

TITLE VII: RELATIONSHIP AND EFFECT ON THE NATIONAL LABOR RELATIONS BOARD

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The National Labor Relations Board was created by Congress in 1935 to administer the National Labor Relations Act (Wagner Act),¹ which was subsequently amended in 1947 (Taft-Hartley Act)² and again in 1959 (Landrum-Griffin Act).³ The basic purpose of the act is to promote collective bargaining and to protect freedom of employee organization as the best means of encouraging and insuring industrial peace. Under the act, the Board has two primary functions: (1) To prevent and remedy unfair labor practices, whether by labor organizations or employers, and (2) to determine by Board conducted secret ballot elections whether employees wish to have unions represent them in collective bargaining. This article examines the past and future roles of the NLRB in the prevention of racial discrimination.

I. RACIAL DISCRIMINATION AS IT AFFECTS BOARD CONDUCTED ELECTIONS

The pronouncement of the Board in 1948 in its *General Shoe Corp.* case⁴ generally defines its basic policy in conducting elections:

Because we cannot police the details surrounding every election, and because we believe that in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. . . .

. . . . In election proceedings, it is the Board's function to provide a laboratory in which an experiment can be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. . . .⁵

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¹ 49 Stat. 449 (1935).

² 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964).

³ Labor Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. § 401 (1964).

⁴ 77 N.L.R.B. 124 (1948).

⁵ Id. at 126-27.

This rule has been refined in *Radio Corp. of America*,⁶ *United States Gypsum Co.*,⁷ and then in *Hollywood Ceramics Co.*,⁸ where the Board stated:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation whether deliberate or not, may reasonably be expected to have a significant impact on the election.⁹

In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on the employees but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent a free expression of the employees' choice. In making this evaluation the Board treats each case on its own facts, taking an *ad hoc* rather than a *per se* approach in its resolution of the issues. It was within the framework of these guidelines that the Board first considered cases relating to racial discrimination prior to 1962. While there have been prior cases in which the Board found interference by the use of racial appeals in conjunction with other acts,¹⁰ as pointed out by some commentators,¹¹ it did not, until the *Sewell Mfg. Co.* case,¹² treat racial appeals in a manner different from other

⁶ 106 N.L.R.B. 1393 (1953).

⁷ 130 N.L.R.B. 901 (1961).

⁸ 140 N.L.R.B. 221 (1962).

⁹ *Id.* at 224.

¹⁰ See, e.g., *South Texas Produce Co.*, 66 N.L.R.B. 1442 (1946), where the Board held the employer engaged in interference by attempting to distort grievances of its American employees into issues of a racial nature in order to prejudice Mexican employees against affiliating with a union; *National Lime & Stone Co.*, 62 N.L.R.B. 282 (1945), where the employer engaged in interference by appealing to Catholic employees on the ground that the union, under John L. Lewis "had communistic ideas in it," and reminded the employees that the church was opposed to communism; *S.K. Wellman Co.*, 53 N.L.R.B. 214 (1943), where the employer stated that if the union won, employees would be replaced by Negroes; *E. Bigelow Co.*, 52 N.L.R.B. 999 (1943), where the employer told employees that if the union went into effect, the colored employees would lose their jobs; *Fred A. Snow Co.*, 41 N.L.R.B. 1288 (1942), where the president of the company threatened to quit and replace himself with his son, who was anti-Negro; *Rapid Roller Co.*, 33 N.L.R.B. 557 (1941), where the employer interfered by asking for the removal of a Negro committeeman and by attempts to frighten other union committeemen by actions designed by the employer to divide and weaken the union; *Arcade Sunshine Co.*, 12 N.L.R.B. 259 (1939), enforced in part, 118 F.2d 49 (D.C. Cir. 1940), where the court held that the fact the employer told the employees (most of whom were Negroes) that the union's attitude toward Negroes in the past had not been friendly is a circumstance supporting the Board's finding of interference. See also *Interlake Iron Corp.*, 33 N.L.R.B. 613 (1941), enforced in part, 131 F.2d 129 (7th Cir. 1942).

¹¹ Sovern, *The NLRA and Racial Discrimination*, 62 Colum. L. Rev. 563 (1962).

¹² 138 N.L.R.B. 66 (1962).

kinds of election propaganda; and while it did not condone such appeals to racism, the Board generally would not set aside an election unless the statements made reference to or involved threats, misrepresentations, fraud, violence or coercion.

Thus, in *Kresge Newark, Inc.*,¹³ the Board rejected the contention that good cause to set aside an election was shown where an employer claimed that an official of a victorious union had said that the employer would lay off colored workers unless they elected the union to protect their jobs. The Board here held that even if this statement were made, it constituted campaign propaganda which could be evaluated by the employees and was not cause which would justify the setting aside of an election.

Again, in the *Sharnay Hosiery Mills, Inc.* case¹⁴ the employer sent an eight page letter to his employees, which stated that the petitioning union favored integration and among other things had contributed \$75,000 to the NAACP. The election took place in Madison, North Carolina. The Board said of the letter:

We note that there is no misrepresentation, fraud, violence, or coercion and that the statements here were temperate and factually correct. They, therefore, afford no basis for setting aside the results of the election.¹⁵

In another case decided the same year a union lost an election where the vice president of the company, a Negro, stated that he was the reason for the advent of the union and that some of the employees did not want to, in effect, work under him because of his race and that the white employees were jealous of him because of his position with the company.¹⁶ Again, the Board sustained the results of the election, stating:

While we do not condone appeals to racial prejudice, nor the conduct of the Company's vice-presidents in raising the issue, we do not find that the injection of the issue, or the context in which it was discussed herein, sufficient ground for invalidation of the results.¹⁷

In *Heintz Div., Kelsey-Hayes Co.*,¹⁸ on the day before the election, the intervening union, an independent, selected eight non-employee male spectators at a ball game, five of whom were Negroes, to distribute handbills promoting the *rival* UAW-CIO Union to em-

¹³ 112 N.L.R.B. 869 (1955).

