.S. at 305 (White, J., dissenting).

²⁶ 29 U.S.C. 159(b)(1) (1970).

²⁷ In the 1940's, the Board routinely excluded managerial employees, such as buyers, from bargaining units containing rank-and-file workers. E.g., *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, 17 L.R.R.M. 394, 395 (1946). However, apparently because the issue was not raised, the Board never held before 1947 that managerial employees were without bargaining and organizational rights under the Wagner Act. See 416 U.S. at 300 (White, J., dissenting). Rather, the likely reason for the exclusion of managerial employees from the bargaining units was a lack of community of interest among rank-and-file workers and managerial personnel. See *Hudson Motor Car Co.*, 55 N.L.R.B. 509, 512 (1944). See also *North Ark. Elec. Coop., Inc.*, 185 N.L.R.B. 550, 75 L.R.R.M. 1068, 1069 (1970).

With respect to supervisors, however, the Board held in *Maryland Drydock Co.*, 49 N.L.R.B. 733, 12 L.R.R.M. 126 (1943), that foremen, though literally "employees" within the meaning of the Act, were ineligible for representation in any unit, whether made up exclusively of supervisors or not. *Id.* at 738, 12 L.R.R.M. at 127. Two years later, in *Packard Motor Car Co.*, 61 N.L.R.B. 4, 16 L.R.R.M. 43 (1945), the Board reversed its prior policy holding that an independent unit of foremen was appropriate under the NLRA. *Id.* at 21, 16 L.R.R.M. at 48. The Supreme Court's affirmation of that Board ruling in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493 (1947), was a primary reason for Congress' exclusion of

in 1947 was tacitly reacting to a putative misreading by the Board of the Wagner Act's application to managerial employees; there is no such misreading on record. Logically, the absence of relevant Board decisions and the congressional silence should lead to the conclusion that Congress did not address itself to the problems of managerial personnel.

However, the Court in *Bell Aerospace*²⁸ found in the congressional silence a tacit ratification of Mr. Justice Douglas' dissent in *Packard Motor Car Co. v. NLRB*.²⁹ According to the Court, the Douglas dissent interpreted the Wagner Act³⁰ as excluding all employees in the "managerial hierarchy."³¹ And, the Court noted, "Congress failed to enact the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary."³² However, the dissenting opinion in *Packard*, read in its entirety, reveals that Justice Douglas believed that the NLRA excluded only those managerial employees who "represent or act for management on labor policy matters."³³ Thus, if Congress implicitly "enacted" the Douglas opinion, as the *Bell Aerospace* Court suggested, it excluded from the Act only supervisors and other managerial employees who loyalty to their employer as labor relations representatives would be jeopardized by their membership in a labor organization. In short, the Douglas dissent, said to have been adopted by Congress, involved the same conflict of interest test later applied by the Board in *Bell Aerospace*.³⁴

It is submitted that the Court's review of the legislative history of the 1947 amendments does not support its finding of a congressional purpose to divest all managerial employees of organizational rights.³⁵ Given the paucity of congressional references in 1947 to

"supervisors" from the NLRA's protections. *Bell Aerospace*, 416 U.S. at 279. See 29 U.S.C. §§ 152(3), 152(11), 164(a) (1970).

²⁸ 416 U.S. at 278.

²⁹ 330 U.S. 485, 493-501 (1947) (Douglas, J., dissenting).

³⁰ 49 Stat. 449.

³¹ 416 U.S. at 281.

³² *Id.* at 284, quoting *Bell Aerospace*, 475 F.2d at 492, 82 L.R.R.M. at 2758.

³³ 330 U.S. at 500 (Douglas, J., dissenting).

³⁴ 190 N.L.R.B. at 432, 77 L.R.R.M. at 1266-67. See also *North Ark. Elec. Coop., Inc.*, 185 N.L.R.B. 550, 550-51, 75 L.R.R.M. 1068, 1068-69 (1970).

³⁵ In addition, the Court found significance in the Board's 1956 holding in *Swift & Co.*, 115 N.L.R.B. 752, 753-54, 37 L.R.R.M. 1391, 1392 (1956), that Congress in 1947 had intended to exclude managerial employees. "And it was this reading which was permitted to stand when Congress again amended the Act in 1959." 416 U.S. at 288. However, as the dissent in *Bell Aerospace* noted, "[t]hat the Board now refuses to follow its prior precedents is no reason to overturn it, for we have frequently sustained Board decisions overruling its prior interpretations of the Act." *Id.* at 310 (White, J., dissenting). Furthermore, in the absence of evidence that Congress addressed itself to the problem of managerial employees, it is too much to read into the 1959 amendments a tacit ratification of *Swift*. *Id.*

managerial employees, the virtually exclusive concern of the committee reports with supervisors and other labor relations personnel, and the amendments' specific reference only to "supervisors," the Court's reliance on highly arguable inferences drawn sporadically from the legislative history seems erroneous. In the absence of clear evidence of a legislative intent to exclude managerial employees from the Act's coverage, the *Bell Aerospace* Court has usurped the congressional function of reconciling the economic and political interests of employers, employees and unions. If only to insure that the Court's "legislating" has struck the balance correctly, congressional consideration of *Bell Aerospace's* result seems desirable.

In the aftermath of the Court's decision in *Bell Aerospace* it remains for the Board to develop the new managerial exclusion on a case-by-case basis.³⁶ It seems clear that the Board will be compelled to alter its conflict of interest test to include managerial employees not performing labor relations functions. In this regard, the Board's criteria in the 1940's and 1950's for determining which employees were managerial and therefore to be excluded from rank-and-file units were cited approvingly by the Supreme Court in *Bell Aerospace*.³⁷ For example, in *Eastern Camera & Photo Corp.*³⁸ the Board defined managerial employees as those who exercise "independent judgment" and who "formulate, determine, and effectuate an Employer's policies."³⁹ Moreover, managerial status depended on the "extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy."⁴⁰ Thus, the Court evidently intends that the Board in the future should exclude as "managerial" those employees whose jobs entail independence in the creation or application of the employer's policies.

B. "*Savair*" Developments—Waiver of Union Dues: Inland Shoe; Coleman Co.; Scrivner-Boogaart

In *NLRB v. Savair Manufacturing Co.*,¹ the Supreme Court reversed a Board decision which had permitted a union to waive the

³⁶ See 416 U.S. at 289-95. The Court remanded the case for the Board to determine in an adjudicatory proceeding whether Bell Aerospace's buyers were "managerial." Id. at 289-90. In so doing, the Court acknowledged that the contours of the managerial standard should be developed on a case-by-case basis. Id. at 294.

³⁷ Id. at 290 n.19.

³⁸ 140 N.L.R.B. 569, 52 L.R.R.M. 1068 (1963).

³⁹ Id. at 571, 52 L.R.R.M. at 1069.

⁴⁰ Id.

¹ 414 U.S. 270 (1973). *Savair* is surveyed and criticized in 1973-74 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1105, 1114-17 (1974).

initiation fees of those employees who had signed union recognition cards prior to the election, on the ground that such an offer was contrary to the principle of free and fair elections² as embodied in the NLRA.³ The Court in *Savair* reasoned that the terms of such an offer created an election atmosphere which would undermine the section 7⁴ rights of employees to refrain from union activity, by inducing the employees to join the union before the election in order to gain the financial benefits of the waiver.⁵ The Court also noted that the Board policy sanctioning pre-election waivers increased the possibilities of election unfairness because it allowed the union to buy election endorsements which misrepresent employee support during the campaign.⁶ The Court further reasoned that the Board's policy undermined the employees' free choice by creating an atmosphere in which employees might feel obligated to vote for the union, though not legally bound to do so, simply because they had signed a union recognition card in order to receive the benefits of the union's offer.⁷

During the Survey year, the Board refined the 1973 *Savair* decision by providing guidelines for situations where the terms of the offer were ambiguous as to when the offer would lapse—before or after the election—but the union had attempted to clarify the ambiguity during its organizational activities. In *Scrivner-Boogaart, Inc.*,⁸ the Board interpreted *Savair* to permit union offers to waive initiation fees when the offer itself or the circumstances surrounding the offer unambiguously demonstrate to employees that it does not lapse until after the election.⁹

In *Inland Shoe Manufacturing Co.*,¹⁰ the Board held that a union leaflet offering to waive initiation fees for "charter members" without further defining what constituted charter membership, violated the *Savair* rule because the offer was ambiguous as to whether it lapsed before or after the election.¹¹ In setting aside the election in *Inland Shoe*, the Board concluded that the offer could be interpreted by employees as requiring them to recognize or to join the union prior to the election in order to become charter members and to receive the benefits of the initiation fee waiver.¹² In order to

² 414 U.S. at 276-81.

³ See 29 U.S.C. § 159(c) (1970).

⁴ 29 U.S.C. § 157 (1970).

⁵ 414 U.S. at 276-81.

⁶ Id. at 277.

⁷ Id. at 277-78.

⁸ 214 N.L.R.B. No. 22, 87 L.R.R.M. 1291 (1974).

⁹ 87 L.R.R.M. at 1291-92, 1293.

¹⁰ 211 N.L.R.B. No. 73, 86 L.R.R.M. 1498 (1974).

¹¹ 86 L.R.R.M. at 1499-1500.

¹² Id. at 1500.

determine whether the union had clarified its ambiguous offer, the Board examined statements made by union organizers prior to the election that "all employees working at the time of the election would be 'charter members.'" ¹³ The Board found that (1) these statements were not presented in such a manner as to insure that they would reach all employees before the election; ¹⁴ and (2) the statements themselves were equivocal as to the exact duration of the offer, and thus, an employee could be misled. ¹⁵ Therefore, the Board set aside the election. ¹⁶

In short, the *Inland Shoe* doctrine provides that a union offer to waive fees must explicitly extend beyond the election date or be shown to have been so understood by employees as a result of union organizational activity. *Inland Shoe* is important because it demonstrates that while the Board will look to extrinsic evidence in determining the proper interpretation to be given an ambiguous union offer to waive initiation fees, the Board will require the union to clarify unequivocally the ambiguity.

In a subsequent decision, *Coleman Co.*, ¹⁷ the Board split over the proper interpretation of a union offer to waive initiation fees that was almost identical to that made in *Inland Shoe*. *Coleman* involved an offer by the union "to waive initiation fees for employees who made application for charter membership." ¹⁸ A three member majority of the Board set aside the election citing *Savair* and *Inland Shoe* as controlling. ¹⁹ The majority held that where the union's offer is unclear on its face as to whether it conforms to the *Savair* rule, the burden is upon the union to "clarify that ambiguity or suffer whatever consequences might attach to employees' possible interpretations of the ambiguity." ²⁰ The majority noted that the waiver offer in *Coleman* did not specify the deadline for applying for charter membership. ²¹

Dissenting Members Fanning and Jenkins argued that the union's offer to waive initiation fees for charter members could not be interpreted as an inducement to make employees join the union before the election because the offer explicitly stated that employees would not have to pay dues until a contract had been signed. ²² The

¹³ Id. at 1499.

¹⁴ See id. at 1500.

¹⁵ Id.

¹⁶ Id.

¹⁷ 212 N.L.R.B. No. 129, 87 L.R.R.M. 1004 (1974).

¹⁸ 87 L.R.R.M. at 1004.

¹⁹ Id. at 1005.

²⁰ Id., quoting *Inland Shoe*, 86 L.R.R.M. at 1500.

²¹ 87 L.R.R.M. at 1005.

²² Id. at 1006 (dissenting opinion).

dissenters concluded that the term "charter membership" was used merely to indicate that there would be a cutoff date for the initial offer.²³ Despite the equivocal nature of the union's offer, the dissenters in *Coleman* appear to have been willing to infer that the deadline for the union's offer extended beyond the election to the time when the local was to be formed.²⁴ It is submitted that the dissenters would undercut the *Savair* decision, by creating a rule of construction which would interpret an ambiguity upon the face of the offer so that the offer would automatically extend beyond the election, to conform to *Savair*. Although the dissent is superficially appealing, it does not address the fair election considerations which underlie *Savair*. The dissenters made extension of the financial benefits of the waiver, rather than a free and fair election, the critical factor in resolving waiver of initiation fee cases.²⁵ It is suggested that the majority correctly focused upon the question of whether the union's offer prejudiced a fair election or violated employees' section 7 rights.

In *Scrivner-Boogaart, Inc.*,²⁶ the third important Survey year decision implementing *Savair*, the full Board examined the question of whether an oral offer to waive initiation fees occurring prior to an election²⁷ is grounds for a valid objection to the election. The Board explicitly created a narrow exception to its *Ideal Electric*²⁸ doctrine, which provides that the date of filing the election petition is the cutoff date for considering pre-election conduct that is alleged to have interfered with free choice in an election.²⁹

In *Scrivner-Boogaart*, the Board held that "a prepetition offer to waive initiation fees in contravention of *Savair* . . . is ground for setting aside an election."³⁰ The Board found:

Since a union must have authorization cards from at least 30 percent of the employees in the bargaining unit prior to the filing of the petition, most solicitations to sign authorization cards occur prior to the filing of the petition. Therefore, it would severely circumscribe the doctrine of

²³ Id.

²⁴ See id. at 1006. The majority in *Coleman* stated that "even assuming that the requirement of an application for charter membership is susceptible of [the dissent's interpretation] that is not the only construction permissible" from the union's offer. Id. at 1005.

²⁵ See id. at 1006 (dissenting opinion).

²⁶ 214 N.L.R.B. No. 22, 87 L.R.R.M. 1291 (1974).

²⁷ 87 L.R.R.M. at 1292.

²⁸ *Ideal Elec. & Mfg. Co.*, 134 N.L.R.B. 1275, 49 L.R.R.M. 1316 (1961). In *Scrivner-Boogaart*, the Board noted that the "unique circumstances connected with the prepetition waivers" and the Supreme Court's holding in *Savair* necessitated the creation of a limited exception to its *Ideal Electric* doctrine. 87 L.R.R.M. at 1293 n.3.

²⁹ 134 N.L.R.B. at 1278, 49 L.R.R.M. at 1317.

³⁰ 87 L.R.R.M. at 1292.

Savair to limit [its] application to postpetition waiver of initiation fees.³¹

The Board's finding conformed to *Savair*, because the Supreme Court in that case had considered the fact that numerous employees had signed cards prior to the filing of the election petition.³²

In *Scrivner-Boogaart*, the Board heard employee testimony that a union representative had stated, at a meeting prior to the filing of an election petition, that initiation fees would be waived if employees signed authorization cards before the election. The union won the election and the employer raised *Savair* precertification objections to the election, alleging that the union official had induced the employees to sign authorization cards prior to the election in order to have their initiation fees waived.³³ In dismissing the employer's objections, the Board noted that it considered a prepetition offer to waive initiation fees, condemned in *Savair*, as grounds for setting aside an election.³⁴ However, the testimonial and documentary evidence supported the union's contention that the waiver offer was not conditioned on pre-election signing of authorization cards.³⁵ The Board stressed the fact that the testimony favoring the union was supported by documentary evidence that it was the international union's past practice to waive initiation fees for everyone who was employed at the time the initial contract was signed regardless of whether they had signed an authorization card or not. The actual wording of the initiation fee waiver certificate corroborated this fact.³⁶

Scrivner-Boogaart is important because (1) it makes prepetition *Savair* violations grounds for setting aside an election and (2) it demonstrates that the Board will heavily weigh documented evidence of a union's past practices with regard to initiation fee waivers in interpreting whether the waiver offer violates *Savair*. In conclusion, these Survey decisions demonstrate that a majority of the Board has in good faith undertaken to implement fully the Supreme Court's *Savair* policy.

C. Denial of Union Certification for Racial Discrimination:

Bekins; Bell & Howell; Grants Furniture

In *Bekins Moving & Storage Co.*,¹ three members of the Board found that the NLRB is constitutionally required to make a precer-

³¹ Id. (footnotes omitted).

³² See 414 U.S. at 277.

³³ See 87 L.R.R.M. at 1292.

³⁴ Id.

³⁵ Id. at 1293.

³⁶ Id.

¹ 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974).

tification examination into employer allegations that a labor organization discriminates in its recruitment and admissions policies.² Chairman Miller and Member Jenkins, supported by Member Kennedy in a concurring opinion, held that the Board would grant a precertification hearing on the employer's pre-election discrimination charges if the union subsequently wins the election and the employer has presented his objections to the Board within five days of the issuance of the election tally.³ However, due to the absence of a majority opinion, the *Bekins* decision only provides a tentative framework for future Board decisions in the area of post election precertification inquiry into employer allegations of union discrimination.

In *Bekins*, Chairman Miller and Member Jenkins held that as an arm of the federal government, the Board could not confer the benefits of certification upon a labor organization which is guilty of discrimination, without violating the Due Process Clause of the Fifth Amendment.⁴ In this respect their decision follows the rationale of *NLRB v. Mansion House Center Management Co.*,⁵ in which the Eighth Circuit in 1973 held that the Board, as an instrumentality of the federal government, was prohibited by the Constitution from directly or indirectly sanctioning discrimination.⁶

² 86 L.R.R.M. at 1325 (Chairman Miller and Member Jenkins). Id. at 1330 (Member Kennedy concurring).

³ 86 L.R.R.M. at 1328. Id. at 1330 (Member Kennedy concurring). It is important to note that objections to Board conducted elections under § 9(c) of the NLRA, 29 U.S.C. § 159(c) (1970) must be made within five days after the tally of ballots has been furnished to the party objecting to the election or conduct affecting the election. In *F.W. Woolworth Co.*, 214 N.L.R.B. No. 99, 87 L.R.R.M. 1545 (1974), a unanimous Board held that an employer cannot unilaterally extend the five-day period by arbitrarily refusing to sign or accept the tally of ballots at the conclusion of the election. 87 L.R.R.M. at 1545. *Woolworth* overrules the Board's decision in *Jacksonville Journal Co.*, 117 N.L.R.B. 360, 39 L.R.R.M. 1229 (1957). See 87 L.R.R.M. at 1545. *Jacksonville Journal* had provided that the five-day time period commenced with actual receipt of the tally results by the objecting party regardless of whether an agent of that party had refused tender or not. See 117 N.L.R.B. at 361-62, 39 L.R.R.M. at 1230.

According to the new *Woolworth* rule, when an attempt has been made to tender the tally results to a party, or his representative, and the party refuses to accept the tally, the Board will deem the party to have been constructively served with the tally. 87 L.R.R.M. at 1545. The effect is that the "time for filing objections would therefore begin to run immediately upon such constructive service." Id. The Board concluded that the five-day period would run "irrespective of whether the party was later furnished with a tally through the mails or other means." Id. The rule does not apply where the tally is served to an election observer. The Board noted that it does not consider an election observer a given party's agent for the purpose of serving a tally. Id.

⁴ 86 L.R.R.M. at 1325.

⁵ 473 F.2d 471, 82 L.R.R.M. 2608 (8th Cir. 1973).

⁶ Id. at 477, 82 L.R.R.M. at 2613. In *Mansion House*, the employer contended that the NLRB could not issue a bargaining order because the union practiced racial discrimination. Id. at 474-75, 82 L.R.R.M. at 2611. The Board issued the order and the Eighth Circuit reversed. The court established the following rules: (1) an employer's claim that the union practices racial discrimination is an appropriate, affirmative defense to an employer's refusal

Although Members Miller and Jenkins did not decide "what degree or form of invidious discrimination would be sufficient to warrant disqualification of a union from receiving or retaining certification,"⁷ they argued that the Board could not "constitutionally certify a union which is shown to have a propensity to fail fairly to represent employees."⁸ The propensity test proposed by Miller and Jenkins has its basis in their conclusion that the union's duty of fair representation is rooted in the Constitution as well as the NLRA.⁹ They found that the constitutional mandate of the Fifth Amendment compels the Board (1) to investigate allegations that the union practices discrimination in its recruitment or admissions policies, and (2) to evaluate the union's ability to fairly represent all the employees in the unit.¹⁰

In a concurring opinion, Member Kennedy agreed with the Chairman and Member Jenkins that the Board is constitutionally "foreclosed" from certifying a union shown to discriminate in its recruitment or admissions practices.¹¹ Nevertheless, he disagreed with their conclusion that the duty of fair representation is grounded in the Constitution.¹² Rather, he affirmed the traditional view that the duty of fair representation is imposed upon the union by the NLRA as a corollary to a union's exclusive bargaining status.¹³ Member Kennedy reasoned that the Board should restrict the scope of its precertification inquiries to those matters about which the Board is constitutionally mandated to inquire.¹⁴ He would not "undertake a precertification inquiry with respect to a potential breach of a union's duty of fair representation,"¹⁵ nor would he extend the Board's definition of invidious discrimination beyond those clas-

to bargain; (2) a union cannot utilize the remedial machinery of the Taft-Hartley Act where it is unwilling to correct its own past practices of racial discrimination; and (3) statistical evidence of racial imbalance in a union is relevant in either corroborating or establishing that a union is or has been engaged in racially discriminatory practices. *Id.* at 475-77, 82 L.R.R.M. at 2612-13. See, e.g., *Williams Enterprises, Inc.*, 212 N.L.R.B. No. 132, 87 L.R.R.M. 1044 (1974).

⁷ 86 L.R.R.M. at 1325 n.8.

⁸ *Id.* at 1326.

⁹ *Id.*

¹⁰ See *id.* at 1325-26.

¹¹ *Id.* at 1329 (Member Kennedy concurring).

¹² *Id.* at 1330.

¹³ *Id.* See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in which the Court stated:

That the authority of bargaining representatives, however, is not absolute is recognized in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-99, in connection with comparable provisions of the Railway Labor Act [45 U.S.C. §§ 151(a)-152 (1970)]. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members, without hostility to any.

Id. at 337. See also *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

¹⁴ 86 L.R.R.M. at 1330 (Member Kennedy concurring).

¹⁵ *Id.*

sifications already declared inherently suspect by the United States Supreme Court.¹⁶

In effect, while Chairman Miller and Member Jenkins would examine a union's ability to fairly represent all employees before certification, Member Kennedy would only allow the Board to examine specific allegations based on race, nationality or alienage.¹⁷ In *Bekins* it appears that he would defer consideration of sex discrimination and potential breaches of the duty of fair representation until after certification, because neither inquiry is constitutionally mandated.¹⁸

Members Fanning and Penello dissented in *Bekins* on two grounds. They argued, first, that the terms of the Taft-Hartley Act prohibit the Board from withholding certification for reasons other than election irregularities. Second, the Constitution does not require the Board to withhold certification from a union which practices invidious discrimination.¹⁹ In addition, the dissent asserted that certification would further, rather than frustrate, the constitutional policy of eliminating discrimination by imposing a statutory duty upon the union to fairly represent all the employees in the unit.²⁰ Although the dissenters clearly did not condone discrimination,²¹ they disagreed with the majority as to whether an employer should be allowed to raise the issue of union discrimination during the representational proceedings.²² They contended that a precertification inquiry circumvents the statutory provisions of section 10 of the NLRA,²³ which allow employees to contest discriminatory representational and membership policies of a certified union.²⁴ The dissenters further suggested that the unfair labor practice provisions of section 8(a)(5) of the NLRA provide procedures for an employer to follow if he desires to be relieved of his obligation to bargain with a union engaged in discriminatory practices.²⁵ They concluded that

¹⁶ See *id.* at 1331.

¹⁷ *Id.* at 1330.

¹⁸ See *id.* at 1330-31.

¹⁹ *Id.* at 1332-33 (Members Fanning and Penello dissenting).

²⁰ *Id.* at 1332.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1334. Section 10 of the NLRA, 29 U.S.C. § 160 (1970), the enforcement section of the Act, empowers the Board to prevent unfair labor practices. In a Survey year decision, *Glass Bottle Blowers Local 106*, 210 N.L.R.B. No. 131, 86 L.R.R.M. 1257 (1974), the Board found that a certified union violated section 8(b)(4)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1970), when it segregated its members on the basis of sex. 86 L.R.R.M. at 1259. The Board held that segregation of membership on the basis of sex effectively denied employees a voice in the resolution of matters affecting working conditions. Denial of full participation in the affairs of the union constituted a restraint on the exercise of the employees' § 7 rights under the NLRA. *Id.* at 1258-59.

²⁴ 86 L.R.R.M. at 1334 (Members Fanning and Penello dissenting).

²⁵ *Id.* at 1334-35. Members Fanning and Penello argued that the employer would not be

"there is simply no justification for devising a procedure by which employers opposed to dealing with their employees collectively can delay and forestall the establishment of the collective bargaining relationship."²⁶

Both Members Fanning and Penello advocated that the Board should consider an employer allegation of discrimination after certification.²⁷ However, in a note,²⁸ they argued that if one assumes, arguendo, that the majority members' conclusion that "the Board cannot issue a certification to a union that discriminates in its membership and representational policies [was correct] . . . the question of the union's qualification to act as a representative should be litigated before the direction of election" not after the offending union wins the election as the majority would allow.²⁹ Permitting an election to take place, they reasoned, would be perceived as a Board ruling that the union in question is qualified for certification and, therefore, poses as government approval of the offending union's discriminatory activity.³⁰

In *Bekins* the Board attempted to reconcile its congressionally mandated duty to promote collective bargaining with its broader responsibility as a federal government agency not to condone, encourage or sanction invidious discrimination. Given the important role that certification plays in federal labor policy under the Act, denial of certification should only be utilized as an extraordinary procedure against an otherwise duly elected union. It is suggested that in *Bekins* a majority of the Board has explicitly limited the use of such an extraordinary procedure to situations where after precertification inquiry it is constitutionally mandated³¹ because the union is found to discriminate on the basis of race, alienage or national origin.

All three members of the Board who were willing to entertain precertification challenges in the *Bekins* case predicated their decisions upon constitutional grounds.³² The permanence of the *Bekins* framework will depend upon the correctness of the majority members' finding that the Due Process Clause of the Fifth Amendment

violating § (8)(a)(5), 29 U.S.C. § 158(a)(5) which imposes a duty on the employer to bargain with the union if the employer demonstrated that the union engaged in discriminatory practices. *Id.*

²⁶ 86 L.R.R.M. at 1335 (Members Fanning and Penello dissenting).

²⁷ *Id.*

²⁸ *Id.* at 1335 n.50.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1325 (Chairman Miller and Member Jenkins). See *id.* at 1330 (Member Kennedy concurring).

³² See *id.* at 1325 (Chairman Miller and Member Jenkins). See *id.* at 1330 (Member Kennedy concurring).

requires the Board to deny certification to a union found to be invidiously discriminating against employees in either its admissions or recruitment policies.

The Board has been a reluctant tribunal in discrimination cases;³³ its self acknowledged inexperience in this area weighed heavily in its decision in *Bekins* not to establish broad guidelines concerning union discrimination.³⁴ In addition, Member Kennedy's refusal to join Chairman Miller and Member Jenkin's conclusion that the union's duty of fair representation is grounded in the Constitution restricts Board precertification inquiries solely to employer allegations of union discriminatory admissions and recruitment practices.³⁵

In two subsequent Survey year decisions, the Board attempted to further develop the *Bekins* framework. In the first case, *Bell & Howell Co.*,³⁶ the Board refused to entertain an employer's precertification complaint of union sex discrimination.³⁷ Like *Bekins*, the *Bell & Howell* decision did not contain a majority opinion. In *Bell & Howell*, Members Fanning and Penello were joined by Member Kennedy in denying a precertification hearing into sex discrimination allegations against the union.³⁸ Member Kennedy, reaffirming his reasoning in *Bekins*, wrote the pivotal opinion in *Bell & Howell* stating that post-election precertification investigation of alleged union sex discrimination is not constitutionally mandated.³⁹ He argued that since the Supreme Court has not found sex, unlike race, alienage or national origin, to be a suspect classification the Board should "not view an allegation of unlawful sex discrimination in a precertification proceeding."⁴⁰ In addition, Member Kennedy exhibited an unwillingness to convert representational cases into Title VII lawsuits.⁴¹ He apparently rejected the use of employer-submitted statistical data standing alone as prima facie proof of a pattern or practice of discrimination.⁴² Finally, Member Kennedy

³³ See id. at 1327-28 (Chairman Miller and Member Jenkins).

³⁴ Id. at 1326-27. Congress has recently expanded the jurisdiction of the Equal Employment Opportunity Commission (EEOC) to include the initiation of pattern and practice suits. 42 U.S.C. § 2000-e et seq. (1970), as amended, Pub. L. No. 92-261 (1972). See Member Kennedy's discussion in *Bekins*, 86 L.R.R.M. at 1330 (Member Kennedy concurring), where he admonished that the Board should not undertake the adjudication of discrimination cases which come within the jurisdiction of other federal agencies unless constitutionally or statutorily required to do so. Cf. id. at 1326 (Chairman Miller and Member Jenkins).

³⁵ 86 L.R.R.M. at 1331 (Member Kennedy concurring).

³⁶ 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974).

³⁷ 87 L.R.R.M. at 1174 (1974).

³⁸ Id.

³⁹ Id. at 1174-75 (Member Kennedy concurring). See text accompanying note 17 supra.

⁴⁰ 87 L.R.R.M. at 1174 (Member Kennedy concurring).

⁴¹ Id. at 1175 (Member Kennedy concurring). Title VII is codified in 42 U.S.C. § 2000-e et seq. (1970).

⁴² See id.

argued that the present claim appeared to be an attempt to "litigate the lawfulness of an alleged discriminatory hiring hall in a representational proceeding," which he could not sanction.⁴³

Member Kennedy's reluctance to convert representational proceedings into Title VII law suits appears justifiable in light of both the Board's inexperience in discrimination cases and the extraordinary nature of the decision to deny certification on grounds other than election irregularity. However, his decision to exclude charges of sex discrimination from precertification inquiry is questionable. Although the Supreme Court has not labeled sex as a suspect classification,⁴⁴ the harmful effects of discrimination based upon sex are no less serious or invidious than other types of discrimination. A union which is able to discriminate on the basis of sex denies to the victims of discrimination the right to organize to vote and ultimately to work within the protections of the NLRA. The issue of whether a union should be certified is equivalent to whether union members will be enfranchised. In terms of Board policy, the discouragement of all union discrimination affecting employees' rights to form or maintain an effective union appears to be mandated.⁴⁵ Therefore, it is suggested that where an employer charges that a union discriminates on the basis of sex, the Board should entertain a precertification inquiry. If it is subsequently shown that the discrimination does in fact exist, the Board should refuse to certify the union, as it would do if the union discriminated on the basis of race.

In a second important Survey year decision, *Grants Furniture Plaza*,⁴⁶ the Board clarified the quantum of evidence required in order to deny certification under *Bekins*.⁴⁷ In *Grants Furniture*, the Board certified the union despite employer allegations that the union was engaged in a pattern and practice of discrimination based upon race, sex and national origin.⁴⁸ To substantiate its claim the employer presented the Board with (1) statistical data demonstrating that the percentage of the union's female and Spanish-surnamed members was below the percentage of such persons in the population of the metropolitan area in which the union was elected and (2) proof that the United States Justice Department had issued a com-

⁴³ Id.

⁴⁴ Member Kennedy noted that in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court refused to find legislative classifications based upon sex as an invidiously suspect classification. *Bell & Howell*, 87 L.R.R.M. at 1174-75 (Member Kennedy concurring). For a discussion of the *Aiello* decision see pp. 1063-68 *infra*.

⁴⁵ See *Jubilee Mfg. Co.*, 202 N.L.R.B. 272, 272-73, 82 L.R.R.M. 1482, 1484-85 (1973). See also 1972-73 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1221-24 (1972).

⁴⁶ 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974).

⁴⁷ 87 L.R.R.M. at 1176.

⁴⁸ Id.

plaint "which alleged that the . . . [union's] international . . . perpetuates prior discriminatory practices against blacks and Spanish-surnamed Americans by requiring them to give up their seniority for bidding and layoff purposes if they transfer from service positions to a higher paying road position."⁴⁹ Members Miller and Jenkins found that the mere allegations of union wrongdoing did not constitute adequate evidence to support precertification objections.⁵⁰ In order to persuade the Board to withhold certification, the employer must present facts in the form of affirmative evidence, not inferences based upon the complaint of a Federal agency.⁵¹ In addition, they admonished that the employer must provide prima facie factual evidence to the regional director in order to have the Board direct a hearing on the employer precertification complaint.⁵² They defined prima facie factual evidence to be that "which would be admissible into evidence at a hearing and subject to evaluation as to its weight and probative force."⁵³

Without commenting on the sex discrimination complaint raised in *Grants Furniture*, Member Kennedy concurred with Members Miller and Jenkins.⁵⁴ However, he implied that although the employer's allegations based upon the Justice Department's complaint would not meet the higher standard of proof required in a precertification inquiry, the complaint would be "relevant" in a duty of fair representation proceeding.⁵⁵

While Members Miller and Jenkins did not pass upon the appropriate weight to be given to statistical data reflecting the racial or ethnic composition of the union's membership in all precertification cases, they found that the data presented in *Grants Furniture* was inadequate under their prima facie factual evidence test.⁵⁶ It appears that they will require the employer to present specific and detailed factual allegations before the Board will entertain the complaint. They suggested the following factors as important in establishing an employer's prima facie case: (1) the union controls or substantially influences access to employment; and (2) the union deliberately restricts access to the membership rolls.⁵⁷ *Grants Furniture* thus requires a higher standard of proof than is ordinarily

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id. at 1177 (Member Kennedy concurring).

⁵⁵ Id.

⁵⁶ Id. at 1176 (Chairman Miller and Member Jenkins).

⁵⁷ Id. Member Kennedy agreed with these factors and added that he did not think that a statistical imbalance, standing alone, could constitute prima facie evidence of unlawful discrimination for certification purposes. Id. at 1177 (Member Kennedy concurring).

required in Title VII actions.⁵⁸ However, this appears to be justifiable in light of the serious ramifications that denial of certification portends under the NLRA.

Both *Bell & Howell* and *Grants Furniture* demonstrate that the Board is going to require a relatively high degree of proof before it will conduct any precertification hearing on an employer's allegations of union discrimination. In light of Chairman Miller's departure from the Board in December of 1974, the *Bekins* line of decisions opens rather than settles the question concerning the shape of Board policy in hearing invidious discrimination charges in precertification proceedings. Much now will depend on the new Chairwoman's⁵⁹ position in this area. For the time being it is, however, clear that the Board will not entertain sex discrimination complaints under any circumstances in precertification hearings. For a variety of reasons, not the least of which is the lack of a clear majority, the Board's policy in this area is highly tentative. It seems probable that precertification hearings will be restricted to serious and obvious cases of union discrimination. However, it would be unfortunate if the Board were to adopt the post certification policy outlined by Members Fanning and Penello, since it seems clear that the Fifth Amendment does impose a duty on the Board to deny the benefits of certification where the union is shown in fact to discriminate on the basis of race, alienage or national origin.⁶⁰ Strict neutrality by the Board is impossible in light of its statutorily mandated duties under the NLRA to direct elections and to certify unions. The Board serves as the trustee of the employees' statutorily protected organizational rights and should not tolerate even the slightest association with or encouragement of union discrimination.

III. UNFAIR LABOR PRACTICES

A. *Employee Concerted Activities*

1. *Minority Employee's Circumvention of Collective Bargaining Agent: Emporium Capwell*

In *Emporium Capwell Co. v. Western Addition Community Organization*,¹ the United States Supreme Court held that concerted activity by minority employees, designed to induce the employer to

⁵⁸ In *Parham v. Southwest Bell Tel. Co.*, 433 F.2d 421, 2 FEP Cas. 1017 (8th Cir. 1970), the court held that statistics which merely revealed an extraordinarily small percent of black employees, except for menial workers, established a prima facie violation of Title VII.

⁵⁹ Chairwoman Murphy was appointed by President Ford to replace Chairman Miller.

⁶⁰ Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹ 420 U.S. 50 (1975).

bargain separately with minority employees over the question of employment discrimination, is not protected activity under section 7 of the NLRA.² Thus, an employer did not violate section 8(a)(1) of the Act³ when he discharged two black employees who rejected their union's grievance procedures and picketed his store.⁴

Emporium involved a series of complaints by minority employees alleging that their employer discriminated on the basis of race in making assignments and promotions. After an investigation, the union concluded that the employer, in violation of the collective bargaining agreement, was engaging in discriminatory employment practices. The union thereupon decided to pursue each complaint of racial discrimination through the contractual grievance procedure.⁵

The union rejected a strike proposed by several minority employees on the grounds that the contract prohibited strikes and required arbitration. Subsequently, those minority employees walked off their jobs and picketed the employer's store in an effort to induce him to bargain separately with them over broad questions of employment discrimination. After repeated warnings, the employer discharged two minority employees for picketing.⁶

The discharged employees filed a section 8(a)(1) unfair labor practice complaint against the employer,⁷ alleging that their picketing was protected under section 7 of the Act because it was in protest of employer discrimination violative of the federal policy against employment discrimination under both section 704(a) of Title VII of the Civil Rights Act of 1964⁸ and the NLRA.⁹ In deciding against them, the Board reasoned that, while the concerted activity undertaken by the minority employees represented a good faith attempt to redress racial discrimination, it was not protected under section 7 because it undermined the "exclusive representa-

² 420 U.S. at 69-70. 29 U.S.C. § 157 (1970) provides in pertinent part that employees shall have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

³ 29 U.S.C. § 158(a)(1) (1970) 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"

⁴ See 420 U.S. at 52-56, 70-72.

⁵ *Id.* at 52-54.

⁶ *Id.* at 56.

⁷ *Id.* at 57.

⁸ 42 U.S.C. § 2000e-3(a) (1970) which provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, to discriminate against any individual; or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing, under this subchapter.

⁹ 29 U.S.C. §§ 157, 158(a)(1) (1970). See *Emporium*, 420 U.S. at 57.

tion" principle of the NLRA.¹⁰ The Board found that the picketing employees, rather than presenting grievances to the employer, which conceivably would have been protected activity under the first proviso of section 9(a),¹¹ had attempted to by-pass their union and circumvent the contractual grievance procedure in order to bargain directly with the employer.¹² In effect, the Board concluded that the minority employees' activity was contrary to the Act, rather than protected by it.

On appeal the District of Columbia Circuit reversed the decision of the Board¹³ and found that although the minority employees' picketing interfered with the "exclusive representation" principle set out in the Act, it constituted protected activity falling within a "limited exception" to the principle of exclusive representation created by the strong federal policy against discrimination in employment.¹⁴ The court reasoned that the union's efforts to process racial discrimination complaints on a case-by-case basis were not "actually remedying the discrimination to the fullest extent possible, by the most expedient and efficacious means."¹⁵

During the Survey year the Supreme Court, in an 8 to 1 opinion written by Justice Marshall, found that the "limited exception" fashioned by the circuit court was incompatible with the principle of exclusive bargaining representation provided in section 9 of the NLRA¹⁶ because it (1) allowed self-appointed representatives to displace their statutorily elected representatives in the bargaining

¹⁰ The Emporium, 192 N.L.R.B. 173, 185-86, 77 L.R.R.M. 1669, 1671 (1971). See also J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

¹¹ 29 U.S.C. § 159(a) (1970). The proviso states:

That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect

¹² 192 N.L.R.B. at 185, 77 L.R.R.M. at 1670-71. The Board concluded that protection of such an attempt to bargain would undermine the statutory system of bargaining through an exclusive, elected representative, impede elected unions' efforts to better the working conditions of minority employees "and place on the Employer an unreasonable burden of attempting to placate selfdesignated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement." Id. at 186, 77 L.R.R.M. at 1671.

¹³ Western Addition Community Org. v. NLRB (The Emporium), 485 F.2d 917, 83 L.R.R.M. 2738 (D.C. Cir. 1973). The circuit court's decision is surveyed and criticized in 1973-74 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1198, 1201-03 (1974).

¹⁴ 485 F.2d at 931, 83 L.R.R.M. at 2748.

¹⁵ Id.