¹⁴ 120 N.L.R.B. 750 (1958).

¹⁵ *Id.* at 751.

¹⁶ Chock Full O'Nuts, 120 N.L.R.B. 1296 (1958).

¹⁷ *Id.* at 1299.

¹⁸ 126 N.L.R.B. 151 (1960).

ployees at the plant gate. The legend read, "Vote UAW-CIO—July 14." There was no identification on the handbill, nor did the distributors wear identification or in any way indicate that they were employed by the intervening union. The Board found that it was clear that the intervenor caused the distribution to be made so as to lead the employees reasonably to believe that it was sponsored by the UAW-CIO. The intervenor won the election, and objections were filed by the UAW. The Board set aside the election, stating that while it will not ordinarily police the method of campaigning, it will not hesitate to do so in cases of fraud or trickery. The Board asserted its belief that the anonymous intrusion of the intervenor in the petitioner's campaign constituted trickery which interfered with the ability of the employees to evaluate properly the propaganda appeal. In order to insure that its elections are conducted under proper laboratory conditions, the Board held that the failure of parties in Board elections to identify themselves as sponsors of campaign propaganda initiated by them constituted grounds for setting aside the election. This view comports with the standards laid down by Congress for national elections¹⁹ which prohibit the distribution and publication of campaign propaganda without indicating the names of the individuals or groups responsible for their issuance.²⁰

A modification of this policy was foreshadowed by statements made by members of the Board after its membership changes during the early part of 1961. In April of that year, Board Chairman Frank W. McCulloch voiced his concern (as had former Chairman Leedom and member Bean before him)²¹ with the growing use of appeals to prejudice in election campaigns. In an address delivered on April 19, 1961, the Chairman pointed out that

less familiar campaigning techniques which are today being increasingly utilized and which arguably interfere with free choice are the use of race hatred, religious intolerance and professionally produced movies with a central theme that the election of a union results in strikes and outside hooligans terrorizing the community.²²

¹⁹ 64 Stat. 475 (1950); 18 U.S.C. § 612 (1964).

²⁰ See also *Chillicothe Paper Co.*, 119 N.L.R.B. 1263 (1958); *Great Atl. & Pac. Tea Co.*, 140 N.L.R.B. 133 (1962).

²¹ See concurring opinions of Leedom & Bean, *Sharnay Hosiery Mills, Inc.*, supra note 14; Leedom concurring and Bean and Murdock dissenting, *Westinghouse Elec. Corp.*, 119 N.L.R.B. 117 (1957). The majority disposed of the latter case by overruling objections to the election relating to racial issues as being untimely filed under the Board's rules and regulations, and, therefore, did not reach this crucial issue.

²² Address by NLRB Chairman McCulloch, April 19, 1962, Eighth Annual Joint Industrial Relations Conference at Michigan State University.

TITLE VII: RELATIONSHIP AND EFFECT ON THE NLRB

Acknowledging the troublesome problems raised by these techniques, Chairman McCulloch queried,

Should we equate the appeal to racial hate and religious intolerance with the defamatory matter with which we are acquainted and which we generally permit; viz., that the boss is a slave-driver, or that the union is only interested in dues. If this equation does not ring true, what limits, if any, are put on us by the First Amendment principles of free speech, and what applicability do these principles have to an NLRB conducted election?²³

Board member Gerald A. Brown, referring to racial appeals in an address during the same month stated,

One approach would be based on the view that appeals to racial prejudice are in the nature of campaign propaganda, that the Board is not a fair employment practices commission and that, in short, this is not our business. The opposite approach would be that the Board, as an Agency of the Government, is directly concerned in light of stated Federal policy on the subject; and that Board should heed the Supreme Court's admonition in *Southern Steamship*, 316 U.S. 31 . . . that the Board "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."²⁴

Citing Supreme Court precedent, member Brown pointed out that profane, libelous, false or insulting racial utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"; in short, dissemination of such racial appeals does not come within the scope of the constitutional protection of free speech.²⁵

Thus, member Brown suggested that the Board had three choices in election cases involving racial appeals. It could consider all racial appeals as unwarranted election interference; it could consider all such appeals as permissible propaganda; or it could adopt some middle view. If the latter course were adopted ". . . the truth, relevance, timing

²³ Ibid.

²⁴ Address by NLRB Member Brown, July 1962, Labor Law Section of the Texas Bar Ass'n.

²⁵ Ibid.

and inflammatory nature of such appeals are factors which would be given weight."²⁶

The Board re-examined the issue in two cases²⁷ decided in 1962 and elected to choose the middle view. The *Sewell*²⁸ decision was rendered on August 9, 1962. Several weeks before then the Board had issued its landmark *Dal-Tex Optical Co.* decision,²⁹ which held that the free speech proviso of section 8(c)³⁰ had no application to representation cases, thus reviving the *General Shoe* doctrine³¹ established in 1943, and overruling the *National Furniture Mfg. Co.* decision³² and other cases that had applied section 8(c) to hold certain statements privileged in election cases. In *Dal-Tex*, the Board found that the entire content of the employer's speeches generated fear of economic loss and hostility toward unions, which destroyed the "laboratory conditions" under which the Board must hold elections. In the *Oak Mfg. Co.* case³³ the Board held that while it recognized the employer's constitutional right of free speech, such right was not derived from section 8(c) which is applicable to unfair labor practices but not to representation cases.³⁴

²⁶ Ibid.

²⁷ *Sewell Mfg. Co.*, supra note 12; *Allan-Morrison Sign Co.*, 138 N.L.R.B. 73 (1962).