¹⁶ 29 U.S.C. § 159 (1970) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining"

process;¹⁷ (2) it dissipated the benefits of organizational strength encouraged by federal labor policy under the NLRA;¹⁸ and (3) it created confusion for the employer as to which group of employees or set of bargaining demands he should recognize.¹⁹

The Court emphasized that even the strong federal policy against racial discrimination could not justify disruption "of the orderly collective bargaining process contemplated by the NLRA."²⁰ The Court found that the federal policy against discrimination does not mandate that employees be given the right to negotiate separately with their employer over employment discrimination, since the principle of exclusive representation is tempered by safeguards, such as the duty of fair representation, designed to protect minority interests.²¹ In addition, discriminatory employment practices which independently violate Title VII may be remedied directly under the procedures established by the Civil Rights Act of 1964.²² Under the Court's 1974 decision in *Alexander v. Gardner-Denver Co.*,²³ a union may not contractually circumscribe an employee's right to seek separate relief under Title VII, since its protection of an individual's right to equal employment opportunity stands independently of the NLRA's guarantees of the right to organize and bargain collectively.²⁴

In both *Gardner-Denver* and *Emporium* the Court was asked to determine whether the federal policy against racial discrimination embodied in Title VII effects changes in the rights of individual employees under the collective bargaining process provided by the NLRA. In *Gardner-Denver* the Court held that an employee may institute a Title VII suit following an adverse grievance award.²⁵ As

¹⁷ See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 67-70 (1975).

¹⁸ See 420 U.S. at 65-70. The Court stated that individual bargaining over employment discrimination divides employees and issues along racial lines, encouraging, rather than discouraging, industrial strife. *Id.* at 67-69.

¹⁹ See *id.* at 67-69.

²⁰ *Id.* at 69.

²¹ *Id.* at 64-65. The Court in *Emporium* listed several of these safeguards: (1) Congress confined the power of the exclusive representative to the appropriate unit. *Id.* at 64; see *Allied Chem. Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 171 (1971); (2) the 1959 Landrum-Griffin amendments to the Act, 73 Stat. 519, assured minority employees a voice in union affairs, *Emporium*, 420 U.S. at 64; (3) the Court noted in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) that a duty of fair representation is imposed upon the union under the Act. 420 U.S. at 64. In addition, the Court in *Emporium* noted that the Board has found that a union's refusal to process racial discrimination grievances is a violation of the union's duty of fair representation. *Id.* See *Hughes Tool Co.*, 147 N.L.R.B. 1563, 1574, 56 L.R.R.M. 1289, 1292 (1964).

²² 42 U.S.C. §§ 2000e-5(a)-(k) (1970). See *Emporium*, 420 U.S. at 65, 71-72.

²³ 415 U.S. 36 (1974). *Gardner-Denver* is surveyed in 1973-74 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1105, 1187 (1974).

²⁴ 415 U.S. at 51-52.

²⁵ *Id.* at 59-60.

a result of *Gardner-Denver*, employees seeking vindication of statutorily protected rights under Title VII are not limited solely to the remedies and procedures of collective bargaining under the NLRA.²⁶ The Court recognized that Title VII provides employees with an individual right to be free of employment discrimination,²⁷ with the federal courts the final forum for resolving questions concerning racial discrimination.²⁸ Thus, as the Court noted in *Emporium*, even where a putative discriminatee's complaint has been denied at the final stage of the contractual arbitration process, access to a Title VII hearing is not foreclosed.²⁹

Rather, in *Emporium* the Court refused to allow the individual employee's right to act against discrimination to undermine the collective rights of the other employees. Since the minority employees were not only protesting the employer's discriminatory employment practice, but were in fact claiming to represent all minority employees at the Emporium for purposes of bargaining over racial discrimination issues, the Court concluded that their activity was not protected by the NLRA,³⁰ even though the activity otherwise might have been protected from employer reprisal by Title VII.³¹

With respect to the Title VII issue, the Court noted that if it were later found that the picketing constituted protected activity under section 704(a),³² the discharged minority employees in *Emporium* would be entitled to recover their jobs with back pay despite the absence of NLRA protections.³³ However, in a note to its opinion, the Court expressed some doubt as to whether the actual picketing in *Emporium* was protected under section 704(a), though it expressly declined to delineate the scope of that section.³⁴ It is questionable whether employee activity protesting racially dis-

²⁶ *Id.*

²⁷ *Id.* at 51.

²⁸ *Id.* at 56.

²⁹ 420 U.S. at 66 n.18.

³⁰ *See id.* at 60-61, 65-68.

³¹ *See id.* at 70-72.

³² 42 U.S.C. § 2000e-3(a) (1970). For text of statute see note 8 *supra*.

³³ 420 U.S. at 71-72.

³⁴ *Id.* n.25. The Court wrote:

The question of whether § 704(a) is applicable to the facts of this case is not as free from doubt as the respondent and amicus would have it. In its brief the NLRB argues that § 704(a) is directed at protecting access to the EEOC and federal courts. . . . Whether the protection afforded by § 704(a) extends only to the right of access or well beyond it, however, is not a question properly presented by this case. Nor is it an appropriate question to be answered in the first instance by the NLRB. Questions arising under Title VII must be resolved by the means that Congress provided for that purpose.

Id.

crimination employment practices which is unprotected by the NLRA is protected under Title VII.

In *Emporium*, the Court emphasized the fact that the employees were attempting to circumvent their exclusive representatives and to bargain directly with their employer, in finding their activity unprotected.³⁵ The Court carefully distinguished the facts in *Emporium* from situations in which employees were not attempting to induce the employer to bargain separately with them.³⁶ Under the first proviso of section 9(a) of the NLRA,³⁷ employees are given the right to present individual grievances directly to the employer, so long as it does not frustrate the contract; *Emporium* does not appear to limit this right.

It is suggested that the holding in *Emporium* is a narrow one: concerted activity by minority employees is not protected where it undermines the exclusive representation principle of the Act, by inducing the employer to by-pass the employees' union and to bargain with individual employees over discriminatory employment practices. Where the minority group's activity is not directed at bargaining, but merely constitutes protest activity, *Emporium* does not appear to withhold the protection of section 7 of the NLRA.³⁸ The Court stressed the importance of maintaining an orderly means of bargaining, but did not foreclose NLRA protections to minority group activity that falls short of inducing separate bargaining.

2. Union Representation at Investigatory Interviews: Weingarten

In its 1967 decision, *Texaco, Inc., Houston Producing Division*,¹ the Board held that section 8(a)(5)² requires an employer to permit an employee's union representative to accompany an employee to an interview at which the employer intends to impose discipline.³ The Board ruled that employee discipline sufficiently affects a term or condition of employment to activate the employer's obligation to consult with the union as bargaining representative.⁴

³⁵ Id. at 67-70.

³⁶ Id. at 60-61.

³⁷ 29 U.S.C. § 159(a) (1970). For text of the proviso see note 11 supra.

³⁸ Cf. 420 U.S. at 60-61.

¹ 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), enforcement denied, 408 F.2d 142, 70 L.R.R.M. 3045 (5th Cir. 1969).

² 29 U.S.C. § 158(a)(5) (1970) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees"

³ 168 N.L.R.B. at 362, 66 L.R.R.M. at 1297.

⁴ Id. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 271 (1975) (Powell, J., dissenting). The Board also found a violation of § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970), since "the Respondent's refusal to respect [the individual's] request that the bargaining representative be permitted to represent him at the meeting interfered with and restrained him in the exercise of his rights guaranteed by section 7 of the Act." 168 N.L.R.B. at 362, 66 L.R.R.M. at 1297.

However, the Board subsequently declined to extend the bargaining obligation under section 8(a)(5) to investigatory or fact-finding interviews, evidently on grounds that the threat to employment had not sufficiently ripened to invoke the employer's duty to deal with the union over terms or conditions of employment or to justify infringing management's prerogative of investigating employee misconduct.⁵ Several years later, in 1972, the Board took a different tack, holding that employer denial of union representation at an investigatory interview violated section 8(a)(1)'s⁶ guarantee of an individual's section 7 right to engage in "concerted activities" for "mutual aid or protection."⁷ This expansive reading of section 7's protections was rejected by several courts of appeals.⁸ However, in the Survey year case, *NLRB v. J. Weingarten, Inc.*,⁹ the Supreme Court held that the Board's new construction of section 7 was permissible.¹⁰

According to the Court, the Board-created right of representation fell within the literal language of section 7 protecting "concerted activities for . . . mutual aid or protection," inasmuch as the right to be joined by a union representative at an investigatory interview is rationally related to protecting the individual's interest in job security and his fellow employees' interest in fair disciplinary proceedings.¹¹ Furthermore, guaranteeing a right to the presence of a union representative at such an interview would effectuate the NLRA's fundamental purpose of righting the "inequality of bargaining power between employees . . . and employers."¹² In any event, since the Board's establishment of a right of representation at an investigatory interview was not beyond the literal or policy parameters of section 7, the Court deferred to the NLRB's expertness in "applying the general provisions of the Act to the complexities of industrial life."¹³

Mr. Justice Powell, writing for himself and Mr. Justice Stewart in dissent, argued that the actual limits of section 7 were narrower

⁵ See, e.g., *Illinois Bell Tel. Co.*, 192 N.L.R.B. 834, 836, 78 L.R.R.M. 1109, 1110 (1971).

⁶ 29 U.S.C. § 158(a)(1) (1970) 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 [7]."

⁷ *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 80 L.R.R.M. 1188 (1972). 29 U.S.C. § 157 (1970) provides that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection"

⁸ *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1138, 84 L.R.R.M. 2436, 2438-39 (5th Cir. 1973); *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847, 83 L.R.R.M. 2823, 2827 (7th Cir. 1973); *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018, 1024-25, 83 L.R.R.M. 2817, 2822 (4th Cir. 1973), rev'd, 420 U.S. 276 (1975).

⁹ 420 U.S. 251 (1975).

¹⁰ *Id.* at 260.

¹¹ *Id.* at 260-61.

¹² *Id.* at 261-62, quoting 29 U.S.C. § 151 (1970).

¹³ *Id.* at 266, quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

than its expansive language would suggest.¹⁴ According to the dissent, the concerted activities which Congress intended to protect were limited to self-organization and to the exercise of collective strength in establishing a framework of collective bargaining and in exacting employer concessions.¹⁵ Therefore, the scope of section 7 did not extend to a right to union representation at an investigatory interview.¹⁶ Rather, the dissent inferred that Congress intended to leave the problem of securing due process in industrial relations to collective bargaining.¹⁷

Weingarten's significance lies both in its precedential value and in its substantive impact on employer-union relations. First, the Supreme Court appears, albeit obliquely, to have defined the limitations on the Board's discretion in applying section 7: the protections of section 7 may be extended to any "concerted activities" directed at employee self-protection provided the NLRB does not run afoul of countervailing policies found in the Act, such as preservation of management prerogatives.¹⁸ Second, the Court has approved the extension of the Act's guarantees to the area of industrial due process. It is doubtful, however, that *Weingarten* will either impose a substantial burden on employers or extend meaningful protections to employees summoned to investigatory interviews. An employee's right to the presence of a union steward arises only where he "reasonably believes the investigation will result in disciplinary action."¹⁹ Furthermore, an employer unwilling to permit a union representative at the interview may conduct his investigation without interviewing the employee, "and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one."²⁰ The employer, therefore, has considerable leverage to induce an employee to waive his right to union representation. Finally, the role played by the union representative at the interview is almost entirely within the employer's control: the

¹⁴ See 420 U.S. at 272-73 (Powell, J., dissenting). Mr. Chief Justice Burger dissented separately on grounds that the "spectacular evolution" of the new § 7 right was not accompanied by a "reasoned Board opinion" below. Id. at 268 (Burger, J., dissenting).

¹⁵ Id. at 273 (Powell, J., dissenting).

¹⁶ Id. at 275.

¹⁷ Id. "The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management. Absent specific limitations imposed by statute or through the process of collective bargaining, management remains free to discharge employees at will." Id. at 273-74, citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 (1960).

¹⁸ See 420 U.S. at 258, 265-67.

¹⁹ Id. at 257. The reasonableness of the employee's fears are to be measured by an objective "reasonable man" test. See id. at 257 n.5.

²⁰ Id. at 258.

employer has no duty to bargain with the steward and may limit the interview to hearing the employee's side of the story.²¹

3. *Neutral Employer Interference with Concerted Activities*: Hudgens

In a significant Survey year decision, *Hudgens v. NLRB*, the Court of Appeals for the Fifth Circuit held that a neutral shopping mall owner's property right to exclude strikers picketing a store within the mall must yield to the strikers' section 7 rights,² where the intended audience of the picketing cannot be effectively reached outside the confines of the shopping center.³ *Hudgens*, which will be reviewed by the Supreme Court during the 1975 October Term,⁴ represents an extension to economic picketing of the balancing tests developed by the Supreme Court in cases where union organizers and non labor-related pamphleteers sought to "trespass" on corporate property. In *NLRB v. Babcock & Wilcox Co.*,⁵ the Supreme Court held that an employer's right to exclude nonemployee union organizers from his property must yield where employees' section 7 right to receive union information could not effectively be vindicated by organizational efforts away from the employer's premises.⁶ In *Lloyd Corp. v. Tanner*,⁷ the Court ruled that the First Amendment would permit the exclusion of anti-Vietnam War pamphleteers from a shopping mall only where the protest was unrelated to the mall and businesses within it, and where "other reasonable opportunities for the pickets to convey their message to their intended audience were available."⁸ It seems likely that the Supreme Court in *Hudgens* will agree with the Fifth Circuit⁹ that, as with organizational rights in *Babcock & Wilcox* and First Amendment rights in *Lloyd Corp.*, section 7 of the NLRA requires that private property rights yield where economic strikers cannot, without trespassing, effectively inform those doing business with the struck employer of the dispute.

²¹ Id. at 260. "The new right thus appears restricted to the privilege to insist on mute and inactive presence of a fellow employee for a union representative; a witness to the interview, perhaps." Id. at 274 n.5 (Powell, J., dissenting).

¹ 501 F.2d 161, 87 L.R.R.M. 2289 (5th Cir. 1974), cert. granted, 420 U.S. 971 (1975).

² 29 U.S.C. § 157 (1970).

³ 501 F.2d at 166-67, 87 L.R.R.M. at 2293.

⁴ Cert. granted, 420 U.S. 971 (1975).

⁵ 351 U.S. 105 (1956).

⁶ Id. at 113.

⁷ 407 U.S. 551 (1972).

⁸ Id. at 563. See also *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 n.9 (1968).

⁹ 501 F.2d at 166-67, 87 L.R.R.M. at 2293.

The facts in *Hudgens* are fairly simple. Striking warehouse employees picketed one of their employer's retail outlets located in a shopping mall.¹⁰ After the manager of the shopping center threatened the pickets with arrest for trespassing, the Board found an unlawful interference with the employees' section 7 rights in violation of section 8(a)(1).¹¹ According to the Board, the pickets were within the class of invitees to the shopping mall.¹² Their exclusion was attributable, therefore, not to a neutral exercise of the mall owner's property rights, but rather only to intentional interference with their participation in concerted activities.¹³ Before the Fifth Circuit Court of Appeals, the NLRB shifted the basis of its finding of a section 8(a)(1) violation. The Board analogized¹⁴ the case to *Republic Aviation Corp. v. NLRB*,¹⁵ in which the Supreme Court affirmed¹⁴ a Board ruling that an employer may not enforce a no solicitation rule against employee organizers on its property without a showing of need for the rule in order to maintain production or discipline.¹⁶

The court of appeals rejected the Board's rationale stating that *Republic Aviation* was inapposite, inasmuch as the pickets in *Hudgens* were not the mall owner's employees.¹⁷ Moreover, economic picketing constituted a substantial interference with the neutral *Hudgens*' property rights, in contrast with the negligible impact of the *Republic Aviation* organizational activities pursued by employees lawfully on the premises.¹⁸

Nevertheless, the court of appeals enforced the Board's order on the basis of a two-part test drawn largely from the Supreme Court's 1972 case, *Lloyd Corp.*¹⁹ First, the protest activities must be related to the use to which the property is put.²⁰ In a labor context, therefore, the picketing must be aimed at an audience doing business with the employer with whom the pickets have a dispute.²¹

¹⁰ Id. at 163, 87 L.R.R.M. at 2290.

¹¹ *Scott Hudgens*, 205 N.L.R.B. 628, 84 L.R.R.M. 1008, 1009 (1973). See 29 U.S.C. § 158(a)(1).

¹² Id., 84 L.R.R.M. at 1009.

¹³ See id.

¹⁴ See 501 F.2d at 165, 87 L.R.R.M. at 2292.

¹⁵ 324 U.S. 793 (1945).

¹⁶ Id. at 805.

¹⁷ 501 F.2d at 166, 87 L.R.R.M. at 2292.

¹⁸ Id. The Court also rejected the mall owner's argument that *Babcock & Wilcox* controlled. Id., 87 L.R.R.M. at 2293. "There, the property rights were those of the employer, not a third party; and the labor rights involved were organizational rights, not consumer picketing rights." Id. It is suggested, however, that the test adopted by the court of appeals does not differ significantly from the *Babcock & Wilcox* test. See text at notes 21-23 infra.

¹⁹ See text at notes 7-8 supra.

²⁰ 501 F.2d at 166, 87 L.R.R.M. at 2293.

²¹ See id. at 167, 87 L.R.R.M. at 2293. In *Lloyd Corp.* the Supreme Court indicated that

Second, the court ruled that the picketing was lawful if the General Counsel of the NLRB could show that alternatives less intrusive on Hudgens' property rights did not exist.²² As in *Babcock & Wilcox*,²³ such an inquiry is aimed at preserving employees' section 7 rights with the least impact on private property rights. *Hudgens*, however, required a different factual inquiry to strike the balance. In *Babcock & Wilcox* the employees to be organized constituted a finite, easily identifiable group; Union organizers might easily reach such employees by means other than trespass on the employer's property.²⁴ The *Hudgens* pickets, on the other hand, could identify their intended audience only as it approached the picketed store. Alternatives such as advertising in the mass media were clearly impractical, and picketing at shopping mall entrances might have undesirable secondary effects.²⁵ Therefore, picketing within Hudgens' mall was the only realistic means of informing the retail outlet's employees and customers of the dispute.²⁶

It is submitted that the Fifth Circuit's resolution of *Hudgens* is correct. The court's development of a balancing test, permitting trespasses where strikers have no alternative means of informing the customers and employees of the struck employer of the dispute, appears necessary to preserve the pickets' section 7 right to engage in economic picketing. As such, the Fifth Circuit's decision is consistent with the Supreme Court's previous rulings that the NLRA imposes a servitude on corporate real property where necessary to the preservation of section 7 rights.²⁷ Without such a servitude in the circumstances of the *Hudgens* case, employers, in league with "neutral" mall owners, might effectively frustrate picketing by isolating themselves within the confines of a shopping center.²⁸ Furthermore, the economic relationship between the lessor mall owner and the struck employer makes it equitable to extend the Act's restraints from the regulated employer to the lessor attempting to shield the employer from economic picketing.

a shopping mall having the attributes of a public business block is subject to a First Amendment requirement that pamphleteers be permitted access, provided their activities were related to an enterprise within the mall and that reasonable alternative opportunities for reaching the intended audience did not exist. See 407 U.S. at 563. See also *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 n.9 (1968).

²² 501 F.2d at 169, 87 L.R.R.M. at 2295.

²³ See 351 U.S. at 112.

²⁴ *Hudgens*, 501 F.2d at 168, 87 L.R.R.M. at 2294.

²⁵ *Id.* at 169, 87 L.R.R.M. at 2295.

²⁶ *Id.*

²⁷ See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544-45 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

²⁸ See *Hudgens*, 501 F.2d at 168, 87 L.R.R.M. at 2294.

B. *Union Discipline of Supervisors*1. *Florida Power & Light*

The 1947 amendments to the National Labor Relations Act divested supervisory personnel of their statutory rights to organize and to bargain collectively.¹ Employers therefore commit no unfair labor practice by firing, refusing to hire or refusing to bargain with unionized supervisors.² An employer, however, remains free to recognize and to bargain with labor organizations representing supervisors.³ Unionized supervisors are commonly subject to divided loyalties and are liable to union discipline if they adhere to management's interests in a union-employer dispute.⁴

Since 1968 the Board has applied section 8(b)(1)(B) of the Act,⁵ which prohibits union coercion of "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances,"⁶ so as to delimit the permissible scope of union discipline of supervisors. In the seminal case, *San Francisco-Oakland Mailers' Local 18, (Northwest Publications, Inc.)*,⁷ the Board held that the language of section 8(b)(1)(B) prohibiting coercion of an employer in the selection of his bargaining and grievance adjustment representatives also covers union discipline penalizing a supervisor for performance of his duties in applying the collective bargaining contract.⁸ In *Oakland Mailers* the Board expanded the application of section 8(b)(1)(B) to prevent the union from doing indirectly, through pressure on the supervisor, what it could not do directly through coercion of the employer.⁹ In subsequent decisions the Board has applied section 8(b)(1)(B) to bar union discipline for the performance of managerial duties which were, at best, arguably related to the application of the collective bargaining agreement.¹⁰ Other decisions indicate that the Board

¹ 29 U.S.C. §§ 152(3), 152(11) (1970). See note 1 at p. 973 *supra*.

² *Florida Power & Light Co. v. IBEW*, 417 U.S. 790, 808 (1974).

³ See 29 U.S.C. § 164(a) (1970).

⁴ See *Florida Power & Light Co. v. IBEW*, 417 U.S. 790, 793-94, 796-97 (1974).

⁵ 29 U.S.C. § 158(b)(1)(B) (1970).

⁶ *Id.*

⁷ 172 N.L.R.B. 2173, 69 L.R.R.M. 1157 (1968).

⁸ *Id.*, 69 L.R.R.M. at 1158.

⁹ See *id.* "[M]anagement's right to a free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance adjustment duties." *IBEW v. NLRB*, 487 F.2d 1143, 1154, 83 L.R.R.M. 2582, 2588-89 (D.C. Cir. 1973) (en banc).

¹⁰ E.g., *Meat Cutters Local 81 (Safeway Stores, Inc.)*, 185 N.L.R.B. 884, 75 L.R.R.M. 1247 (1970), enforced, 458 F.2d 794, 79 L.R.R.M. 2309 (D.C. Cir. 1972) (exercise of employer's purchasing policy in derogation of the union's work-preservation interest); *Sheet Metal Workers Local 49 (General Metal Products, Inc.)*, 178 N.L.R.B. 139, 72 L.R.R.M. 1070 (1969), enforced,

regarded section 8(b)(1)(B) as protecting all supervisory or managerial functions whether or not they could be termed "collective bargaining" or "grievance adjustment."¹¹

Recently, the Board expanded its interpretation of section 8(b)(1)(B) to prohibit union discipline of those supervisor-members whose duties included grievance adjustment or collective bargaining, for their performance of non-supervisory functions, i.e., rank-and-file work done during an economic strike.¹² In a significant Survey year decision, *Florida Power & Light Co. v. IBEW*,¹³ the Supreme Court rejected this latest expansive reading of section 8(b)(1)(B).¹⁴

Florida Power & Light was a consolidated appeal of two board decisions.¹⁵ In both cases some of the supervisors who crossed the unions' picket lines were beneficiaries of the union's collective bargaining agreements with the employers. The others retained nominal union membership enabling them to enjoy union-sponsored pension plans and other benefits.¹⁶ All supervisors who performed rank-and-file work during the strike were fined by their unions and, in some instances, expelled from membership.¹⁷ The Board ruled that the union discipline in both cases violated section 8(b)(1)(B).¹⁸ According to the Board's reasoning, section 8(b)(1)(B) is violated where the underlying reason for the union's discipline of supervisors is a dispute "between the employer and the union rather than between the union and the supervisor."¹⁹ Thus, any discipline

430 F.2d 1348, 75 L.R.R.M. 2062 (10th Cir. 1970) (supervisor fined for performance of work arguably reserved for the rank-and-file under the collective agreement).

¹¹ *Florida Power & Light Co. v. IBEW*, 417 U.S. 790, 801-02 (1974). See *Lithographers Locals 15-P & 272 (Toledo Blade Co.)*, 175 N.L.R.B. 1072, 71 L.R.R.M. 1467 (1969), enforced, 437 F.2d 55, 76 L.R.R.M. 2422 (6th Cir. 1971).

¹² Local 2150, IBEW (Wisconsin Elec. Power Co.), 192 N.L.R.B. 77, 78, 77 L.R.R.M. 1607, 1609 (1971), enforced, 486 F.2d 602, 83 L.R.R.M. 2827 (7th Cir. 1973).

¹³ 417 U.S. 790 (1974).

¹⁴ *Id.* at 804-05, 813.

¹⁵ Local 134, IBEW (Illinois Bell Tel. Co.), 192 N.L.R.B. 85, 77 L.R.R.M. 1610 (1971), enforcement denied, 487 F.2d 1143, 83 L.R.R.M. 2582 (D.C. Cir. 1973) (en banc), rev'g on rehearing 487 F.2d 1113, 81 L.R.R.M. 2257 (D.C. Cir. 1972); System Council U-4, IBEW (Florida Power & Light Co.), 193 N.L.R.B. 30, 78 L.R.R.M. 1065 (1971), enforcement denied, 487 F.2d 1143, 83 L.R.R.M. 2582 (D.C. Cir. 1973) (en banc).

¹⁶ 417 U.S. at 792-93, 795.

¹⁷ *Id.* at 793-94, 796-97.

¹⁸ Local 134, IBEW (Illinois Bell Tel. Co.), 192 N.L.R.B. 85, 86, 77 L.R.R.M. 1610, 1612 (1971); System Council U-4, IBEW (Florida Power & Light Co.), 193 N.L.R.B. 30, 31, 78 L.R.R.M. 1065, 1066 (1971).

¹⁹ Local 2150, IBEW (Wisconsin Elec. Power Co.), 192 N.L.R.B. 77, 78, 77 L.R.R.M. 1607, 1609 (1971), enforced, 486 F.2d 602, 83 L.R.R.M. 2827 (7th Cir. 1973). *Wisconsin Electric* was decided by the Board on the same day as *Illinois Bell*. The Board's opinion in *Wisconsin Electric* sets forth the Board's interpretation of § 8(b)(1)(B). The Board has not sought to apply § 8(b)(1)(B) to discipline arising from a purely intra-union dispute unrelated to a supervisor's duties to his employer. See *Painters Local 453 (Syd Gough & Sons)*, 183 N.L.R.B. 187, 74 L.R.R.M. 1539, 1540 (1970).

which resolved a supervisor's conflicting loyalties in favor of his union and against his employer was an unfair labor practice.²⁰

The Supreme Court rejected the Board's broad application of section 8(b)(1)(B) and held that union discipline of supervisor-members violated section 8(b)(1)(B) only where it penalized "the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer."²¹ Discipline for performing rank-and-file struck work therefore does not violate section 8(b)(1)(B).²² However, the Court failed to provide a definition of grievance adjustment or collective bargaining for application in future cases concerning the permissible scope of union discipline of supervisors.

The Supreme Court distinguished the policy bases of section 8(b)(1)(B) from the policies underlying those sections of the Act enabling employers to exclude supervisors from labor organizations. According to the Court, sections 2(3) and 14(a)²³ were enacted to enable employers to demand the undivided loyalty of supervisors by prohibiting their membership in unions.²⁴ Section 8(b)(1)(B), on the other hand, was not intended to be "any part of the solution to the generalized problem of supervisor-[union] member conflict of loyalties."²⁵ Rather, the Court viewed the legislative history as revealing that the evils to be remedied were "union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment."²⁶ More specifically, Congress intended to outlaw union coercion with respect to an employer's participation in a multi-employer bargaining unit and union pressure on an employer to replace foremen whose performance as supervisors was offensive to the union.²⁷

In the Court's opinion, the Board had extended section 8(b)(1)(B) to insulate virtually all employer demands for supervisors' loyalty from union interference, thereby rendering the scope of the section coterminous with sections 2(3) and 14(a).²⁸ Unless section 8(b)(1)(B) were read more narrowly, the Court concluded, the "op-

²⁰ See *Illinois Bell Tel.*, 192 N.L.R.B. at 86, 77 L.R.R.M. at 1612. Member Fanning, dissenting, noted the absence of causal relationship between discipline penalizing the performance of struck rank-and-file work and the statutorily proscribed restraint of an employer's freedom in collective bargaining and grievance adjustment. *Id.* at 88, 77 L.R.R.M. at 1614 (Member Fanning dissenting).

²¹ 417 U.S. at 804-05.

²² *Id.* at 805, 813.

²³ 29 U.S.C. §§ 152(3), 164(a) (1970). See note 1 *supra*.

²⁴ 417 U.S. at 808.

²⁵ *Id.* at 813.

²⁶ *Id.* at 803.

²⁷ *Id.* at 803-04.

²⁸ See *id.* at 806-08.

tion"²⁹ provided by Congress, which permits employers to exclude supervisors from unions, would be illusory.³⁰ An employer, who had waived his statutory rights to exclude supervisors from labor organizations, would be able to reclaim a supervisor's undivided loyalty in a section 8(b)(1)(B) proceeding.³¹ To avoid such an anomaly, the Court found that 8(b)(1)(B) is to be construed as literally as practicable in accordance with the congressional intent to protect only grievance adjustment and collective bargaining functions.³² Conflict of loyalties problems arising in areas unprotected by section 8(b)(1)(B) are to be left to union-employer resolution in collective bargaining.³³

In a brief dissent, Justice White, writing for four justices of the Court,³⁴ argued that supervisors' performance of rank-and-file struck work "is part and parcel of the process of collective bargaining," and therefore, union interference with such a function falls within the scope of section 8(b)(1)(B).³⁵ The minority's willingness to refer to an employer's economic self-defense during a strike as "collective bargaining" within the meaning of section 8(b)(1)(B) appears to stretch that phrase beyond its commonly accepted meaning. Ordinarily, collective bargaining is understood to include only contract negotiations, administration of an existing agreement and informal union-employer consultations.³⁶ In light of the phrase's limited meaning, performance of struck work can hardly be regarded as "collective bargaining." Moreover, the Court's identification of Congress' limited purpose in enacting section 8(b)(1)(B) as the preservation of employers' freedom of choice with respect to multi-employer collective bargaining,³⁷ militates against a liberal application of the phrase "collective bargaining" to all aspects of labor-management relations.

The Board's sweeping application of section 8(b)(1)(B) had insured employers of supervisors' undivided loyalties in all areas of union-management relations. Thus, employers were vested with

²⁹ Id. at 812.

³⁰ See id. at 812-13.

³¹ See id.

³² Id. at 804-05.

³³ Id. at 813. While holding that the union's discipline for performance of rank-and-file struck work was not prohibited by § 8(b)(1)(B), the Court also noted that it was unprotected under § 8(b)(1)(A)'s, 29 U.S.C. § 158(b)(1)(A) (1970), proviso permitting union discipline not violative of employees' right under § 7, 29 U.S.C. § 157 (1970). Since supervisors are not employees for purposes of the Act, § 8(b)(1)(A)'s delineation of permissible and impermissible union discipline of employees is inapplicable to discipline of supervisors. 417 U.S. at 805 n.16.

³⁴ Id. at 813 (Justice White, dissenting, joined by Chief Justice Burger and Justices Blackmun and Rehnquist).

³⁵ Id. at 814, quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 495 (1960).

³⁶ D. Bok & J. Dunlop, *Labor and the American Community* 217 (1970).

³⁷ 417 U.S. at 803.

rights that they had ostensibly waived when the employers failed to exclude supervisors from labor organizations, as permitted by sections 2(3)³⁸ and 14(a).³⁹ The unfairness of this Board construction of section 8(b)(1)(B) is apparent upon examination of employers' economic motives for waiving their exclusionary rights under the Act. Employers often permit workers who are promoted to supervisory positions to retain union membership in order to avoid the expense of providing pension and other benefits which would be terminated upon withdrawal from union membership.⁴⁰ The Board's application of section 8(b)(1)(B), however, would enable employers to continue reaping the financial advantages of supervisors' continued membership while denying the union, which provides the benefits, any claim to the supervisors' support during a strike. In contrast, the Court's decision that unions and employers should resolve their competing claims to supervisors' loyalties through the give-and-take of collective bargaining appears better advised. Furthermore, in those instances where the supervisors are beneficiaries of the collective bargaining agreement which is the subject of the strike, the Court is clearly justified in recognizing the union's interest in preventing the supervisors from performing rank-and-file work in derogation of that strike.

While the Supreme Court's decision represents the reversal of a line of Board decisions relating to discipline for the performance of rank-and-file struck work,⁴¹ the impact of *Florida Power & Light* on other Board interpretations of section 8(b)(1)(B) is unclear. *Florida Power & Light* teaches that discipline for performance of unit work during a strike cannot be held to affect adversely a supervisor's performance of his grievance adjustment or collective bargaining duties.⁴² However, the Court did not indicate whether a union might lawfully discipline a supervisor who performs *both* managerial and rank-and-file work during a strike. Nor did the Court rule on the correctness of the Board's extension of section 8(b)(1)(B) to protect all managerial functions, whether or not they are classifiable as "collective bargaining" or "grievance adjustment."⁴³ The Board's application of section 8(b)(1)(B) to all managerial and supervisory activities, on grounds that such discipline has a coercive carry-over effect on collective bargaining or grievance adjustment duties, avoids the practical difficulty of determining, on a

³⁸ 29 U.S.C. § 152(3) (1970). See note 1 at p. 973 *supra*.

³⁹ 29 U.S.C. § 164(a) (1970). See note 1 at p. 973 *supra*.

⁴⁰ *IBEW v. NLRB*, 487 F.2d 1148, 1169, 83 L.R.R.M. 2582, 2601 (D.C. Cir. 1973).

⁴¹ E.g., *Local 2150, IBEW (Wisconsin Elec. Power Co.)*, 192 N.L.R.B. 77, 77 L.R.R.M. 1607 (1971).

⁴² 417 U.S. at 804-05.

⁴³ See *id.* at 801-02.

case-by-case basis, which supervisory functions constitute, for example, administration of the collective bargaining agreement and which do not. However, the Supreme Court's admonition that section 8(b)(1)(B) is to be narrowly read⁴⁴ may necessitate such a case-by-case approach or at least a clearer showing of an adverse carryover effect of the discipline on collective bargaining or grievance adjustment duties.

2. Hammond Publishers; Triangle Publications

In *Florida Power & Light Co. v. IBEW*¹ the Supreme Court found union discipline of foremen permissible under section 8(b)(1)(B)² where the supervisors had ostensibly³ performed only rank-and-file work during a strike. The Court did not rule on the legality of penalties assessed against supervisors who performed both managerial and rank-and-file work during a strike. Several months after *Florida Power & Light*, the Board, in *Typographical Local 16 (Hammond Publishers, Inc.)*,⁴ held that a union violated section 8(b)(1)(B) when it disciplined supervisors who crossed a picket line to perform mainly supervisory functions as well as a "minimal amount" of rank-and-file struck work.⁵ According to the Board's interpretation of *Florida Power & Light*, the existence of a section 8(b)(1)(B) violation turns on whether the "reasonable effect" of union discipline is to inhibit a supervisor's future execution of collective bargaining or grievance adjustment duties.⁶ Applying this test in *Hammond Publishers*, the Board, without further explanation, found it "reasonably likely" that union discipline of the supervisors would adversely affect their future performance of section 8(b)(1)(B) duties.⁷ The Board majority implied strongly that it regarded *Florida Power & Light* to be limited to situations where supervisors "substitute their services for those of the rank-and-file

⁴⁴ Id. at 804-05.

¹ 417 U.S. 790 (1974).

² 29 U.S.C. § 158(b)(1)(B) (1970) outlaws coercion or restraint of "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

³ See 417 U.S. at 791-92, 793, 796.

⁴ 216 N.L.R.B. No. 149, 88 L.R.R.M. 1378 (1975).

⁵ 88 L.R.R.M. at 1381.

⁶ Id. at 1379. The Board's "reasonable effect" test is based on the following language from *Florida Power & Light*:

The conclusion is thus inescapable that a union's discipline of . . . a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

⁴¹⁷ U.S. at 804-05.

⁷ 88 L.R.R.M. at 1381.

employees."⁸ The Board, therefore, believes that section 8(b)(1)(B) absolutely protects the performance by unionized supervisors of predominantly managerial tasks behind a picket line.

In a companion case, *Typographical Local 6 (Triangle Publications, Inc.)*,⁹ the NLRB held that union discipline of strikebreaking supervisors who performed only managerial functions during the strike violated section 8(b)(1)(B).¹⁰ In *Triangle Publications*, the Board rejected contentions that union discipline motivated by "strikebreaking" rather than by the quality of the supervisor's managerial activities was permissible since such discipline would be unlikely to affect the future performance of section 8(b)(1)(B) duties.¹¹ Rather, the Board concluded that discipline for performance of any supervisory duties, whether carried out during a strike or not, would inevitably have an adverse influence on the supervisor's future collective bargaining and grievance adjustment functions.¹²

Member Fanning, in lengthy dissents, took issue with the majority's reasoning. *Hammond Publishers*, he argued, presented essentially the same facts as *Florida Power & Light*.¹³ Although the Supreme Court in that case addressed itself explicitly only to the rank-and-file work performed by the disciplined supervisors, the record below revealed that the foremen had performed both supervisory and unit work during the strikes.¹⁴ Therefore, Member Fanning argued, the Supreme Court had tacitly approved union discipline focused on the performance of struck work despite the supervisor's simultaneous performance of managerial duties.¹⁵

In his *Triangle Publications* dissent, Member Fanning agreed with the majority's premise that section 8(b)(1)(B) is violated where the "reasonable effect" of union discipline is to inhibit a supervisor's future performance of collective bargaining and grievance adjustment duties.¹⁶ However, he felt that *Florida Power & Light* required a more persuasive showing of a causal relationship between union discipline and coercion with respect to section 8(b)(1)(B) duties than had been shown in *Triangle Publications*. First, Member Fanning noted, the forbidden coercion would likely result where the union discipline was directed at influencing the supervisor's perfor-

⁸ Id.

⁹ 216 N.L.R.B. No. 147, 88 L.R.R.M. 1384 (1975).

¹⁰ 88 L.R.R.M. at 1386.

¹¹ Id. at 1385.

¹² Id. at 1386.

¹³ 88 L.R.R.M. at 1382-83 (Member Fanning dissenting).

¹⁴ Id.

¹⁵ Id. at 1383 & n.19, 1384.

¹⁶ 88 L.R.R.M. at 1389 (Member Fanning dissenting).

mance of protected activities.¹⁷ In *Triangle Publications*, however, the union was concerned only with strikebreaking, not with the nature of the work performed behind the picket line.¹⁸ Second, if, regardless of the union's motivation, the impact of the discipline on the supervisor were likely to deter him from faithful performance of his section 8(b)(1)(B) obligations in the future, a violation could be found.¹⁹ The discipline in *Triangle Publications*, however, would not reasonably affect a supervisor's performance of section 8(b)(1)(B) duties, since the supervisor would relate the punishment to working during a strike rather than to the manner in which he had performed his managerial duties:

[W]hen the supervisor fined for crossing a picket line is adjusting a grievance several weeks later he is *not* performing the same function for which he was previously fined because he was not fined for adjusting a grievance or anything related thereto. He was fined for crossing the picket line. The reasonable conclusion for the supervisor to draw is that if, once again in the future, he crosses a lawful picket line, he will, once again, be disciplined.²⁰

Therefore, according to Member Fanning, discipline imposed to punish strikebreaking rather than the manner in which section 8(b)(1)(B) duties are performed is never violative of the Act.²¹

It is suggested that Member Fanning's interpretation of section 8(b)(1)(B) is correct. First, the Supreme Court in *Florida Power & Light* indicated that the scope of section 8(b)(1)(B) is little broader than its literal concern with coercion with respect to the "selection" of collective bargaining and grievance adjustment agents: only interference with the supervisor's performance of his section 8(b)(1)(B) duties is prohibited.²² Furthermore, the Court recognized that unions have a legitimate interest in the loyalty of unionized supervisors.²³ In light of the Court's admonition that section 8(b)(1)(B) be narrowly read, and its approval of unions' conflicting claims to

¹⁷ Id. at 1388.

¹⁸ Id.

¹⁹ See id. at 1389.

²⁰ Id. at 1389-90.

²¹ Id. at 1390.

²² See 417 U.S. at 804-05.

Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment.

Id. at 804. See id. at 804-05, quoted at note 6 *supra*.