²⁸ *Sewell Mfg. Co.*, supra note 12.

²⁹ 137 N.L.R.B. 1782 (1962).

³⁰ Section 8(c) of the act provides:

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

National Labor Relations Act (Wagner Act) § 8, added by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(c) (1964).

³¹ *General Shoe Corp.*, supra note 4.

³² 106 N.L.R.B. 1300 (1953).

³³ 141 N.L.R.B. 1323 (1963). For other cases following *Dal-Tex Optical Co.*, supra note 29, see *General Indus. Electronics Co.*, 146 N.L.R.B. 1139 (1964); *Lord Baltimore Press*, 142 N.L.R.B. 328 (1963); *Steel Equip. Co.*, 140 N.L.R.B. 1158 (1963); *Marsh Supermkts.*, 140 N.L.R.B. 899 (1963).

³⁴ The applicability of § 8(c) to representation cases has run the full gamut. Note, *Employer Free Speech in Union Organizing Campaigns*, 15 U. Fla. L. Rev. 231 (1962). As aforementioned, the early Board cases indicated that, § 8(c) notwithstanding, if the employees' free choice was interfered with, the election would be set aside. *Metropolitan Life Ins. Co.*, 90 N.L.R.B. 935 (1950); *General Shoe Corp.*, supra note 4. Later cases held that an employer's speech was protected by § 8(c). *Lux Clock Mfg. Co.*, 113 N.L.R.B. 1194 (1955); *Esquire, Inc.*, 107 N.L.R.B. 1238 (1954); *A.S. Abell Co.*, 107 N.L.R.B. 362 (1953); *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300 (1953). These cases, however, were specifically overruled by *Dal-Tex Optical Co.*, supra note 29. Some courts have stated that § 8(c) is no more than the first amendment restated. *NLRB v. Corning Glass Works*, 204 F.2d 422 (1st Cir. 1953); *NLRB v. Bailey Co.*, 180 F.2d 278 (6th Cir. 1950); *NLRB v. LaSalle Steel Co.*, 178 F.2d 829 (7th Cir. 1949). Thus, employers and some commentators have urged that free speech, whether protected by § 8(c) or the Constitution, still controls what an employer may state during a campaign. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor*

As noted previously³⁵ the Board had occasion in 1962 to re-examine its prior determinations in this area. In the *Sewell* case³⁶ the employer, two weeks before the election, had shown his employees a picture of an unidentified Negro man dancing with an unidentified white woman. Beneath the picture was the caption, "The C.I.O. Strongly Pushes and Endorses the F.E.P.C." The same day the employer sent his employees a reproduction of the front page of the *Jackson (Mississippi) Daily News*, which contained a picture of a white man dancing with a Negro woman. The caption beneath the picture read, "Union Leader James B. Carey Dances with a Lady Friend—He is President of the I.U.E., Which Seeks to Unionize Vickers Plant here."³⁷ Also beneath this picture was a bold heading: "Race Mixing is an Issue as Vickers Workers Ballot." This news coverage, coupled with the employer's letters and his distribution of *Militant Truth*, was held to be objectionable conduct. The Board stated:

We are faced in this case with a claim that by a deliberate, sustained appeal to racial prejudice the Employer created conditions which made impossible a reasoned choice of a bargaining representative and therefore that the election should be set aside.³⁸

This was not, as the Board was careful to point out,³⁹ a case involving threats or promises with racial overtones. Nor did this resolve the issue, for the second election was also set aside on substantially the same grounds.⁴⁰ "We find that the documents in question were intended to and did inflame the racial feelings and other prejudices of the voters on matters unrelated to election issues," stated the Board.⁴¹

A second case, *Allen-Morrison Sign Co.*,⁴² involved a lengthy letter from the employer to his workers dealing primarily with matters indisputably germane to the election, particularly the union's stated

Relations Act, 78 Harv. L. Rev. 38, 68-69 (1964). Contra, Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957). On the other hand, although the Supreme Court supported the view that the first amendment protects an employee respecting union organization, *Thomas v. Collins*, 323 U.S. 516 (1945), *Thornhill v. Alabama*, 310 U.S. 88 (1940), under its totality of conduct doctrine, the Supreme Court held that an employer's statement was coercive when considered in a background of anti-union activities, *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1941).

³⁵ Supra note 27.

³⁶ *Sewell Mfg. Co.*, supra note 12.

³⁷ The lady with whom Mr. Carey was dancing happened to have been the wife of an official of one of the new African nations and the occasion was a diplomatic party held about five years previously.

³⁸ *Sewell Mfg. Co.*, supra note 12, at 70.

³⁹ Citing *Grandwood Furniture Co.*, 129 N.L.R.B. 1465 (1961), and *Westinghouse Elec. Corp.*, 119 N.L.R.B. 117 (1957).

⁴⁰ See *Sewell Mfg. Co.*, 140 N.L.R.B. 220 (1962).

⁴¹ Id. at 221.

⁴² 138 N.L.R.B. 13 (1962).

position on race matters. This was followed two days before the election with a letter which contained a one column reprint from an issue of *Militant Truth*, the same magazine referred to in the *Sewell* case. The Board restated the test laid down in the *Sewell* case:

So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.⁴³

Thus, the Board declined to set aside the election, concluding the employer's letter was temperate in tone and that the excerpt from *Militant Truth* may have been related to the choice before the voters.

Since the *Sewell* and *Allen-Morrison* cases, the Board has had occasion to apply this test in other election cases. In the *Archer Laundry Workers* case,⁴⁴ the union prevailed in a hotly contested election by a vote of 68 to 59 in a unit predominantly comprised of Negro voters. The historic background leading up to the election revealed that employees of several Baltimore, Maryland laundries had approached a prominent Negro clergyman with complaints about labor conditions at their respective places of employment. Various Negro leaders and organizations became interested and, banding together, contacted the AFL-CIO leadership. The result was a joint meeting with the International Laundry Workers Union which agreed to conduct an organizational campaign with the mutual aid and assistance of the Negro community and various interested organizations.