²³ 417 U.S. at 812 n.22.

foremen's loyalty, Member Fanning's narrow application of section 8(b)(1)(B) seems preferable.

C. *Duty to Bargain—Narrowing Gissel:*

Linden Lumber

It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . designated or selected . . . by the majority of the employees in a unit appropriate for such purposes" ¹ In the landmark 1969 case, *NLRB v. Gissel Packing Co.*, ² the Supreme Court held that the duty to bargain collectively under section 8(a)(5) ³ was not restricted "solely to those unions whose representative status is certified after a Board election." ⁴ In *Gissel* the Court upheld bargaining orders directed at employers who had rejected union demands to bargain 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 processes." ⁵ In addition, the Court approved the Board's practice of allowing an employer, who was confronted with evidence of majority support for the union, to refuse to bargain with the union and to petition for an election irrespective of his beliefs concerning the union's majority status. ⁶ However, the Court did not decide whether section 8(a)(5) required an employer who committed no unfair labor practices interfering with the Board's election machinery and who refused to petition for an election, to bargain with a union presenting evidence of majority support. ⁷ The Supreme Court resolved that question in the employer's favor in the Survey year case, *Linden Lumber Division, Summer & Co. v. NLRB*, ⁸ holding that an employer, who refrains from interfering with a fair election, has an absolute right to refuse to bargain or to petition for an election. ⁹

In *Linden Lumber*, several employers, confronted with bargaining demands based on authorization cards signed by a majority in each of the proposed units, refused to negotiate with the unions or to petition for elections. ¹⁰ The Board found that the employers com-

¹ 29 U.S.C. §§ 158(a)(5), 159(a) (1970).

² 395 U.S. 575 (1969).

³ 29 U.S.C. § 158(a)(5) (1970).

⁴ 395 U.S. at 600.

⁵ *Id.* at 614.

⁶ *Id.* at 594.

⁷ See *id.* at 595, 601 n.18.

⁸ 419 U.S. 301 (1974).

⁹ *Id.* at 310.

¹⁰ *Id.* at 302.

mitted no unfair labor practices. Instead, the Board adopted "a 'voluntarist' view of the duty to bargain. Absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union."¹¹ In *Linden Lumber* the Board overruled prior decisions authorizing the issuance of a bargaining order where an employer, in "bad faith"¹² or without a "reasonable doubt"¹³ of a union's majority status, refused to bargain with a union presenting evidence of majority support and failed to protect himself by petitioning for an election. In the Board's view, testing an employer's motivation or knowledge was hopelessly subjective and therefore unworkable.¹⁴ Moreover, a union could easily invoke the Board's election machinery:

In that manner, if there is indeed majority support, it will be evidenced in clear and unmistakable fashion within a matter of a few weeks. Surely that is a far better basis for the bargaining relationship than a decision in litigation which would take us nearly a year to reach and which, even then, may be subject to debate as to the soundness of its evidentiary base and to further contest in the courts.¹⁵

A divided Supreme Court upheld the Board's new policy announced in *Linden Lumber* of granting employers, who commit no unfair labor practices which impair the electoral process, an absolute right to refuse to bargain or to petition for an election.¹⁶ The Court held that "a union with authorization cards purporting to

¹¹ *Truck Drivers Local 413 v. NLRB*, 487 F.2d 1099, 1106, 84 L.R.R.M. 2177, 2181 (D.C. Cir. 1973), rev'g *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971); *Wilder Mfg. Co.*, 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972). *Truck Drivers Local 413*, in turn, was reversed sub nom. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

¹² E.g., *Aaron Bros. Co.*, 158 N.L.R.B. 1077, 1078-79, 62 L.R.R.M. 1160, 1161 (1966). "Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards rather than an election, as the method for determining the union's majority." *Id.* at 1078, 62 L.R.R.M. at 1161. At oral argument in *Gissel*, the Board announced a new policy of abandoning "good faith" inquiries where an employer, confronted with a bargaining demand, petitioned for an election. 395 U.S. at 594. "Thus, an employer can insist that a union subject itself to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct. . . ." *Id.*

¹³ See *Snow & Sons*, 134 N.L.R.B. 709, 710, 49 L.R.R.M. 1228, 1229 (1961), enforced, 308 F.2d 687, 51 L.R.R.M. 2199 (9th Cir. 1962).

¹⁴ *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718, 720-21, 77 L.R.R.M. 1305, 1309 (1971); *Wilder Mfg. Co.*, 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039, 1039-40 (1972). *Linden Lumber* and *Wilder* were consolidated for review in *Linden Lumber*, 419 U.S. 301 (1974).

¹⁵ *Wilder*, 81 L.R.R.M. at 1041.

¹⁶ 419 U.S. at 310.

represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure."¹⁷

In its decision the majority first noted the preferred status of an election as a reliable vehicle for testing employee sentiment.¹⁸ In contrast, since authorization cards or a recognitional strike do not conclusively establish the existence of a union majority, an employer may entertain a good-faith doubt as to the union's status.¹⁹ The Court also noted approvingly the Board's retreat from the subjectivity of "good faith" inquiries,²⁰ and further reasoned that the short period of time consumed by an election, in contrast to an unfair labor practice proceeding, supported the Board's preference for recognition based on certification rather than on a bargaining order.²¹ Finally, the majority cited "practical administrative procedural questions" in support of its decision:²² an employer, desiring to avoid a bargaining obligation could petition for an election in a unit unsatisfactory to the union. Under current Board procedure, such an employer petition would not be deemed to raise a "question of representation" within the meaning of section 9(c)(1)(B)²³ and would be dismissed.²⁴ The burden of petitioning for an election would then be shifted to the union, a result identical to the Board's practice pursuant to *Linden Lumber*.²⁵ Since the employer could thus nullify a section 8(a)(5) obligation to petition for an election, the Court saw little sense in creating a duty which was at best illusory.²⁶

Linden Lumber is the culmination of the Board's efforts to narrow the scope of section 8(a)(5). Initially, the Board would investigate an employer's "good faith" in refusing to bargain, whether or not he simultaneously petitioned for an election.²⁷ Under *Gissel*, the Board would investigate only where the employer had refused to petition for an election when faced with a bargaining demand.²⁸

¹⁷ *Id.*

¹⁸ *Id.* at 306.

¹⁹ *Id.* But compare the Court's recognition in *Gissel* of authorization cards and recognitional strikes as reliable indicia of majority support. 395 U.S. at 601-09.

²⁰ 419 U.S. at 306.

²¹ *Id.* at 306-07.

²² *Id.* at 309.

²³ 29 U.S.C. § 159(c) (1) (B) (1970) provides in pertinent part that an employer faced with a bargaining demand might petition for an election. Thereafter, "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

²⁴ 419 U.S. at 308-09. See *William Wood Bakery, Inc.*, 97 N.L.R.B. 122, 123, 29 L.R.R.M. 1066 (1951).

²⁵ 419 U.S. at 309.

²⁶ See *id.*

²⁷ See, e.g., *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264, 24 L.R.R.M. 1548, 1550 (1949).

²⁸ See 395 U.S. at 591.

With *Linden Lumber*, the Board has abandoned "good faith" investigations altogether.²⁹ A section 8(a)(5) duty to bargain with an uncertified union will arise only where the employer has agreed with the union to be bound by means other than an election,³⁰ or where the employer has engaged in unfair labor practices which dissipate a union's majority support and interfere with a fair election.³¹

It is suggested that the Court erred in approving the Board's narrowing of an employer's section 8(a)(5) duty to bargain. First, the virtual nullification of a duty to bargain with an uncertified union is inconsistent with the legislative history of section 8(a)(5). As the Court in *Gissel* noted, "it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.'"³² And, as the Board stated in 1947, "[t]he obligation imposed by the Act is to bargain with the representatives of a majority of the employees. If the majority is present, the obligation exists, subject to the possibility that a particular employer may, in good faith, ask for reasonable proof of the representative's asserted majority status."³³ At the time of the Taft-Hartley amendments, therefore, it was settled that evidence of majority support "could establish majority status and thereby impose a bargaining obligation on an unwilling employer by means other than . . . a Board-supervised election."³⁴ This interpretation of the duty to bargain was explicitly affirmed by the House Conference Report accompanying the Taft-Hartley Act, which stated that the reenacted section 8(a)(5) was intended to follow the provisions of "existing law."³⁵ In addition, the conferees rejected a proposal to limit the duty to bargain to unions "currently recognized . . . or certified,"³⁶ further evidencing a congressional intent to leave the scope of the duty to bargain as it was prior to 1947.³⁷ Finally, both the Board³⁸ and the Supreme Court³⁹ indicated shortly after the 1947 Taft-Hartley amendments that "[i]n the absence of any bona fide dispute as to the existence of the required majority of

²⁹ 190 N.L.R.B. at 720-21, 77 L.R.R.M. at 1309.

³⁰ See *Linden Lumber*, 419 U.S. at 310 n.10. See also *Gissel*, 395 U.S. at 591.

³¹ See *Gissel*, 395 U.S. at 600.

³² Id. at 596, quoting *NLRB v. Dahlsstrom Metallic Door Co.*, 112 F.2d 756, 757, 6 L.R.R.M. 746, 747 (2d Cir. 1940).

³³ *Roanoke Pub. Warehouse*, 72 N.L.R.B. 1281, 1282 n.3, 19 L.R.R.M. 1267, 1268 (1947).

³⁴ 419 U.S. at 312 (Stewart, J., dissenting).

³⁵ H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947). See 419 U.S. at 312 (Stewart, J., dissenting).

³⁶ H.R. 3020, 80th Cong., 1st Sess. § 8(a)(5) (1947).

³⁷ 419 U.S. at 312 (Stewart, J., dissenting).

³⁸ See *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264, 24 L.R.R.M. 1548, 1550 (1949).

³⁹ *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 69 (1956).

eligible employees, the employer's denial of recognition of the union [violates] § 8(a)(5) of the Act."⁴⁰ According to principles of statutory construction,⁴¹ it appears clear that the 1947 amendments reenacted section 8(a)(5) with judicial and administrative gloss intact, imposing a duty to bargain on employers confronted with convincing evidence of majority support. While the Board might justifiably exercise discretion in developing tests for determining when "convincing evidence of majority support" or employer "good faith" had been exhibited, the Board certainly does not have discretion to eliminate statutorily created duties. Nevertheless, the Supreme Court in *Linden Lumber*, without reference to the congressionally defined scope of section 8(a)(5), approved the Board's narrowed construction of the duty to bargain.⁴²

Linden Lumber's abandonment of the section 8(a)(5) duty to bargain with a union evidencing majority support was foreshadowed by *Gissel*. In that case the Court unquestioningly approved the Board's retreat from inquiries into the "good faith" of an employer who petitioned for an election in response to a union's demand to bargain.⁴³ The Court perhaps assumed that the filing of the petition evidenced good faith and that a union victory would result in prompt bargaining.⁴⁴ However, in *Linden Lumber* the Court discovered, apparently for the first time, that an employer could easily avoid a prompt resolution of the bargaining obligation dispute by petitioning for an election in a unit unacceptable to the union, thereby bringing about the petition's automatic dismissal.⁴⁵ Furthermore, where an election was held, the employer could continue to refuse to bargain, forcing the initiation of a lengthy section 8(a)(5) proceeding. At least where a defiant employer was concerned, the election option approved in *Gissel* guaranteed as much delay in securing employees' collective bargaining rights as the pre-*Gissel* "good faith" investigations.

The Court in *Gissel* approved a loophole allowing employers to escape their bargaining obligations by designating an unacceptable unit or by refusing to bargain after an election had been held. The

⁴⁰ *Id.*

⁴¹ See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974).

⁴² *Truck Drivers Local 413 v. NLRB*, 487 F.2d 1099, 84 L.R.R.M. 2177 (D.C. Cir. 1973) where the court stated:

It is one thing to abandon a subjective standard used to determine when employers are required to recognize on the basis of cards and replace it by the alternative, and arguably more objective, standard of "independent knowledge." That was the Supreme Court's understanding in *Gissel* [sic]. It is another thing to abandon any standard.

Id. at 1108 n.36, 84 L.R.R.M. at 2183 n.36.

⁴³ See 395 U.S. at 591, 600.

⁴⁴ See *id.* at 600.

⁴⁵ 419 U.S. at 308-09. See text at notes 19-22 *supra*.

Court in *Linden Lumber*, instead of closing the loophole in order to protect employees' section 8(a)(5) rights, ruled, in effect, that the loophole required extinction of the rights.⁴⁶ As a result, only an election petition filed by a union can now create a bargaining obligation.⁴⁷

Curiously, the coup de grace administered by *Linden Lumber* to an employer's pre-election duty to bargain appears likely to have little impact on the balance of union and employer power. An election, not a pre-election bargaining demand, is now virtually the only means of triggering an employer's bargaining obligation. However, where the union does have majority support and where the employer acts in good faith, reliance on an election rather than on a bargaining demand will delay recognition for only a few weeks.⁴⁸ On the other hand, where an employer refuses recognition after an election, the resulting delay should not be much greater than that attending a *Joy Silk* unfair labor practice proceeding seeking to enforce a pre-election duty to bargain.⁴⁹

Employers are, nonetheless, advantaged in two ways by *Linden Lumber*. First, the delay attending an election might result in an erosion of the union strength which existed at the time of the initial bargaining demand. Second, employers are relieved of the legal, if not practicably enforceable, burden of bargaining as soon as credible evidence of majority support is presented. On the union-employer battleground, *Linden Lumber* results in an immeasurable psychological advantage for employers.

IV. SUCCESSOR EMPLOYERS

A. Introduction

The Survey year saw further judicial and administrative development of the law governing a "successor" employer's obligations to arbitrate and bargain with his predecessor's employees. In *Howard Johnson Co. v. Detroit Local Joint Executive Board*,¹ the Supreme Court held that a successor corporation which purchased the assets of its predecessor and continued to employ only a fraction of the predecessor's work force had no duty under the predecessor's collective bargaining agreement to arbitrate the claims of the discharged employees.² The union representing the predecessor's

⁴⁶ See 419 U.S. at 308-09.

⁴⁷ See *id.* at 310.

⁴⁸ See *id.* at 306-07, citing 37 NLRB Ann. Rep. 13 (1972).

⁴⁹ See *id.*

¹ 417 U.S. 249 (1974).

² *Id.* at 264-65.

employees had failed to satisfy the threshold requirement of showing continuity in the work force. Its claims, therefore, did not warrant invocation of the labor law policy considerations which, in prior cases, had given rise to successors' duties to arbitrate,³ bargain,⁴ or remedy a predecessor's unfair labor practices.⁵ In contrast, during the Survey year the Fifth Circuit in *Steelworkers v. United States Gypsum Co.*⁶ held that a duty to arbitrate would survive the sale of a business where the requirement of continuity of the work force in a substantially unchanged working environment was met.⁷

The NLRB, in 1974, failed to develop clear standards for determining successorship obligations where the corporate transition results in retention of some of the predecessor's employees in an expanded bargaining unit. In *Spruce Up Corp.*,⁸ the Board split three ways in formulating tests for determining the number of employees from the predecessor's work force which must be retained in a new, expanded unit before a successor's duty to bargain arises. In a separate section of its *Spruce Up* opinion,⁹ the Board addressed itself to the application of dicta in *NLRB v. Burns International Security Services, Inc.*¹⁰ which indicated that where "it is perfectly clear that the new employer plans to retain all of the employees in the unit [he must] initially consult with the employees' bargaining representative before he fixes terms."¹¹ The Board applied this language very narrowly in *Spruce Up*, holding that the employer who intends to retain all or most of his predecessor's employees has no duty to bargain with their representative about initial terms of employment, unless he has unconditionally offered them re-employment.¹² As a result of the current Board policy, a "successor" employer evidently may bargain individually with the employees whom he intends to retain, with his collective bargaining obligation arising only after a majority of employees have been hired under the individually negotiated terms.¹³

The impact of these court and Board decisions on the develop-

³ *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

⁴ *NLRB v. Burns Int'l Security Serv., Inc.*, 406 U.S. 272 (1972). For a discussion of *Burns* see 1972-73 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1209-16 (1973).

⁵ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). For a discussion of *Golden State*, see 1973-74 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1105, 1160-63 (1974).

⁶ 492 F.2d 713, 85 L.R.R.M. 2962 (5th Cir.), cert. denied, 419 U.S. 998 (1974).

⁷ 492 F.2d at 726, 85 L.R.R.M. at 2971.

⁸ 209 N.L.R.B. No. 19, 85 L.R.R.M. 1426 (1974).

⁹ 85 L.R.R.M. at 1426-28.

¹⁰ 406 U.S. 272 (1972).

¹¹ *Id.* at 294-95.

¹² 85 L.R.R.M. at 1428.

¹³ See *id.*

ing law of "successorship" is best understood in light of earlier Supreme Court decisions defining the duties of successor employees. In its first encounter with the successorship problem in 1964, the Court held in *John Wiley & Sons v. Livingston*¹⁴ that a corporation which had absorbed its predecessor through a merger, and had continued the employment of all of its predecessor's employees, must arbitrate with their union representative under the predecessor's collective bargaining agreement.¹⁵ In *Wiley* the Court stressed the central role which arbitration plays in effectuating national labor policy.¹⁶ However, the Court stated that the duty to arbitrate would be imposed only where there was a "continuity of identity in the business enterprise,"¹⁷ a condition interpreted in the Survey year in *Howard Johnson* to include the retention of a substantial portion of the predecessor's employees.¹⁸ The duty to arbitrate, therefore, appeared to stem from the need to avoid industrial strife through affording retained employees a degree of protection against sudden changes in their conditions of employment.¹⁹ However, *Wiley* involved a merger in which the predecessor corporation disappeared.²⁰ The Supreme Court has subsequently attached considerable significance to this fact, indicating that *Wiley* might be read as having turned in large part on a factual finding or a legal conclusion under state law that the successor impliedly assumed the labor relations obligations of its predecessor.²¹ In its next successorship decision, *NLRB v. Burns International Security Services, Inc.*,²² the Supreme Court refused to enforce a Board order that a successor employer adhere to the substantive terms of the predecessor's collective bargaining agreement.²³ The Court noted that the compelling national policy favoring arbitration, stressed in *Wiley*,²⁴ was inapplicable in *Burns*, where the Board, rather than an arbitrator, was imposing the contract terms on the successor employer.²⁵ Furthermore, *Wiley* was inapposite insofar as its finding of a duty to bargain was based on the successor's implied assumption, in the

¹⁴ 376 U.S. 543 (1964).

¹⁵ Id. at 548.

¹⁶ Id. at 549.

¹⁷ Id. at 551.

¹⁸ 417 U.S. at 258-59.

¹⁹ *Wiley*, 376 U.S. at 549.

²⁰ Id. at 544-45.

²¹ *Howard Johnson*, 417 U.S. at 257; *Burns*, 406 U.S. at 286. See *Wiley*, 376 U.S. at 547-48. More likely, the Supreme Court has narrowed retroactively *Wiley's* basis of decision.

²² 406 U.S. 272 (1972).

²³ Id. at 291.

²⁴ 376 U.S. at 549.

²⁵ 406 U.S. at 286.

merger, of the predecessor's labor relations obligations.²⁶ Burns had merely outbid its predecessor for a security services contract and retained its predecessor's employees without purchasing any of the predecessor's assets or assuming its obligations.²⁷ In addition, the Court in *Burns* based its denial of enforcement of the Board's order on the NLRA's command that the parties be free from governmentally imposed substantive contract terms.²⁸

Finding no basis in law for requiring Burns to honor its predecessor's contract, the Court also noted that the automatic imposition of the predecessor's labor relations obligations would hamper the free transfer of capital.²⁹ Moreover, binding a union to the old contract would prevent it from seeking more favorable terms than were available from the putatively less prosperous predecessor.³⁰ Thus, the Court's holding was based both on policy considerations favoring maximization of successor employer and union freedom and on an absence of federal labor law policies requiring survival of the predecessor's contract terms.³¹

The *Burns* decision, in turn, must be read in light of the Court's 1973 opinion in *Golden State Bottling Co. v. NLRB*.³² In that case, the interest of a successor employer in freedom from the predecessor's labor relations obligations was held subordinate to labor law policies requiring the remedying of an unfair labor practice committed by the predecessor.³³ The purchasing corporation, which retained most of the predecessor's employees and which had

²⁶ Id. at 286-87. See *Wiley*, 376 U.S. at 547-48.

²⁷ 406 U.S. at 286-87. The Court stated:

Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8(a)(5), [29 U.S.C. § 158(a)(5) (1970)] and § 9(a) [29 U.S.C. § 159(a) (1970)]. But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.

Id.

²⁸ Id. at 281-84. 29 U.S.C. § 158(d) (1970) provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."

²⁹ 406 U.S. at 287-88.

³⁰ Id. at 288.

³¹ The Court also held in *Burns* that a successor employer would be required to bargain "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent" Id. at 281. In such a case, the union is presumed to have retained its majority status, see id., and the duty to bargain arises from the command of § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), that an employer "bargain collectively with the representatives of his employees" See 406 U.S. at 281. In addition, the Court held that the duty to bargain would mature only when the new employer had hired an apparent majority of employees from the old unit. Id. at 295.

³² 414 U.S. 168 (1973).

³³ Id. at 184-85.

notice of the predecessor's outstanding obligation to remedy the unfair labor practice,³⁴ was required to reinstate and to provide back pay to an unlawfully discharged employee.³⁵

In *Golden State* the Supreme Court balanced successor employers' interests in the free transfer of capital and freedom in initiating the enterprise against the policies of the NLRA. On balance, the discharged employee's right to reinstatement and back pay was found to merit greater recognition.³⁶ Furthermore, the retained employees would be likely to view the successor's failure to remedy the unfair labor practice as a continuation of the predecessor's labor policies, with resulting labor unrest.³⁷ Alternatively, the unremedied unfair labor practice might deter protected organizational activities, further frustrating the purposes of the NLRA.³⁸ In comparison the burden placed on successor employers would be minimal. Notice to the successor of the outstanding duty to remedy the unfair labor practice is necessary before liability may be imposed.³⁹ The purchasing corporation, therefore, may protect itself through a reduction in the sales price or an indemnification clause in the contract of sale.⁴⁰

After *Golden State* it appears that a successor employer's interest in freedom from the predecessor's labor relations commitments, emphasized in *Burns*,⁴¹ is not always paramount. Rather, the vindication of important national labor policies may burden the corporate transition. And, in contrast to the Court's narrow reading in *Burns* of *Wiley* as a case involving a merger,⁴² *Golden State* appears to teach that *Wiley's* command⁴³ to balance the interests of retained employees against those of the purchasing corporation remains viable in the developing law of successorship.

B. Duty to Arbitrate

1. *Howard Johnson*

Against this background, the Supreme Court decided *Howard Johnson Co. v. Detroit Local Joint Executive Board*.¹ The

³⁴ Id. at 171.

³⁵ Id. at 171-72.

³⁶ Id. at 181.

³⁷ Id. at 184.

³⁸ Id.

³⁹ *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 969, 65 L.R.R.M. 1168, 1169 (1967), enforced sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544, 68 L.R.R.M. 2913 (5th Cir. 1968).

⁴⁰ *Golden State*, 414 U.S. at 185.

⁴¹ See 406 U.S. at 287-88.

⁴² See 406 U.S. at 286. See text at notes 20-21 supra.

⁴³ 376 U.S. at 549.

¹ 417 U.S. 249 (1974).

petitioner in *Howard Johnson* had purchased the assets of a corporation which operated a motel and restaurant and which had entered into a collective bargaining agreement with its employees. In the contract of sale, Howard Johnson expressly disclaimed its predecessor's contractual labor obligations, which included a duty to arbitrate.² The successor corporation then recruited its own 45 member labor force, hiring only 9 of the predecessor's employees.³

The union representing the predecessor's employees sued Howard Johnson under section 301⁴ to compel arbitration.⁵ According to the union, the successor was bound by the contract provisions requiring continuation of the old work force except in cases of "just cause" dismissal.⁶

The Supreme Court reversed the lower court, which had relied on *John Wiley & Sons v. Livingston*⁷ in ordering arbitration.⁸ In the Court's view, *Howard Johnson's* similarity to *Wiley* ended with the nature of the remedy sought.⁹ First, *Howard Johnson* involved no merger whereby the predecessor employer disappeared. Instead, the predecessor remained a viable entity to which the union could turn for damages.¹⁰ Furthermore, the Court perceived in the *Wiley* merger an implied assumption of the predecessor's contractual labor relations commitments; in *Howard Johnson*, the successor merely purchased some assets and expressly disclaimed the predecessor's contractual duties to its employees.¹¹

Secondly, the Court also interpreted the successor's obligation in *Wiley* as deriving in part from the retained employees' need for protection from sudden changes in the conditions of their employment and arbitration's therapeutic effect in avoiding industrial

² Id. at 251-52.

³ Id. at 252.

⁴ Section 301(a) of the NLRA, 29 U.S.C. § 185(a) (1970), provides:

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

⁵ 417 U.S. at 253.

⁶ Id. at 260.

⁷ 376 U.S. 543 (1964).

⁸ 417 U.S. at 255-56. See *Detroit Joint Bd. v. Howard Johnson Co.*, 81 L.R.R.M. 2329 (E.D. Mich. 1972), *aff'd*, 482 F.2d 489, 83 L.R.R.M. 2804 (6th Cir. 1973).

⁹ 417 U.S. at 255. The Court rejected the notion that § 301 suits to compel arbitration might succeed where, in similar circumstances, national labor policies would prevent the Board from finding an unfair labor practice. Thus, it cannot be said "that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus . . . permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims." Id. at 256.

¹⁰ Id. at 257. In view of the Court's apparent emphasis on the need for continued viability of the predecessor corporation, it may be argued that, as a matter of federal common law, a merger will create a duty in the surviving corporation to honor the predecessor's labor relations commitments, irrespective of the duties imposed by state law in a merger situation.

¹¹ See id. at 257.

strife.¹² Such policy considerations were absent in *Howard Johnson* where the successor replaced most of the work force. Moreover, since *NLRB v. Burns International Security Services, Inc.*¹³ provided that the successor had no duty as a matter of law to retain any of the predecessor's employees,¹⁴ it would be anomalous to enable a union, through a suit to compel arbitration, to defeat an employer's right under *Burns* to replace the work force.¹⁵ In the absence of the requisite continuity in the work force creating a duty to arbitrate, the union's argument that the successor was obliged to arbitrate the absence of continuity was pure bootstrap.¹⁶

Although the federal common law of "successorship" is far from fully developed, several general principles are evident in light of *Howard Johnson*, *Burns* and *Wiley*. First, successor employers' duties to the predecessor's employees to arbitrate, bargain or remedy unfair labor practices do not mature until a majority in the predecessor's bargaining unit are hired.¹⁷ Thus, a successor may avoid such obligations by recruiting its own work force except to the extent that section 8(a)(3)¹⁸ prohibits discrimination based on anti-union animus.¹⁹ Successor employers, then, have maximum freedom in determining whether obligations to predecessor employees will be honored. Employees such as those replaced by *Howard Johnson* are virtually at the mercy of the marketplace.

This state of the law may prove harsh for employees nondiscriminatorily discharged by the successor. However, the Court seems correct in its finding that nothing in the NLRA, save its condemnation of anti-union discrimination, requires the continuation of predecessor employees' jobs.²⁰ Moreover, except where an assumption of the predecessor corporation's obligations in a merger is implied as a matter of state law, "the principles of law governing

¹² *Id.* at 264.

¹³ 406 U.S. 272 (1972).

¹⁴ See *id.* at 287-88.

¹⁵ 417 U.S. at 262.

¹⁶ See *id.* at 262-63.

¹⁷ *Burns*, 406 U.S. at 281.

¹⁸ 29 U.S.C. § 158(a)(3) (1970) outlaws discrimination by an employer "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

¹⁹

Of course, it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under § 8(a)(3) Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union.

Howard Johnson, 417 U.S. at 262 n.8. See also *Bausch & Lomb, Inc.*, 214 N.L.R.B. No. 53, 88 L.R.R.M. 1196 (1974); *Greengate Mall, Inc.*, 209 N.L.R.B. No. 2, 85 L.R.R.M. 1303 (1974).

²⁰ See *Burns*, 406 U.S. at 280 n.5.

ordinary contracts would not bind to a contract an unconsenting successor"²¹ The Supreme Court's unwillingness to depart from such contract principles in developing the common law of successorship is the resolution of several policy considerations. Recognition of the survival of employees' contractual rights to continued employment would certainly deter purchasing entrepreneurs who are anxious to reorganize an enterprise which in many instances may be failing.²² Moreover, if all substantive contract rights were held to survive the sale to the successor, the unforeseeability of the scope of assumed obligations might have an even greater deterrent effect on successors.²³ On the other hand, it is suggested that unions might mitigate the harshness of a lack of enforceable rights against successors by securing in the predecessor's collective bargaining agreement a liquidated damages clause or other provision protecting employees discharged as a result of sale of the business.

In the event the successor employer retains a majority of the predecessor's bargaining unit, the extent of his obligations is determined by a balancing of such factors as maximization of the free transfer of capital, deterrence of industrial unrest stemming from frustration of reasonable employee expectations, and vindication of the other policies of the NLRA.²⁴ A duty to bargain²⁵ or to arbitrate²⁶ might survive a sale of assets to, or merger with, a successor because of the relatively minor inconvenience to the successor, the retained employees' interest in job security, and the national interest in industrial peace. For similar reasons, the duty to remedy a predecessor's unfair labor practices may survive.²⁷ However, successors' interests in initiating their enterprises unimpeded by the predecessor's contractual labor obligations, and union's parallel interests in bargaining from scratch with successors, militate against the survival of substantive contract terms.²⁸

2. *United States Gypsum*

In *Howard Johnson Co. v. Detroit Local Joint Executive Board*,¹ the Court did not decide whether an employer who purchases the assets of his predecessor and retains most of the employees in an unchanged working environment will be required to arbitrate

²¹ *Wiley*, 376 U.S. at 550.

²² See *Burns*, 406 U.S. at 287-88.

²³ See *id.* at 288-90.

²⁴ See, e.g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184-85 (1973).

²⁵ See *Burns*, 406 U.S. 272.

²⁶ See *Wiley*, 376 U.S. 543.

²⁷ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184-85 (1973).

²⁸ *Burns*, 406 U.S. at 287-88.

¹ 417 U.S. 249 (1974).

grievances under the predecessor's collective bargaining agreement.² Resolution of this question entails a difficult reconciliation of the sometimes conflicting language and policy considerations found in *John Wiley & Sons, Inc. v. Livingston*³ and *NLRB v. Burns International Security Services, Inc.*⁴ For example, in *Wiley*, the Court stated:

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continued to be resolved by arbitration ⁵

On the other hand, the Court in *Burns* held that the successor employer's interest in freedom to reorganize the enterprise unhampered by the predecessor's labor relations commitments outweighed retained employees' interests in the carry-over of substantive provisions of the predecessor's collective bargaining agreement.⁶ Moreover, in the absence of labor law policies suggesting an assumption of the predecessor's contractual obligations as a matter of law, the NLRA's guarantee of governmental abstention from the imposition of contract terms⁷ prevented the Board from binding *Burns* to its predecessor's contract.⁸

However, the *Burns* decision leaves open the possibility that a *Wiley* duty to arbitrate grievances under the predecessor's contract may survive in a successorship situation even though the entire contract will not. In a significant Survey year decision, *Steelworkers v. United States Gypsum Co.*,⁹ the Court of Appeals for the Fifth

² Id. at 256.

³ 376 U.S. 549 (1964). See pp. 1020-21 *supra*.

⁴ 406 U.S. 272, 287-88 (1972). See pp. 1020-21 *supra*.

⁵ 376 U.S. at 549. The holding in *Wiley*, however, was much narrower:

We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.

Id. at 548.

⁶ 406 U.S. at 287-88.

⁷ "[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

⁸ 406 U.S. at 287.

⁹ 492 F.2d 713, 85 L.R.R.M. 2962 (5th Cir.), cert. denied, 419 U.S. 998 (1974).

Circuit held that the principles enunciated in *Wiley* retained sufficient vitality to require an unconsenting successor, who purchased the predecessor's physical plant and employed nearly all of the predecessor's employees, to arbitrate under the predecessor's collective bargaining agreement.¹⁰

In *United States Gypsum*, the Steelworkers Union was certified as bargaining representative of the production and maintenance employees of the predecessor corporation.¹¹ Subsequently, United States Gypsum purchased the predecessor's physical plant and renounced the predecessor's collective bargaining agreement with the Steelworkers.¹² However, the Company retained all but three of the predecessor's employees and operated the plant substantially as before.¹³ After a successful section 301 action to compel arbitration under the predecessor's contract,¹⁴ the arbitrator ordered the company to recognize the union as bargaining representative,¹⁵ to compensate the employees for a wage increase delayed by the employer's refusal to bargain,¹⁶ and to compensate the union for dues not checked off.¹⁷

In upholding the arbitrator's award, the Fifth Circuit distinguished *Burns* on several grounds. First, *United States Gypsum* was "an example of an almost uninterrupted continuation of the same labor environment as existed with the previous employer"¹⁸ Thus, employees' legitimate expectations of continuity in both working conditions and their employer's labor relations policies where the successor left the predecessor's business operations substantially unchanged,¹⁹ favored survival of a duty to arbitrate in a case such as *United States Gypsum* where little more than title to the corporate assets had been altered.²⁰ Furthermore, in the absence of arbitration, the frustration of employee expectations might undermine the union's prestige or encourage industrial unrest, consequences contrary to the purposes of the NLRA.²¹ In addition, arbitration provided a measure of stability for employees during a critical period in their employment, an interest which *Wiley* found worthy of protection.²²

¹⁰ 492 F.2d at 725-27, 85 L.R.R.M. at 2970-72.

¹¹ Id. at 716, 85 L.R.R.M. at 2963.

¹² Id., 85 L.R.R.M. at 2963-64.

¹³ Id., 85 L.R.R.M. at 2964.

¹⁴ Id. at 718, 85 L.R.R.M. at 2965.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 719, 85 L.R.R.M. at 2966.

¹⁸ Id. at 726, 85 L.R.R.M. at 2971.

¹⁹ Id., quoting *Burns*, 406 U.S. at 304 (Rehnquist, J., dissenting).

²⁰ See 492 F.2d at 726, 85 L.R.R.M. at 2971.

²¹ See id.

²² 376 U.S. at 549.

Secondly, the Fifth Circuit attached significance to the fact that in *United States Gypsum* an arbitrator would have the freedom to determine which contract provisions would survive.²³ In *Burns*, on the other hand, the Board purported to bind the successor to all the terms of the predecessor's contract.²⁴ This distinction is important since:

an arbitrator's acknowledged expertise in contract interpretation permit[s] him to evaluate the collective bargaining agreement sought to be carried over in light of the conditions existing after the change and against the backdrop of the predecessor's relationship with the union in order to determine the extent to which the predecessor's labor agreement should be deemed binding on the successor.²⁵

The Board, on the other hand, in enforcing an alleged obligation of *Burns* under sections 8(a)(1)²⁶ and 8(a)(5)²⁷ "followed an all or nothing approach, thus introducing an undesirably rigid analysis to the resolution of successorship problems."²⁸

Nevertheless, it should be noted that, because *United States Gypsum* preceded the Supreme Court's decision in *Howard Johnson*, the Fifth Circuit could not directly address itself to dicta in *Howard Johnson* which suggested that a duty to arbitrate under section 301 was subject to the same constraints as a Board order to adhere to a predecessor's substantive contract terms in a section 8(a)(5) or 8(a)(1) proceeding:

[In *Burns*] we emphasized that freedom of collective bargaining . . . was a "fundamental premise" of the federal labor laws . . . and that it was therefore improper to hold *Burns* to the substantive terms of a collective-bargaining agreement which it had neither expressly nor impliedly assumed.²⁹

In addition, the Court in *Howard Johnson* noted that the section 8(d)³⁰ prohibition against Board imposition of substantive contract terms in an unfair labor practice proceeding should similarly restrain the federal courts in a section 301 action to compel arbitration under the predecessor's collective bargaining agreement, both to

²³ 492 F.2d at 726-27, 85 L.R.R.M. at 2971-72.

²⁴ Id. at 727, 85 L.R.R.M. at 2972. See *Burns*, 406 U.S. at 276 & n.2.

²⁵ *United States Gypsum*, 492 F.2d at 727, 85 L.R.R.M. at 2972.

²⁶ 29 U.S.C. § 158(a)(1) (1970).

²⁷ Id. § 158(a)(5).

²⁸ 492 F.2d at 727, 85 L.R.R.M. at 2972.

²⁹ *Howard Johnson*, 417 U.S. at 254-55, quoting *Burns*, 406 U.S. at 287.

³⁰ 29 U.S.C. § 158(d) (1970) provides in pertinent part that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession."

discourage forum-shopping and to insure substantive consistency in federal labor law as developed by the Board and the courts.³¹ In light of the emphasis in *Howard Johnson*³² and *Burns*³³ on insuring free collective bargaining unfettered by the terms of a predecessor's labor contract, it may be argued that the federal policy against binding an employer and a union to contract terms prohibits the survival of the contractual duty to arbitrate in a successorship situation as in *United States Gypsum*. Such an approach, however, assumes that the contract terms are being imposed from without by judicial or administrative fiat, as in the case of a Board order to agree to a contract term. On the other hand, such an argument against the result in *United States Gypsum Co.* might be countered by recognizing that, as a matter of federal common law, the substantial continuity of the identity of the employing industry, the need to afford the retained work force a degree of protection, and the labor law policies favoring prevention of industrial unrest create an implied contractual assumption of the predecessor's duty to arbitrate.³⁴ Thus a successor's duty to arbitrate would arise from his own contractual undertaking and not from a court or Board order that all contract terms survive.³⁵

³¹ 417 U.S. at 255-56. Both *Burns*, 406 U.S. at 283-84, 287, and *Howard Johnson*, 417 U.S. at 254-55, relied heavily on *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), in extending the doctrine of governmental abstention from imposition of a predecessor's substantive contract terms in a successorship situation.

³² 417 U.S. at 254-55.

³³ 406 U.S. at 287.

³⁴ See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

[T]he general rule of corporate liability is that when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability. . . . The perimeters of the labor-law doctrine of successorship, however, have not been so narrowly confined. . . . Successorship has been found "where the new employer purchases a part or all of the assets of the predecessor employer . . . [and] where the entire business is purchased by the new employer" The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application.

Id. at 182 n.5, quoting *Burns*, 406 U.S. at 306 (Rehnquist, J., dissenting).

But see *Burns*, 406 U.S. at 291. A duty to observe the pre-existing contract does not "ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor . . ." *Id.* The Court, however, did not address itself to the question whether the duty to arbitrate might be implied where the employer had not merely outbid its predecessor, see *id.* at 274-75, but had purchased the enterprise and had continued operations substantially as before. See also *Wiley*, 376 U.S. at 551.

³⁵ See *Wiley*, 376 U.S. at 550-51.

Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be

Recognizing the survival of a duty to arbitrate in a situation where the transfer of corporate assets results in few or no changes in the work environment would impose less of a burden on successor employers than recognition of full contract survival.³⁶ The more limited burden of arbitration would logically reduce inhibitions on free transfer of capital and freedom in initiating the new enterprise, interests recognized as compelling in *Burns*.³⁷ Moreover, a union desiring to bargain from scratch with the successor could waive arbitration.³⁸ Furthermore, the survival of a duty to arbitrate would be consistent with the Court's repeated recognition of "the central role of arbitration in effectuating national labor policy."³⁹ Because of arbitration's arguably less inhibiting effect on the free transfer of capital and because of its unique role in alleviating employer/employee strife, the balance struck by the court in *United States Gypsum* in favor of survival of duty to arbitrate appears correct.

C. Duty to Bargain: Spruce Up

1. Expanded Bargaining Unit

In *NLRB v. Burns International Security Services, Inc.*,¹ the Court held that "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent" the Board may order the successor to bargain.² However, the Court did not address itself to the question of whether a duty to bargain may be imposed upon a successor where the bargaining unit is changed in the corporate transition, or where a majority of employees in the new unit

founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. . . . There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy.

Id.