The employer filed objections to the conduct of the election on seven grounds alleging, *inter alia*, that the union, in conjunction with the various other groups had engaged in a deliberate and sustained campaign of inflammatory and intemperate appeals to the racial emotions and prejudices of Archer's employees, thus creating an atmosphere under which a free and fair expression of employees' choice was impossible. Citing *Sewell*, the employer pointed, *inter alia*, to an illustrated leaflet headed *Freedom Is Everybody's Fight*. The leaflet bore the legends, "Dogs couldn't stop us, Police brutality couldn't stop us, Fire hoses couldn't stop us," and ended with the query, "Are you going to let your boss stop you? A yes vote for the Union is a vote

⁴³ *Sewell Mfg. Co.*, supra note 12, at 71-72

⁴⁴ *Archer Laundry Co.*, 58 L.R.R.M. 1212 (1965), rev'd, — F.2d — (4th Cir. 1966).

for freedom."⁴⁵ Another leaflet, attributed to the Maryland Civic Interest group, portrayed pickets with signs protesting segregation and asking employees to support the AFL-CIO and exhorting them to join in the fight for better wages, hours and working conditions. Still another leaflet queried, "What does Martin Luther King, Jr. have to say about labor unions?"⁴⁶ and ended with the exhortation that the labor hater is almost always "a twinheaded creature spewing anti-Negro talk from one mouth and anti-union propaganda from the other." In an article published in a local newspaper, the *Baltimore Afro-American*, the regional director of the AFL-CIO was quoted as saying that the only inflammatory racial issue involved in the campaign was the poverty of the colored Archer laundry workers and the affluence of the white owners.⁴⁷ Because of their joint venture, the Board agreed with the employer that the union was responsible for the individual acts of the various community groups and the literature disseminated by them. The Board also agreed that the group did appeal to racial self-consciousness. However, the Board held that their conduct did not warrant setting aside the election.

The Board compared the *Archer* case with the *Sewell* case, pointing out that in *Sewell* the picture of the white union leader dancing with a Negro woman graphically implied that unionism would bring in its wake social and physical race mixing and that the theme was a union demand for racial integration, socialistic legislation and free range of communist conspirators. On the other hand, in *Archer*, the theme, while based upon a racial issue, bore different implications. Here the Negro laundry workers were told that because they were Negroes, they were discriminated against in the *economic* sphere; that in the past they had received lower wages and poorer working conditions because they were Negroes. The Board found that they were urged to join a union, not as an act against the white race but to permit concerted action which could bring Negroes equality with the white workers.

As stated in one communication directed to the workers during the campaign: "It is a simple fact that colored workers who belong to unions are far better off than those who don't."⁴⁸ The Board concluded that the literature distributed did not deliberately seek to invoke the hatred of Negro employees against the white people nor was it designed to appeal to or engender race hatred, but instead, to *racial self-consciousness and racial pride*. Nor was it, as in *Sewell*, a deliberate attempt to overstress and exacerbate racial feeling by ir-

⁴⁵ 58 L.R.R.M. at 1213-14.

⁴⁶ *Ibid.*

⁴⁷ *Id.* at 1215.

⁴⁸ *Id.* at 1214.

relevant and inflammatory appeals, but rather to strike deep into the very core of the traditional appeal for economic betterment. Accordingly, the material in this case was held to constitute privileged campaign propaganda and not valid grounds for setting the election aside.

II. APPLICATION TO UNFAIR LABOR PRACTICE CASES

Until recently, the NLRB has not involved itself directly in the application of unfair labor practice principles to racial discrimination.⁴⁹ However, within the past five years the Board, in several well publicized decisions, has extended its prior determinations involving a statutory bargaining representative's duty of fair representation as well as the responsibilities of both the employer and the representative to refrain from racial discrimination. The initial case in such a recent trend is *Miranda Fuel Co.*⁵⁰ This pilot case had a checkered career. In the first *Miranda* case⁵¹ the Board found that the delegation to the union to determine the seniority of employees violated sections 8(a)(3) and (1) as well as sections 8(b)(2) and 8(b)(1)(A).⁵² The facts in the case show that under the union's contract, drivers were able to take leaves of absence during the slack period and then return with full seniority rights, providing they had reported to the shop steward by a particular date. When the charging party in the instant

⁴⁹ This is not to say that the Board has not in the past considered threats of or discrimination relating to race, religion or creed in conjunction with anti-union campaigns as evidence of unfair labor practices. See *Robert Meyer Hotel Co.*, 154 N.L.R.B. No. 38 (1965) (threat to replace employees with white employees); *Borg-Warner Corp.*, 148 N.L.R.B. 949 (1964) (threat to white employees that they would have to associate with Negroes); *Boyce Mach. Corp.*, 141 N.L.R.B. 756 (1963) (threat to Negroes that if union won union would replace them); *Associated Grocers, Inc.*, 134 N.L.R.B. 468 (1961) (advertising for white replacements during Negro organizational campaign); *Petroleum Carrier Corp.*, 126 N.L.R.B. 1031 (1960) (threat to employ Negroes); *Empire Mfg. Corp.*, 120 N.L.R.B. 1300 (1958) (threat that union will hire Negroes); *Bibb Mfg. Co.*, 82 N.L.R.B. 338 (1949) (reading anti-union poem to Negro employees at segregated picnic); *Reeves Rubber, Inc.*, 60 N.L.R.B. 366 (1945), enforced, 153 F.2d 340 (9th Cir. 1946) (threat that plant would be run by Negroes and Mexicans); *Edinburg Citrus Ass'n*, 57 N.L.R.B. 1145 (1944), enforcement denied, 147 F.2d 353 (5th Cir. 1945) (if union came in, Mexicans would have their jobs); *Planters Mfg. Co.*, 10 N.L.R.B. 735 (1938); cases collected in note 10 supra.

⁵⁰ 140 N.L.R.B. 181 (1962).

⁵¹ *Miranda Fuel Co.*, 125 N.L.R.B. 454 (1959).

⁵² *Id.* at 457. Sections 8(a)(1) and 8(b)(1)(A) forbid employers and labor organizations from restraining or coercing employees in the exercise of the rights guaranteed by § 7. Section 7 guarantees employees the right to self-organization, to form, join or assist labor organizations, to bargain collectively and to engage in concerted activities as well as the right to refrain from any of such activities. Section 8(a)(3) prohibits employers from discriminating in hiring or tenure of employment or any term or condition of employment which tends to encourage or discourage membership in any labor organization. Section 8(b)(2) prohibits a labor organization from causing or attempting to cause an employer to engage in discrimination against an employee which tends to encourage or discourage union membership.

case reported later than the date arranged in the contract, the union placed this individual on the bottom of the seniority list. When the union found out that the charging party had not been able to report due to illness, it refused to place him at his proper seniority, contending that he had left work prior to the commencement of the slack period. In 1960 the Board's order was enforced by the Court of Appeals for the Second Circuit⁵³ which agreed with the Board that the delegation of seniority rights improperly encouraged union membership and violated the sections referred to above. However, in 1961, the Supreme Court held, in *Local 357, Teamsters v. NLRB*,⁵⁴ that the mere granting of exclusive authority to a union to determine seniority was not a per se violation. With the reversal of the delegation of seniority doctrine, the *Miranda* case was remanded to the Board in light of the *Local 357, Teamsters* case.

In December 1962 the Board came down with its second decision in *Miranda*.⁵⁵ The majority of the Board found that the discrimination against the charging party was arbitrary and without legitimate purpose and, therefore, that it had the foreseeable effect of encouraging union membership. The majority held that the union and the employer had violated sections 8(b)(1)(A) and 8(a)(1) respectively, in that employees must be given the right to be free from "unfair or irrelevant or invidious treatment."⁵⁶ These rights were protected under section 7 of the act against union or employer intrusion. In addition, the majority found a violation of sections 8(b)(2) and 8(a)(3), since the discrimination involved herein encouraged membership in the labor organization.

In support of its position, the majority in *Miranda* relied on the Supreme Court cases under the Railway Labor Act, *Steele v. Louisville & N.R.R.*,⁵⁷ and *Tunstall v. Brotherhood of Locomotive Firemen*.⁵⁸ Moreover, it referred to a case involving the Board where the Supreme Court held: "When the . . . Union accepted certification as the bargaining representative for the group, it accepted a trust. It became bound to represent equally and in good faith the interests of the whole group."⁵⁹ Between the time of the decisions in *Steele* and *Tunstall* and the instant case, the Board has recognized and applied the doctrine that a bargaining representative has a duty to represent all mem-

⁵³ *NLRB v. Miranda Fuel Co.*, 284 F.2d 861 (2d Cir. 1960).

⁵⁴ 365 U.S. 667 (1961), reversing *Pacific Intermountain Express Co.*, 107 N.L.R.B. 837 (1954).

⁵⁵ *Miranda Fuel Co.*, supra note 50.

⁵⁶ *Id.* at 190.

⁵⁷ 323 U.S. 192 (1944).

⁵⁸ 323 U.S. 210 (1944).

⁵⁹ *Miranda Fuel Co.*, supra note 50, at 184, citing *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944).

bers of the unit equally and without discrimination on the basis of race, color or creed.⁶⁰ Applying this doctrine, the majority held that under section 7 of the act employees have the right to be free from unfair, irrelevant or invidious treatment by the bargaining agent;⁶¹ and where an employer participates in this action with the union, both violate the act. The majority, relying on the Supreme Court's decision in *Radio Officers' Union*,⁶² then went on to conclude that the joint action herein by the employer and the union violated sections 8(a)(3) and 8(b)(2), since the foreseeable result of the discrimination was to encourage membership in the union.⁶³

The dissent agreed that the statutory bargaining representative has a duty under section 9(a) of the act⁶⁴ to represent the interests of all employees in the bargaining unit fairly and impartially. It contended, however, that the unfair labor practice provisions may not be violated merely by a failure to represent all employees fairly and that Congress did not intend to make discrimination of this nature violative of the act.

In support of its position, it cited *NLRB v. Drivers Local (Curtis Bros.)*⁶⁵ where the Supreme Court dealt at length with the limitations of the Board's powers, with specific reference to section 8(b)(1)(A) of the NLRA. In *Curtis*, the union involved was not the representative of a majority of employees, and it sought by way of peaceful picketing to compel immediate recognition from the employer. The Board found that such recognitional picketing restrained and coerced employees in the exercise of rights guaranteed under section 7 in that the picketing coerced the employer into forcing its employees to be represented by a union not of their choice and thus constituted an unfair labor practice under section 8(b)(1)(A).⁶⁶ The Circuit Court of Appeals for the District of Columbia set aside the Board's order, holding that section 8(b)(1)(A) was inapplicable to peaceful picketing, whether organizational or recognitional in nature.⁶⁷ The Supreme Court affirmed the circuit and refused to apply 8(b)(1)(A). After an extensive review of the legislative history⁶⁸ of the Taft-Hartley Act and

⁶⁰ *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

⁶¹ *Miranda Fuel Co.*, supra note 50, at 185.

⁶² *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1953).