³⁶ *United States Gypsum*, 492 F.2d at 727, 85 L.R.R.M. at 2972.

³⁷ 406 U.S. at 287-88. Cf. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973). In binding a successor to remedy the predecessor's unfair labor practice, "[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by § 7 . . . and protection for the victimized employee . . . are achieved at a relatively minimal cost to the bona fide successor." Id.

³⁸ See *Burns*, 406 U.S. at 288 (survival of all contract terms rejected as unnecessarily inhibiting a union desiring to bargain from scratch with a successor employer).

³⁹ *Wiley*, 376 U.S. at 549. "It would derogate from 'the federal policy of settling labor disputes by arbitration' . . . if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established . . ." Id., quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

¹ 406 U.S. 272 (1972).

² Id. at 281.

were not represented by the union certified to represent the old unit. In *Spruce Up Corp.*,³ the Board split three ways in attempting to decide what number of employees in an old unit must be carried over in a new, expanded unit before a successor has a duty to bargain. In *Spruce Up*, a union was certified as bargaining representative for barbers employed in 19 shops on a military base. Before the end of the certification year, a new concessionaire submitted a winning bid to operate the 19 unionized barbershops as well as 8 non-union shops on the base.⁴ When the shops began operation under new management a majority of barbers from the old unit had been hired; however, the unionized barbers did not represent a majority in the new unit of 27 shops.⁵

On these facts, four of the five Board members agreed that the successor employer had a duty to bargain with the union.⁶ However, the Board was divided in identifying the number of retained employees which will give rise to a successorship duty to bargain. Three members of the Board agreed that employees from the former unit must form a "majority" of employees in the new appropriate unit within the successor's operation before the new employer must bargain.⁷ However, these members disagreed among themselves in deciding how majority status would be shown. Member Kennedy, noting in dissent that the appropriate unit had been expanded in the corporate transition from 19 to 27 barbershops, argued that the union's continued majority status should be found only where employees from the certified unit represented a majority in the new unit.⁸ Members Jenkins and Miller, on the other hand, would first determine whether a majority of employees from the certified unit had been retained in the transition. Then, if, as in *Spruce Up*, the expansion of the unit were no greater than that which would constitute an accretion had the original employer retained ownership, they would find a duty to bargain since there was no "substantial alteration in the basic character of the [original] unit."⁹

³ 209 N.L.R.B. No. 19, 85 L.R.R.M. 1426 (1974).

⁴ 85 L.R.R.M. at 1427.

⁵ See id. at 1428.

⁶ Id. at 1428 (Members Jenkins and Miller). Id. at 1437-38 (Member Fanning concurring). Id. at 1441 & n.48 (Member Penello concurring).

⁷ See id. at 1429 (Members Jenkins and Miller); id. at 1432 (Member Kennedy dissenting).

⁸ Id. at 1434 (Member Kennedy dissenting).

⁹ Id. at 1429 (Members Jenkins and Miller).

This addition of a few more shops does not destroy the basic continuity of the employing industry, which is the keystone of our successorship doctrine. . . . [H]ad the predecessor acquired the contract to operate these eight additional shops, we would have treated the addition of these like facilities and similarly classified employees as an accretion to the certified unit. . . .

Such an accretion would have given the predecessor no right to question the

In contrast, Members Fanning and Penello argued that the duty to bargain "does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit."¹⁰ These Members defined "legally significant portion" no more precisely than as the "stable nucleus" of the employment force.¹¹

Three distinct views may be identified in *Spruce Up*. Members Fanning and Penello would tie a successor's bargaining obligation to retention of a nebulously defined, "legally significant" portion of the predecessor's employees.¹² Members Jenkins and Miller would find a duty to bargain only where a majority from the certified unit was retained, provided that the old unit is not substantially altered.¹³ Member Kennedy would require the "successor" to bargain only where a majority of the new unit was employed in the certified unit.¹⁴ The situation is further confused by the retirement of Chairman Miller, leaving the Fanning-Penello position the only one retaining the expressed support of more than one Board member.

It is suggested that Member Kennedy's view—that majority status must be measured in the context of the new unit—is the most defensible. In such cases, where the attitudes of new employees are unknown and the retained employees' support for the union can only be inferred from the results of a past election in which many of those employees may well have opposed the union, a presumption of continued majority status for the union is logically unsupportable. The imposition in *Burns* of a duty to bargain where the unit remained unchanged and a bare majority of employees from the certified unit were retained represented a difficult accommodation of the conflicting policies of the NLRA favoring both a continued presumption of a union's majority status¹⁵ and employees' rights to

continuing majority status of the Union. Neither, then, do we understand why the successor to the bargaining obligation should be permitted to do so, if it becomes clear on the record evidence that his hires [sic] from the predecessor's work force meet the test announced by the Supreme Court—i.e., that the majority status of the Union in the preexisting unit has been reestablished.

Id. at 1428-29.

¹⁰ Id. at 1437 (Member Fanning concurring). See id. at 1441 n.48 (Member Penello concurring).

¹¹ Id. at 1437 (Member Fanning concurring). Id. at 1441 n.48 (Member Penello concurring).

¹² Id.

¹³ See id. at 1429 (Members Jenkins and Miller).

¹⁴ Id. at 1432 (Member Kennedy dissenting).

¹⁵ See 29 U.S.C. § 159(c)(3) (1970), which provides in relevant part that "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." See also *Burns*, 406 U.S. at 279 n.3.

a free selection or rejection of a bargaining representative.¹⁶ Where the new unit consists mostly of new employees it would seem that the old unit has been sufficiently drastically altered to tip the balance in favor of recognition of employees' right to a new selection. Furthermore, where the union has no relationship to a majority of employees in the new unit its interest in an assured status as bargaining representative seems less compelling than the employees' right to a new election.

In *Spruce Up*, Members Jenkins and Miller justified a presumption of the union's continued majority status by analogizing to the presumption accorded a union in an accretion situation.¹⁷ In such a case, the addition of a few employees to an established bargaining unit does not disturb the union's presumed continued majority status. However, the Jenkins-Miller analogy is inaccurate insofar as it ignores the fact that the corporate transition in *Spruce Up* had resulted in a majority of newly hired, non-union employees, a situation quite different from a typical accretion where the nucleus of the unit remains unchanged as the unit size is slightly increased. In such a situation, where the majority from the old unit has chosen a union, the labor law policies favoring a continued presumption of majority status¹⁸ should not be overridden by the mathematical possibility that the addition of new employees might reverse the election result.

2. *Date when Duty Arises*

In *Spruce Up*, the Board also dealt with the separate problem of determining when a successor, who intends to retain all or most of his predecessor's employees, must bargain with their union representative. The Supreme Court, in dicta in *NLRB v. Burns International Security Services, Inc.* noted that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor"¹⁹ However, the Court also stated that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."²⁰ In *Spruce Up* a

¹⁶ See 29 U.S.C. § 159(a) (1970), which provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives . . . for the purposes of collective bargaining"

¹⁷ 85 L.R.R.M. at 1429.

¹⁸ See *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954).

¹⁹ 406 U.S. 272, 294 (1972).

²⁰ *Id.* at 294-95.

divided Board construed this exception very narrowly, holding that a successor must consult³ with the union before establishing initial terms of employment in the new enterprise only where he (1) "misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment" or (2) "failed to clearly announce [his] intent to establish a new set of conditions prior to inviting former employees to accept employment."⁴ Thus, an employer intending to retain all or a majority of his predecessor's employees may bargain individually with the employees about their conditions of employment under the new ownership provided that he has not unconditionally offered re-employment.⁵

In *Spruce Up*, the employer took over a barbershop concession at a military base.⁶ Before commencing operations, the new employer "expressed a general willingness to hire the barbers employed by the former employer,"⁷ all of whom were unionized,⁸ but added that he would be offering less favorable terms of employment. Thereafter, the employer refused to bargain with the union representative about those initial conditions of employment.⁹

The employer's general offer of re-employment did not precede his announcement of less favorable terms of employment. The Board found no unfair labor practice since his intent to hire the barbers was conditioned on their acceptance of the new employment terms:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one"¹⁰

According to the Board, an employer forfeits his *Burns* right to set unilaterally initial conditions of employment only where he uncon-

³ In *Bachrodt Chevrolet Co.*, 205 N.L.R.B. No. 122, 84 L.R.R.M. 1052, 1054 (1973), the Board held that the duty to consult entailed the full statutory duty to bargain.

⁴ 85 L.R.R.M. at 1428.

⁵ See *id.*

⁶ *Id.* at 1427.

⁷ *Id.* at 1428. The employer testified that he had told the employees' bargaining representative that "all the barbers who are working will work." *Id.* at 1427.

⁸ *Id.* at 1427.

⁹ *Id.*

¹⁰ *Id.* at 1428.

ditionally offers re-employment to the predecessor's employees before fixing those terms.¹¹

The Board justified its narrow reading of the "perfectly clear" exception set out in *Burns*¹² on the ground that a rule more protective of employees' bargaining rights would deter a successor "from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms"¹³ Moreover, employers might refuse to hire some of the old employees in order to avoid a bargaining obligation.¹⁴ According to the Board, a different interpretation of *Burns* would be "subject to abuse" and would "encourage employer action contrary to the purposes" of the NLRA.¹⁵

It is submitted that the majority's reading of *Burns* is erroneous. First, as noted by Member Fanning in his dissent, the *Spruce Up* rule

leads to the anomalous, if not absurd, result that a bargaining obligation . . . arises when the successor plans to retain the former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established.¹⁶

Thus, the *Burns* exception announced by the Supreme Court has been reduced by the Board to a virtual nullity since bargaining would be required only where there exists no union-employer dispute as to the terms of employment.¹⁷

The majority also ignored dicta in *Burns* which indicated that the successor employer in that case would have been required to bargain with retained employees' union representative about initial

¹¹ Id. In deciding *Spruce Up*, the majority decision inexplicably ignored its unanimous holding in *Howard Johnson Co.*, 198 N.L.R.B. No. 98, 80 L.R.R.M. 1769 (1972). (This Board decision is unrelated to the 1974-75 Survey year case, *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974). See text at pp. 1022-25 supra.) In *Howard Johnson Co.*, the Board found that a successor employer had a duty to bargain under the *Burns* exception where the successor's manager "held group meetings with the motel employees in which he . . . reassured the employees of their jobs, and advised them of the wages and employee benefits which they would receive from Respondent, comparing them to those they had been receiving pursuant to the predecessor's union contracts." 80 L.R.R.M. at 1770. The relevant facts of *Howard Johnson* thus appear indistinguishable from *Spruce Up*, where the Board found offers of employment coupled with differing terms of employment to be conditional offers of employment which do not create a bargaining obligation. See 85 L.R.R.M. at 1428.

¹² See text at notes 1-2 supra.

¹³ 85 L.R.R.M. at 1428.

¹⁴ Id. Discrimination in hiring based on union membership, however, violates § 8(a)(3), 29 U.S.C. §158(a)(3) (1970). See *Burns*, 406 U.S. at 280 n.5.

¹⁵ 85 L.R.R.M. at 1428.

¹⁶ Id. at 1439 (Member Fanning dissenting).

¹⁷ Id. See also id. at 1440 (Member Penello dissenting).

terms of employment as soon as he had hired the employees under those terms but before the commencement of business operations.¹⁸ It should be "the successor's intention to hire, not its determination of the terms under which it will hire, that determines whether or not he must honor a timely demand for bargaining prior to the commencement of operations."¹⁹

Moreover, the *Spruce Up* rule, which enables a new employer who intends to hire all or most of the predecessor's work force to bargain individually with the employees, needlessly subordinates the employees' section 7 rights to bargain collectively. The Supreme Court has explicitly recognized that in a successorship situation retained employees need protection from sudden changes in employment conditions.²⁰ Indeed, the purpose of the *Burns* exception is to protect such employees by affording them the right to deal collectively with the successor where "it is perfectly clear that the new employer plans to retain all of the employees in the unit"²¹ It appears illogical to conclude that the Court intended that the duty to bargain about changes in employment conditions could be avoided by changing employment conditions, the very subject of the bargaining duty.

Finally, the Board majority's fear that a rule affording employees' bargaining rights would encourage dismissals by a successor or needless uncertainty in employment continuity²² seems exaggerated. In many businesses "purchasers as a practical matter need the experienced employees of their predecessor to continue the business successfully."²³ It is further suggested that an employer seeking to avoid bargaining obligations altogether would exercise his *Burns* right²⁴ to refuse to hire a majority of the predecessor's employees. It is unlikely that an employer who waived this *Burns*

¹⁸ [T]here is no evidence that *Burns* ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request to bargain after *Burns* had completed its hiring and if *Burns* had negotiated in good faith and had made offers to the union which the union rejected, *Burns* could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice.

Burns, 406 U.S. at 295. See *Spruce Up*, 85 L.R.R.M. at 1438 (Member Fanning dissenting).

¹⁹ 85 L.R.R.M. at 1438 (Member Fanning dissenting).

²⁰ *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964). See also *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 263-64 (1974).

²¹ *Burns*, 406 U.S. at 294-95.

²² 85 L.R.R.M. at 1428.

²³ *Id.* at 1440 (Member Penello dissenting).

²⁴ See *Burns*, 406 U.S. at 280 n.5. See also *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 261 (1974). However, such an avoidance of bargaining obligations violates § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), if it is motivated by antiunion animus. See *Burns*, 406 U.S. at 280 n.5. See also *Bausch & Lomb*, 214 N.L.R.B. No. 53, 88 L.R.R.M. 1196 (1974); *Greengate Mall, Inc.*, 209 N.L.R.B. No. 2, 85 L.R.R.M. 1303 (1974).

right and was willing to enter a long-term bargaining relationship with retained employees would engage in dilatory or evasive tactics to avoid a short-term bargaining duty concerning initial terms of employment. Moreover, since the successor employer would only be required to deal collectively instead of individually with employees and would retain his freedom to institute unilaterally determined conditions of employment after an impasse is reached,²⁵ the imposition of a bargaining duty would be of minimal inconvenience to the employer.

The Board's *Spruce Up* rule unnecessarily divests employees of collective rights at a crucial period of their employment. It is to be hoped that the narrow Board majority in *Spruce Up* will reconsider the wisdom of its holding. In the absence of overruling by the Board, judicial review of the *Spruce Up* rule appears desirable.

V. ARBITRATION

A. *Post-arbitral Deferral—Board and Courts in Conflict:* Banyard; Electronic Reproduction

The NLRB has generally been successful in winning federal appellate court approval of its deferral to arbitration policies.¹ However, recent decisions of the District of Columbia Circuit have held that the Board's *Spielberg*² standards for post-arbitral deferral are inadequate.³

In an early Survey year decision, *Local 715, IBEW v. NLRB (Malrite of Wisconsin)*,⁴ the D.C. Circuit ruled that the Board had improperly applied the *Spielberg* doctrine by abstaining from hearing unfair labor practice complaints which arose after the arbitration hearing.⁵ The court noted that deferral on an issue not considered by the arbitrator cannot be justified by the underlying rationale of the *Spielberg* doctrine.⁶ Later in the Survey year, the

²⁵ 85 L.R.R.M. at 1440 (Member Penello dissenting).

¹ *Local 2188, IBEW v. NLRB* (Western Elec. Co.), 494 F.2d 1087, 1090-91, 85 L.R.R.M. 2576, 2578-79 (D.C. Cir. 1974); *Associated Press v. NLRB*, 492 F.2d 662, 667-68, 85 L.R.R.M. 2440, 2444-45 (D.C. Cir. 1974). See *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974).

² *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). In *Spielberg*, the Board established its policy of dismissing unfair labor practice complaints where the issues involved had been previously resolved by an arbitration award. *Id.* at 1082, 36 L.R.R.M. at 1153.

³ *Banyard v. NLRB*, 505 F.2d 342, 346-47, 87 L.R.R.M. 2001, 2003-05 (D.C. Cir. 1974). See *Local 715, IBEW v. NLRB (Malrite of Wisc.)*, 494 F.2d 1136, 1139-40, 85 L.R.R.M. 2823, 2825-26 (D.C. Cir. 1974). Cf. *Local 2188, IBEW v. NLRB (Western Elec. Co.)*, 494 F.2d 1087, 1091, 85 L.R.R.M. 2576, 2579 (D.C. Cir. 1974).

⁴ 494 F.2d 1136, 85 L.R.R.M. 2823 (D.C. Cir. 1974).

⁵ *Id.* at 1139-40, 85 L.R.R.M. at 2825-26.

⁶ *Id.*

same circuit in *Banyard v. NLRB*,⁷ while generally reaffirming its approval of the Board's deferral policies,⁸ held that its continued approval would be "conditioned upon the resolution by the arbitral tribunal of *congruent* statutory and contractual issues."⁹

The court in *Banyard* consolidated two separate Board orders for review purposes.¹⁰ The Board had dismissed unfair labor practice complaints by two employees who were discharged by their respective employers for refusing to drive vehicles which they alleged were unsafe.¹¹ In the first case, John Banyard, an employee of McLean Trucking Co., was discharged when he refused to drive a truck that was overloaded in violation of an Ohio road safety statute.¹² Although Banyard's union commenced grievance proceedings under the contract, Banyard filed an unfair labor practice complaint with the Board.¹³ He alleged that the company had used his refusal to drive the truck as a pretext for discharging him because of union activities.¹⁴ Before the Board had the opportunity to consider the section 8(a)(1) and (3) charges raised by Banyard's complaint, his claim was denied by the arbitrator at the final stage of the contractual grievance procedure.¹⁵

Applying its *Spielberg* doctrine, the NLRB dismissed Banyard's complaint.¹⁶ On review, the D.C. Circuit ruled that the Board's deferral was inappropriate because (1) the resolution of the question of whether an employee had been discharged for union activity was not within the "special competence" of an arbitrator;¹⁷ and (2) the record of the arbitration proceeding and the award failed to demonstrate whether the grievance committee had considered Banyard's claim in light of the company's violation of the Ohio safety statute.¹⁸

Banyard establishes two additional prerequisites that must be met before the Board can abstain from hearing unfair labor practice complaints under the *Spielberg* doctrine.¹⁹ First, the court stated

⁷ 505 F.2d 342, 87 L.R.R.M. 2001 (D.C. Cir. 1974).

⁸ Id. at 345-46, 87 L.R.R.M. at 2003.

⁹ Id. at 348, 87 L.R.R.M. at 2005.

¹⁰ Id. at 342, 87 L.R.R.M. at 2001.

¹¹ Id. at 343-45, 87 L.R.R.M. at 2001-03.

¹² Id. at 343-44, 87 L.R.R.M. at 2001-02.

¹³ Id. at 344, 87 L.R.R.M. at 2002.

¹⁴ Id.

¹⁵ Id. The Board announced its decision in *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971), during the period in which Banyard's claim was being considered by the grievance committee. Under *Collyer*, the Board would have abstained from hearing unfair labor practice charges pending the arbitrator's decision. Id. at 840, 77 L.R.R.M. at 1936.

¹⁶ *McLean Trucking Co.*, 202 N.L.R.B. 710, 712, 82 L.R.R.M. 1652, 1654 (1973).

¹⁷ 505 F.2d at 346, 87 L.R.R.M. at 2003-04.

¹⁸ Id. at 346-47, 87 L.R.R.M. at 2004.

¹⁹ Id. at 347, 87 L.R.R.M. at 2004-05. In *Matrite*, the court noted the three prerequisites to Board abstention under *Spielberg*: (1) fair and regular arbitral proceedings, (2) parties who

that *Spielberg* only applies if the grievance or arbitration panel "clearly decided the issue on which it is later urged that the Board should give deference."²⁰ Secondly, the issue decided must be within the "special competence" of the arbitration or grievance panel.²¹

The court in its discussion of *Banyard's* case did not explicitly define arbitral competence, but the definition appears to be implicit in its holding that continued approval of the Board's deferral to arbitration policies is "conditioned upon the resolution by the arbitral tribunal of congruent statutory and contractual issues."²² It is submitted that arbitral competence is a corollary of the court's deferral requirement of statutory and contractual congruence.

Congruence denotes a significant interrelationship between contractual and statutory issues. The issues are congruent when the bases of the statutory claim and the contractual dispute are so intertwined that the resolution of the contractual issue by the arbitrator disposes of the statutory unfair labor practice question.²³

In *Banyard*, it is submitted, the court appears to be referring to arbitral competence in a jurisdictional sense. The resolution of statutory questions concerning concerted or union activity is, according to congressional mandate, within the exclusive jurisdiction of the NLRB.²⁴ An employee alleging that he was discharged because of concerted or union activity should be accorded the statutory right to have the Board and not an arbitrator decide the question²⁵ unless the parties demonstrate that the statutory and contractual issues presented to the arbitrator are congruent. Where those issues are not congruent, it follows that the arbitrator is not competent, in a jurisdictional sense, to hear the complaint. The Board must, therefore, be precluded from deferring to an arbitration award when the arbitrator lacked jurisdiction to decide the statutory issue in the first place.

The *Banyard* decision does not, however, appear to require that the Board give de novo consideration to every unfair labor practice issue that an arbitrator might decide.²⁶ Rather, the Board can defer to an arbitration award in those instances where the

have agreed to be bound by the arbitral award, and (3) a decision which is not clearly repugnant to the purposes and policies of the NLRA. 494 F.2d at 1138, 85 L.R.R.M. at 2824.

²⁰ 505 F.2d at 347, 87 L.R.R.M. at 2004-05.

²¹ Id. at 347, 87 L.R.R.M. at 2005.

²² Id. at 348, 87 L.R.R.M. at 2005.

²³ Id.; *Malrite*, 494 F.2d at 1138, 85 L.R.R.M. at 2824.

²⁴ *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957). See generally 29 U.S.C. § 160 (1970).

²⁵ See *International Great Lakes Shipping Co.*, 215 N.L.R.B. No. 121, 88 L.R.R.M. 1070, 1071 (1974) (Members Fanning and Jenkins concurring).

²⁶ See 505 F.2d at 345, 87 L.R.R.M. at 2003.

resolution of the contractual issue is congruent with the resolution of the statutory issue.²⁷

The court's discussion of the second discharge case appears to shed some light on its definition of arbitral competence. In that case, the employee, Clay D. Ferguson, did not allege that he was fired under a pretext, but contended that in refusing to drive a tractor which he considered unsafe, he was engaged in a concerted activity under section 7 of the NLRA.²⁸ He claimed that his protest against an alleged abnormally dangerous working condition was protected under section 502 of the Act.²⁹ At the time of his discharge, Article 16 of the collective bargaining agreement between his union and the employer, Roadway Express, Inc., provided that an employee "would not be required to operate vehicles not in safe operating condition."³⁰ To the degree that both the contractual and statutory issues turned on the question of safety, Ferguson's complaint appears to have presented a situation within the D.C. Circuit's definition of congruence.

The Board dismissed Ferguson's unfair labor practice complaint,³¹ deferring instead to an arbitration award which stated in its entirety: "Claim of Union Denied."³² The Board considered its abstention proper because "the statutory question—whether in all circumstances Ferguson was justified in refusing to operate the tractor because of unsafe operating conditions—" was identical to the contractual issue under Article 16, which prohibited discharge unless the refusal to drive was "unjustified."³³

On review, the D.C. Circuit indicated that the statutory and contractual issues relating to the Ferguson case met its standard of congruence. Nevertheless, it concluded that the Board may have erroneously characterized the issues as "identical."³⁴ While the issues may be congruent, the standards for deciding those issues under the statute and under the contract may be different. The Board's deferral was inappropriate because the arbitration award did not demonstrate the standard that the arbitrator utilized in deciding the congruent safety issues. The court implied that since the statutory and contractual issues were congruent the arbitrator

²⁷ Id. at 345-46, 87 L.R.R.M. at 2003.

²⁸ 29 U.S.C. § 157 (1970). See 505 F.2d at 347-48, 87 L.R.R.M. at 2005-06.

²⁹ Section 502, 29 U.S.C. § 143 (1970) provides in part that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment . . . [shall not] be deemed a strike under this chapter." See 505 F.2d at 347, 87 L.R.R.M. at 2005.

³⁰ 505 F.2d at 344, 87 L.R.R.M. at 2002. For the text of Article 16 see id. n.7.

³¹ 505 F.2d at 345, 87 L.R.R.M. at 2003.

³² See id. at 349, 87 L.R.R.M. at 2006.

³³ Id. at 348, 87 L.R.R.M. at 2005.

³⁴ See id.

had the competence to decide both issues.³⁵ However, the arbitrator must have demonstrated in a written opinion, not only that he recognized the statutory standard, but that he applied it correctly.³⁶

In the instant case, the court stated that since Ferguson had based his statutory claim on section 502, the standards set out in *Gateway Coal Co. v. UMW*³⁷ governed.³⁸ Since the exceedingly brief arbitration award did not demonstrate whether the grievance committee had applied the *Gateway* standard to Ferguson's unfair labor practice complaint, the court remanded the issue to the Board.³⁹ In dicta the court stated:

If in the present case the Joint Committee applied to the issue before it a standard correct under the contract but not under the judicial interpretation of section 502, then it cannot be said that the statutory issue was decided by the Joint Committee. In that event the Board's abstention goes beyond deferral and approaches abdication [of its statutorily mandated duties].⁴⁰

Subsequent to both the *Malrite*⁴¹ and *Banyard*⁴² decisions, the NLRB, in an attempt to discourage issue-splitting and forum-shopping between the Board and arbitrators, issued its decision in *Electronic Reproduction Service Corp.*⁴³ The decision expands the scope of the Board's *Spielberg* doctrine in discharge and discipline cases. In contrast to the restrictive prerequisites placed on *Spielberg* deferral by the D.C. Circuit in *Banyard*,⁴⁴ the NLRB in *Electronic Reproduction* extended its deferral doctrine to give full effect to an arbitration award even though the award did not explicitly indicate that the related unfair labor practice issue was presented to or even considered by the arbitrator.⁴⁵ In *Electronic Reproduction*, a divided Board found that a union's refusal to raise unfair labor practice issues in an arbitration proceeding acted as a form of estoppel against the union in any subsequent Board hearing on the unfair

³⁵ Id.

³⁶ Id. at 349, 87 L.R.R.M. at 2006.

³⁷ 414 U.S. 368 (1974). *Gateway Coal* requires "that a union seeking to justify a contractually prohibited work stoppage under § 502 must present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." Id. at 386-87.

³⁸ See 505 F.2d at 348, 87 L.R.R.M. at 2005.

³⁹ Id. at 349, 87 L.R.R.M. at 2006.

⁴⁰ Id. at 348, 87 L.R.R.M. at 2005.

⁴¹ Local 715, IBEW v. NLRB (*Malrite of Wisconsin*), 494 F.2d 1136, 85 L.R.R.M. 2823 (D.C. Cir. 1974).

⁴² 505 F.2d 342, 87 L.R.R.M. 2001 (D.C. Cir. 1974).

⁴³ 213 N.L.R.B. No. 110, 87 L.R.R.M. 1211 (1974).

⁴⁴ See note 19 and text at notes 19-21 *supra*.

⁴⁵ See 87 L.R.R.M. at 1213-14, 1218.

labor practice issues which could have or should have been presented to the arbitrator in the initial contractual grievance proceeding.⁴⁶

In *Electronic Reproduction* the Board explicitly overruled its previous decisions in *Yourga Trucking, Inc.*⁴⁷ and *Airco Industrial Gases*.⁴⁸ Prior to *Electronic Reproduction*, the Board interpreted *Spielberg* to allow deferral to an arbitration award that resolved a statutory issue only when the award demonstrated that the statutory issue had been considered and decided correctly in light of Board or court precedent.⁴⁹ In reversing its *Yourga-Airco* policy, the Board noted that

in discharge and discipline cases the basic contractual issue is whether or not the grievant has been disciplined or discharged for just cause. It is of course obvious that "just cause" does not include illegal or discriminatory reasons. Indeed, a showing that the true reason for the discipline or discharge was a discriminatory one negates any employer claim that the discharge or discipline was "for just cause."⁵⁰

The Board acknowledged that arbitrators have a clearly recognized duty to take into consideration illegal and discriminatory reasons in determining a discipline or discharge case "for just cause."⁵¹ As an example, the Board quoted from Arbitrator Saul Wallen:

Thus this Board policy, known as the *Spielberg* doctrine, places on arbitrators an especial responsibility, in a case where an allegation of discrimination appears to be other than wholly capricious, to make certain that Management's actions are completely free of discriminatory taint and, it seems to us, to resolve doubts on this score in favor of upholding the purposes of the Act.⁵²

Thus, in *Electronic Reproduction*, the Board refused to overturn the arbitrator's decision⁵³ even though the award was silent as

⁴⁶ See *id.* at 1219 (dissenting opinion).

⁴⁷ 197 N.L.R.B. 928, 80 L.R.R.M. 1498 (1972) (party seeking deferral has burden of demonstrating that the statutory issues of either antiunion discrimination or pretext had been presented in the initial arbitration proceeding).

⁴⁸ 195 N.L.R.B. 676, 79 L.R.R.M. 1467 (1972) (Board will not defer where award gave no indication whether arbitrator had considered the related unfair labor practice).

⁴⁹ E.g., *Yourga Trucking*, 197 N.L.R.B. at 928, 80 L.R.R.M. at 1499; *Airco*, 195 N.L.R.B. at 676, 79 L.R.R.M. at 1468.

⁵⁰ 87 L.R.R.M. at 1215.

⁵¹ *Id.*

⁵² *Id.*, quoting from 48 LA 19 (1967).

⁵³ 87 L.R.R.M. at 1218.

to whether the parties had apprised the arbitrator of, or the arbitrator had considered the question of, pretext or anti-union discrimination in the discharge and discipline cases.⁵⁴ The Board will now conclude that arbitrators have considered the unfair labor practice issues even if the award is silent as to whether the arbitrator has either been apprised of or considered a related unfair labor practice issue unless it is evident that the arbitrator did not in fact consider the unfair labor practice issue.⁵⁵ *Electronic Reproduction* puts the burden on the party asserting that the Board should not defer to an arbitration award to demonstrate that there are "unusual circumstances," not including the desire to have the statutory issue considered by the Board, which prevented the arbitrator from considering and resolving the statutory issue in question.⁵⁶

The *Electronic Reproduction* decision, though silent on the D.C. Circuit's standards of "competence" and "congruence,"⁵⁷ appears to tacitly reject the first new prerequisite to *Spielberg* set out by the D.C. Circuit in the *Banyard* decision, i.e., *Spielberg* only applies if the grievance or arbitration panel "clearly decided the issue on which it is later urged that the Board should give deference."⁵⁸

In *Electronic Reproduction* the majority appears to have concluded that arbitrators will be both willing and able to consider and decide the statutory issues.⁵⁹ However, since arbitrators have not always agreed on the scope of their duties and obligations to consider related statutory issues in the course of interpreting a collective bargaining contract, the Board's decision may precipitate summary actions and decisions by arbitrators who are unwilling to undertake the added responsibility of resolving statutory questions.⁶⁰ For example, this situation arose in *Monsanto Chemical Co.*,⁶¹ where the arbitrator specifically refused to pass on the statutory discrimination issue presented in a discharge case.⁶²

However, the Board in *Electronic Reproduction* apparently does not believe that *Monsanto* reflects the normal and usual practice of arbitrators.⁶³ It is clear that the "unusual circumstances" exception set out in *Electronic Reproduction* would not only include situations like *Monsanto*, but cases where the parties have con-

⁵⁴ Id. at 1213.

⁵⁵ See id.

⁵⁶ Id. at 1216.

⁵⁷ See text at notes 22-23 supra.

⁵⁸ See note 19 supra and accompanying text.

⁵⁹ See 87 L.R.R.M. at 1216.

⁶⁰ Id.

⁶¹ 130 N.L.R.B. 1097, 47 L.R.R.M. 1451 (1961).

⁶² Id. at 1098-99, 47 L.R.R.M. at 1452.

⁶³ See 87 L.R.R.M. at 1216.

tracted to exclude specific statutory issues from the arbitrator's consideration.⁶⁴ The Board noted in support of its decision that it considered that

the usual and normal practice of parties to collective agreements is to submit to the arbitrator the central issues of the justness or unjustness of the discipline or discharge and that it is the normal practice of parties to submit, and arbitrators to consider as relevant . . . evidence of unfairness or unjustness arising out of antiunion discrimination of the type which we [the Board] consider in cases arising under section 8(a)(3) of our Act.⁶⁵

The Board has defined the arbitrator's duty in considering the statutory issues of discrimination or pretext as coextensive with his contractual duties of determining "just cause" in a discharge or discipline case.⁶⁶ If the Board has correctly defined the relationship between the contractual issue of "just cause" and the unfair labor practice issues of pretext or discrimination, it is submitted that the factual situation presented in *Electronic Reproduction* put the resolution of the statutory and contractual issues within the *Banyard* congruence standard.⁶⁷ Therefore, although the Board did not address the question of congruence in *Electronic Reproduction*, the case falls within the D.C. Circuit's definition. The arbitrator in *Electronic Reproduction* by definition possessed the "competence" under the *Banyard* standard to resolve both the statutory and contractual issues raised in the case, since resolution of a discharge for just cause necessarily encompasses a determination of discharge for antiunion animus.

Preventing an arbitrator from considering statutory issues of discrimination or pretext would emasculate the policy and purpose behind the arbitration doctrines set out in both *Collyer* and *Spielberg*.⁶⁸ The Supreme Court has recently endorsed these doctrines in *William E. Arnold Co. v. Carpenters District Council*.⁶⁹ In *Arnold* the Court quoted approvingly from the *Collyer* decision:

We believe it to be consistent with the fundamental objec-

⁶⁴ Id.

⁶⁵ 87 L.R.R.M. at 1216.

⁶⁶ Id. at 1215.

⁶⁷ Cf. 195 N.L.R.B. 676, 678, 79 L.R.R.M. 1467, 1469-70 (Member Kennedy dissenting).

⁶⁸ See *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-18 (1974). See also the Steelworkers Trilogy: *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960).

⁶⁹ 417 U.S. 12, 16-18 (1974). For a discussion of *Arnold*, see pp. 975-77 *supra*.

tives of Federal Law to require parties . . . to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures.⁷⁰

The underlying conflict between the *Banyard* decision and the Board's *Electronic Reproduction* doctrine lies in the question of the review of the arbitrator's reasoning and decisions when a statutory issue is presented along with a contractual issue. In *Banyard* the court's primary concern appears to be protection and vindication of statutory rights, and the means by which a reviewing court can determine whether the arbitrator has applied the correct statutory standard in light of prior Board or court precedent.⁷¹ For the Board, the resolution of the statutory issue is secondary to the policy of having the parties resolve their own problems in the manner that they provided by their own contractual agreement. The Board appears to have evaluated the resolution of the statutory issues within the context of an integrated whole. The Board's evaluation takes into consideration the variety of statutory and contractual factors which will eventually form the basis of the arbitrator's decision, not the least of which is the parties' trust in the work of the arbitrator whom they have contractually agreed to have resolve their disputes.⁷²

Therefore, the Board's decision is consistent with the recent trend of cases which encourage parties to provide adequate and acceptable procedures for resolving their own disputes.⁷³ In view of the broad federal policies favoring arbitration,⁷⁴ it appears that the Board's decision is a prudent one where the resolution of the statutory and contractual issues are congruent or where, as in *Electronic Reproduction*, they are coextensive. Deferral to an arbitrator's decision which does not demonstrate that the arbitrator either considered or correctly resolved the statutory issue, when the issues are not congruent may indeed be detrimental to statutorily protected rights under the NLRA.

However, it is submitted that where the issues are congruent, *Electronic Reproduction* requires the parties to acknowledge and define the role that they want arbitration to play in their relationship. Otherwise, the Board will assume that the arbitrator has correctly taken into consideration the statutory issue in his determi-

⁷⁰ Id. at 17.

⁷¹ See 505 F.2d 342, 348, 87 L.R.R.M. 2001, 2005 (1974).

⁷² Cf. *Steelworkers Trilogy*, note 67 *supra*.

⁷³ See 417 U.S. at 12 and cases cited at note 3 *supra*.

⁷⁴ See note 67 *supra*.

nation of the contractual issue. The doctrine set out in *Electronic Reproduction* does not force parties to submit or arbitrators to consider statutory issues which they wish to reserve to the Board. It does require that if the parties wish to reserve these issues to the Board they cannot do so unilaterally; *Electronic Reproduction* requires that they contractually limit the scope of arbitration in their disputes.⁷⁵ Thus, parties can agree to exclude issues from arbitration and arbitrators can refuse to consider them.⁷⁶ The Board's "unusual circumstances" exception appears to acknowledge a freedom of contract philosophy.⁷⁷ Secondly, it discourages the parties from attempting to get "two bites of the apple" in a subsequent Board hearing by withholding an issue from the arbitrator.⁷⁸ This will insure stability and finality for arbitrators' decisions.

In contrast, in light of the D.C. Circuit's *Banyard* decision the Board should not attempt to extend *Electronic Reproduction* to include situations without statutory and contractual congruence. The lack of congruence could imply that the parties had failed to reach a contractual resolution as to the arbitrability of the statutory issue in question. It is inherent in the Board's reasoning in *Electronic Reproduction* that the issue before the arbitrator be within the contractually agreed upon scope of arbitration as defined in their collective bargaining agreement.⁷⁹

B. Judicial Expansion of Boys Markets: Inland Steel

During the Survey year, the United States Supreme Court refused to review a series of circuit court decisions which broadened the power of federal courts to enjoin labor activity under the *Boys Markets* rule.¹ The Supreme Court in *Boys Markets, Inc. v. Retail Clerks Local 770*² created a narrow exception to section 4 of the Norris-LaGuardia Act.³ The Court held that under limited circumstances⁴ a federal court has jurisdiction under section 301⁵ to enjoin violations of a union's contractual duty not to strike.⁶

⁷⁵ Id. at 1216.

⁷⁶ Id.

⁷⁷ Cf. 87 L.R.R.M. at 1216.

⁷⁸ See 87 L.R.R.M. at 1215.

⁷⁹ Id. at 1213.

¹ NAPA Pittsburgh, Inc. v. Chauffeurs Local 926, 502 F.2d 321, 87 L.R.R.M. 2044 (3d Cir. 1974), cert. denied, 419 U.S. 1049 (1975); Pilot Freight Carriers, Inc. v. Teamsters Union, 497 F.2d 311, 86 L.R.R.M. 2337 (4th Cir.), cert. denied, 419 U.S. 369 (1974).

² 398 U.S. 235 (1970).

³ 29 U.S.C. §§ 101-15 (1970).

⁴ Before a federal court can enjoin a strike or a lock-out under *Boys Markets*, it must

Currently there is sharp disagreement among the circuits concerning both the proper interpretation of *Boys Markets* and the scope of its application to sympathy strike activity.⁷ The juxtaposition of two strong federal policies—one encouraging arbitration and the other limiting the injunctive powers of federal courts in labor disputes—has generated this disagreement. During the Survey year the Third,⁸ Fourth⁹ and Seventh Circuits,¹⁰ in disagreement with an earlier decision of the Fifth Circuit,¹¹ affirmed the issuance of *Boys Markets* injunctions where the unions were engaging in sympathy strike activity. In *Inland Steel Co. v. Local 1545, UMW*,¹² the court affirmed the issuance of a *Boys Markets* injunction against union members participating in a sympathy strike, even though the contract lacked an express no-strike clause.¹³ The collective bargaining agreement included a mandatory grievance procedure and a broadly worded miscellaneous clause which provided that matters not specifically mentioned in the agreement were to be governed by the grievance procedure.¹⁴ The agreement also incorporated the

ascertain: (1) whether the strike is a breach of a no-strike obligation under an effective agreement; (2) whether the strike is over an arbitrable grievance; (3) whether both parties are contractually bound to arbitrate the underlying grievance which caused the strike; and (4) whether the injunction is proper under traditional, equitable considerations. See 398 U.S. at 253-55; *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 1373, 81 L.R.R.M. 2644, 2645 (5th Cir. 1972). See also *North America Coal Co. v. UMW*, 497 F.2d 459, 464, 86 L.R.R.M. 2339, 2342 (6th Cir. 1974), finding that *Boys Markets* requires "that where a collective bargaining agreement contained a mandatory arbitration clause, injunctive relief may be appropriate regardless of the provisions of the Norris-LaGuardia Act," *id.*, but where the district court had failed to consider ordinary principles of equity, issuance of an injunction was not valid. *Id.*

⁵ 29 U.S.C. § 185 (1970), which confers jurisdiction on district courts in "[s]uits for violation of contracts between an employer and a labor organization representing employees"

⁶ 398 U.S. at 253-54.