⁶³ *Miranda Fuel Co.*, supra note 50, at 190; see Cox, supra note 34, where arguments pro and con were posed by the author; Sovern, supra note 11.

⁶⁴ This section provides that the representative designated by a majority of employees in an appropriate unit for collective bargaining shall be the exclusive representative for all the employees in said unit.

⁶⁵ 362 U.S. 274 (1960).

⁶⁶ *Curtis Bros. Inc.*, 119 N.L.R.B. 232 (1957).

⁶⁷ *Drivers Local v. NLRB*, 274 F.2d 551 (D.C. Cir. 1958).

⁶⁸ 1 Legislative History of Labor Management Relations Act 99, 112, 158, 178-89, 292, 321, 407, 456 (1948).

specifically section 8(b)(1)(A) of that act, the Court concluded that Congress intended that this section apply only to union tactics involving violence, intimidation and reprisal, as well as conduct involving more than the general pressures upon employees implicit in economic strikes.⁶⁹

The dissent in *Miranda* utilized the pronouncement of the Court in *Curtis* to argue that the same result follows in the instant case; namely, that Congress had no intention to apply section 8(b)(1)(A) to the facts herein, but only to tactics involving violence, intimidation and reprisal, or threats thereof. Moreover, with respect to the contention of the majority that sections 8(b)(2) and 8(a)(3) were applicable here, the dissent noted that the facts in the instant case showed no evidence of a desire to encourage or discourage union membership. Thus, with no specific evidence of such a desire, it could have been neither inferred nor a foreseeable result of such conduct.

In December 1963 the Board's second *Miranda* decision reached the United States Court of Appeals for the Second Circuit.⁷⁰ The court denied enforcement of the Board's decision with a panel of the court split three ways. Judge Medina rejected the Board's entire theory that unfair, irrelevant or invidious treatment of an employee is a breach of the union's duty of fair representation and held that in any event it would not amount to an unfair labor practice. Judge Lumbard concurred in the refusal to enforce the Board's decision, but did so on the ground that there was no evidence that the union had violated its duty of fair representation. Judge Lumbard considered it unnecessary to decide if such unfair action, unrelated to union membership, could amount to an unfair labor practice. Judge Friendly dissented in favor of the Board's majority decision, concluding that such arbitrary exercise of union power encouraged union membership. He suggested that it would be desirable to have these cases processed through the Board since the ability of the aggrieved employee to proceed in court against an employer is limited by the usual arbitration provisions.

Since the *Miranda* decision, the Board has had occasion to review its determination while applying it to other factual situations. In *Ohio Pipeline Constr. Co.*,⁷¹ the union failed to re-register one of its members, thereby causing him not to be referred for employment. The trial examiner found that the union had violated sections 8(b)(1)(A) and (2), relying on the *Miranda* test of the right of employees to be free from unfair, irrelevant or invidious treatment. However, a Board

⁶⁹ 362 U.S. at 290 (1960).

⁷⁰ NLRB v. *Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963).

⁷¹ 144 N.L.R.B. 1365 (1963).

majority, consisting of members Leedom and Brown, disagreed with the trial examiner and found that the mere fact that the union had failed to re-register an employee could not be treated as coming under the *Miranda* principle. They stated: "Mere forgetfulness or inadvertent error is not the type of conduct that the principles of *Miranda* were intended to reach."⁷² Ten days later, in *New York Times Co.*,⁷³ the Board again refused to find a violation under the *Miranda* doctrine. There the union, in order to give work to those who needed it rather than to those who had full-time positions elsewhere, determined that one union member who was employed elsewhere was "not at trade." This classification affected his opportunity for regular employment. The Board held that such a determination of classification was not arbitrary or invidious, but rather a reasonable classification.⁷⁴

On the same day that the Civil Rights Act of 1964 was signed into law, the Board issued a decision in *Hughes Tool Co.*⁷⁵ finding a union guilty of unfair labor practices, and stripping it of its certification as bargaining representative, because of its racially discriminatory practices. The reasoning of the Board was based on the rationale in *Miranda*. The facts in *Hughes* showed that for the past five years employees had been represented by two locals, one representing white, and the other representing Negro employees. In 1961, after the two local unions were unable to agree with the employer on a proposal for eliminating racial discrimination, the white local signed a contract with the employer while the Negro local refused to sign. Shortly thereafter the employer and the white local agreed to enlarge a number of apprenticeships. However, under the contract terms, they were only available to white employees. A Negro bid for one of these apprenticeships, and, when rejected, asked the white local to represent him in processing a grievance.⁷⁶ The white local did not reply to his request, and he then filed a charge alleging violation of section 8(b)(1)(A) (*i.e.*, restraining and coercing employees). The Negro local then filed a motion to rescind the certification of the white local, contending that the existence of the segregated locals and the white local's practice of discrimination rendered its certification invalid. The Board was unanimous in its decision to revoke the union's certification and relied on

⁷² *Id.* at 1368.

⁷³ 144 N.L.R.B. 1555 (1963).

⁷⁴ For similar results, see *United States Trucking Corp.*, 145 N.L.R.B. 225 (1963); *Houston Chronicle Publ. Co.*, 145 N.L.R.B. 1657 (1964); *Millwrights' Local (Planet Corp.)*, 144 N.L.R.B. 798 (1963).

⁷⁵ 147 N.L.R.B. 1573 (1964).