⁷ A sympathy strike, the right of a union employee to honor a stranger union picket line, is a protected activity. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 75-76 (1953). A comprehensive list of the conflicting circuit court cases on sympathy strikes can be found in Judge Fairchild's dissenting opinion in *Inland Steel Co. v. UMW*, 505 F.2d 293, 301, n.2, 87 L.R.R.M. 2733, 2739, n.2 (7th Cir. 1974) (dissenting opinion). See also cases cited at note 1 *supra*.

⁸ *Island Creek Coal Co. v. UMW*, 507 F.2d 650, 653-54, 88 L.R.R.M. 2364, 2366-67 (3d Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3675 (U.S. June 13, 1975); *NAPA Pittsburgh, Inc. v. Chauffeurs Local 926*, 502 F.2d 321, 324, 87 L.R.R.M. 2044, 2046 (3d Cir. 1974), cert. denied, 419 U.S. 1049 (1975).

⁹ *Wilmington Shipping Co. v. Longshoremen Local 1426*, 86 L.R.R.M. 2846, 2847 (4th Cir.), cert. denied, 419 U.S. 1022 (1974); *Pilot Freight Carriers v. Teamsters Union*, 497 F.2d 311, 312, 86 L.R.R.M. 2337 (4th Cir.), cert. denied, 419 U.S. 369 (1974).

¹⁰ *Inland Steel Co. v. UMW*, 505 F.2d 293, 299-300, 87 L.R.R.M. 2733, 2738 (7th Cir. 1974).

¹¹ *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 81 L.R.R.M. 2644, 2645 (5th Cir. 1972).

¹² 505 F.2d 293, 87 L.R.R.M. 2733 (7th Cir. 1974).

¹³ *Id.* at 298-300, 87 L.R.R.M. at 2736-38.

¹⁴ *Id.* at 297, 87 L.R.R.M. at 2736.

terms of the 1971 National Bituminous Coal Wage Agreement, which provided that parties were obligated to arbitrate "any local trouble of any kind aris[ing] at the mine."¹⁵

The court characterized the issue as

whether the defendant unions' conduct in honoring a stranger union's picket line constituted an arbitrable issue under the collective bargaining agreement in force between the parties, and, if so, whether the duty to arbitrate gave rise to an *implied no-strike clause* justifying the issuance of a *Boys Markets* injunction.¹⁶

The court concluded that the broad language of the miscellaneous clause and the terms of the National Bituminous Coal Wage Agreement encompassed a work stoppage honoring a stranger union's picket line.¹⁷ The court reasoned that a sympathy strike is "local trouble,"¹⁸ and that as a result of the broadly worded miscellaneous clause, the parties had agreed to arbitrate not only disputes concerning the meaning and application of the provisions of the agreement, but also disputes "about matters not specifically mentioned in [their] agreement."¹⁹

Although the arbitrability of the dispute in *Inland* was not free from doubt, the court noted that the strong policy in favor of arbitration, announced in the Steelworkers Trilogy²⁰ and reaffirmed in *Gateway Coal Co. v. UMW*²¹ mandated that doubts be resolved in favor of arbitration.²² The court therefore concluded that even where there is doubt as to the arbitrability of a particular dispute, the district court has jurisdiction to issue an injunction if the other conditions of the *Boys Markets* rule are met.²³ Basically, the court was confronted by two antagonistic federal policies—one protecting the rights of employees to engage in concerted activity free from hostile court interference and the other encouraging employees to

¹⁵ Id. See *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374-76 (1974), for a discussion of the terms of the 1971 National Bituminous Coal Wage Agreement. The *Gateway Coal* decision is discussed in the 1973-74 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1105, 1182-86 (1974).

¹⁶ 505 F.2d at 295, 87 L.R.R.M. at 2734 (emphasis added).

¹⁷ Id. at 298-300, 87 L.R.R.M. at 2737-38.

¹⁸ Id. at 298, 87 L.R.R.M. at 2736.

¹⁹ Id.

²⁰ Id. The Steelworkers Trilogy consists of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

²¹ 414 U.S. 368 (1974).

²² 505 F.2d at 298-99, 87 L.R.R.M. at 2737.

²³ See 505 F.2d at 298-300, 87 L.R.R.M. at 2737-38. See note 4 *supra* for conditions necessary for issuance of a *Boys Markets* injunction.

restrict their use of strikes and other economic sanctions in favor of arbitration. The court favored the policy encouraging arbitration and stated that to "the extent that a dispute is arbitrable, there exists [a concomitant] obligation not to strike over the dispute."²⁴

The threshold question under the court's analysis is whether the dispute is arbitrable. If so, an injunction will issue.²⁵ In the *Inland* contract, there was no express clause limiting the union's right to engage in sympathy strike activity, but the court found that a limitation existed in the broad language of the miscellaneous clause.²⁶ The court rationalized that the union had waived, sub silentio, its statutorily protected right to honor a stranger union's picket line by agreeing to the inclusion of the miscellaneous clause in the contract.²⁷ As a result, where the contract does not expressly contain a provision defining the extent of permissible sympathy strike activity, a broad arbitration clause may be interpreted by a court as a waiver of the union's statutorily protected right to engage in sympathy strike activity. If the court interprets the contract as making the legitimacy of a sympathy strike an arbitrable issue, under the *Inland* rationale, an implied duty not to engage in a sympathy strike is thereby created.

Under the guise of furthering the policies favoring arbitration, the court in *Inland* has found a means to circumvent the labor injunction proscriptions of the Norris-LaGuardia Act. It has opened the door to the type of judicial abuse of the injunctive process that the Norris-LaGuardia Act was designed to prevent. Under *Inland*, a court, without reaching the merits, can enjoin concerted union activity because it "arguably" presents an arbitrable issue under the contract.²⁸ The injunction will postpone the union's sympathy strike until the arbitrator has decided whether in fact the issue is an arbitrable one.²⁹

Moreover, under the *Inland* rationale, once a court has determined that a union's right to engage in sympathy strike activity may be arbitrable, an implied duty arises on the part of the union not to engage in a sympathy strike.³⁰

The court in *Inland* did not consider the lack of an express no-strike clause "of any consequence,"³¹ noting that the Supreme

²⁴ 505 F.2d at 299, 87 L.R.R.M. at 2738.

²⁵ Id. at 299-300, 87 L.R.R.M. at 2738.

²⁶ Id. at 297-99, 87 L.R.R.M. at 2736-38.

²⁷ See id. at 298, 87 L.R.R.M. at 27, 36-37.

²⁸ See id. at 299-300, 87 L.R.R.M. at 2738.

²⁹ See id. at 300-01, 87 L.R.R.M. at 2738-39 (dissenting opinion).

³⁰ See id. at 300, 87 L.R.R.M. at 2738.

³¹ Id.

Court in *Teamsters Local 741 v. Lucas Flour*³² had held that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes.³³ However, in *Lucas Flour* the arbitrability of the dispute was explicitly covered by the contract;³⁴ in *Inland*, the court construed the general language of the miscellaneous clause to include the duty to arbitrate the question of sympathy strikes.³⁵

In light of the *Inland* decision, it is suggested that unions will find themselves unable to engage in sympathy strike activity unless they have unequivocally reserved the right in the contract. Where an arbitration provision does not specifically cover sympathy strike activity, but does contain a broadly worded arbitration clause, a court may now enjoin the sympathy strike without consideration of the merits, pending resolution by the arbitrator as to whether the contracts' arbitration provision does in fact incorporate sympathy strike activity. Furthermore, union attempts specifically to reserve the right to engage in sympathy strike activity may be ineffective in light of the Third Circuit's decision in *NAPA Pittsburgh v. Chauffeurs Local 926*.³⁶ In *NAPA*, the court upheld the validity of a *Boys Markets* injunction pending an initial determination by an arbitrator as to whether the stranger union's picketing constituted primary activity.³⁷ Failure to unequivocally reserve the right to engage in all types of sympathy activity could conceivably result in a *NAPA*-type situation, where the court would enjoin a sympathy strike until an arbitrator has determined that a union's sympathy activity is specifically exempted from the no-strike provision of the contract.

Under the guise of furthering the policies favoring arbitration, the circuit courts have begun to chip away boldly at the labor-injunction proscriptions of the Norris-LaGuardia Act. It is suggested that no matter how beneficial the policy of encouraging parties to settle their own disputes through arbitration might be, that policy should not be used as a lever to force unions to give up their statutory rights to honor another union's picket line, or to permit federal courts to issue labor injunctions in contravention of the Norris-LaGuardia Act.

³² 369 U.S. 95 (1962).

³³ *Id.* at 104-05.

³⁴ *Id.* at 105.

³⁵ 505 F.2d at 297-300, 87 L.R.R.M. at 2736-38.

³⁶ 505 F.2d 321, 87 L.R.R.M. 2044 (3d Cir. 1974), cert. denied, 419 U.S. 1049 (1975). For discussion of the *NAPA* decision and a more detailed treatment of the application of *Boys Markets* to sympathy strike activity, see Axelrod, *The Application of the Boys Markets Decision in the Federal Courts*, 16 B.C. Ind. & Com. L. Rev. 893, 920-26 (1975).

³⁷ 505 F.2d at 323-24; 87 L.R.R.M. at 2045-46.

VI. SENIORITY—THE LAST HIRED, FIRST FIRED
SENIORITY SYSTEM:
Watkins; Waters; Jersey Central

The economic recession has given rise to the most significant issue of the Survey year: whether layoffs pursuant to a last hired, first fired system are violative of Title VII. If a company with a past history of discrimination has only recently begun to hire minority employees, the last hired, first fired system inevitably leads to the discharge of all or nearly all of the recently hired minority employees. However, to conduct layoffs pursuant to any other system is to ignore the hard earned seniority rights accumulated by non-minority employees. Thus, few issues present such potentially far reaching implications, as the courts must reconcile vital, competing interests of minority and non-minority employees.

The legal issue presented is twofold: is the last hired, first fired seniority system violative of Title VII, and if so, what relief should be ordered to correct the violation?¹ Proponents of the system contend that even if the system does have a discriminatory impact, it is nevertheless expressly authorized by the language and legislative history of section 703(h)² as a bona fide seniority system, and is thus not violative of Title VII.³ Opponents, on the other hand, contend that the system is violative of Title VII because it has a disproportionate impact on minority employees and it perpetuates the effects of past discrimination.⁴ The opponents further contend that under these circumstances the last hired, first fired system is not authorized by section 703(h) and that they are thus entitled to broad equitable relief, including fictional seniority or separate seniority lists.⁵ The Supreme Court has not yet resolved these competing arguments and at present the lower courts are divided.⁶

The issue was first presented in *Watkins v Steelworkers of America, Local No. 2369*,⁷ where the district court held that layoffs

¹ See analysis in *Watkins v. United Steel Workers of America, Local No. 2369*, 369 F. Supp. 1221, 1224-31, 7 FEP Cas. 90, 91-98 (E.D. La. 1974).

² 42 U.S.C. § 2000e-2(h) (1970).

³ See, e.g., *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1317-18, 8 FEP Cas. 577, 583-84 (7th Cir. 1974).

⁴ See *Watkins*, 369 F. Supp. at 1224, 7 FEP Cas. at 91.

⁵ See *Waters*, 502 F.2d at 1319, 8 FEP Cas. at 585.

⁶ At present two circuits have held that the last hired, first fired system does not violate Title VII—the Seventh Circuit in *Waters*, 502 F.2d at 1318, 8 FEP Cas. at 584, and the Third Circuit in *Jersey Central Power & Light Co. v. Local Union 327 of IBEW*, 508 F.2d 687, 710, 9 FEP Cas. 117, 132 (3d Cir. 1975). Several district courts have held that the system is violative of Title VII. See *Watkins*, 369 F. Supp. at 1226, 7 FEP Cas. at 93; *Schaefer v. Tannian*, 10 FEP Cas. 897, 898 (E.D. Mich. 1975); *Delay v. Carling Brewing*, 10 FEP Cas. 164, 165 (N.D. Ga. 1974).

⁷ 369 F. Supp. 1221, 7 FEP Cas. 90 (E.D. La. 1974).

pursuant to a last hired, first fired seniority system are prohibited by Title VII and 42 U.S.C. § 1981 where the layoffs perpetuate the effects of past discrimination.⁸ The court's reasoning was two-tiered. First, two lines of related cases were cited to establish the principle that employment preferences cannot be allocated on the basis of seniority, where past discriminatory policies prevented minority employees from accumulating seniority.⁹ Under the first line of cases, departmental seniority systems which perpetuated the effects of past discrimination were held unlawful under Title VII.¹⁰ The second line of cases involved craft union referral rules which granted referral priority to those employees with long service in the craft union. These rules were also held violative of Title VII.¹¹ Thus, because the last hired, first fired system similarly predicated layoffs on the basis of seniority, which minority employees had been precluded from accumulating, the court concluded that the system unlawfully perpetuated the effects of past discrimination.¹²

The court next considered whether the system was nevertheless permissible under section 703(h) as a bona fide seniority system.¹³ Defendants relied heavily on certain legislative history indicating that Title VII has no effect on existing seniority rights and that the last hired, first fired seniority system is bona fide.¹⁴ However, the court reasoned that these statements were not conclusive, because they were entered into the legislative record prior to the introduction of the version of Title VII which was ultimately enacted and which included, for the first time, specific language dealing with seniority systems in section 703(h).¹⁵ Furthermore, the court noted, these statements have been rejected by courts in numerous prior decisions in which existing seniority rights have, in fact, been judicially modified.¹⁶

Having thus rejected the proffered legislative history, the court considered the language of section 703(h), relying on prior judicial

⁸ Id. at 1226, 7 FEP Cas. at 93.

⁹ Id. at 1225-26, 7 FEP Cas. at 92-93.

¹⁰ Id., citing, e.g., *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 1 FEP Cas. 875 (5th Cir. 1969).

¹¹ 369 F. Supp. at 1226, 7 FEP Cas. at 93, citing, e.g., *United States v. Local 36, Sheet Metal Workers*, 416 F.2d 123, 2 FEP Cas. 127 (8th Cir. 1969).

¹² 369 F. Supp. at 1226, 7 FEP Cas. at 93.

¹³ Id. at 1227-29, 7 FEP Cas. at 94-95.

¹⁴ Id. at 1227, 7 FEP Cas. at 94, citing comments of Senator Clark:

Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired" he can still be the "first fired" as long as it is done because of his status as "last hired" and not because of his race.

110 Cong. Rec. 7217 (1964) (questions and answers prepared by Senator Clark).

¹⁵ 369 F. Supp. at 1228, 7 FEP Cas. at 94.

¹⁶ Id. at 1228, 7 FEP Cas. at 95, citing, e.g., *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 1 FEP Cas. 260 (E.D. Va. 1968).

interpretations to conclude that one characteristic of a bona fide seniority system is the lack of discrimination.¹⁷ Since the court had already found that the last hired, first fired system operated discriminatorily, the system could not prevail under this standard.¹⁸ Thus, the court held that the system unlawfully perpetuated the effects of past discrimination and was not justifiable as a bona fide seniority system.¹⁹

On appeal,²⁰ the decision of the district court was reversed by the Fifth Circuit which held that, within the facts presented in the case, the defendant's last hired, first fired seniority system did not violate either Title VII or 42 U.S.C. section 1981.²¹ Of central importance in the court's reversal was the fact that in the mid-1960's the company had stopped all of its discriminatory hiring practices.²² All the plaintiffs were relatively young and, due to this fact, none of the plaintiffs was ever denied a job or deterred from applying for a job because of prior discriminatory practices. Indeed, when the company stopped its discriminatory practices, all but one of the plaintiffs was below the minimum age of legal employment. Thus, when each of the plaintiffs applied for a job, he was hired pursuant to non-discriminatory policies and was afforded his proper seniority status.²³ This fact was not only stated by the court as a proviso to its holding,²⁴ but was also relied on by the court to reject each of the arguments advanced by the plaintiffs.²⁵

The plaintiffs did not contend that the seniority system was a per se violation of Title VII. Instead, they argued that the system, though facially neutral, was violative of Title VII in that it perpetuated or locked in the effects of past discrimination.²⁶ The court rejected this argument, reasoning that the particular plaintiffs in the present case had never experienced prior discrimination by the defendant. Thus, as to these plaintiffs, there were no discriminatory effects which could be either perpetuated or locked in.²⁷ To hold otherwise, the court concluded, would be to grant preferential treatment to employees who were hired on an equal basis with

¹⁷ 369 F. Supp. at 1228, 7 FEP Cas. at 95, quoting *Quarles*: "Section 703(h) expressly states the seniority system must be *bona fide*. . . . Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination." 279 F. Supp. at 517, 1 FEP Cas. at 270.

¹⁸ See text at notes 6-10 *supra*.

¹⁹ 369 F. Supp. at 230-31, 7 FEP Cas. at 96.

²⁰ *Watkins v. Steelworkers, Local 2369*, 516 F.2d 41, 10 FEP Cas. 1305 (5th Cir. 1975).

²¹ *Id.* at 44-45, 10 FEP Cas. at 1300.

²² *Id.* at 46, 10 FEP Cas. at 1301.

²³ *Id.* at 44-46, 10 FEP Cas. at 1299-1301.

²⁴ See *id.* at 44-45, 10 FEP Cas. at 1300.

²⁵ See *id.* at 45-48, 10 FEP Cas. at 1300-02.

²⁶ *Id.* at 45, 10 FEP Cas. at 1300.

²⁷ *Id.* at 45-46, 10 FEP Cas. at 1300-01.

whites and who were afforded their proper seniority status relative to whites.²⁸

The court alternatively reasoned that even if the plaintiffs had established that the system was discriminatory, it was nevertheless exempted from being unlawful by section 703(h) as a bona fide seniority system.²⁹ No contention was made that the system was based on an intent to discriminate. Rather, the plaintiffs relied on the interpretation of section 703(h) in earlier departmental seniority system cases and argued that the defendant's last hired, first fired system was not bona fide because it perpetuated the effects of past discrimination.³⁰ The court rejected this argument, distinguishing the departmental seniority system cases on the ground that, unlike the present action, these cases involved employees who had not attained their proper seniority status in the work force.³¹ The court then cited extensively from its prior decision in *Local 189, United Papermakers & Paperworkers v. United States*,³² in which the court concluded that a job seniority system was not bona fide as to employees who had been the subject of prior discrimination, but was bona fide as to newly hired employees who had never been subjected to the prior discrimination.³³ A contrary conclusion, the court in *Local 189* reasoned, would result in preferential rather than remedial treatment.³⁴ Because the plaintiffs in *Watkins* had similarly never experienced prior discrimination, the court concluded that the reasoning in *Local 189* was applicable and, as such, the defendant's last hired, first fired system was bona fide under section 703(h).³⁵ The court further supported this conclusion by noting an express intent of Congress to preserve seniority rights between white employees and minority employees who had never been discriminated against.³⁶

The court lastly considered the plaintiffs' claim based on 42 U.S.C. section 1981, noting initially that some employment practices which are lawful under Title VII may nevertheless be unlawful under section 1981.³⁷ However, the court concluded that the seniority system did not violate this statutory provision.³⁸ The plain-

²⁸ Id. at 46, 10 FEP Cas. at 1301.

²⁹ Id. at 46-47, 10 FEP Cas. at 1301.

³⁰ Id. at 47, 10 FEP Cas. at 1302.

³¹ Id.

³² 416 F.2d 980, 1 FEP Cas. 875 (5th Cir. 1969).

³³ Id. at 995, 1 FEP Cas. at 886.

³⁴ Id.

³⁵ 516 F.2d at 47, 10 FEP Cas. at 1302.

³⁶ Id.

³⁷ Id. at 49, 10 FEP Cas. at 1304.

³⁸ Id. at 50, 10 FEP Cas. at 1304.

tiffs had, in all respects, been afforded identical treatment as white employees. Thus, the system neither presently discriminated nor perpetuated the effects of past discrimination and, as such, there was no violation of section 1981.³⁹

The result reached by the Fifth Circuit in *Watkins* is in accord with the result reached by the Seventh Circuit in *Waters v. Wisconsin Steel Works*⁴⁰ and by the Third Circuit in *Jersey Central Power & Light Co. v. Local 327, IBEW*.⁴¹ In *Waters*, the court upheld the district court's finding that, prior to 1964, the defendant had engaged in discriminatory hiring practices.⁴² The plaintiff had applied for a job with the defendant in 1957.⁴³ Thus, unlike the plaintiffs in *Watkins*, the plaintiff in *Waters* had been subjected to the defendant's prior discriminatory practices. Nevertheless, the court held that the defendant's last hired, first fired seniority system violated neither Title VII nor section 1981.⁴⁴ In reaching this result, the court made three important findings. First, the defendant's last hired, first fired seniority system was not "of itself" racially discriminatory, nor did it result in perpetuation of the effects of past discrimination.⁴⁵ Second, the last hired, first fired system is bona fide seniority system under section 703(h).⁴⁶ The court supported this finding by citing extensively from the legislative history which was expressly rejected by the district court in *Watkins*. Finally, fictional seniority is not available as a remedy under Title VII.⁴⁷ In support of this finding, the court cited prior case law to the effect that fictional seniority results in preferential rather than remedial treatment for minority employees and that it was the intent of Title VII to prohibit such preferential treatment.⁴⁸

The Third Circuit applied a different analysis in a different procedural context to reach the same result in *Jersey Central Power and Light Co. v. Local Union 327, of IBEW*.⁴⁹ Here the plaintiff company sought a declaratory judgment as to whether, in conduct-

³⁹ Id.

⁴⁰ 502 F.2d 1309, 8 FEP Cas. 577 (7th Cir. 1974).

⁴¹ 508 F.2d 687, 9 FEP Cas. 117 (3d Cir. 1975).

⁴² 502 F.2d at 1316-17, 8 FEP Cas. at 583.

⁴³ Id. at 1313, 8 FEP Cas. at 580.

⁴⁴ Id. at 1318-20, 8 FEP Cas. at 584-85.

⁴⁵ Id. at 1318, 8 FEP Cas. at 584.

⁴⁶ Id.

⁴⁷ Id. at 1319, 8 FEP Cas. at 585.

⁴⁸ Id., quoting *Quarles*, 279 F. Supp. at 519, 1 FEP Cas. at 272; and *Local 189*, 416 F.2d at 994-95, 1 FEP Cas. at 886-87. This discussion on the availability of fictional seniority is clearly misplaced. The issue before the court was whether the defendant's seniority system violated Title VII. A discussion of the remedies available once a violation has been shown is irrelevant to this issue.

⁴⁹ 508 F.2d 687, 9 FEP Cas. 1117 (3d Cir. 1975).

ing anticipated layoffs, the company should adhere to a collective bargaining agreement embodying the last hired, first fired system, or whether it was precluded from doing so by a conciliation agreement made with the EEOC to retain among its workers a certain proportion of minority employees.⁵⁰ From the court's statement of the facts, it cannot be determined whether any of the employees to be laid off were previously subjected to the company's past discriminatory policies.

After concluding that the collective bargaining agreement and the conciliation agreement were not in conflict,⁵¹ the court addressed the question of the validity of layoffs pursuant to the last hired, first fired seniority system embodied in the collective bargaining agreement. The court first considered this question under basic contract principles, reasoning that it could modify the seniority clause of the collective bargaining agreement only upon proof that the resulting seniority system was contrary to public policy.⁵² After considering the applicable provisions of Title VII, particularly section 703(h), the court found no expression of a contrary public policy sufficient to invalidate the seniority clause.⁵³

The Third Circuit then considered whether the last hired, first fired system would be valid under Title VII if the plaintiff showed that the system perpetuated the effects of past discrimination.⁵⁴ On this question, the court reasoned that where the challenged seniority system qualifies as bona fide under section 703(h), evidence that it perpetuates the effects of past discrimination is irrelevant.⁵⁵ Thus, the dispositive question became whether the last hired, first fired system was bona fide under section 703(h). The court held that it was, basing its holding on the legislative history accepted in *Waters* and rejected by the district court in *Watkins*.⁵⁶

Three circuits have now decided, in different contexts, that a last hired, first fired seniority system does not violate Title VII. Nevertheless, district courts continue to hold the system violative of Title VII.⁵⁷ Moreover, it is reasonably arguable that the system does violate Title VII, at least in those cases where the plaintiffs were the subjects of prior discrimination.

Section 703(a)⁵⁸ prohibits employment discrimination. Under

⁵⁰ Id. at 691, 9 FEP Cas. at 118.

⁵¹ Id. at 701, 9 FEP Cas. at 125.

⁵² Id. at 704, 9 FEP Cas. at 127-28.

⁵³ Id. at 704-05, 9 FEP Cas. at 128-29.

⁵⁴ Id. at 705-10, 9 FEP Cas. at 129-32.

⁵⁵ Id. at 706, 9 FEP Cas. at 129.

⁵⁶ Id. at 708-10, 9 FEP Cas. at 131-32.

⁵⁷ See, e.g., *Schaefer v. Tannian*, 10 FEP Cas. 897, 908 (E.D. Mich. 1975); *Delay v. Carling Brewing*, 10 FEP Cas. 164, 165 (N.D. Ga. 1974).

⁵⁸ 42 U.S.C. § 2000e-2(a) (Supp. III 1973).

two lines of traditional Title VII analysis, the last hired, first fired system may constitute unlawful employment discrimination. First, the system has a disproportionate impact on minority employees. This analysis has often been applied to prohibit the use of certain criteria in hiring and promotion decisions, including test scores⁵⁹ and diplomas.⁶⁰ There is no reason why the analysis should not also be applied to prohibit the use of seniority in layoff decisions.⁶¹ Secondly, the system perpetuates the effects of past discrimination in those cases where the plaintiffs were previously subjected to the employer's prior discriminatory policies. This analysis has often been applied to invalidate departmental seniority systems⁶² and craft union referral rules.⁶³ Again, there is no reason why this analysis should not be applied to the last hired, first fired seniority system. It is thus submitted that, in some instances, this seniority system may create a *prima facie* violation of Title VII.

The more difficult legal problem is whether the last hired, first fired system is nevertheless permissible as a *bona fide* seniority system under section 703(h). Section 703(h) provides:

... it shall not be an unlawful employment practice for an employer to apply different standards . . . pursuant to a *bona fide* seniority or merit system . . . provided that such differences are not the result of an intention to discriminate. . . .⁶⁴

This language disqualifies from *bona fide* status all seniority systems which are based on an intent to discriminate. However, it does not follow that all systems which are not based on an intent to discriminate are *bona fide*. This has been recognized in departmental seniority cases.⁶⁵ Furthermore, as a general interpretation of Title VII, the

⁵⁹ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

⁶⁰ *Id.*

⁶¹ One might argue that this traditional Title VII analysis should not be applied to the seniority question because, unlike the use of test scores or diplomas, the seniority issue does not involve a comparison of two people who are at the same level in terms of applying for employment, but rather involves a comparison of two people who have already worked at a job and who have built up different "equities" in their respective jobs. However, this greater job equity should not be allowed to immunize employees from the prohibitions of Title VII where, as here, the greater job equity was built up at the expense of minority employees who were generally precluded from building up similar job equity due to past discriminatory policies.

⁶² See, e.g., *Local 189 v. United States*, 416 F.2d 980, 985-88, 1 FEP Cas. 875, 879-81 (5th Cir. 1969).

⁶³ See, e.g., *United States v. Local 36 Sheet Metal Workers*, 416 F.2d 123, 131 (8th Cir. 1969).

⁶⁴ 42 U.S.C. § 2000e-2(h) (1970).

⁶⁵ See *Local 189*: "We find unpersuasive the argument that whatever its operational effects, job seniority is immune under the statute because not imposed with the intent to discriminate." 416 F.2d at 995, 1 FEP Cas. at 887.

Supreme Court has stated that employment policies should be judged according to their consequences, not according to the motivations behind them.⁶⁶ Thus, while the language of section 703(h) references one category of seniority systems which are not bona fide,⁶⁷ it does not answer the critical question of what systems are bona fide.

The legislative history is not instructive on this question. As evidenced by the district court's decision in *Watkins*⁶⁸ on the one hand, and *Waters*⁶⁹ and *Jersey Central*⁷⁰ on the other, the applicable legislative history is subject to conflicting interpretations.

It is submitted that the answer lies in the case law interpreting section 703(h). The leading case is *Quarles v. Philip Morris, Inc.*,⁷¹ in which the court stated: "Section 703(h) expressly states that the seniority system must be bona fide . . . Obviously one characteristic of a bona fide seniority system must be lack of discrimination."⁷² This interpretation effectively renders section 703(h) nugatory. Under the general scheme of Title VII, any practice which discriminates is unlawful and any practice which does not discriminate is lawful. For section 703(h) to have any meaning, it must create an exception to this general scheme for bona fide seniority systems. However, under the *Quarles* interpretation the section is rendered meaningless because it is interpreted consistently with the general scheme of Title VII; any system which discriminates is not bona fide and any system which does not discriminate is bona fide. Nevertheless, the *Quarles* interpretation has been judicially accepted by the district court decision in *Watkins*⁷³ and in cases dealing with departmental seniority systems.⁷⁴ Furthermore, *Quarles* was decided in 1968. Therefore, Congress has had ample opportunity to amend section 703(h) to preclude the *Quarles* interpretation. From its inaction, Congressional acquiescence in the interpretation may be inferred.⁷⁵ Finally, the interpretation is consistent with the established rule of construction that unclear provisions of a statute should be construed in a manner consistent with the general purpose of the

⁶⁶ *Griggs*, 401 U.S. at 432.

⁶⁷ However, see interpretations of this language in *Waters*, 502 F.2d at 1318, 8 FEP Cas. at 584; and *Jersey Central*, 508 F.2d at 708-10, 9 FEP Cas. at 131-32. See also *Quarles*, quoted at note 17 *supra*.

⁶⁸ See text at notes 7-39 *supra*.

⁶⁹ See text at notes 40-48 *supra*.

⁷⁰ See text at notes 49-56 *supra*.

⁷¹ 279 F. Supp. 505, 1 FEP Cas. 260 (E.D. Va. 1968).

⁷² *Id.* at 517, 1 FEP Cas. at 270.

⁷³ 369 F. Supp. at 1228, 7 FEP Cas. at 95.

⁷⁴ See, e.g., *United Papermakers Local 189 v. United States*, 416 F.2d 980, 988, 1 FEP Cas. 875, 880 (5th Cir. 1969).

⁷⁵ See *Missouri v. Ross*, 299 U.S. 72, 75 (1936); *United States v. Elgin, J. & E. Ry.*, 298 U.S. 492, 500 (1935).

statute.⁷⁶ For these reasons, it is suggested that the *Quarles* interpretation represents a reasonable interpretation of section 703(h) which gives content to the bona fide seniority system classification. Title VII was designed to eliminate employment discrimination. To sanction a seniority system which has a disproportionate impact on minority employees and which perpetuates the effects of past discrimination is clearly contrary to this general intent of Title VII. Therefore, based on the *Quarles* interpretation, it is submitted that in cases where the effects of prior discrimination are perpetuated the last hired, first fired seniority system is not bona fide under section 703(h).

A second argument by which the system might be justified is business necessity. The test under the defense of business necessity is whether the discriminatory policy is sufficiently related to successful job performance.⁷⁷ It is submitted that the last hired, first fired system cannot prevail under this standard. In many past decisions, the courts have invalidated the use of intelligence test scores in hiring decisions.⁷⁸ The use of these test scores was premised on a general assumption of job relatedness: the more intelligent a worker is, the better his job performance will be. However, the courts have rejected this general assumption of job relatedness, requiring specific proof to discharge the business necessity burden.⁷⁹ The last hired, first fired seniority system also rests on a general assumption: the more years of service a worker has, the greater his morale and expectation of security and the better his job performance. Thus, it is submitted that this system is not generally justified by business necessity because it rests on the same type of assumption which has been rejected by the courts in other fact situations. Consequently, it is further submitted that the last hired, first fired seniority system, which is not justified as a bona fide seniority system under section 703(h) and which is rarely justified by business necessity, is violative of Title VII.

It should be noted that this analysis considers the issue solely from a legal standpoint. However, the issue also involves significant human consequences which have in some cases influenced judicial reasoning. If a court finds that the last hired, first fired system violates Title VII, the result may be the loss of accumulated seniority rights by non-minority employees. Due to the economic

⁷⁶ *Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 631-32 (1973); *Richards v. United States*, 369 U.S. 1, 11 (1961).

⁷⁷ *Griggs*, 401 U.S. at 431.

⁷⁸ See, e.g., *id.*; *Walston v. County School Bd.*, 7 FEP Cas. 616, 622 (4th Cir. 1974); *Arnold v. Ballard*, 10 FEP Cas. 1363, 1370 (N.D. Ohio 1975).

⁷⁹ *Id.* at 431-32.

recession, this loss of seniority rights may ultimately cost the employee his job. This equitable consideration was reflected in the *Waters* decision where the Seventh Circuit stated: "To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer."⁸⁰ However, as noted above, the last hired, first fired issue presents two questions: the violation question—whether the system violates Title VII; and the remedy question—if a violation exists, what remedy should be ordered by the court? While it is appropriate for a judge to consider equitable factors, it is submitted that they are more properly considered under the remedy question than under the violation question. The violation question presents a problem of statutory interpretation and this interpretation will be diluted by the injection of equitable considerations. The remedy question, on the other hand, calls for the court to broadly exercise its equitable powers.⁸¹ Here, such equitable considerations are more properly taken into account.

The question of what remedies should be ordered by the court if it finds the seniority system violative of Title VII presents interesting problems concerning the court's remedial powers under section 706(g).⁸² Several possible remedies have been suggested.

The district court in *Watkins*, after finding a violation of Title VII, suggested that layoffs might be apportioned between minority and non-minority employees on the basis of the proportion of each group to the total work force in the plant.⁸³ Within each group the last hired, first fired principle would operate. Although the court did not discuss how this remedy would be implemented, presumably separate seniority lists would be used. The court did note, however, that if adopted, this remedy should apply only to future layoffs, not retroactively to past layoffs.⁸⁴

The district court also suggested that the company might be ordered to rehire the displaced minority employees with a corresponding adoption of work reduction techniques until normal attrition reduced the work force to its most efficient level.⁸⁵ Again, the court did not discuss how this remedy would be implemented. However, a four day work week, or a six hour workday, or expanded vacations for all workers might be appropriate. Finally, under a third possible remedy suggested in *Watkins*, the company would be

⁸⁰ 502 F.2d at 1320, 8 FEP Cas. at 585.

⁸¹ 42 U.S.C. § 2000e-5(g) (Supp. III 1973).

⁸² 42 U.S.C. § 2000e-5(g) (Supp. III 1973).

⁸³ 369 F. Supp. at 1232, 7 FEP Cas. at 98.

⁸⁴ Id.

⁸⁵ Id.

ordered to pay a lump sum or to grant expanded fringe benefits to laid-off minority employees.⁸⁶ This remedy is based on the premise that the company was responsible for creating the past discriminatory policies which are presently perpetuated by the last hired, first fired system, and should thus be responsible for bearing the present burden of those past policies.⁸⁷

A fourth possible remedy is fictional seniority. Here the minority employee would be given seniority for layoff purposes starting with some specified past date. Few requests for relief have provoked such diverse responses as the request for fictional seniority.

One view was expressed by the Third Circuit in *Jurinko v. Wiegand Co.*,⁸⁸ where the court held that fictional seniority is mandatory to eliminate the effects of past discrimination.⁸⁹ Plaintiffs had been discriminatorily discharged because of sex and the court agreed that they were entitled to an award of back seniority from the date of the discharge.⁹⁰ A second view was expressed by the Sixth Circuit in *Meadows v. Ford Motor Co.*⁹¹ where the court held that fictional seniority is discretionary in the trial judge. Here plaintiffs had been denied jobs because of sex and the court held that the district court could, in its discretion, order fictional seniority after considering the interests of both the displaced workers in employment and the employer in maintaining an experienced work force.⁹² The court further noted, however, that sufficient evidence to justify an award of back pay would not automatically compel an award of fictional seniority.⁹³ Finally, a third view was expressed by the Seventh Circuit in *Waters* where the court stated that fictional seniority may not be awarded in employment discrimination cases.⁹⁴ Here, the court reasoned that under Title VII all workers should be treated equally and that fictional seniority constitutes preferential rather than remedial treatment.⁹⁵

It is submitted that fictional seniority is necessary to eradicate the effects of past discrimination and that such seniority may be justified under the "but-for" rationale applied in back pay cases⁹⁶ and in

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ 477 F.2d 1038, 5 FEP Cas. 925 (3d Cir. 1973), vacated on other grounds, 414 U.S. 970 (1973).

⁸⁹ 477 F.2d at 1046, 5 FEP Cas. at 931.

⁹⁰ Id.

⁹¹ 510 F.2d 939, 9 FEP Cas. 180 (6th Cir. 1975).

⁹² Id. at 948-49, 9 FEP Cas. at 188.

⁹³ Id.

⁹⁴ 502 F.2d at 1319, 8 FEP Cas. at 585. See also *Franks v. Bowman Transportation Co.*, 495 F.2d 398, 417-18, 8 FEP Cas. 66, 79-80 (5th Cir. 1974).

⁹⁵ 502 F.2d at 1319, 8 FEP Cas. at 585.

⁹⁶ See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 252, 7 FEP Cas. 1115, 1147 (5th Cir. 1974).

affirmative action hiring quota cases.⁹⁷ "[U]nder Title VII . . . the injured workers must be restored to the economic position in which they would have been *but for* the discrimination . . ."⁹⁸ The real issue presented by the fictional seniority question is whether this rationale is overridden by the significant effect that fictional seniority would have on the established seniority rights of non-minority employees. The better view is that it should not. Minority employees were prevented from accumulating seniority because they were denied available jobs pursuant to discriminatory policies. Non-minority employees, on the other hand, benefited from these discriminatory policies because they were hired into jobs that would not otherwise have been available, and were thus able to accumulate seniority rights from an earlier date than would have been possible in the absence of the discriminatory policies. To deny fictional seniority to minority employees is to continue the inequitable consequences created by the prior discrimination. Minority employees should not be denied their full remedies simply to protect the seniority rights of non-minority employees which would not have been accumulated if it were not for the past discriminatory policies of the employer.⁹⁹

An important question under the fictional seniority issue concerns the date from which seniority should be created. The court in *Jurinko*¹⁰⁰ suggested that seniority should be awarded from the date that the plaintiffs applied for, and were discriminatorily denied, jobs with the defendant company. This date seems appropriate. It is submitted, however, that it is sufficient to establish by a preponderance of the evidence that a plaintiff would have applied for a job but for the discriminatory policy. The availability of the remedy of fictional seniority should not depend on whether the plaintiff went through the futile act of applying for a job which he knew he would be denied. Under the suggested standard, young workers who entered the labor force after the discriminatory policy was no longer practiced would not be entitled to fictional seniority. This should allay the only legitimate fears of non-minority workers.

It might be argued that in no case should seniority be awarded to a date prior to the effective date of Title VII. This argument rests on the fact that prior to the enactment of Title VII, companies had no notice that their discriminatory practices were unlawful. One response to this argument is that 42 U.S.C. section 1981 also pro-

⁹⁷ See *Rios v. Steamfitters, Local 638*, 501 F.2d 622, 632, 8 FEP Cas. 293, 301 (2d Cir. 1974).

⁹⁸ *Pettway*, 494 F.2d at 252, 7 FEP Cas. at 1147.

⁹⁹ See *Patterson v. American Tobacco Co.*, 8 FEP Cas. 778, 784 (E.D. Va. 1974).

¹⁰⁰ 477 F.2d at 1046-47, 5 FEP Cas. at 931-32.

hibits employment discrimination, and that statute was enacted in 1870. However, section 1981 was not applied in the private employment area until 1970.¹⁰¹ Thus, at least with regard to private employees, this response is not persuasive. As a result, it is submitted that fictional seniority, where awarded, should not be granted from a date prior to March 24, 1964, the effective date of Title VII.

In conclusion, each of the four suggested remedies appears to be an appropriate method of dealing with the discriminatory effect of layoffs caused by the economic recession. Common to each is the underlying principle that the burden created by the layoffs should, as much as possible, be distributed over the entire work force rather than concentrated on any one group of employees. Only by adhering to this principle will the courts be able to adequately reconcile the competing interests of minority and non-minority employees.

VII. SEX DISCRIMINATION—*The Applicability of Aiello to Title VII Cases*

In *Geduldig v. Aiello*¹ the Supreme Court of the United States held, by a 6-3 vote, that the exclusion of normal pregnancy from coverage under California's disability insurance plan was rationally related to the state's legitimate interest in maintaining a self-sufficient disability insurance program, and thus was not violative of the Equal Protection Clause of the Fourteenth Amendment.² The plan, which had been in operation for nearly 30 years, was designed to provide benefits to private employees temporarily unable to work because of disabilities not covered by workmen's compensation.³ Funded entirely from employee contributions—1% of salary up to an annual maximum of \$85—the plan had been self-sufficient since its inception.⁴ However, not all disabilities were covered under the plan. Specifically excluded were disabilities related to normal pregnancy.⁵

Plaintiff,⁶ a female employee temporarily disabled by a normal pregnancy, applied for and was denied benefits under the plan pursuant to this exclusion.⁷ Seeking to enjoin enforcement of the

¹⁰¹ *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 481-83 (7th Cir. 1970).

¹ 417 U.S. 484 (1974).

² *Id.* at 496-97.

³ *Id.* at 486.

⁴ *Id.* at 487, 492.

⁵ *Id.* at 489.

⁶ Four plaintiffs originally filed the suit. However, the claims of three of these plaintiffs were mooted when the state disability insurance plan was amended to include abnormal disabilities relating to pregnancy. *Id.* at 489-92.

⁷ *Id.* at 490.

exclusion, plaintiff filed suit in federal court contending that the exclusion constituted discrimination on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment.⁸

The threshold question before the Supreme Court was whether the stricter tests applied in *Reed v. Reed*⁹ and *Frontiero v. Richardson*,¹⁰ which involved sex-based classifications, or the more easily satisfied rational relationship test traditionally applied to other non-suspect classifications would be utilized.¹¹ This depended on whether the plan's exclusion of normal pregnancy disabilities created a classification based on sex.¹² In footnote 20 of the opinion the Court answered this question:

While it is true that only women can become pregnant, it does not follow that any legislative classification concerning pregnancy is a sex-based classification. . . . Absent a showing that distinctions involving pregnancy are mere pretexts . . . lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis ¹³

Concluding, therefore, that the pregnancy exclusion did not create a sex-based classification under the Fourteenth Amendment, the Court found the stricter tests of *Reed* and *Frontiero* inapplicable.¹⁴

Instead, the Court treated the exclusion as creating a classification based on pregnancy.¹⁵ Applying the principle that legislatures may address a problem one step at a time, the Court held that California was free to draw the line short of pregnancy disabilities as long as its decision to do so was "rationally supportable."¹⁶ Such rational support was found in the state policy of limiting the coverage of the plan to that level of benefits which could be adequately financed by the existing, easily administered 1% contribution rate.¹⁷

The three dissenters, in an opinion written by Justice Brennan, argued that the pregnancy exclusion did create a sex-based classification: "[D]issimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."¹⁸ They reasoned that the stricter

⁸ Id.

⁹ 404 U.S. 71, 76 (1971).

¹⁰ 411 U.S. 677, 688 (1973).

¹¹ 417 U.S. at 494-96.

¹² Id. at 494-95.

¹³ Id. at 496 n.20.

¹⁴ Id.

¹⁵ Id. at 494-95.

¹⁶ Id.

¹⁷ Id. at 496.

¹⁸ Id. at 501 (Brennan, J., dissenting).

tests of *Reed* and *Frontiero* should have been applied¹⁹ and that the pregnancy exclusion should have been upheld only upon a showing by the state that the exclusion "serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means."²⁰ The state's asserted interest in limiting the costs of the program, the dissenters concluded, was not sufficient to satisfy this standard.²¹

Although *Aiello* was an equal protection case, the issue has arisen during the Survey year as to whether *Aiello's* reasoning—that pregnancy disability exclusions do not constitute sex discrimination under the Fourteenth Amendment—mandates a similar finding of no sex discrimination where similar pregnancy disability exclusions are challenged under Title VII. The basic question presented to the courts has been whether the scope of protection against sex discrimination under Title VII is limited to the scope of protection under the Fourteenth Amendment.

A negative answer was given by the Second Circuit in *Communication Workers v. American Telephone & Telegraph Co., Long Lines Department*,²² where the court held that *Aiello* did not require the dismissal of plaintiffs' Title VII action challenging the defendant company's employee disability insurance plans which excluded pregnancy disabilities from coverage.²³ The district court had held that the decision in *Aiello* precluded a finding of sex discrimination under Title VII.²⁴ The lower court rejected the plaintiffs' contention that sex-based classifications are more easily established under Title VII than under the Fourteenth Amendment.²⁵ Since the Supreme Court in *Aiello* had held that such a pregnancy exclusion did not constitute a sex-based classification under the Fourteenth Amendment, it followed that a similar exclusion could not constitute a sex-based classification under Title VII.²⁶ This was true, the lower court concluded, despite the fact that the plan presently under review was a private employment insurance plan rather than a state welfare statute as was involved in *Aiello*.²⁷ As a result, the plaintiffs' claim was dismissed.²⁸ However, the district court certified the question of

¹⁹ *Id.* at 502-03.

²⁰ *Id.* at 503, citing *Kahn v. Shevin*, 416 U.S. 351, 357-58 (1974).

²¹ 417 U.S. at 503-05 (Brennan, J., dissenting).

²² 513 F.2d 1024, 10 FEP Cas. 435 (2d Cir. 1975).

²³ *Id.* at 1032, 10 FEP Cas. at 441.

²⁴ *Communication Workers v. American Tel. & Tel. Co., Long Lines Dept.*, 379 F. Supp. 679, 682, 8 FEP Cas. 529, 531 (S.D.N.Y. 1974).

²⁵ *Id.* at 682-83, 8 FEP Cas. at 531.

²⁶ *Id.* at 681-82, 8 FEP Cas. at 530-31.

²⁷ *Id.* at 682, 8 FEP Cas. at 531.

²⁸ *Id.* at 681, 8 FEP Cas. at 530.

the interpretation and applicability of *Aiello* to the court of appeals, admitting that upon this question "there is substantial ground for difference of opinion."²⁹

The Second Circuit reversed, holding that *Aiello* was not dispositive of the plaintiffs' Title VII action.³⁰ Four reasons were cited by the court to support its conclusion that *Aiello* should not be applied in the Title VII area. First, *Aiello* was an equal protection case. The standards applied and the determinations made therein were intended to be read as applicable only within the equal protection context. Nowhere in *Aiello* is there any reference to Title VII or any suggestion that the decision was intended to be applicable to cases arising under Title VII.³¹ Second, the application of *Aiello* to Title VII cases would not only circumscribe the reach of Title VII, but it would also invalidate EEOC guidelines, promulgated pursuant to Title VII, which mandate that pregnancy disabilities are to be treated in the same manner as other disabilities for all job related purposes.³² To conclude that the majority in *Aiello* had intended such a result without ever mentioning Title VII or the EEOC guidelines would be "inconceivable."³³ Third, *Aiello* was decided within the context of constitutional analysis, whereas the Title VII issue is one of statutory interpretation.³⁴ Fourth, Title VII was designed to prohibit a broader range of discriminatory evils than is prohibited under the Fourteenth Amendment: "There is no requirement that the discriminatory practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause."³⁵

The Second Circuit's decision in *Communication Workers* is typical of the Survey year cases in which the applicability of *Aiello* to the Title VII area has been discussed. In fact, every court which has considered the issue, with the sole exception of the district court in *Communication Workers*, has concluded that *Aiello* is not dispositive of Title VII claims.³⁶ Nevertheless, it is at least arguable that *Aiello* should be applied to such litigation.

The same two-step inquiry is followed in both Title VII and

²⁹ Id. at 684, 8 FEP Cas. at 532.

³⁰ 513 F.2d at 1031-32, 10 FEP Cas. at 441.

³¹ Id. at 1030, 10 FEP Cas. at 439-40.

³² Id., 10 FEP Cas. at 440.

³³ Id.

³⁴ Id. at 1031, 10 FEP Cas. at 440.

³⁵ Id.

³⁶ See *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 203-04, 9 FEP Cas. 227, 229-30 (3d Cir. 1975); *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784, 787, 9 FEP Cas. 138, 139-40 (N.D. Iowa 1975); *Vineyard v. Hollister School Dist.*, 8 FEP Cas. 1009, 1012 (N.D. Cal. 1974). See also *Union Free School Dist. No. 6 v. New York State Human Rights Appeal Bd.*, 35 N.Y.2d 371, 362 N.Y.S.2d 139, 141-42, 10 FEP Cas. 431, 432-33 (1974).

Fourteenth Amendment sex discrimination cases. First, does the challenged practice create a sex-based classification? Second, if so, is the resulting sex discrimination prohibited?³⁷ This inquiry is based on the conclusion that until the fact of a sex-based classification has been established, there can be no sex discrimination under either Title VII or the Fourteenth Amendment. Those cases of which *Communication Workers* is typical have focused on the second step of this inquiry, reaching the conclusion that a practice which does not constitute unlawful sex discrimination prohibited by the Fourteenth Amendment may nevertheless constitute unlawful sex discrimination prohibited by Title VII.³⁸ Indeed, this conclusion is reasonably supportable by the legislative history of Title VII.³⁹

Aiello, however, focused on the first step of the inquiry: whether the exclusion created a sex-based classification.⁴⁰ This is a factual determination which the *Aiello* Court answered in the negative. The question is the same for both Title VII and Fourteenth Amendment cases; consequently, a determination on this question in the context of a Fourteenth Amendment claim would seem equally applicable to a Title VII case. Without a sex-based classification, there can be no sex discrimination and without sex discrimination, there can be no claim under Title VII.

This analysis has a reasonable foundation in the language of the *Aiello* opinion.⁴¹ However, it is submitted that *Aiello* was incorrect in its determination of no sex-based classification. Distinctions which are based on physical characteristics unique to members of

³⁷ See *Communication Workers*, 379 F. Supp. at 682, 8 FEP Cas. at 531.

³⁸ "There is no requirement that the discriminatory practices forbidden by [Title VII] should be limited to practices violative of the Equal Protection Clause." *Communication Workers*, 513 F.2d at 1031, 10 FEP Cas. at 440; accord, *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784, 787, 9 FEP Cas. 138, 140 (N.D. Iowa 1975); *Vineyard v. Hollister School Dist.*, 8 FEP Cas. 1009, 1012 (N.D. Cal. 1974).

³⁹ The broad power of Congress to prohibit discrimination extends beyond the existing prohibition in the Fourteenth Amendment. The constitutional sources of this broad Congressional power are section 5 of the Fourteenth Amendment, which authorizes Congress to enact broader and more specific legislation to implement the principles of the Amendment, *Katzbach v. Morgan*, 384 U.S. 641, 648-51 (1966), and the Commerce Clause, U.S. Const. art. I, § 8. See *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784, 787, 9 FEP Cas. 138, 140 (N.D. Iowa 1975). The "affecting commerce" language of Title VII, 42 U.S.C. § 2000e-(b) (Supp. II 1972), and its legislative history, see H. Rep. No. 92-238, 1972 U.S. Code Cong. and Ad. News 2137, indicate that Congress exercised its power under both of these constitutional sources in enacting Title VII:

Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill.

Id. at 2154. Thus, it is entirely possible that Congress intended that sex discrimination under Title VII should be a broader and more encompassing category than sex discrimination under the Fourteenth Amendment.

⁴⁰ See 417 U.S. at 496 n.20.

⁴¹ *Id.* See text at note 13 *supra*.

one sex clearly create sex-based classifications.⁴² Because the decision is incorrect, the lower courts have ample justification to refuse to apply *Aiello* expansively into the Title VII area. Furthermore, as the Second Circuit cautioned, it is unlikely that the Supreme Court could have intended *Aiello* to have significant repercussions in the Title VII area since the Court never mentioned this statute in the decision.⁴³ Thus, while a reading of *Aiello* suggests its applicability to such claims, the lower courts should continue to interpret the decision narrowly and reject its application in actions brought under Title VII.

VIII. AFFIRMATIVE ACTION UNDER TITLE VII: *Rios*

At the present time, eight circuits have ordered affirmative goals or quotas in order to eradicate the effects of past employment discrimination.¹ However, authority for many of these affirmative awards has been found in 42 U.S.C. section 1981,² 42 U.S.C. section 1983,³ or Part III of Executive Order 11246.⁴ Only four of the eight circuits have ever ordered affirmative relief pursuant to Title

⁴² In the dissenting opinion in *Aiello*, Justice Brennan stated:

[A] limitation is imposed on the disabilities for which women may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applicable to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

Id. at 501 (Brennan, J., dissenting). EEOC regulations promulgated pursuant to Title VII reflect this same view. 29 C.F.R. § 1604.10(b) (1974). See also *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784, 787, 9 FEP Cas. 138, 141 (N.D. Iowa 1975); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971): "This definition [sex discrimination] would include those classifications schemes which, rather than using the terms 'male' and 'female,' make the classification contingent upon those characteristics which are physically possible in only one sex, such as ability to become pregnant."

⁴³ *Communication Workers*, 513 F.2d at 1030, 10 FEP Cas. at 440.

¹ See *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1026-27 (1st Cir. 1974); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1340-41 (2d Cir. 1973); *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 172 (3d Cir. 1971); *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir. 1974); *United States v. Local 212, IBEW*, 472 F.2d 634, 636 (6th Cir. 1973); *United States v. Carpenters & Joiners Local 169*, 457 F.2d 210, 220 (7th Cir. 1972); *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 377 (8th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1971).

² See, e.g., *Carter v. Gallagher*, 452 F.2d 315, 318 (1971), *aff'd and modified on rehearing*, 452 F.2d 327 (8th Cir. 1972).

³ See *Vulcan Soc'y of New York City Fire Dept., Inc. v. Civil Serv. Comm'n*, 490 F.2d 387, 390 (2d Cir. 1973); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1337 (2d Cir. 1973).

⁴ 3 C.F.R. 339 (Supp. 1964-65), 42 U.S.C. § 2000e (1970). See *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 162-63 (3d Cir. 1971).

VII,⁵ and these orders have often provoked vigorous dissents.⁶ The controversy involves the reconciliation of the general relief provisions of section 706(g),⁷ which authorize an award of "such affirmative action as may be appropriate," with the specific limitation of section 703(j)⁸ which prohibits preferential treatment on account of minority status. Proponents of affirmative goals or quotas argue that such relief is authorized by section 706(g)⁹ while opponents argue that goals and quotas have been exempted by section 703(j) from the forms of relief available under section 706(g).¹⁰

During the Survey year, the Second Circuit was presented with this issue in *Rios v. Steamfitters, Local 638*.¹¹ Here, the court attempted to reconcile the seeming conflict in Title VII provisions by interpreting section 703(j) to prohibit affirmative goals only where the underlying disparity or imbalance is caused by factors other than unlawful discriminatory conduct.¹²

The lower court found that Local 638 was the collective bargaining agent for steamfitters in New York City and two surrounding counties. It had two branches, the higher paid "A" branch whose members were journeymen engaged in construction work, and the lower paid "B" branch whose members worked in shops or performed repair work. Prior to 1967, there were no non-white members in the A branch. By the end of 1971, less than one percent of the A branch membership was non-white, and by the end of 1972, largely due to preliminary relief granted by the court, the membership was 4.5 percent non-white. In addition, approximately 25 percent of the A branch members had secured their membership through participation in a five-year apprenticeship program. However, since 1964, only 5.7 percent of the participants in this program had been non-white, and at the time of the trial only 16 of 376 participants were non-white.¹³

⁵ 42 U.S.C. § 2000e-5(g) (1970). See *United States v. Ironworkers Local 86*, 443 F.2d 544, 546 (9th Cir. 1971); *Rios v. Steamfitters Local 638*, 501 F.2d 622, 631 (2d Cir. 1974); *United States v. Local 212, IBEW*, 472 F.2d 634, 636 (6th Cir. 1973); *United States v. Local 38, IBEW*, 428 F.2d 144, 149 (6th Cir. 1970); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047, 1053 (5th Cir. 1969).

⁶ See, e.g., *Rios v. Steamfitters Local 638*, 501 F.2d 622, 634, 8 FEP Cas. 293, 303 (2d Cir. 1974).

⁷ 42 U.S.C. § 2000e-5(g) (1970).

⁸ 42 U.S.C. § 2000e-2(j) (1970).

⁹ See, e.g., *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047, 1052 (5th Cir. 1969).

¹⁰ See, e.g., *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1027 (1st Cir. 1974).

¹¹ 501 F.2d 622, 8 FEP Cas. 293 (2d Cir. 1974).

¹² *Id.* at 630-31, 8 FEP Cas. at 299-300.

¹³ See *id.* at 624-28, 8 FEP Cas. at 295-98. The opinion of the district court is found at 360 F. Supp. 979, 6 FEP Cas. 319 (S.D.N.Y. 1973), sub nom. *United States v. Steamfitters, Local 638*.

Based on these findings, the district court concluded that Local 638 had violated Title VII by presently perpetuating the effects of past discrimination.¹⁴ The court then imposed on the union a minimum membership goal of 30 percent non-white membership in the A branch by July 1, 1977, to be achieved by implementing a series of interim goals.¹⁵

Local 638 appealed the imposition of this goal, arguing that such relief was not authorized under Title VII.¹⁶ The court of appeals first noted that once unlawful discrimination is established, broad equitable powers are vested in the court.¹⁷ These powers, the court concluded, provide sufficient authority for the lower court's imposition of a preferential membership goal.¹⁸ However, the more troublesome question was whether these equitable powers are limited by section 703(j), which provides in pertinent part:

Nothing contained in this subchapter shall be interpreted to require any . . . labor organization . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance which may exist with respect to the total number or percentage of [non-whites] . . . admitted to membership or classified by any labor organization . . . in comparison with the total number or percentage of [such non-whites] . . . in any community ¹⁹

The court conceded that, "at first blush," section 703(j) might appear to prohibit court-ordered membership goals.²⁰ However, the court avoided this problem by interpreting section 703(j) to prohibit membership goals only where the imbalance or disparity was caused by factors other than unlawful discrimination.²¹ Three reasons were advanced to support this interpretation: (1) where unlawful discrimination has not been demonstrated, no justification exists for the

¹⁴ Id. at 989, 6 FEP Cas. at 328.

¹⁵ See 501 F.2d at 625-26, 8 FEP Cas. at 296.

¹⁶ Id. at 628, 8 FEP Cas. at 298. Local 638 also argued that the preferential goals violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. However, the court dismissed these claims by referring to its own past decisions in which the same claims were raised and rejected. Id.

¹⁷ The court found authority for the imposition of the membership goal in § 706(g), 42 U.S.C. § 2000e-5(g) (1970), which authorizes an award of such "equitable relief as the court deems appropriate," in § 707(a), 42 U.S.C. § 2000e-6(a) (1970), which authorizes the Attorney General to seek in a pattern and practice suit (such as the present case) such relief "as he deems necessary to insure the full enjoyment of the rights herein described," and in the court's equitable power to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 501 F.2d at 629, 8 FEP Cas. at 298-99.

¹⁸ 501 F.2d at 629, 8 FEP Cas. at 299.

¹⁹ 42 U.S.C. § 2000e-2(j) (1970).

²⁰ 501 F.2d at 630, 8 FEP Cas. at 299.

²¹ Id., 8 FEP Cas. at 300.

imposition of membership goals;²² (2) where unlawful discrimination has been demonstrated the mere prohibition of future discrimination is an illusory and inadequate remedy;²³ and (3) any other interpretation of section 703(j) would completely nullify the stated purposes of Title VII.²⁴

In a vigorous dissent, Judge Hays argued that the majority's interpretation was without basis in either the text or the legislative history of section 703(j).²⁵ The text of this provision, he maintained, prohibits all preferential treatment without exception.²⁶ It thus removes goals and quotas from the category of relief otherwise available under Title VII. Furthermore, the legislative history of this provision, Judge Hays continued, reveals that section 703(j) was specifically added as an amendment to the original version of Title VII to placate those opponents who contended that Title VII would lead to preferential hiring or membership goals.²⁷ Judge Hays thus concluded that section 703(j) barred all preferential goals whether or not past discrimination had been demonstrated.²⁸

Judge Hays' interpretation has substantial support in the legislative history of Title VII.²⁹ The interpretation of the majority, on the other hand, has substantial judicial support.³⁰ Nevertheless, it is submitted that under the majority's interpretation, section 703(j) has been effectively written out of Title VII. While recognizing that section 703(j) creates a prohibition on the court's power to order affirmative goals or quotas, the majority would apply this prohibition only where no unlawful discrimination can be shown. This interpretation is highly questionable. Where no violation of Title VII is shown, the court is without power to order *any* relief under that statute. Thus, by ascribing to Congress a meaningless purpose in enacting section 703(j), the majority has completely and improperly erased that section from Title VII.

Rios is equally significant in another respect—the court of appeals' modification of the 30 percent figure chosen by the district court as its membership goal. In choosing this figure, the lower court relied heavily on certain census statistics and a percentage (28 percent: the percentage of "minority" residents in New York City)

²² *Id.* at 631, 8 FEP Cas. at 300.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 634, 8 FEP Cas. at 303 (dissenting opinion).

²⁶ *Id.*

²⁷ *Id.* at 634-37, 8 FEP Cas. at 303-05.

²⁸ *Id.* at 637, 8 FEP Cas. at 305.

²⁹ See *id.* at 634-37, 8 FEP Cas. at 303-05.

³⁰ See, e.g., *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir. 1971); *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 172-73 (3d Cir. 1971); *United States v. Local 38, IBEW 428* F.2d 144, 149-50 (6th Cir. 1970).

proposed by a city official.³¹ However, the Second Circuit concluded that this 30 percent figure was inaccurate in that it did not necessarily reflect the percentage of non-whites who would have been hired as steamfitters but for the Union's discrimination. Three reasons were advanced: (1) the figure proposed by the city official was based on a definition of the term "minority" which included all non-whites, while the present suit involved only Black and Spanish-surnamed persons;³² (2) the figure proposed by the city official was based on the non-white population of New York City, while the present suit involved not only New York City, but also two surrounding counties in which the non-white population is significantly smaller than that of the city;³³ and, most importantly, (3) the census figures relied on by the lower court showed the percentage of non-whites in the entire population of New York City and the two surrounding counties, while the Union does not draw its membership from the entire population, since women had never sought to be steamfitters and persons under 18 years of age were not allowed to be steamfitters.³⁴ Thus, the court concluded that the more accurate statistic upon which the membership goal should be based was the percentage of non-whites in the male work force over 18 years of age in the Union's jurisdiction.³⁵

[W]e believe that reliable statistics with respect to the *labor force* provide a more accurate basis for arriving at an appropriate non-white percentage goal than does the information relied upon by the district court, which included not only males forming the labor force, but females, children, retired persons and others who would not, absent discrimination, have been the source of Union members or apprentices.³⁶

In closing, the Second Circuit hinted that a figure closer to 20 percent would be more accurate in restoring non-whites to the position in which they would have been but for the unlawful discrimination.³⁷ However, the case was remanded to the lower court for final determination of a percentage figure.³⁸

The common sense approach of the Second Circuit has great appeal. If non-whites have been unlawfully discriminated against

³¹ 501 F.2d at 632, 8 FEP Cas. at 301.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 633, 8 FEP Cas. at 302.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

and if remedial goals are to be imposed to restore these non-white employees to the position in which they would have been but for the unlawful discrimination, then it is entirely proper that the degree of later restoration should, as closely as possible, equal the degree of earlier discrimination. It is thus submitted that, in the future, federal courts should follow the Second Circuit's approach of basing preferential hiring or membership goals on the percentage of *available* non-white workers in the labor force.

IX. PROCEDURE

A. *Notice In Title VII, (b)(2) Class Actions:* Alexander; Freeman; Wetzel

Before a class can be certified by the district court under Rule 23 of the Federal Rules of Civil Procedure, it must first satisfy the four prerequisites of Rule 23(a),¹ plus one of the three prerequisites of Rule 23(b):² either (b)(1), (b)(2), or (b)(3). Most Title VII class actions are certified as (b)(2) actions because the requirement of section (b)(2)—that “the party opposing the class has acted or re-

¹ Fed. R. Civ. P. 23 (a) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claim or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

² Fed. R. Civ. P. 23(b) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

fused to act on grounds generally applicable to the class . . .”—is ideally sited to employment discrimination claims.³

Injunctive and declaratory relief are the standard remedies sought in Title VII, (b)(2) class actions, although back pay may also be awarded provided the request for back pay does not predominate over the request for injunctive and declaratory relief.⁴ In addition, the final judgment in (b)(2) actions is *res judicata* as to each member of the designated class whether or not the member is a named party, specifically represented at trial, or even given notice of the suit.⁵ Indeed, notice in (b)(2) actions is within the trial court's discretion⁶ as compared to the mandatory notice requirement of (b)(3) class actions.⁷ Notice in Title VII, (b)(2) class actions was a recurring issue in Title VII litigation during the Survey year as federal courts divided over the problem of whether “discretionary” notice should *always* be required in Title VII, (b)(2) class actions, and if so, what type of notice should be required and upon whom the cost should be imposed.

The district court in *Alexander v. Avco Corp.*⁸ required notice as a general prerequisite to all Title VII, (b)(2) class actions.⁹ Plaintiffs, three employees of the defendant Avco Corp., filed a class action to challenge defendant's employment practices as racially discriminatory in violation of Title VII. The suit was originally certified as a (b)(2) class action.¹⁰ However, defendant Avco later argued that the suit could not continue as a class action because notice had never been given by the plaintiff to any absent members of the class.¹¹

The court agreed with the defendant, holding that notice was

³ Indeed, the Advisory Committee illustrated the use of Rule 23(b)(2) in civil rights litigation. See Advisory Committee's Notes, 39 F.R.D. 69, 102 (1966).

⁴ Although the “predominates over” test was applied several times during the Survey year, the courts, in general, did not elucidate the standard. For example, in *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 8 FEP Cas. 66 (5th Cir. 1974) the court simply stated the test and concluded that the damages request did not predominate. *Id.* at 422, 8 FEP Cas. at 83-84. However, in *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 9 FEP Cas. 211 (3d Cir. 1975) the court did state that in Title VII class actions the damages request could never predominate since back pay is an equitable remedy and hence, not considered damages. *Id.* at 250-51, 9 FEP Cas. at 219.

⁵ See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 248-49, 9 FEP Cas. 211, 218-19 (3d Cir. 1975) where the *res judicata* impact of Rule 23(c)(3) is explained. See generally *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940).

⁶ Fed. R. Civ. P. 23(d)(2).

⁷ Fed. R. Civ. P. 23(c)(2). See also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). See generally Note, 16 B.C. Ind. & Com. 254 (1975).

⁸ 380 F. Supp. 1282, reported *sub nom.* *Newman v. Avco Corp.*, 8 FEP Cas. 714 (M.D. Tenn. 1974).

⁹ *Id.* at 1286, 8 FEP Cas. at 718.

¹⁰ *Id.* at 1283-86, 8 FEP Cas. at 716-18.

¹¹ *Id.* at 1285, 8 FEP Cas. at 717.

required as a matter of due process in all Title VII, (b)(2) class actions; because no notice had been given in the present suit, the original certification had to be withdrawn.¹² In support of its holding, the court cited a "growing body of authority," all non-Title VII cases, which espouses the general principle that due process requires notice in all class actions where the judgment would bind absent members of the class.¹³ The court's reliance on these cases to support its notice requirement suggests that in the future the *Alexander* court and courts which follow the *Alexander* decision will not deal with the issue of notice in Title VII, (b)(2) class actions on a case-by-case basis, but rather will automatically require notice in all Title VII, (b)(2) class actions as a mandatory requirement.¹⁴

Because no notice at all had been given in *Alexander*, the court did not reach the issue of what specific type of notice should be given in Title VII, (b)(2) class actions and who should bear the cost of such notice. This question was addressed in *Freeman v. Motor Convoy, Inc.*,¹⁵ where the district court ordered the defendant company to post notice of the pending class actions at its business offices and terminals.¹⁶ *Freeman* involved a class action brought under Title VII and 42 U.S.C. section 1981 to challenge the defendant company's employment practices as racially discriminatory. Declaratory and injunctive relief were sought, as well as an award of back pay.¹⁷

The court first held that, because of the "circumstances in this case," discretionary notice must be provided to all potential class members.¹⁸ Then, in specifying the nature of the required notice, the court ordered that a formal notice (set forth in an appendix to the court's opinion) be posted at the terminals and trucking offices of the defendant employer.¹⁹ The responsibility for, and presumably the costs of, posting this notice were imposed upon the defendant company.²⁰

The "circumstances of this case" which prompted the court to invoke its discretionary power to order notice were based largely on

¹² Id. at 1286, 8 FEP Cas. at 718.

¹³ Id. Specifically cited by the court were *Schrader v. Selective Serv. Sys. Loc. Bd. No. 76*, 470 F.2d 73 (7th Cir. 1972) (right to fatherhood classification under Military Selective Service Act); *Zeilstra v. Tarr*, 466 F.2d 111 (6th Cir. 1972) (same); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (odd-lot investors, buyers, and sellers suing two brokerage firms and New York Stock Exchange); and *Pasquier v. Tarr*, 318 F. Supp. 1350 (E.D. La. 1970) (right to fatherhood classification under Military Selective Service Act).

¹⁴ See 380 F. Supp. at 1286, 8 FEP Cas. at 718.

¹⁵ 9 FEP Cas. 89 (N.D. Ga. 1974).

¹⁶ Id. at 94.

¹⁷ Id. at 90.

¹⁸ Id. at 94 & n.6.

¹⁹ Id. at 94.

²⁰ Id.

plaintiff's request for back pay.²¹ This request created visible similarities between plaintiff's (b)(2) action and the standard (b)(3) action in which monetary relief predominates and in which notice is a mandatory requirement. Thus, while the court was willing to certify the suit as a (b)(2) class action, the request for the type of relief customarily awarded in (b)(3) class actions convinced the court to invoke its discretionary authority to order notice to the absent class members.²²

In contrast to the results of the *Alexander* and the *Freeman* decisions, the Third Circuit held in *Wetzel v. Liberty Mutual Insurance Co.*²³ that notice was not required in a Title VII, (b)(2) class action because no unfairness would result to the parties from a lack of notice.²⁴ Plaintiffs, two female claims representatives employed by defendant Liberty Mutual, alleged that the company violated Title VII by selecting predominantly males for the higher paying job of claims adjuster.²⁵ The district court certified plaintiff's suit as a (b)(2) class action and held that notice was not required.²⁶ Defendant appealed to the circuit court, arguing that the suit should have been certified as a (b)(3) class action²⁷ in which notice would be mandatory, and in the alternative, that if the suit was properly certified under section (b)(2), the court should require discretionary notice either as a requirement of due process or pursuant to its general supervisory powers over the district courts within the circuit.²⁸

The Third Circuit first held that the suit could properly proceed as a (b)(2) class action.²⁹ Then, on the issue of notice, the court stated that it was "reluctant" to impose any notice in Title VII, (b)(2) class actions pursuant to its general supervisory powers over the district courts, and would not do so unless either required by Rule 23, or unfairness would result to the parties.³⁰ The court's reluctance arose from the fact that private class actions are "the cutting edge of the Title VII sword" and that the "imposition of notice and the ensuing costs often discourage such suits."³¹

The court concluded that it was not required by Rule 23 to

²¹ See *id.* at 92-94.

²² *Id.*

²³ 508 F.2d 239, 9 FEP Cas. 211 (3d Cir. 1975).

²⁴ *Id.* at 254-56, 9 FEP Cas. at 222-24.

²⁵ *Id.* at 243-44, 9 FEP Cas. at 214.

²⁶ See *id.* at 244, 9 FEP Cas. at 214.

²⁷ *Id.* at 248, 254, 9 FEP Cas. at 215, 217.

²⁸ *Id.* at 254, 9 FEP Cas. at 222.

²⁹ *Id.* at 248, 9 FEP Cas. at 217.

³⁰ *Id.* at 254, 9 FEP Cas. at 222.

³¹ *Id.*

impose notice in Title VII, (b)(2) class actions.³² The court further concluded that unfairness would not result to the parties in this particular case from the lack of notice, since the plaintiff class was cohesive and was adequately represented by competent counsel.³³ Thus, the class action was permitted to continue in the absence of any notice.³⁴

Two questions arise from the *Alexander*, *Freeman*, and *Wetzel* cases: is notice a mandatory requirement in Title VII, (b)(2) class actions? If so, what are the implications for employers and employees where such notice is imposed?

Notice is certainly not a mandatory requirement of Rule 23 (b)(2) itself. This fact, which is reiterated in the Advisory Committee's Notes on Rule 23,³⁵ was recognized by both the *Wetzel*³⁶ and *Freeman*³⁷ courts. However, the more interesting question, which was raised by both the *Wetzel*³⁸ and the *Alexander*³⁹ courts, is whether the Due Process Clause of the Fourteenth Amendment may be invoked as a source of law above and beyond Rule 23 to impose a notice requirement in all Title VII, (b) (2) class actions. As noted in *Alexander*, there is a growing body of authority which has applied this reasoning to (b)(2) actions outside of the Title VII area⁴⁰ and *Alexander* has now become the first case to apply the reasoning within the Title VII area. As noted earlier, these cases are based on the premise that any time absent class members may be bound by the final judgment in a class action, they are entitled, as a matter of due process, to be notified of that action.⁴¹

This reasoning embodies the assumption that the notice requirements of Rule 23 and the notice requirements of the due process clause are not co-extensive. This assumption appears to be contrary to the intent of the Advisory Committee as stated in its Notes on Rule 23: "This mandatory notice [in (b)(3) actions], together with any discretionary notice which the court may find it advisable to give [in (b)(1) and (b)(2) actions] is designed to fulfill requirements of due process to which the class action procedure is of course

³² *Id.*

³³ *Id.* at 256, 9 FEP Cas. at 224.

³⁴ See *id.* at 257, 9 FEP Cas. at 225.

³⁵ Advisory Committee's Notes, 39 F.R.D. 69, 106-07 (1966).

³⁶ 508 F.2d at 254, 9 FEP Cas. at 222.

³⁷ 9 FEP Cas. at 94 n.6.

³⁸ 508 F.2d at 256-57, 9 FEP Cas. at 223-25.

³⁹ *Alexander*, 380 F. Supp. at 1286, 8 FEP Cas. at 718.

⁴⁰ See note 13 and accompanying text *supra*. However, because of the "confused procedural history" of these cases, the court in *Wetzel* questioned their precedential value on the issue of notice. 508 F.2d at 255 n.36, 9 FEP Cas. at 223 n.36.

⁴¹ See 380 F. Supp. at 1286, 8 FEP Cas. at 718.

subject."⁴² Thus, it appears that the opinion of the circuit courts upon which the *Alexander* decision is based and the opinion of the Advisory Committee are directly opposite. This conclusion might be avoided if the Advisory Committee's statement is interpreted to mean that Rule 23 is designed to fulfill only the minimum requirements of due process and that in some cases more than the minimum requirements will be necessary. However, no court has yet adopted this interpretation of the statement.

The central question thus becomes whether due process requires mandatory notice in all (b)(2) class actions despite the discretionary language of Rule 23. The leading case on due process notice is *Mullane v. Central Hanover Trust Co.*,⁴³ in which the Supreme Court, presented with a question as to the particular type of notice required, held that personal notice rather than notice by publication was required by the due process clause to be given to easily found beneficiaries in the judicial settlement of a trust.⁴⁴ In so holding, the Court stated: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁴⁵ This language was quoted with approval in the subsequent case of *Schroeder v. City of New York*,⁴⁶ in which the Court was again presented with a question as to the type of notice required.⁴⁷ In addition, the *Mullane* opinion has been relied upon by several lower courts which have held that notice is required in all (b)(2) class actions as a matter of due process.⁴⁸

At the outset, however, it is important to note that the broad language of *Mullane* is dicta. It was also dicta as subsequently applied in *Schroeder*. This is true because both cases involved a question as to the *type* of notice required, rather than whether *any* notice at all was required.⁴⁹ Furthermore, both cases were decided prior to the effective date of Rule 23, in which the (b)(1), (b)(2), and (b)(3) distinctions were made for the first time among different types of class actions.⁵⁰ Therefore, the broad dicta in both cases was not

⁴² Advisory Committee's Notes, 39 F.R.D. 69, 107 (1966).

⁴³ 339 U.S. 306 (1949).

⁴⁴ *Id.* at 320.

⁴⁵ *Id.* at 314.

⁴⁶ 371 U.S. 208 (1962).

⁴⁷ *Id.* at 211.

⁴⁸ See, e.g., *Eisen v. Carlisle & Jacquelin*, 491 F.2d 555, 565 (2d Cir. 1968); *Pasquier v. Tarr*, 318 F. Supp. 1350, 1353 (E.D. La. 1970). See also Symposium—The Class Action, 10 B.C. Ind. & Com. L. Rev. 496, 559-61 (1969).

⁴⁹ 339 U.S. at 307; 371 U.S. at 208-09.

⁵⁰ Rule 23 became effective on July 1, 1966. 39 F.R.D. 69 (1966).

made with reference to these major distinctions. In addition, the drafters of Rule 23 were fully aware of the *Mullane* and *Schroeder* opinions and nevertheless drafted Rule 23 to require only discretionary notice in (b)(2) actions.⁵¹ This fact gives rise to an inference that the drafters did not consider the broad dicta of *Mullane* and *Schroeder* as conclusive on the question of notice in all class actions. Finally, this position is reinforced by subsequent decisions holding that notice is not mandatory in (b)(2) actions under the Due Process Clause.⁵² For these reasons, it is submitted that *Mullane* and *Schroeder* do not enunciate a due process requirement of mandatory notice in all class actions. Consequently, it appears that the discretionary notice requirement of Rule 23(b)(2) is constitutionally adequate.

The final question which remains concerns the implications for employees and employers where notice is imposed. The Third Circuit in *Wetzel* suggested that the imposition of such notice would often discourage plaintiff employees from maintaining their suits as class actions.⁵³ However, this is not always true. Employees will not be deterred where the costs of notice are imposed on the employer, as was apparently done in *Freeman*.⁵⁴ Nor will employees be deterred even in those cases where they must bear the costs of notice, as long as the court orders some form of low-cost notice. Requiring plaintiff employees to post a notice at the place of employment is a prime example. In these cases, the imposition of notice will not discourage class actions and the final result will be that more employees will be made aware of their potential rights to back pay awards in pending class actions.

Accordingly, notice generally adds up to greater costs to employers. Not only may the employer sometimes have to pay the costs of notice, as in *Freeman*, but the employer will also have to pay greater back pay awards, where such awards are computed on the basis of the number of employees who assert and establish their

⁵¹ Indeed, the Advisory Committee cited both *Mullane* and *Schroeder* in support of its statement regarding the interplay of (b)(1), (b)(2), and (b)(3) with the Due Process Clause. 39 F.R.D. at 107.

⁵² See, e.g., *Wetzel*, 508 F.2d at 257, 9 FEP Cas. at 225: "We thus agree with the framers of the rule, several district courts that have expressly considered the question, and several of the commentators that notice to absent members of a (b)(2) class is not an absolute requisite of due process." See also *Northern Natural Gas Co. v. Grounds*, 292 F. Supp. 619 (D. Kan. 1968): "We think that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties." *Id.* at 636; *Doglow v. Anderson*, 43 F.R.D. 472, 493-501 (E.D.N.Y. 1968).

⁵³ 508 F.2d at 254, 9 FEP Cas. at 222.