⁷⁶ See *NLRB v. General Motors Corp.*, 307 F.2d 679 (D.C. Cir. 1962); *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

its decision in *Pioneer Bus Co.*⁷⁷ In addition, the Board was in full agreement as to the finding of a violation of section 8(b)(1)(A), although the reasoning for both the majority and the dissent was substantially different. The majority, relying on its prior determination in *Miranda*, applied the *Steele* and *Tunstall* cases in noting that there was a duty of fair representation, and, accordingly, such a duty of fair representation was enforceable under sections 7 and 8 of the act. Where a union violates this duty, the majority held that it also restrains and coerces employees in violation of section 7 rights. In addition to the violation of section 8(b)(1)(A), the majority also found violations of sections 8(b)(2) and (3), notwithstanding the fact that the complaint issued by the General Counsel had not alleged violation of these latter provisions.⁷⁸

The dissent found, as noted above, a violation of 8(b)(1)(A) solely on the ground that the union had discriminated against the Negro employee because he was not a member of its local, and not because the union did not perform its duty of fair representation. Although the dissent agreed that a union has a duty of fair representation, it concluded that such a failure to fairly represent may not amount to an unfair labor practice, yet may result in the revocation of a certification. In relying on such a conclusion, the dissent looked to the legislative history of section 7 and concluded that the purpose of the passage of the act herein was primarily to protect the organizational rights of employees. The dissent noted that if the Board is to embark on this new field of racial discrimination amounting to unfair labor practices, it will be entering an area for which it has no preparation and which is likely to seriously interfere with its present activities. Quoting specifically from the dissent:

What we are confronted with is an important question of policy which should be resolved not by logomachy, but by a careful weighing of alternatives in the light of the ends to be achieved. Where specific statutory rights or prohibitions are not involved, should enforcement of the duty of fair representation be left to the courts, to the Board, or both? In such circumstances, should cases of breach of this duty insofar as they involve race discrimination be treated differently from breaches involving nonracial factors? If a separate agency is created to handle the task of eliminating employment discrimination by unions and employers based on race, should the Board have a duty in this field? If so, what should it be?

⁷⁷ 140 N.L.R.B. 54 (1962).

⁷⁸ For an explanation of §§ 7, 8(b)(1)(A) & 8(b)(2), see note 52 supra. Section 8(b)(3) prohibits a labor organization that represents a majority of employees in an appropriate unit from refusing to bargain in good faith with an employer.

To ask these questions is to appreciate that the problem with which we are presented is legislative to be resolved by the Congress and not by an administrative body whose duty it is only to administer the law which Congress has written. . . . Accordingly, we would rest our finding of a violation of 8(b)(1)(A) not on non-performance of the duty of fair representation, but on those other considerations present in this case which Congress brought within the unfair labor practice ambit of the statute.⁷⁹

Aside from the procedural problem raised by the fact the General Counsel in the *Hughes* case did not allege in its complaint violations of section 8(b)(2) and 8(b)(3), the dissent noted that in accordance with its position in *Miranda*, a mere refusal to process a grievance cannot amount to an attempt to cause discrimination against an employee in violation of 8(a)(3) of the act. Here, as in *Miranda*, there was no encouragement or discouragement of membership in a labor organization, and, therefore, there could not have been a violation of section 8(b)(2). Moreover, the dissent pointed out that section 8(b)(3) outlined a bargaining duty owed by the union to employers and not to employees; further, Congress did not intend that a violation of the duty of fair representation to its members would be an unfair labor practice under section 8(b)(3). Accordingly, it was the position of the dissent that except for a violation of section 8(b)(1)(A) based upon discrimination concerning non-union membership, there could be no violation of the act, notwithstanding the fact that there clearly was a failure to perform the duty of fair representation which unanimously caused revocation of the certification herein.

In *Galveston Maritime Ass'n*,⁸⁰ the Board restated its prior decisions in *Miranda* and *Hughes* with the same result. In *Galveston*, the union forced a work distribution based upon race, as well as union membership, and forbade white and Negro gangs from working together. The entire Board found a violation of sections 8(b)(1)(A) and 8(b)(2) by the union's distribution arrangement based upon union and non-union considerations.⁸¹ However, the majority, in addition to the discrimination based upon non-membership, relied on *Miranda* and *Hughes* in finding a violation of section 8(b)(2), stating that the action engaged in by the union concerning work quotas constituted ir-

⁷⁹ *Hughes Tool Co.*, supra note 75, at 1590.

⁸⁰ 148 N.L.R.B. 897 (1964).

⁸¹ The entire Board was also in agreement that the union herein had violated § 8(b)(1)(A) by punishing members for having filed unfair labor practice charges with the Board. See *Local 138, Int'l Union of Operating Eng'rs*, 148 N.L.R.B. 679 (1964).

relevant, invidious and unfair consideration of race and union membership. Moreover, the majority held that under the statute herein, a labor organization's duty to bargain collectively includes the duty to represent fairly. The majority found a violation of section 8(b)(3). They concluded that "when a statutory representative negotiates a contract in breach of the duty which it owes to employees to represent all of them fairly and without invidious discrimination, the representative cannot be said to have negotiated . . . in good faith as to the employees whom it represents or toward the employer."⁸²

In *Maremont Corp.*⁸³ the Board again reviewed the past decisions in this area. The facts showed that after the employer's tool and die shop had been relocated, the union's negotiating committee, composed mainly of Negroes, asked the employer to decrease the departmental seniority of the tool and die shop employees, who were all white. The employer agreed, and as a result, these white employees lost seniority built up with the employer. The Board, comprising a panel of Chairman McCulloch and members Leedom and Jenkins, all agreed that the union, as well as the employer, had violated the act, but each had his own reasons for such a conclusion. Member Leedom concluded that there was racial discrimination by the union against the white employees and that the union, therefore, had failed to fulfill its duty of fair representation in violation of section 8(b)(1)(A). In addition, member Leedom found that such action by the union amounted to an attempt to cause discrimination in violation of section 8(b)(2). Accordingly, the employer's acquiescence in such an agreement had violated sections 8(a)(1) and (3) of the act. Member Leedom's conclusions in the *Maremont* case were based on the majority decisions in *Hughes*, *Miranda* and *Galveston*. Chairman McCulloch found a violation of sections 8(b)(1)(A) and 8(b)(2) in view of the fact that the union's conduct was motivated at least in part by union considerations. Here the white employees of the shop had in the past opposed the officers of the union. Therefore, it was concluded that such action taken against them was in part due to their past opposition. In addition, the employer's submission to the union's unlawful demands had violated sections 8(a)(1) and (3). Member Jenkins was of the opinion that the union's conduct was not based on personal animosity toward the employees because of their race, but that the union, consisting of a substantial number of Negro employees, had attempted to vitiate the effects of years of racial discrimination in the shop. However, he found a violation of sections 8(b)(1)(A) and 8(b)(2) because he felt the