⁵⁴ 9 FEP Cas. at 94. However, it should be noted that in the context of a (b)(3) class action, the Supreme Court recently stated: "The usual rule is that a plaintiff must initially bear the cost of notice to the class." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

right to back pay.⁵⁵ This is likely to be a direct function of the amount and type of notice required.

B. *Proof in Title VII Litigation: The Applicability of McDonnell Douglas*

The Supreme Court has decided two major cases concerning the burden of proof in Title VII litigation, *Griggs v. Duke Power Co.*¹ and *McDonnell Douglas Corp. v. Green*.² In *Griggs*, the earlier of the two decisions, the Court held that under Title VII a company could not, in making initial employment and subsequent transfer decisions, utilize educational requirements which disqualify a disproportionate number of blacks unless the company could show that the requirements were sufficiently related to successful job performance.³ *Griggs* was a class action, and in the lower courts the plaintiff class had already established a past history of discrimination against blacks which was presently being perpetuated by the disproportionate impact of the educational requirements. Thus, when the case reached the Supreme Court, the primary issue for consideration was the company's burden in justifying the challenged practice.⁴ The Court first rejected the company's contention that if it could show either good intent or the lack of discriminatory intent in using the educational requirements, the practice was not violative of Title VII.⁵ Instead, the Court held that the requirements could be justified only upon a showing of business necessity: "[I]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."⁶ Applying this test to the educational requirements used by the Duke Power Co., the Court concluded that the company had failed to satisfy its burden of demonstrating job relatedness.⁷

In the subsequent case of *McDonnell Douglas Corp. v. Green*, the Court was presented with the issue of the burden of proof in a private, non-class action under Title VII.⁸ Plaintiff, a black former

⁵⁵ See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 261-62, 7 FEP Cas. 1115, 1154-55 (5th Cir. 1974).

¹ 401 U.S. 424 (1971). Although *Griggs* was a race discrimination case, it has been applied to other forms of discrimination. See, e.g., *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972) where the court stated, "Justice Burger's discussion of 'the business necessity' test clearly extended to other forms of discrimination than race. . . ." Id. at 350.

² 411 U.S. 792 (1973).

³ 401 U.S. at 431.

⁴ Id. at 429.

⁵ Id. at 432.

⁶ Id. at 431.

⁷ Id.

⁸ 411 U.S. at 800.

employee of the McDonnell Douglas Corporation, alleged that the company had unlawfully refused to rehire him because of his race. The company, on the other hand, responded that it had refused to rehire the plaintiff because he had recently engaged in certain illegal conduct directed against the company.⁹

The court discussed at length the burdens of proof to which the two parties were subject. This discussion culminated in the enunciation of a three-step procedure¹⁰ defining the "order and allocation of proof in a private, non-class action challenging employment discrimination."¹¹ Under Step I of this procedure, the burden is initially upon the employee to prove a prima facie case of racial discrimination by showing:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.¹²

It should be noted, however, that in a footnote, which has since been relied upon by lower courts to distinguish *McDonnell Douglas*,¹³ the Court stated: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations."¹⁴

Under Step II of the Court's procedure, if the employee has satisfied his initial burden of proving a prima facie case of racial discrimination, the burden then shifts to the employer to advance "some legitimate, non-discriminatory reason" to justify the company's refusal to hire the plaintiff.¹⁵ Finally, if the employer advances such a reason, then under Step III of the Court's procedure, the burden shifts back to the employee who must demonstrate that

⁹ Id. at 801.

¹⁰ Id. at 802-04.

¹¹ Id. at 800.

¹² Id. at 802.

¹³ See, e.g., *Rodriguez v. East Tex. Motor Freight*, 8 FEP Cas. 1246, 1257 (5th Cir. 1974); *Waters v. Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1317 n.3, 8 FEP Cas. 577, 583 n.3 (7th Cir. 1974).

¹⁴ 411 U.S. at 802 n.13.

¹⁵ Id. at 802. The Court did not provide guidelines as to what constitutes a "legitimate, nondiscriminatory reason." In addition, during the Survey year little light was shed on the meaning of this defense. However, see *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 7 FEP Cas. 416 (9th Cir. 1974), where the Ninth Circuit held that the employer's promotion-from-within policy did not constitute a "legitimate, nondiscriminatory reason." Id. at 296, 7 FEP Cas. at 419.

the employer's asserted reason is merely pretextual.¹⁶ Although the case was remanded on other grounds, the Court did suggest that on the facts before it the plaintiff had established a prima facie case of racial discrimination, but that the defendant had sufficiently rebutted the plaintiff's showing by advancing a legitimate, non-discriminatory reason.¹⁷ Thus, on remand, the plaintiff would have to establish pretextuality.¹⁸

McDonnell Douglas was decided one year prior to the present Survey year. Because of the marked difference between the burden of proof under *Griggs* and the burden of proof under *McDonnell Douglas*, the lower federal courts were often confronted during the Survey year with the question of whether *Griggs* or *McDonnell Douglas* applied to the fact situation at hand.¹⁹ On this question, the *McDonnell Douglas* opinion itself has been of central importance because therein the Court distinguished *Griggs* on two grounds. First, *Griggs* concerned the legality of a general company policy which was applicable to all employees and which had the effect of excluding many blacks.²⁰ *McDonnell Douglas*, on the other hand, involved the legality of a single decision not to hire a particular individual.²¹ Secondly, the *Griggs* educational requirements operated to exclude applicants on the basis of "childhood deficiencies in the education and background of minority citizens," a factor beyond the applicant's control.²² However, the plaintiff in *McDonnell Douglas* was excluded because of his illegal conduct against the company, a voluntary act.²³

The Fifth Circuit's decision in *Rodriquez v. East Texas Motor Freight*²⁴ is a Survey year case which relied, at least in part, on the first of these two distinctions cited by the *McDonnell Douglas* Court. Here, the court held that *Griggs* and not *McDonnell Douglas* was applicable in a class action challenging certain transfer policies which were utilized by the defendant company.²⁵ However, as evidenced by the companion case to *Rodriquez*, *Herrera v. Yellow*

¹⁶ 411 U.S. at 804.

¹⁷ *Id.* at 807.

¹⁸ *Id.*

¹⁹ For factually similar cases applying *McDonnell Douglas*, see, e.g., *Franklin v. Troxel Mfg. Co.*, 501 F.2d 1013, 1014-15, 8 FEP Cas. 654, 655-56 (6th Cir. 1974) (black female applicant denied employment by company with past history of racial discrimination); *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 295, 7 FEP Cas. 416, 419 (9th Cir. 1974) (black female applicant denied employment because of promotion-from-within policy).

²⁰ See 401 U.S. at 427-28.

²¹ 411 U.S. at 806.

²² See 401 U.S. at 427-28.

²³ *Id.*

²⁴ 8 FEP Cas. 1246 (5th Cir. 1974).

²⁵ See *id.* at 1257.

Freight System,²⁶ the procedural fact of whether the suit is maintained as a class action is not the crucial factor in determining whether *Griggs* or *McDonnell Douglas* is applicable. Unlike *Rodriguez*, *Herrera* was a private non-class action by a small group of individual plaintiffs who challenged the same transfer policies which were involved in *Rodriguez*.²⁷ Nevertheless, the court once again held *McDonnell Douglas* distinguishable and *Griggs* applicable.²⁸

Both *Rodriguez* and *Herrera* cited two additional grounds upon which *McDonnell Douglas* is distinguishable. First, the qualifications of the plaintiff in *McDonnell Douglas* were undisputed, since he had previously held the same job for which he later applied.²⁹ However, because they had never taken the prerequisite road test, the plaintiffs in *Rodriguez* and *Herrera* had not yet demonstrated that they were qualified for the more skilled job which they now sought.³⁰ Second, in both of the Fifth Circuit cases there was a history of past discrimination which would deter potential employees from ever applying for employment, whereas *McDonnell Douglas* involved no such history of past discrimination.³¹ Related to this latter distinction is the Seventh Circuit's decision in *Waters v. Wisconsin Steel Works*.³² Here the court held that *McDonnell Douglas* was not applicable on the issue of whether the plaintiff had established a prima facie case of past discrimination.³³ Thus, while the Fifth Circuit stated in *Rodriguez* and *Herrera* that *McDonnell Douglas* is not applicable if a history of past discrimination is shown which would have discouraged potential employees from applying for a job, the Seventh Circuit went further and stated in *Waters* that *McDonnell Douglas* is inapplicable on the initial question of whether the plaintiff has, in fact, established such a history of past discrimination.

At the same time, it is important to note several significant circumstances which, although different from those presented in *McDonnell Douglas*, have nevertheless been held insufficient to distinguish the *McDonnell Douglas* case. The first of these is the statute under which the discrimination claim is brought. In *McDonnell Douglas*, the employee's claim was based on Title VII.³⁴ However, the decision has been applied during the Survey year to claims

²⁶ 8 FEP Cas. 1266 (5th Cir. 1974).

²⁷ *Id.* at 1267.

²⁸ *Id.* at 1268.

²⁹ 411 U.S. at 794.

³⁰ *Rodriguez*, 8 FEP Cas. at 1257; *Herrera*, 8 FEP Cas. at 1268.

³¹ *Rodriguez*, 8 FEP Cas. at 1257; *Herrera*, 8 FEP Cas. at 1268.

³² 502 F.2d 1309, 8 FEP Cas. 577 (7th Cir. 1974).

³³ *Id.* at 1317, 8 FEP Cas. at 583.

³⁴ 411 U.S. at 793-94.

based on 42 U.S.C. section 1981,³⁵ 42 U.S.C. section 1982,³⁶ and the Age Discrimination in Employment Act.³⁷ The second of these circumstances is the type of discrimination which is asserted. *McDonnell Douglas* was a race discrimination case.³⁸ Nevertheless, during the Survey year the decision was also applied to claims of age discrimination,³⁹ religious discrimination⁴⁰ and sex discrimination.⁴¹ Finally, the specific type of employer action which is challenged has also not been significant. While *McDonnell Douglas* involved a hiring decision, the case has been applied to discharge⁴² and promotion⁴³ decisions. Also noteworthy is the fact that at least once during the Survey year *McDonnell Douglas* was applied outside the employment area to a claim that contractors and vendors of new homes in Chicago were unlawfully maintaining separate and discriminatory housing markets for blacks and whites.⁴⁴

In summary, during the Survey year the lower courts constantly sought to clarify the fact situations to which *McDonnell Douglas* applies as compared to the fact situations to which *Griggs* applies. It has emerged that where a general employer policy or practice is challenged in a class action, *Griggs* and not *McDonnell Douglas* applies.⁴⁵ This is also true where an individual employee challenges a single employer action as based on a general discriminatory policy.⁴⁶ Furthermore, in the opinion of the Fifth Circuit, if in addition the challenged policy is part of a past and continuing history of discrimination, the applicability of *Griggs* is strengthened.⁴⁷ On the other hand, where the employer has acted discriminatorily towards only one employee, and that action is not

³⁵ *Long v. Ford Motor Co.*, 496 F.2d 500, 505 n.11, 7 FEP Cas. 1053, 1057 n.11 (6th Cir. 1974).

³⁶ *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 334 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1975).

³⁷ 29 U.S.C. § 621-34 (1970). *Wilson v. Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84, 86, 8 FEP Cas. 749, 750 (5th Cir. 1974). In this case, the court did not actually apply *McDonnell Douglas* as direct precedent. Instead, the court formulated its own prima facie test based on "analogous *McDonnell* factors." *Id.*

³⁸ 411 U.S. at 796.

³⁹ *Wilson v. Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84, 86, 8 FEP Cas. 749, 750 (5th Cir. 1974).

⁴⁰ *Slamon v. Westinghouse Elec. Corp.*, 386 F. Supp. 174, 176, 8 FEP Cas. 1325, 1327 (E.D. Pa. 1974).

⁴¹ *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094, 1100-01, 7 FEP Cas. 994, 999 (2d Cir. 1974).

⁴² See, e.g., *Wilson v. Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84, 86, 8 FEP Cas. 749, 750 (5th Cir. 1974).

⁴³ *Pettit v. United States*, 488 F.2d 1026, 1033 (Ct. Cl. 1973).

⁴⁴ *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 334 (7th Cir. 1974).

⁴⁵ See, e.g., *Rodriguez*, 8 FEP Cas. at 1257.

⁴⁶ See, e.g., *Herrera*, 8 FEP Cas. at 1268. See also *Waters v. Wisconsin Steel Works*, 582 F.2d 1309, 1317, 8 FEP Cas. 577, 583 (7th Cir. 1974).

⁴⁷ *Rodriguez*, 8 FEP Cas. at 1257; *Herrera*, 8 FEP Cas. at 1268.

based on a policy of general application but rather is based on facts peculiar to the individual, then *McDonnell Douglas* governs.⁴⁸ This pattern is underscored by the fact that *McDonnell Douglas* has been applied almost exclusively to individual hiring, firing, promotion or demotion decisions. While there is at least one case applying *McDonnell Douglas* in a manner inconsistent with these general rules,⁴⁹ it is submitted that it represents an improper application of the *McDonnell Douglas* decision.

The final question for consideration is the implications for employers and employees of the application of *McDonnell Douglas* rather than *Griggs*. First, where *McDonnell Douglas* is applicable, the employee's burden in establishing a prima facie case of discrimination is easier to satisfy than under *Griggs*. The general rule in Title VII cases is that the employee must establish the existence of discrimination by a preponderance of the evidence.⁵⁰ *McDonnell Douglas* does not abrogate this rule. However, *McDonnell Douglas* aids the employee in satisfying his burden under this rule by setting forth a series of easily established facts and declaring that upon proof of these facts the employee satisfies his burden of establishing a prima facie case of discrimination.⁵¹ Furthermore, a close examination of the required facts reveals that the employee does not have to introduce any direct evidence of discrimination. Rather, the existence of discrimination arises by inference. *Griggs*, on the other hand, did not specifically consider the employee's burden in establishing a prima facie case of discrimination. Therefore, in cases where *Griggs* is applicable, the employee must establish his prima facie case without the help of any aid such as that created in *McDonnell Douglas*. This distinction is especially important where the employer moves for a judgment on the pleadings pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the employee has failed to establish a prima facie case under Title VII. Employees will be in a better position to defeat this motion where *McDonnell Douglas* rather than *Griggs* is applicable.

⁴⁸ See, e.g., *Wilson v. Sealtest Food Div. of Kraftco Corp.*, 501 F.2d 84, 86, 8 FEP Cas. 749, 750 (5th Cir. 1974); *Long v. Ford Motor Co.*, 496 F.2d 500, 505-06, 7 FEP Cas. 1053, 1057 (6th Cir. 1974); *Slamon v. Westinghouse Elec. Corp.*, 386 F. Supp. 174, 176, 8 FEP Cas. 1325, 1327 (E.D. Pa. 1974). See also cases cited at note 18 supra.

⁴⁹ In *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1975), the court applied *McDonnell Douglas* to define the burden placed upon certain land companies and building contractors to rebut a prima facie case of racial discrimination. *Id.* at 334. This application was erroneous. Because the suit was a class action brought to challenge discriminatory policies affecting all blacks in a particular housing market, *Griggs*, not *McDonnell Douglas*, should have been applied.

⁵⁰ *Dewey v. Reynolds Metal Co.*, 422 F.2d 324, 328 (6th Cir. 1970), aff'd, 402 U.S. 689 (1971); *Ochoa v. Monsanto Co.*, 335 F. Supp. 53, 59 (S.D. Tex. 1971), aff'd, 473 F.2d 318 (5th Cir. 1973).

⁵¹ 411 U.S. at 802.

However, the employer's burden in rebutting that prima facie case is also more easily sustained under the *McDonnell Douglas* decision. Here, the employer need only *allege* any legitimate, non-discriminatory reason and the burden of rebuttal has been satisfied.⁵² Thus, not only does the employer have a broad range of available defenses, since any legitimate, nondiscriminatory reason will suffice, but his burden in establishing that reason has been reduced to a mere allegation. In contrast, under the *Griggs* decision, the employer's burden of rebuttal is much more difficult to sustain. Here the employer has only one defense available: business necessity.⁵³ Furthermore, it appears that the employer must establish this defense by a preponderance of the evidence.⁵⁴

In conclusion, it is submitted that, where applicable, the *McDonnell Douglas* decision has significantly reduced both the employee's burden of establishing a prima facie case of discrimination and the employer's burden of rebuttal. As a result, the ultimate burden in many Title VII cases under *McDonnell Douglas* rests with the employee when he seeks to establish pretextuality. It should be noted, however, that in establishing pretextuality, the employee does not have to show that the employer acted discriminatorily. Instead, the employee only has to show that the reason asserted by the employer to justify the challenged action is not the actual reason upon which the action was originally based.⁵⁵ Therefore, under *McDonnell Douglas*, the employee can win his employment discrimination case without ever having introduced any direct evidence of discrimination if he can show: (1) those facts under the prima facie test which create the inference of discrimination; and (2) that the challenged personnel action was not based on the reason asserted by the employer.

C. *Implementation of Class-wide Back Pay Awards:* Johnson; Pettway

Despite some judicial reluctance to award class-wide back pay in Title VII actions,¹ it is now established in the Third,² Fourth,³

⁵² Id. See also *Taylor v. Safeway Stores*, 365 F. Supp. 468, 6 FEP Cas. 556 (D. Colo. 1973).

⁵³ 401 U.S. at 431.

⁵⁴ Id.

⁵⁵ 411 U.S. at 805-05.

¹ See, e.g., *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 311 (8th Cir. 1972) where the Eighth Circuit denied, with little discussion, a request for back pay. In a subsequent decision, the Eighth Circuit adopted the concept of back pay. *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 378-80 (8th Cir. 1973). The court also noted that prior to this decision, the law was unclear in the Circuit on the propriety of back pay awards. Id. at 380.

Fifth,⁴ Sixth,⁵ Seventh,⁶ and District of Columbia⁷ Circuits that back pay may be awarded in Title VII class actions despite the fact that many members of the class have not exhausted their administrative remedies with the EEOC.⁸ In fact, several circuits have gone one step further by providing that, absent "special circumstances," the district court must award back pay if a prima facie case of class-wide discrimination has been established.⁹ However, in fashioning such relief, significant problems have arisen concerning both the mechanics of calculating class-wide back pay awards, and the burden of proof imposed on individual members of the class who seek to establish their right to a portion of the back pay award.

During the Survey year, the Fifth Circuit provided insight into both of these problems in two factually similar cases, *Johnson v. Goodyear Tire & Rubber Co.*¹⁰ and *Pettway v. American Cast Iron Pipe Co.*¹¹ Both cases involved private class actions brought under Title VII and 42 U.S.C. section 1981,¹² in which the plaintiffs (1) revealed a history of past discrimination against blacks by the defendant companies¹³ and (2) challenged certain present policies of the defendant companies as perpetuating the effects of the demonstrated past discrimination.¹⁴ The court in *Johnson* found that the company's departmental seniority system unlawfully carried for-

² *Rosen v. Public Serv. Elec. & Gas Co.*, 477 F.2d 90, 94-96 (3d Cir. 1972).

³ *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 140-42 (4th Cir. 1973); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803-04 (4th Cir. 1971).

⁴ *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 442, 444, 8 FEP Cas. 84, 87-88 (5th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 251-52, 7 FEP Cas. 1115, 1147 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375, 7 FEP Cas. 627, 634-35 (5th Cir. 1974).

⁵ *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876, 7 FEP Cas. 987, 988 (6th Cir. 1973).

⁶ *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197, 1201-02 (7th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-21 (7th Cir. 1969).

⁷ *Watkins v. Washington*, 472 F.2d 1373, 1375 (D.C. Cir. 1972).

⁸ The general relief provision of Title VII is found at 42 U.S.C. § 2000e-5(g) (Supp. III 1973). See generally Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 Rutgers L. Rev. 741 (1973); Comment, Back Pay in Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964, 23 Emory L.J. 163 (1974); Comment, Equal Employment Opportunity: The Back Pay Remedy under Title VII, 1974 U. Ill. L.F. 379 (1974).

⁹ *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 252-53, 7 FEP Cas. 1115, 1148 (5th Cir. 1974); *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 142 (4th Cir. 1973). See *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876-77 (6th Cir. 1973). Cf. *Newman v. Piggie Park Enterps. Inc.*, 390 U.S. 400, 402 (1967) (per curiam).

¹⁰ 491 F.2d 1364, 7 FEP Cas. 627 (5th Cir. 1974).

¹¹ 494 F.2d 211, 7 FEP Cas. 1115 (5th Cir. 1974).

¹² *Pettway*, 494 F.2d at 216, 7 FEP Cas. at 1119; *Johnson*, 491 F.2d at 1368, 7 FEP Cas. at 629.

¹³ *Pettway*, 494 F.2d at 218-20, 7 FEP Cas. at 1121-23; *Johnson*, 491 F.2d at 1368-69, 7 FEP Cas. at 629-30.

¹⁴ *Pettway*, 494 F.2d at 222-24, 236-41, 7 FEP Cas. at 1124-26, 1135-39; *Johnson*, 491 F.2d at 1373-74, 7 FEP Cas. at 633.

ward the effects of past discrimination in violation of Title VII.¹⁵ In *Pettway* the court similarly held violative of Title VII defendant's departmental seniority system, its posting and bidding procedure and its age requirement in apprenticeship programs.¹⁶ In both *Johnson* and *Pettway* the court authorized an award of class-wide back pay and remanded to the district court for determination and implementation of the award.¹⁷ However, because of the enormous complexities involved in this relatively new task, the court provided guidance to the district court in both cases on alternative methods of calculating class-wide back pay awards,¹⁸ and on the burden of proof on individual members of the class.¹⁹

After defining the goal of class-wide back pay as the restoration of injured employees "to the economic position in which they would have been but for the discrimination,"²⁰ the court enunciated two general principles useful in computing back pay awards.²¹ As a result of the uncertainties involved in trying to determine which employees would have secured which jobs had it not been for the defendant company's discriminatory policies, the court explained that: "(1) unrealistic exactitude is not required, [and] (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer."²²

The court then discussed alternative methods of calculation. Where the class is small, the time period is short, or the effect of the discrimination is straightforward, the court stated that a class-wide approach was not necessary and suggested an individual-by-individual approach whereby the employment history of each class member would be reconstructed to determine if, and to what extent, a particular class member was injured by the discriminatory policies.²³ The total of these individual awards would be the amount of the class-wide award.²⁴

However, where the class is large, the time period is long, or the effect of the discrimination is ambiguous, the court suggested a

¹⁵ 491 F.2d at 1370-74, 7 FEP Cas. at 631-33.

¹⁶ 494 F.2d at 234-38, 7 FEP Cas. at 1134-36.

¹⁷ *Pettway*, 494 F.2d at 251, 7 FEP Cas. at 1147; *Johnson*, 491 F.2d at 1382, 7 FEP Cas. at 640.

¹⁸ *Pettway*, 494 F.2d at 260-63, 7 FEP Cas. at 1153-56.

¹⁹ *Pettway*, 494 F.2d at 259-60, 7 FEP Cas. at 1152-53; *Johnson*, 491 F.2d at 1374-75, 1379-80, 7 FEP Cas. at 634-35, 638-39.

²⁰ *Pettway*, 494 F.2d at 252, 7 FEP Cas. at 1147.

²¹ *Id.* at 260-61, 7 FEP Cas. at 1153-54.

²² *Id.* at 260-61, 7 FEP Cas. at 1154 (citations omitted).

²³ *Id.* at 261, 7 FEP Cas. at 1154.

²⁴ *Id.*

class-wide approach.²⁵ Two formulas were specifically discussed. The first was the *Stamps* formula, so named because it was initially applied in *Stamps v. Detroit Edison Co.*²⁶ There, the court first defined the class and the back pay period. The court then determined the average earnings of the five groups of jobs from which members of the plaintiff class had been excluded, and awarded each member of the class the amount of the average earnings "computed for pay grade progression purposes according to the number of years of employment, less the amount of interim earnings."²⁷ Secondly, the court in *Pettway* discussed the "comparability" or "representative employee earnings" formula.²⁸ Under this formula, after determining the class and time period, a court compares the plaintiff class to a group of employees who are comparable in size, ability, and length of employment but who have not been hindered by the unlawful employment discrimination. The amount of back pay awarded becomes the difference, if any, between the amounts earned by the plaintiff class and the group of comparable employees within the defined time period.²⁹ In closing, the court noted that in addition to "straight salary," back pay awards should also include interest, overtime, shift differentials and fringe benefits, including vacations and sick pay.³⁰

In *Johnson*, the court primarily addressed the issue of the burden of proof placed on an individual employee who seeks to establish his right to a portion of the class-wide back pay award.³¹ Noting that "individual circumstances vary and not all potential discriminatees are entitled to recovery,"³² the court stated that once a prima facie case of discrimination against the class is established, an initial burden of proof is placed on the individual employee to demonstrate that he is, in fact, a member of the recognized class which was subjected to the discrimination.³³ In satisfying this burden of proof, the employee would not be required to recreate with exactitude what his employment situation would have been in the absence of the discrimination. Instead, the court suggested, the burden of proof should be based on "ascertainable and provable"

²⁵ Id. at 261-62, 7 FEP Cas. at 1154-55.

²⁶ 365 F. Supp. 87, 6 FEP Cas. 612 (E.D. Mich. 1973), rev'd sub nom. EEOC v. Detroit Edison Co., 10 FEP Cas. 239 (6th Cir. 1975).

²⁷ 365 F. Supp. at 121-22, 6 FEP Cas. at 640-41.

²⁸ 494 F.2d at 262-63, 7 FEP Cas. at 1155-56.

²⁹ Id. The court noted that in the instant action the latter method, the comparability formula, was more realistic than an individual-by-individual approach because of the size of the plaintiff class. Id. at 263, 7 FEP Cas. at 1156.

³⁰ Id. at 263, 7 FEP Cas. at 1156.

³¹ 491 F.2d at 1379, 7 FEP Cas. at 638.

³² Id. at 1375, 7 FEP Cas. at 635.

³³ Id. at 1379, 7 FEP Cas. at 638.

objective factors, concluding that if the employee could prove that he was hired by the company into a predominantly black, low paying position and that he was frozen into that position by virtue of the company's discriminatory policies, then he had satisfied his burden of proof.³⁴

It is submitted that the second part of this test is illusory, at least in those cases where the class is defined narrowly in terms of the discrimination alleged. The burden of proof in establishing class-wide back pay awards is a two step process.³⁵ First, the plaintiff class must establish that, as a class, it has been frozen into the lower paying jobs due to the employer's discriminatory policy.³⁶ Secondly, the individual employee must prove that he is entitled to a share of the class-wide award.³⁷ However, in many instances, the same evidence which initially was admitted to prove that the class was frozen into lower paying jobs may also later serve to show that a particular employee was frozen into a lower paying job. Thus, once the employee has demonstrated that he is a member of the plaintiff class, he will be able to rely on the evidence already introduced by the class to prove that he too was frozen into a lower paying job, thus satisfying his burden under the second part of the *Johnson* test.

In *Pettway*, the court elaborated on the burden of proof standard which was established in *Johnson*. "[I]t is clear that the burden of proof formulated by the court conceives an initial lighter burden on the back pay claimant with a heavier weight of rebuttal on the employer."³⁸ The court further stated that the "maximum" burden³⁹ which could be imposed on an individual in the instant action was to require a statement setting forth: (1) the employee's current job and pay rate, (2) the jobs he was discriminatorily denied and their pay rates, (3) evidence that he was qualified, including a record of his employment history with the company, and (4) an estimate of the requested back pay.⁴⁰ By providing such a statement, the individual employee would satisfy his initial burden of proof. In closing, the court noted that both the employer's records and the employer's aid shall be available to the plaintiff in satisfying his initial burden.⁴¹

Once an employee has met the initial burden of demonstrating

³⁴ Id. at 1379-80, 7 FEP Cas. at 638.

³⁵ See *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 443, 8 FEP Cas. 84, 88 (5th Cir. 1974).

³⁶ Id. at 443-44, 8 FEP Cas. at 88.

³⁷ Id. at 444, 8 FEP Cas. at 88-89.

³⁸ 494 F.2d at 259, 7 FEP Cas. at 1153.

³⁹ Id. at 259-60, 7 FEP Cas. at 1153.

⁴⁰ Id.

⁴¹ Id. at 260, 7 FEP Cas. at 1153.

that he is a member of the class which has been discriminated against, the burden shifts to the company to establish by "convincing evidence" that factors other than the discriminatory policies would have prevented the member from advancing beyond his low paying position.⁴² The court provided little insight into exactly what type of factors would be sufficient to discharge the employer's burden. The court did state, however, that the employer can discharge his burden as to a particular employee by showing that the employee was not qualified to advance from the lower paying job to a higher paying job.⁴³ However, it should be noted that this defense must be established by "clear and convincing evidence," whereas all other defenses are subject to a lesser "convincing evidence" standard.⁴⁴

It is submitted that another available defense would be the lack of available jobs.⁴⁵ If the employer can establish that there were no higher paying jobs available during the alleged discriminatory period, and that this is the reason why the class member did not advance, then the employer has satisfied his burden as to each member of the class. Moreover, if the employer can establish that there were only a few jobs available, fewer than the number of members in the class, then he has discharged his burden as to the aggregate number of class members for which no jobs were available. In effect, the burden then shifts back to the individual class member who must establish that, because of superior qualifications or greater seniority, he would have been selected to one of those jobs "but for" the employer's discriminatory policy. However, regardless of which defense the employer asserts in rebuttal, the court should resolve "any doubts in proof . . . in favor of the discriminatee giving full and adequate consideration to applicable equitable principles."⁴⁶

The final question for consideration, which was not specifically addressed in either the *Pettway* or the *Johnson* decisions, is whether an employee must actually have applied for a higher paying job before he is entitled to a portion of the back pay award. The court in *Pettway* did state that the employee must specify "the jobs he was denied because of discrimination."⁴⁷ One could argue that under this requirement, the employee must have actually applied for the job which he claims he was discriminatorily denied. However, the court in *Pettway* further stated, in discussing the need for flexibility in calculating class-wide awards, that "there is no way of determin-

⁴² 491 F.2d at 1380, 7 FEP Cas. at 638.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 444, 8 FEP Cas. 84, 89 (5th Cir. 1974).

⁴⁶ *Johnson*, 491 F.2d at 1380, 7 FEP Cas. at 638.

⁴⁷ 494 F.2d at 259, 7 FEP Cas. at 1153.

ing [precisely] which jobs the class members would have bid on, and have obtained if discriminatory [policies] had not been in existence. . . . [However] it does not follow that back pay claims based on promotions cannot be awarded. Unrealistic exactitude is not required."⁴⁸ Furthermore, the *Pettway* court quoted with approval from the Seventh Circuit's decision in *Bowe v. Colgate, Palmolive Co.*⁴⁹ wherein the court stated, "[i]n each case the problem was to determine in some reasonable fashion 'the highest rate of pay for such jobs as [the employee] would have bid on and qualified for if a non-discriminatory seniority scheme would have been in existence.' "⁵⁰

Therefore, based on these statements, it is submitted that the individual employee need not have actually applied for a higher paying job before he is entitled to an award of back pay. Moreover, this conclusion is consistent with the general duty of a court in calculating back pay awards, which is to reconstruct, as nearly as possible, what the employment situation would have been but for the discriminatory policy.⁵¹ Because the mere existence of a discriminatory policy often deters employees from applying futilely for a better job,⁵² it is arguable that absent the discriminatory policy more employees would have applied for and acquired higher paying jobs.

X. EEOC ENFORCEMENT POWERS UNDER SECTION 706: *Sanchez-Raymond Metal Products-General Electric*

Whenever a charge of unlawful employment discrimination is presented to the Equal Employment Opportunity Commission (hereinafter "Commission" or "EEOC"), the Commission must proceed in one of two fashions. First, if the state in which the alleged discriminatory act occurred has a law which both prohibits the discriminatory act and establishes an authority with the power to grant or seek relief, then the EEOC must notify that state authority, which may then proceed under state law.¹ Second, if no such state law exists, the EEOC must, within 10 days, notify the employer and, shortly thereafter, conduct an investigation to determine if reasonable cause exists to believe that the allegation is true.² If

⁴⁸ Id. at 260, 7 FEP Cas. at 1153-54.

⁴⁹ 489 F.2d 896, 6 FEP Cas. 1132 (7th Cir. 1973).

⁵⁰ 494 F.2d at 262, 7 FEP Cas. at 1155, quoting *Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896, 902, 6 FEP Cas. 1132, 1136 (7th Cir. 1973).

⁵¹ *Pettway*, 494 F.2d at 261-62, 7 FEP Cas. at 1155.

⁵² Cf. id. at 260, 7 FEP Cas. 1153.

¹ 42 U.S.C. §§ 2000e-5(c) to (d) (Supp. III 1973).

² See id. § 2000e-5(b).

reasonable cause is found, the Commission must seek to remedy the discriminatory act through the informal methods of conference, conciliation and persuasion.³ If these methods prove unsuccessful, the EEOC may then file a civil action against the employer in federal district court.⁴ In addition, the aggrieved employee may file a civil action against the employer either within 90 days of notification by the EEOC that the Commission has dismissed his charge⁵ or that the Commission has failed to file a civil action within 180 days of the employee's initial filing of the charge.⁶

During the Survey year, one issue concerning the proper scope of the enforcement powers granted to the EEOC by section 706(f)(1)⁷ of Title VII frequently arose in the federal courts: What is the relationship required by section 706(f)(1) between the scope of the initial employee's charge filed with the EEOC and the scope of the EEOC complaint subsequently filed in district court?

In resolving this issue, the courts have often relied on *Sanchez v. Standard Brands, Inc.*⁸ Plaintiff, a female employee of Standard Brands, filed a charge with the EEOC alleging sex discrimination.⁹

³ Id. §§ 2000e-5(b).

⁴ Id. §§ 2000e-5(f)(1), (3).

⁵ Id. § 2000e-5(f)(1).

⁶ Id.

⁷ Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III 1973) provides as follows: If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from filing of such charge or 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 (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

⁸ 431 F.2d 455, 2 FEP Cas. 788 (5th Cir. 1970).

⁹ Id. at 458, 2 FEP Cas. at 790.

The subsequent EEOC investigation revealed that there was no reasonable cause for the charge of sex discrimination, but that there was reasonable cause for a discrimination charge based on national origin. As a result of the EEOC's findings, plaintiff filed a civil action alleging the latter form of discrimination.¹⁰ The district court dismissed this action since it was not included in the original charge¹¹ of sex discrimination.

The Fifth Circuit reversed.¹² In upholding the plaintiff's right to assert the national origin claim, the Fifth Circuit applied the following standard: "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."¹³ Thus, the court focused on the scope of the EEOC investigation, which it stated should be construed liberally, as defining the proper relationship between the employee's initial charge and subsequent judicial complaint.¹⁴ While *Sanchez* dealt with the relationship between an employee charge and a subsequent judicial complaint filed by the same employee, the standard applied therein has nevertheless been used to define the relationship between an employee charge and the subsequent judicial complaint filed by the EEOC.¹⁵

During the Survey year, the issue of this relationship between an employee charge and an EEOC complaint arose in *EEOC v. General Electric Co.*¹⁶ Two black male employees of General Electric filed charges of racial discrimination with the EEOC. However, in investigating the two charges, the Commission determined that there was probable cause to believe that General Electric discriminated not only against blacks, but also against women. The EEOC judicial complaint subsequently filed included allegations of both forms of discrimination.¹⁷

The district court held that the EEOC could not maintain the claim of discrimination based on sex.¹⁸ After citing the *Sanchez* standard,¹⁹ the court added a further caveat which ultimately proved fatal to the EEOC's sex discrimination claim: "[t]he discrimination uncovered must at least have had the potential of prejudicing the charging party in order to be the subject of a later suit

¹⁰ Id. at 459, 2 FEP Cas. at 790.

¹¹ Id. at 460, 2 FEP Cas. at 791.

¹² Id. at 466, 2 FEP Cas. at 796.

¹³ Id.

¹⁴ Id. at 466-67, 2 FEP Cas. at 796-97.

¹⁵ See, e.g., *EEOC v. Kimberly-Clark Corp.*, 10 FEP Cas. 38, 48 (6th Cir. 1975).

¹⁶ 376 F. Supp. 757, 8 FEP Cas. 47 (W.D. Va. 1974).

¹⁷ Id. at 758-59, 8 FEP Cas. at 47-48.

¹⁸ Id. at 762, 8 FEP Cas. at 50.

¹⁹ Id. at 760-61, 8 FEP Cas. at 49.

growing out of the charge."²⁰ Since the two employees who originally filed the charges against General Electric were both males, neither could be potentially prejudiced by the defendant's discrimination against women. Summary judgement was granted as to the EEOC's sex discrimination claim.²¹ Thus, under the *General Electric* standard, a crucial factor in determining the relationship between the employee charge and the EEOC judicial complaint is the race, color, religion, sex or national origin of the original charging party.²²

In contrast to the *General Electric* decision, the district court in *EEOC v. Raymond Metal Products Co.*²³ held that an EEOC judicial complaint based on an employee charge could properly include any type of discrimination for which the jurisdictional prerequisites of Title VII had been satisfied.²⁴ While in the process of investigating an employee charge of discrimination based on national origin, the EEOC found reasonable cause for charges of discrimination based not only on national origin, but also on sex and race. When it was unable to secure a conciliation agreement with the defendant as to any of the discrimination claims, the EEOC filed a complaint in the district court.²⁵

The court held that the EEOC judicial complaint could properly include all three forms of discrimination.²⁶ After citing the *Sanchez* standard that "the scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charges of discrimination,"²⁷ the court applied a much broader standard based on the policy considerations²⁸ underlying the *Sanchez* decision. "[A]n EEOC civil action may properly embrace, in addition to those allegations contained in the initial charge, any allegation of other discriminatory practices for which there has been an investigation, a determination of reasonable cause, and a genuine attempt at conciliation."²⁹ In fashioning

²⁰ Id. at 761, 8 FEP Cas. at 50.

²¹ Id. at 763, 8 FEP Cas. at 51.

²² Id. at 761, 8 FEP Cas. at 50.

²³ 8 FEP Cas. 1199 (D. Md. 1974).

²⁴ Id. at 1204.

²⁵ Id. at 1201, 1205.

²⁶ Id. at 1204.

²⁷ Id. at 1204, quoting *Sanchez*, 431 F.2d at 466, 2 FEP Cas. at 796.

²⁸ The policy considerations referred to by the court in *Raymond Metal Products* arise from the statutory scheme of Title VII. Under this scheme a charge is not filed to directly initiate a civil action. Instead, the charge initiates an investigation. Only if the investigation reveals reasonable cause, and only if conciliation efforts are unsuccessful is a civil action commenced. Thus, the investigation and the civil action are more directly connected than the charge and the civil action and, as such, the investigation and not the charge should define the proper scope of the EEOC judicial complaint. 8 FEP Cas. at 1204.

²⁹ 8 FEP Cas. at 1204.

this standard, the court considered and rejected the standard applied in *General Electric*—that the EEOC complaint may properly include only allegations which have the “potential of prejudicing the charging party.”³⁰ This standard was rejected, first, because it had no statutory basis in Title VII,³¹ and second, because the standard becomes unmanageable where the EEOC is the charging party, since it would be absurd to require that the discriminatory practice have the potential of prejudicing the EEOC.³²

These criticisms are not well founded. Section 706(f)(1) requires at least some relationship between the EEOC judicial complaint and the original employee charge. This general requirement, which was expressly recognized in *General Electric*,³³ arises from both the language³⁴ and the scheme³⁵ of Title VII. However, Congress was silent as to the *particular* relationship required. No indication appears in either the language or the legislative history of Title VII. Due to this congressional silence, there is no particular standard which can be said to have a statutory basis in Title VII. Thus, it is illogical to criticize the *General Electric* standard as being without such statutory basis.

The second criticism—that the *General Electric* standard becomes unmanageable when the EEOC is the charging party—is also unpersuasive. In such cases, a different procedural context is involved. Here, the EEOC judicial complaint is based on the previously filed EEOC charge whereas in *General Electric* and *Raymond Metal Products* the EEOC judicial complaint was based on a charge filed by an employee. Certainly the *General Electric* standard should not be rejected in one procedural context just because it would be unmanageable in another, different procedural context.

In fashioning a proper standard to define the relationship required between the scope of the employee charge and the scope of the subsequently filed EEOC judicial complaint, two factors must be accommodated: the standard must properly take account of the requirements of section 706(f)(1) and it must be practical. The *Raymond Metal Products* standard does not properly take account

³⁰ Id. at 1206, quoting *General Electric*, 376 F. Supp. at 761, 8 FEP Cas. at 50.

³¹ 8 FEP Cas. at 1206.

³² Id.

³³ 376 F. Supp. at 760, 8 FEP Cas. at 49.

³⁴ Section 709(a), 42 U.S.C. § 2000e-8(a) (1970) provides that, in investigating an employee charge, the EEOC shall have access to any evidence “relevant to the charge.” Furthermore, section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1970) authorizes the EEOC to file a civil action “thirty days after a charge is filed” against the company “named in the charge.”

³⁵ Section 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III 1973) provides that notice of an employee charge shall be given to the company and that efforts toward informal conciliation shall be made by the EEOC. These provisions would be rendered meaningless if the EEOC could subsequently file a civil complaint unrelated to the employee charge.

of the requirements of section 706(f)(1) and, for this reason, the standard should be rejected. While section 706(f)(1) is ambiguous as to the precise relationship required, it is clear that the section requires at least *some* relationship. The *Raymond Metal Products* standard entirely ignores this requirement.

The *General Electric* standard does take account of section 706(f)(1) requirements. However, the standard is arguably impractical and, for this reason, it should also be rejected. If, in the course of a reasonably limited investigation of an employee charge, the EEOC discovers discriminations not alleged in the charge, practicality requires that the EEOC be allowed to include this discrimination in a subsequent judicial complaint. Otherwise, the EEOC will be forced to "start over" with respect to the newly discovered discrimination, either by encouraging another employee to file a charge or by filing a new charge itself.³⁶ This will not only cause fragmentation of the EEOC's case against an employer into a series of separate claims, but it will also cause unnecessary duplication and delay.³⁷ This result should not be occasioned by the fortuitous fact that the newly discovered discrimination does not have the potential of prejudicing the employee whose charge initiated the investigation.

It is submitted that the standard which best accommodates the need for practicality and the requirements of section 706(f)(1) is the original *Sanchez* standard that "the scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."³⁸ Two competing interests are at stake. First, the EEOC should not be hampered by an overly restrictive standard which results in unnecessary delay, fragmentation, and duplication of EEOC enforcement proceedings. Second, the EEOC should not be permitted, on the basis of a single employee charge, to launch a full-scale investigation of all policies and practices of a defendant company. The *Sanchez* standard is practical because it properly accommodates both of these interests. On the one hand, the standard permits the inclusion of any discrimination discovered in the normal course of investigating an employee charge.³⁹ On the other hand, the standard excludes any discrimination which is the product of an unreasonably broad investigation, thus preventing the EEOC from conducting a "fishing expedition" under the guise of investigating an employee charge.

The *Sanchez* standard also satisfies the requirement of section

³⁶ *Raymond Metal Products*, 8 FEP Cas. at 1205.

³⁷ *Id.*

³⁸ 431 F.2d at 466, 2 FEP Cas. at 796. See text at notes 12-15 *supra*.

³⁹ *Id.*

706(f)(1) that there be at least some relationship between a subsequent EEOC judicial complaint and the original employee charge. Under the *Sanchez* standard, the relationship is provided in the requirement that an investigation be reasonably limited to the discrimination alleged in the employee charge and that only discrimination discovered during the course of such a reasonably limited investigation be included in the subsequent judicial complaint.⁴⁰ Therefore,¹ it is submitted that the *Sanchez* standard both satisfies the requirements of section 706(f)(1) and provides a practical and workable rule to guide EEOC enforcement proceedings.

XI. FEDERAL EMPLOYMENT—JUDICIAL APPLICATION OF SECTION 717

Under section 717(a) of the 1972 Amendments,¹ the protections of Title VII were extended to federal employees and applicants for federal employment. The primary authority to enforce these protections is vested in the Civil Service Commission under section 717(b).² Pursuant to section 717(b), the Civil Service Commission must promulgate rules and regulations,³ annually review and approve national and regional equal employment opportunity plans,⁴ review and evaluate the operation of equal employment opportunity programs,⁵ and solicit information and recommendations from interested individuals and groups.⁶ In addition, section 717(c) grants to any federal employee who believes that he has experienced discrimination the right to file a civil action in district court.⁷ However, before filing such an action, the employee must first satisfy certain jurisdictional requirements set out both in section 717(c) and in the rules and regulations promulgated by the Civil Service Commission.⁸ Within 30 days of the alleged discriminatory action, the employee must discuss the matter with the agency Equal Employment Opportunity Counselor.⁹ Within 15 days of the date of his final interview with the Equal Employment Opportunity Counselor, he may file a complaint with his employer agency¹⁰ which is then

⁴⁰ *Id.*

¹ 42 U.S.C. § 2000e-16(a) (Supp. III 1973).

² 42 U.S.C. § 2000e-16(b) (Supp. III 1973).

³ *Id.*

⁴ 42 U.S.C. § 2000e-16(b)(1) (Supp. III 1973).

⁵ 42 U.S.C. § 2000e-16(b)(2) (Supp. III 1973).

⁶ 42 U.S.C. § 2000e-16(b)(3) (Supp. III 1973).

⁷ 42 U.S.C. § 2000e-16(c) (Supp. III 1973).

⁸ The rules and regulations promulgated by the Civil Service Commission pursuant to § 717(b) are found at 5 C.F.R. § 713 (1975).

⁹ 5 C.F.R. § 713.214(a)(1)(i) (1975).

¹⁰ 5 C.F.R. § 713.214(a)(1)(ii) (1975).

required to conduct an investigation of the employee's complaint.¹¹ Upon completion of this investigation, the agency shall provide an opportunity for an adjustment of the complaint on an informal basis.¹² If no such adjustment is reached, the employee may proceed in one of four ways. He may, within 15 days, request a hearing and decision by the agency head.¹³ He may, within 15 days, request a decision by the agency head without a hearing.¹⁴ He may, within 15 days, appeal the decision to the Civil Service Commission.¹⁵ If dissatisfied with the decision of the Civil Service Commission, he may, within 30 days of such decision, file a civil action in the district court.¹⁶ Finally, he may, within 30 days of notice of final action taken by an agency, file a civil action in the district court,¹⁷ without resort to the Civil Service Commission. The employee may also file a civil action in the district court if either the agency or the Civil Service Commission fails to take final action on the employee's complaint within 180 days of receipt of the complaint.¹⁸ In any civil action brought under section 717(c) the head of the employer agency is the defendant.¹⁹

¹¹ 5 C.F.R. § 713.216 (1975).

¹² 5 C.F.R. §§ 713.217(a), (b) (1975).

¹³ 5 C.F.R. § 713.217(b) (1975).

¹⁴ *Id.*

¹⁵ 5 C.F.R. §§ 713.231, .233 (1975).

¹⁶ 42 U.S.C. § 2000e-16(c) (Supp. III 1972).

¹⁷ 42 U.S.C. § 2000e-16(c) (Supp. II 1972).

¹⁸ *Id.*

¹⁹ *Id.* The procedure governing private employee discrimination claims outlined at 42 U.S.C. §§ 2000e-5(a) to (f) (Supp. III 1973) is not fully analyzed in this Survey. However, this procedure is basically as follows. If the state in which the alleged violation occurred has a state law which prohibits the challenged practice and authorizes a state agency to grant relief, then the employee must initially file his complaint with the state agency. *Id.* § 2000e-5(c). If no solution is reached within 60 days, or within 120 days if the state law was only enacted in the preceding year, *id.*, then the employee may file a charge with the Equal Employment Opportunity Commission, within 300 days of the alleged violation. *Id.* § 2000e-5(e). If there is no applicable state law, the employee may initiate his claim by filing a charge with the EEOC within 180 days of the alleged violation. *Id.* Upon receiving an employee charge, the EEOC must notify the employer within 10 days and conduct an investigation of the charge to determine if there is reasonable cause to believe the charge is true. *Id.* § 2000e-5(b). If no such reasonable cause is found, then both parties must be promptly notified. *Id.* If the EEOC does find reasonable cause, then it must seek to informally eliminate the alleged violation through conference, conciliation, and persuasion. *Id.* If no conciliation agreement is reached within 30 days of the filing of the employee charge, the EEOC, or the Attorney General in appropriate cases, may bring a civil action against the employer. *Id.* § 2000e-5(f). Alternatively, if either reasonable cause is not found, or reasonable cause was found but no conciliation agreement or civil action has been forthcoming from the EEOC within 180 days of the filing of the charge, then the employee shall be so notified. *Id.* § 2000e-5(f). The employee then has 90 days from the receipt of such notice to file a civil action in the district court. *Id.* See also note 7 at pp. 1093 *supra*.

For a general discussion of the private employee procedure and some of the problems which have arisen under that procedure, see 1973-1974 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1105, 1203-65 (1974).

During the Survey year, two issues concerning the judicial application of section 717 received considerable attention in the federal courts: (1) does section 717 apply retroactively to employee claims which were pending administratively on March 24, 1972, the effective date of section 717, and (2) is the employee automatically entitled to a trial de novo in the district court after having exhausted his administrative remedies, and if not, what is the nature of the more limited judicial review to which the employee is entitled?

A. *Retroactive Application of Section 717: Koger; Place*

The majority of the district courts²⁰ and courts of appeals²¹ have held that section 717 should be applied retroactively. In general, these courts have focused on two issues: (1) whether section 717 creates new substantive rights for federal employees or whether it merely creates a new remedy to enforce previously existing rights, and (2) whether an inference may be drawn that Congress intended section 717 to apply prospectively from the fact that, in section 14 of the Act,²² Congress specifically authorized the retroactive application of certain provisions of the 1972 Amendments, though not section 717.²³

The issue of retroactivity was first raised during the Survey year in *Koger v. Ball*,²⁴ where the Fourth Circuit held that section 717 applies retroactively to cases pending administratively on the effective date of section 717.²⁵ Plaintiff, a black employee of the Social Security Administration, initiated the administrative grievance procedure on February 22, 1972 by writing a letter to his director charging racial discrimination. Unable to secure relief from the director, the employee filed a formal complaint on April 28, 1972 with the Secretary of the Department of Health, Education and Welfare. When the Secretary failed to take final action on the

²⁰ See, e.g., *Walker v. Kleindienst*, 357 F. Supp. 749, 750-51, 5 FEP Cas. 1007, 1008 (D.D.C. 1973); *Henderson v. Defense Contract Admin. Serv. Region*, 370 F. Supp. 180, 183, 7 FEP Cas. 241, 242 (S.D.N.Y. 1973). But see, e.g., *Hill-Vincent v. Richardson*, 359 F. Supp. 308, 309, 5 FEP Cas. 973, 974 (N.D. Ill. 1973); *Mosely v. United States*, 6 FEP Cas. 462 (S.D. Cal. 1973).

²¹ See *Sperling v. United States*, 515 F.2d 464, 10 FEP Cas. 654 (3d Cir. 1975); *Brown v. General Serv. Adm'n*, 507 F.2d 1300, 8 FEP Cas. 1298 (2d Cir. 1974); *Womack v. Lynn*, 504 F.2d 267, 8 FEP Cas. 844 (D.C. Cir. 1974); *Koger v. Ball*, 497 F.2d 702, 7 FEP Cas. 1111 (4th Cir. 1974). But see *Place v. Weinberger*, 497 F.2d 412, 7 FEP Cas. 1176 (6th Cir. 1974).

²² Pub. L. No. 92-261, § 14 (March 24, 1972).

²³ Section 14 of Pub. L. No. 92-261 (March 24, 1972) provides: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

²⁴ 497 F.2d 702, 7 FEP Cas. 1111 (4th Cir. 1974).

²⁵ *Id.* at 704, 7 FEP Cas. at 1111.

complaint within 180 days, the plaintiff filed a civil action in the district court pursuant to section 717, which had become effective while he was pursuing his administrative remedies.²⁶

The court held that section 717 applies retroactively, conferring subject matter jurisdiction on the district court to hear the plaintiff's complaint.²⁷ Three reasons were advanced by the court in support of its holding. First, section 717 is a procedural statute creating no new substantive rights, but merely providing a new remedy for the enforcement of a previously existing right. As such, the application of section 717 is governed by the general rule that procedural statutes are applicable to cases pending at the time of their enactment as long as such application does not result in manifest injustice.²⁸ Second, section 717 is based on the policy that the courts should be the final tribunal for the resolution of federal employee discrimination cases. This policy applies with equal force to claims pending administratively at the effective date of section 717.²⁹ Third, section 717, read literally, applies to claims pending administratively on the date of its enactment.³⁰ This was true, the court stated, because:

1) his "complaint of discrimination based on race . . . [was] brought pursuant to . . . Executive Order 11478 . . ."; 2) he waited "one hundred and eighty days from the filing of the initial charge with the department, agency, or unit . . . " before filing suit; and 3) he was "aggrieved . . . by the failure to take final action on his complaint."³¹

The court expressly rejected the argument that, because Congress did not include section 717 among those provisions to be applied retroactively, the inference may be drawn that Congress intended that section 717 apply only prospectively.³² The court rejected this inference, relying first on the general rule that procedural statutes are to be applied retroactively to cases pending at the time of their enactment³³ and, second, on the absence of legislative history to support the inference that Congress intended section 717 to apply only prospectively.³⁴

However, within a few days of the Fourth Circuit's decision in

²⁶ Id. at 704, 7 FEP Cas. at 1112.

²⁷ Id. at 704, 7 FEP Cas. at 1111.

²⁸ Id. at 705-06, 7 FEP Cas. at 1113.

²⁹ Id. at 706, 7 FEP Cas. at 1113.

³⁰ Id.

³¹ Id.

³² Id. at 707-08, 7 FEP Cas. at 1114-15.

³³ Id. at 707, 7 FEP Cas. at 1114.

³⁴ Id. at 707-08, 7 FEP Cas. at 1114-15.

Koger, the Sixth Circuit reached a contrary result in *Place v. Weinberger*.³⁵ Plaintiff, a female employee of the Pure Food and Drug Administration, had filed a complaint of discrimination based on sex with the EEOC on September 24, 1971. After an unfavorable disposition of her complaint by the EEOC, the plaintiff appealed to the Civil Service Commission, which affirmed the EEOC decision. Plaintiff then filed a civil action in the district court pursuant to section 717(c) on September 13, 1972.³⁶

The court held that the suit was barred by the doctrine of sovereign immunity since the consent embodied in section 717 did not apply retroactively to this claim.³⁷ In so holding, the court relied on two general rules: waivers of sovereign immunity are to be strictly construed,³⁸ and statutes are presumed to operate prospectively in the absence of a clear expression to the contrary.³⁹ However, the linchpin of the Sixth Circuit's decision was its acceptance of the "inference of congressional intent" argument rejected in *Koger*: "Congress clearly intended certain portions of the Act to operate retroactively and so indicated. We therefore conclude that by its silence as to other sections Congress intended such sections to have prospective application only."⁴⁰ The Sixth Circuit further rejected the characterization of section 717 as a procedural statute creating no new substantive rights.⁴¹

It should be noted that during the Survey year the Second,⁴² Third,⁴³ and District of Columbia⁴⁴ Circuits were also presented with the retroactivity issue. All agreed with the Fourth Circuit's determination that section 717 should be applied retroactively to claims pending administratively on the date of its enactment.⁴⁵

It is submitted that section 717 should be so applied. While the

³⁵ 497 F.2d 412, 7 FEP Cas. 1176 (6th Cir. 1974), cert. denied, 419 U.S. 1040 (1975).

³⁶ Id. at 413, 7 FEP Cas. at 1177.

³⁷ Id. at 414, 7 FEP Cas. at 1177.

³⁸ Id. at 414, 7 FEP Cas. at 1178, citing *United States v. Sherwood*, 312 U.S. 584 (1941).

³⁹ 497 F.2d at 414, 7 FEP Cas. at 1178, citing *Hassett v. Welch*, 303 U.S. 303 (1938).

⁴⁰ 497 F.2d at 414, 7 FEP Cas. at 1178.

⁴¹ Id. at 414, 7 FEP Cas. at 1178.

⁴² *Brown v. General Serv. Adm'n*, 507 F.2d 1300, 8 FEP Cas. 1298 (2d Cir. 1974).

⁴³ *Sperling v. United States*, 515 F.2d 464, 10 FEP Cas. 654 (3d Cir. 1975).

⁴⁴ *Womack v. Lynn*, 504 F.2d 267, 8 FEP Cas. 844 (D.C. Cir. 1974). There is a distinction between *Womack* on the one hand and *Koger*, *Place*, and *Brown* on the other. The latter three cases involved employee claims that were pending administratively on the effective date of § 717. *Womack*, however, involved an employee claim that was pending in the district court on that date. However, the court in *Womack* ignored this distinction and considered the applicability of § 717 on the same principles as the courts in *Koger*, *Place*, and *Brown*.

⁴⁵ *Sperling v. United States*, 515 F.2d 465, 474, 10 FEP Cas. 654, 660-61 (3d Cir. 1975); *Brown v. General Serv. Adm'n*, 507 F.2d 1300, 1305-06, 8 FEP Cas. 1298, 1303 (2d Cir. 1974); *Womack v. Lynn*, 504 F.2d 267, 269, 8 FEP Cas. 844, 846 (D.C. Cir. 1974).

inference of prospectivity accepted by the Sixth Circuit is not per se unreasonable, it is suggested that there are sufficient countervailing considerations which undermine its acceptance.

First, any substantive rights embodied in section 717 already existed in various statutes,⁴⁶ Civil Service Commission regulations,⁴⁷ and Executive Orders,⁴⁸ the most significant of which is Executive Order No. 11,478 which provides:

It is the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment and treatment of civilian employees of the Federal Government.⁴⁹

Thus, section 717 should be viewed as a procedural statute, the applicability of which is governed by the general rule applied in *Koger*.⁵⁰ The inference of prospectivity accepted by the Sixth Circuit is inconsistent with this general rule. Second, there is no legislative history whatsoever to support the inference. Third, as noted by the Second Circuit, the Supreme Court recently stated the following in upholding the retroactive application of a federal statute authorizing the award of attorney's fees in school desegregation cases:

We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.⁵¹

The inference accepted by the Sixth Circuit is contrary to the policy embodied in this statement. Fourth, as the court stated in *Koger*, section 717 evinces a Congressional policy that the courts should be the final tribunal for employment discrimination claims.⁵² This pol-

⁴⁶ See, e.g., 5 U.S.C. § 7151 (1970), which provides:

It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

⁴⁷ 5 C.F.R. § 713.201-.521 (1975).

⁴⁸ See, e.g., Exec. Order No. 11,478, 3 C.F.R. 207 (1974), 42 U.S.C. § 2000e (1970); Exec. Order No. 11,246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970).

⁴⁹ 3 C.F.R. 207 (1974), 42 U.S.C. § 2000e (1970).

⁵⁰ 497 F.2d at 705-06, 7 FEP Cas. at 1113.

⁵¹ *Brown*, 507 F.2d at 1305-06, 8 FEP Cas. 1302-03, quoting *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974).

⁵² 497 F.2d at 706, 7 FEP Cas. at 1113.

icy applies with equal force to claims arising before the effective date of section 717. These four considerations are logical and persuasive and, as such, totally undermine the acceptability of the inference that Congress intended section 717 to apply prospectively because it did not include section 717 among those provisions made expressly retroactive.

There is arguably a fifth consideration, accepted by the Fourth Circuit in *Koger*—that a literal reading of section 717 authorizes its retroactive application to claims pending at the time of its enactment.⁵³ This is true, the court concluded, because if the employee has filed a civil action pursuant to Executive Order No. 11,478 within 30 days of notification of final agency action, then all the jurisdictional requirements of section 717 have been satisfied and the suit may thus be maintained.⁵⁴ However, it is submitted that this analysis is erroneous. Whether an employee has satisfied the technical jurisdictional requirements to maintain a suit is irrelevant to the underlying question of whether the statute which authorizes that suit is to be retroactively applied. The application of a statute is solely a matter of congressional intent, and only after the retroactivity issue has first been decided should the court then consider whether the employee has satisfied jurisdictional requirements. It is significant to note that in no case since the *Koger* decision has the "literal language" argument been adopted.

B. *Trial De Novo Under Section 717:*

Hackley; Salone; Sperling

The second issue which has arisen during the Survey year concerning section 717 is whether, after exhausting administrative remedies,⁵⁵ the federal employee is automatically entitled to a trial de novo in federal district court, and if not, what is the nature of the more limited judicial review to which he is entitled. On this issue the statute is silent,⁵⁶ the legislative history is contradictory,⁵⁷ and the federal courts are divided.⁵⁸

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ A private employee is entitled to trial de novo after exhausting procedures before the Equal Employment Opportunity Commission. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-800 (1973). Furthermore, the Supreme Court has also held that a private employee is entitled to a trial de novo after exhausting arbitration proceedings pursuant to a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

⁵⁶ While 42 U.S.C. § 2000e-16(c) (Supp. III 1973) confers jurisdiction on the federal courts to hear federal employee discrimination cases, the statute makes no mention of how the courts are to exercise this jurisdiction.

⁵⁷ For example, Senator Williams stated: "[W]ritten expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for a review of

During the Survey year the Tenth Circuit, presented with this issue in *Salone v. United States*,⁵⁹ held that a federal employee is not initially entitled to a trial de novo after exhausting administrative remedies, but is rather entitled only to a more limited review of the administrative record.⁶⁰ Plaintiff, a civilian employee of the U.S. Air Force, filed a complaint of racial discrimination with the Commander of the Air Force base at which he worked in April, 1972. After an adverse decision on his complaint by the Air Force, plaintiff appealed to the Civil Service Commission which affirmed the Air Force decision without comment. Plaintiff then filed a civil action in district court pursuant to section 717, requesting a trial de novo on his racial discrimination claim.⁶¹ The district court denied the request.⁶²

The Tenth Circuit affirmed, holding that the plaintiff was initially entitled only to a review of the administrative record.⁶³ The court recognized that its decision created a disparity in the judicial treatment of private and federal employees.⁶⁴ A private employee who files a civil action after proceedings before the EEOC is entitled to a trial de novo on his employment discrimination claim. However, a federal employee who files a civil action after proceedings before the Civil Service Commission is entitled only to a review of the administrative record. Nevertheless, the court concluded that this disparity was justified.⁶⁵

First, the court cited the leading case of *Hackley v. Johnson*⁶⁶ and stated that the disparity was justified for the reasons provided in *Hackley*.⁶⁷ In *Hackley*, where the trial de novo issue was presented to a federal court for the first time, the district court held that, initially, the federal employee was entitled to a review of the administrative record.⁶⁸ The Tenth Circuit, in accord with *Hackley*, concluded that an automatic trial de novo would burden the federal judiciary with an increased case load, duplicate administrative fact finding proceedings, hamper the need for prompt, consistent deci-

the administrative proceeding record" 118 Cong. Rec. 4922 (Feb. 22, 1972). However, Senator Cranston stated: "As with other cases brought under Title VII of the Civil Rights Act of 1964, Federal District Court review would not be based on the agency and/or CSC record and would be a trial de novo." 119 Cong. Rec. 4929 (Feb. 22, 1973).

⁵⁸ See notes 76 and 78 *infra*.

⁵⁹ 511 F.2d 902, 10 FEP Cas. 1 (10th Cir. 1975).

⁶⁰ *Id.* at 904, 10 FEP Cas. at 2.

⁶¹ *Id.* at 902-03, 10 FEP Cas. at 1.

⁶² *Id.* at 903, 10 FEP Cas. at 1.

⁶³ *Id.* at 904, 10 FEP Cas. at 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 360 F. Supp. 1247, 6 FEP Cas. 79 (D.D.C. 1973).

⁶⁷ 511 F.2d at 904, 10 FEP Cas. at 2.

⁶⁸ 360 F. Supp. at 1252, 6 FEP Cas. at 83.

sions in employment discrimination matters, and represent an extreme departure from past federal employment cases in which review has been limited to the administrative record.⁶⁹ These reasons, the Tenth Circuit concluded in *Salone*, in part justified the disparity created between private and federal employees.⁷⁰ Further justification was found by the Tenth Circuit in the fact that decisions of the Civil Service Commission which are appealed to the district court are generally governed by the Administrative Procedure Act⁷¹ which provides for a limited review of the administrative record.⁷²

A contrary result was reached by the Third Circuit in *Sperling v. United States*,⁷³ where the court held that a federal employee who files a civil action in district court pursuant to section 717 is entitled to a trial de novo in all cases.⁷⁴ Plaintiff was a white civilian employee of the U.S. Army at Fort Monmouth, New Jersey. At the fort, he also served as the union representative. In this capacity, plaintiff successfully represented a black employee in grievance proceedings which extended from 1965 to 1967. Shortly thereafter, after being denied a promotion, plaintiff filed his own claim, contending that the denial was in retaliation for his successful representation of the black employee. Extensive administrative proceedings followed, culminating in an adverse decision by the Civil Service Commission in 1972. Plaintiff then filed a civil action in federal district court.⁷⁵

In holding that the plaintiff was entitled to a trial de novo on his employment discrimination claim, the court adopted the following reasoning: section 717(c)⁷⁶ authorizes the employee to file a civil action; section 717(d)⁷⁷ states that this civil action is governed by sections 706(f) through (k),⁷⁸ as applicable; sections 706(f) through (k), which apply to private employee civil actions, have been held by the Supreme Court to require a trial de novo;⁷⁹ thus, federal employees are also entitled to a trial de novo in section 717(c) civil actions.⁸⁰ The court expressly rejected the argument, adopted by some lower courts,⁸¹ that the applicability of sections 706(f) through

⁶⁹ 511 F.2d at 903-04, 10 FEP Cas. at 2.

⁷⁰ 511 F.2d at 904, 10 FEP Cas. at 2.

⁷¹ 5 U.S.C. § 701 (1970).

⁷² 511 F.2d at 904, 10 FEP Cas. at 2.

⁷³ 515 F.2d 465, 10 FEP Cas. 654 (3d Cir. 1975).

⁷⁴ Id. at 481, 10 FEP Cas. at 667.

⁷⁵ Id. at 467-68, 10 FEP Cas. at 655-56.

⁷⁶ 42 U.S.C. § 2000e-16(c) (Supp. III 1973).

⁷⁷ 42 U.S.C. § 2000e-16(d) (Supp. III 1973) provides: "The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

⁷⁸ 42 U.S.C. §§ 2000e-5(f) to (k) (Supp. III 1973).

⁷⁹ See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-800 (1973).

⁸⁰ 515 F.2d at 474-75, 10 FEP Cas. at 661-62.

⁸¹ See, e.g., *Guilday v. U.S. Dept. of Justice*, 8 FEP Cas. 1015, 1016 (D. Del. 1974).

(k) is discretionary since, under section 717(d), these provisions govern federal employee civil actions only "as applicable."⁸²

The court further reasoned that if section 717(c) was interpreted to require only a limited review of the administrative record, the law concerning judicial review of federal employment decisions would be exactly the same as it was prior to the enactment of section 717(c) because, at least in those circuits which did not recognize sovereign immunity as a bar to judicial review, the record of such decisions was already being reviewed.⁸³ Thus, the law would remain unchanged for all civil actions in which an administrative record was developed below, a result which Congress could not have intended through a new enactment.

Finally, the court argued, in disagreement with *Hackley*,⁸⁴ that the legislative history of section 717(c) indicated a Congressional intent to require a trial de novo in civil actions filed by federal employees.⁸⁵ Recognizing contrary statements by Senator Williams, a co-sponsor of the 1972 Amendments, to the effect that only judicial review of the administrative record is necessary under section 717(c),⁸⁶ the court nevertheless concluded⁸⁷ that the following statements of the Senate Committee Report were more reflective of Congressional intent: "Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII."⁸⁸

Having thus decided that the federal employee is entitled to a trial de novo in all cases, the court then considered the role of the administrative record in such de novo proceedings, concluding that the record is reviewable on a motion for summary judgment to determine whether any material issue of fact exists.⁸⁹ If no material issue of fact is found to exist, summary judgment may be granted on the record. However, if a material issue of fact is found to exist, then a de novo trial is held and the employee must establish his claim by a preponderance of the evidence. The administrative record is admissible in evidence at this trial.⁹⁰

As evidenced by the conflict between the Third and Tenth Circuits, the trial de novo issue has spawned considerable litigation in the federal courts. At present, the majority of courts have inter-

⁸² 515 F.2d at 475-76, 10 FEP Cas. at 662.

⁸³ Id. at 476-77, 10 FEP Cas. at 663.

⁸⁴ 360 F. Supp. at 1251-52, 6 FEP Cas. at 82.

⁸⁵ 515 F.2d at 477-81, 10 FEP Cas. at 663-66.

⁸⁶ 118 Cong. Rec. 4922 (1972).

⁸⁷ 515 F.2d at 480-81, 10 FEP Cas. at 666.

⁸⁸ S. Rep. No. 92-415, 92d Cong., 1st Sess. 16 (1971).

⁸⁹ 515 F.2d at 484, 10 FEP Cas. at 669.

⁹⁰ Id.

preted section 717(c) to initially require only a review of the administrative record.⁹¹ If the agency decision is not sustained by the evidence in the record, then the trial court may, in its discretion, remand, take supplemental testimony, or grant relief.⁹² However, there is still a significant minority of decisions in which the court has held that a trial de novo is required in all cases.⁹³

The question is initially one of Congressional intent. The problem, however, is that the legislative history, a standard indicator of Congressional intent, is conflicting.⁹⁴ It is submitted that the answer does not lie, as argued by the Third Circuit,⁹⁵ in an ascertainment of the most persuasive statements within the conflicting legislative history. This approach simply does not lend itself to a convincing result.

The solution may be found in the language of the statute itself. The statute provides:

The provisions of [section 706] (f) through (k) of this title,

⁹¹ Cases decided during the Survey year holding a federal employee entitled only to review of the record: *Fisher v. Brennan*, 384 F. Supp. 174, 177, 10 FEP Cas. 685, 687 (E.D. Tenn. 1974); *Smith v. Snyder*, 381 F. Supp. 1083, 1087, 10 FEP Cas. 645, 648 (E.D. Pa. 1974); *Brooks v. Lynn*, 65 F.R.D. 78, 79, 10 FEP Cas. 638, 639 (W.D. Okla. 1974); *Richerson v. Fargo*, 64 F.R.D. 393, 395, 10 FEP Cas. 644, 645 (E.D. Pa. 1974); *McGowan v. U.S. Information Agency*, 10 FEP Cas. 618, 620 (D.D.C. 1974); *Robinson v. Warner*, 10 FEP Cas. 609, 612 (D.D.C. 1974); *Cates v. Johnson*, 377 F. Supp. 1145, 1146, 10 FEP Cas. 564, 565 (W.D. Pa. 1974); *Allen v. Veterans Administration*, 10 FEP Cas. 195, 197 (W.D. Pa. 1974); *Ficklin v. Sabatini*, 9 FEP Cas. 70, 72 (E.D. Pa. 1974); *Eastland v. Tenn. Valley Authority*, 8 FEP Cas. 1226, 1231 (N.D. Ala. 1974); *Guilday v. U.S. Dept. of Justice*, 385 F. Supp. 1096, 1098-99, 8 FEP Cas. 1015, 1017 (D. Del. 1974); *Evans v. Johnson*, 8 FEP Cas. 1013, 1015 (C.D. Cal. 1974); *Baca v. Butz*, 376 F. Supp. 1005, 1010, 8 FEP Cas. 116, 120 (D.N.M. 1974); *Spencer v. Schlesinger*, 374 F. Supp. 840, 844, 8 FEP Cas. 848, 850-51 (D.D.C. 1974). See also *McLaughlin v. Callaway*, 382 F. Supp. 885, 890, 10 FEP Cas. 135, 138 (S.D. Ala. 1974) where the court held that a trial de novo is not automatically required, but nevertheless granted such a trial de novo under the specific facts of the case.

For pre-Survey year decisions holding that a federal employee is not automatically entitled to a trial de novo, see, e.g., *Pointer v. Sampson*, 62 F.R.D. 689, 696, 7 FEP Cas. 905, 910 (D.D.C. 1974); *Thompson v. United States Dept. of Justice*, 372 F. Supp. 762, 764, 7 FEP Cas. 347, 348 (N.D. Cal. 1974); *Handy v. Gayler*, 364 F. Supp. 676, 679, 6 FEP Cas. 597, 598 (D. Md. 1973).

⁹² See, e.g., *Guilday*, 385 F. Supp. at 1098, 8 FEP Cas. at 1017.

⁹³ For Survey year cases holding that the federal employee is entitled to a trial de novo, see *Boston v. Naval Station*, 10 FEP Cas. 649, 652 (E.D. Va. 1974); *Hunt v. Schlesinger*, 389 F. Supp. 725, 728, 10 FEP Cas. 52, 54 (W.D. Tenn. 1974); *Robinson v. Klassen*, 9 FEP Cas. 84, 85 (E.D. Ark. 1974).

For pre-Survey year decisions holding that the employee is entitled to a trial de novo, see *Griffin v. U.S. Postal Serv.*, 7 FEP Cas. 303, 304 (M.D. Fla. 1973); *Jackson v. U.S. Civil Serv. Comm'n*, 379 F. Supp. 589, 594, 7 FEP Cas. 575, 578 (S.D. Tex. 1973); *Henderson v. Defense Contract Admin. Serv. Region*, 370 F. Supp. 180, 184, 7 FEP Cas. 241, 244 (S.D.N.Y. 1973); *Thompson v. U.S. Dept. of Justice*, 360 F. Supp. 255, 258, 6 FEP Cas. 581, 583 (N.D. Cal. 1973), reconsidered and rev'd, 372 F. Supp. 762, 7 FEP Cas. 347 (1974).

⁹⁴ See note 46 supra.

⁹⁵ *Sperling*, 515 F.2d at 480, 10 FEP Cas. at 666.

as applicable, shall govern civil actions brought hereunder.⁹⁶

Because sections 706(f) through (k) have been held to require a trial de novo, the central question is the interpretation of the words "as applicable." One view, supported by some lower courts,⁹⁷ is that these words create discretion in the trial judge to refuse to apply any of the provisions in sections 706(f) through (k) to federal employee cases. This view was expressly rejected in *Sperling*.⁹⁸ A better view appears to be that the words "as applicable" were added to the statute in recognition of the fact that some of the private employee provisions in sections 706(f) through (k) are not capable of being applied to federal employee cases. Thus, Congress intended that these provisions should be inapplicable. However, those private employee provisions which are capable of being applied to federal employee cases must be applied under section 717(d). For example, section 706(i) provides:

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section the [Equal Employment Opportunity Commission] may commence proceedings to compel compliance with such order.⁹⁹

This provision is not capable of being applied to federal employee cases because the Equal Employment Opportunity Commission has no jurisdiction over such cases. However, the remaining provisions of sections 706(f) through (k) are capable of being applied to federal employee cases. Thus, it is submitted that Congress intended in section 717(d) to make these remaining provisions applicable where a federal employee files a civil action in district court. Since these provisions have been held to require a trial de novo in private employment cases, it is submitted that a trial de novo is also required in federal employment cases.

This procedure will undoubtedly result in judicial waste in those cases which are not decided on a motion for summary judgment based on the record. The court will have to hear testimony and take evidence which has already been compiled at the administrative level. However, as noted by the Third Circuit in *Sperling*,¹⁰⁰

⁹⁶ 42 U.S.C. § 2000e-16(d) (Supp. III 1973).

⁹⁷ See, e.g., *Guilday*, 385 F. Supp. at 1097, 8 FEP Cas. at 1016.

⁹⁸ 515 F.2d at 840, 10 FEP Cas. at 662-63.

⁹⁹ 42 U.S.C. § 2000e-5(i) (Supp. III 1973).

¹⁰⁰ 515 F.2d at 484, 10 FEP Cas. at 668.

this problem is more properly one for legislative concern. Thus, it is submitted that judicial waste and duplication are not sufficient reasons to ignore what appear to be the statutory requirements of section 717. Furthermore, the Supreme Court has recently allowed such judicial duplication of pre-judicial proceedings in an analogous fact situation in *Alexander v. Gardner-Denver Co.*,¹⁰¹ where the Court concluded that a private employee was entitled to a trial de novo on his employment discrimination claim even though the employee had already enjoined full arbitration proceedings pursuant to a collective bargaining agreement.¹⁰² This conclusion applies even to those cases in which a record has been developed in the arbitration proceedings.

One final matter must be considered. The majority of courts have held that federal employees are initially entitled to only a review of the administrative record.¹⁰⁴ Under this procedure, the standard by which the administrative record is reviewed is of central importance. However, there is widespread confusion as to what standard should be applied. During the Survey year the following standards were applied: "clear weight of evidence;"¹⁰⁵ "affirmatively established by clear weight of evidence;"¹⁰⁶ "substantial evidence;"¹⁰⁷ "clearly supported by substantial evidence;"¹⁰⁸ "preponderance of the evidence;"¹⁰⁹ and "arbitrariness."¹¹⁰ This confusion is underscored by the fact that even within a case different standards are sometimes cited. For example, in *Hackley*, the court stated that the applicable standard was "affirmatively established by the clear weight of the evidence in the record."¹¹¹ However, in reviewing the record, the court applied the "preponderance of the evidence" standard.¹¹²

It is submitted that the proper standard is the preponderance of the evidence standard. A major concern of those courts which have

¹⁰¹ 415 U.S. 36 (1974).

¹⁰² *Id.* at 59-60.

¹⁰³ *Id.* at 57.

¹⁰⁴ See note 76 *supra*.

¹⁰⁵ *Brooks v. Lynn*, 65 F.R.D. 78, 79, 10 FEP Cas. 638, 639 (W.D. Okla. 1974).

¹⁰⁶ *Pointer v. Sampson*, 62 F.R.D. 689, 695, 7 FEP Cas. 905, 909 (D.D.C. 1974); *Eastland v. Tenn. Valley Authority*, 8 FEP Cas. 1226, 1231 (N.D. Ala. 1974); *McLaughlin v. Callaway*, 382 F. Supp. 885, 890, 10 FEP Cas. 135, 139 (S.D. Ala. 1974).

¹⁰⁷ *Smith v. Snyder*, 381 F. Supp. 1083, 1088, 10 FEP Cas. 645, 649 (E.D. Pa. 1974); *Cates v. Johnson*, 377 F. Supp. 1145, 10 FEP Cas. 564 (W.D. Pa. 1974); *Evans v. Johnson*, 8 FEP Cas. 1013, 1014 (C.D. Cal. 1974).

¹⁰⁸ *McGowan v. U.S. Information Agency*, 10 FEP Cas. 618, 620 (D.D.C. 1974).

¹⁰⁹ *Haire v. Callaway*, 9 FEP Cas. 168, 170 (E.D. Mo. 1974); *Guilday*, 385 F. Supp. 1096, 1101-02, 8 FEP Cas. 1015, 1020 (D. Del. 1974).

¹¹⁰ *Tomlin v. Air Force Medical Center*, 369 F. Supp. 353, 357, 7 FEP Cas. 238, 240 (S.D. Ohio 1974).

¹¹¹ 360 F. Supp. at 1252, 6 FEP Cas. at 83.

¹¹² *Id.* at 1253, 1255, 6 FEP Cas. at 84, 85.

denied a trial de novo has been that such a trial would duplicate administrative fact finding proceedings.¹¹³ However, once the facts are before the court, whether presented in a trial de novo, as in private employee cases, or through an administrative record, as in federal employee cases, fairness requires that these facts be accorded the same judicial treatment. Since a preponderance of the evidence standard is applied in private employee cases, the same standard should be applied to federal employee cases. It is true, however, that in a trial de novo, facts are developed before the judge who can assess the credibility of any witnesses who testify. This is not possible where the facts below are presented through an administrative record. Therefore, it is further submitted that in those cases where a judge believes that an assessment of credibility is essential to a fair determination of whether the employee has satisfied his burden by a preponderance of the evidence, the judge should expand the hearing, taking supplemental testimony or requiring the witness to testify before him in court.

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¹¹³ See, e.g., *Guilday*, 385 F. Supp. at 1099, 8 FEP Cas. at 1017.