⁸² *Galveston Maritime Ass'n*, supra note 80, at 900. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Central of Ga. R.R. v. Jones*, 229 F.2d 648 (5th Cir. 1956), cert. denied, 352 U.S. 848 (1956).

⁸³ 149 N.L.R.B. No. 482 (1964).

union's conduct was based on unfair, irrelevant and invidious, as well as union considerations.

In *Business League of Gadsen*,⁸⁴ the Board members reiterated their respective positions on the application of the act to racial discrimination. In this case the employer and the union permitted racial job discrimination by means of racial seniority rosters, with certain jobs allocated to white employees and others to Negroes. White employees with less seniority than Negroes were entitled to greater opportunity for promotion and transfer. When one Negro employee bid on a job, it was refused him by the employer on the ground the job was a "white job," and when he filed grievances with the union concerning the refusal, the union refused to process his complaint. Other complainants filed grievances with the union to eliminate the discriminatory practices, and the union refused to process them as well. The majority of the Board, consisting of members Leedom, Brown and Jenkins, restated its position in *Hughes*,⁸⁵ *Galveston*⁸⁶ and *Miranda*⁸⁷ to the effect that such racial discrimination by a bargaining representative violates sections 8(b)(1)(A), (2) and (3). Moreover, refusal, based on racial grounds, to process a grievance on behalf of a member of the bargaining unit constituted such a violation. The majority noted that in *Ford Motor Co. v. Huffman Co.*,⁸⁸ the Court had held that the statutory obligation of a collective bargaining agent is to represent all members equally and to make an honest effort to serve the interests of all without hostility to any. Moreover, the Court in *Ford Motor Co.* had further stated that the range of discretion allowed to a statutory representative is accompanied and limited by a requirement that such representative consistently exercise complete good faith and honesty of purpose.

After reciting the statutory duty of a bargaining agent to all its members, the majority in *Business League* proceeded to make several comments concerning the dissent's position. The dissent had concluded that there were no unfair labor practices committed because there was no discrimination due to non-membership in the union. However, the majority pointed out that in the *Hughes* decision, the present dissenters had found a violation of section 8(b)(1)(A) on the basis that the individual involved was a non-union member. The majority then observed that the dissent's position in *Hughes* and in the instant case led to a curious result, for it could be argued therefrom that employees who followed the route of self-organization and became members of a labor organization obtained less protection than did the non-member

⁸⁴ 150 N.L.R.B. No. 18 (1964).

⁸⁵ *Hughes Tool Co.*, supra note 75.

⁸⁶ *Galveston Maritime Ass'n*, supra note 80.

⁸⁷ *Miranda Fuel Co.*, supra note 51.

⁸⁸ Supra note 82.

in *Hughes*. In addition to commenting on the inconsistent position that the dissent was alleged to have taken, the majority referred to the passage of Title VII of the Civil Rights Act and stated:

We are not unmindful that in Title VII of the Civil Rights Act of 1964 the Congress has legislated concerning racial discrimination by labor organizations. But the reach of Title VII goes far beyond such discrimination, proscribing as it does discrimination on the basis of race, color, religion, sex, or national origin by employers, employment agencies, and joint labor-management committees, as well as labor organizations. Moreover, the Board's powers and duties are in no way limited by Title VII. On June 12, 1964, before the passage of the Civil Rights Act of 1964, the Senate rejected by a vote of 59 to 29 an amendment to Title VII which had been proposed by Senator Tower (R, Texas) and which perhaps would have had the effect of limiting the Board's powers. See the Congressional Record (daily copy) 88th Congress, 2nd Session, pp. 13171-73. The proposed amendment reads:

EXCLUSIVE REMEDY

Sec. 717. Beginning on the effective date of sections 703, 704, 706, and 707 of this title, as provided in section 716, the provisions of this title shall constitute the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title.⁸⁰

The dissent in *Business League* took the opportunity to restate its position in view of the allegations of inconsistency attributed to it by the majority. The dissent noted the following: (1) Under section 9 of the act a bargaining representative owes a duty fairly and impartially to represent all employees; (2) there is nothing in the wording of sections 7 or 8 and nothing in the legislative history to make the right of fair representation protected under section 7; (3) although there is such a duty of fair representation, a violation of it may not amount to an unfair labor practice, but it is sufficient reason for revoking the certification; (4) a union may violate section 8(b)(1)(A)

⁸⁰ 150 N.L.R.B. No. 18 (1964).

by refusing to process a grievance where the refusal is based on the individual's non-membership or on other considerations specifically condemned by the statute. The dissent went on to point out that where, as in the present case, and as distinguished from *Hughes*, the union refuses to process a grievance for a particular member of its organization, there can be no violation of 8(b)(1)(A). In *Hughes* the employee's non-membership in the union was a factor in the union's refusal to process the grievance but not so in the present case. The mere fact that the breach of the duty of fair representation results in the revocation of the certification cannot mean that it therefore follows that an unfair labor practice has been committed.⁹⁰

Notwithstanding the views of the dissent, the Board majority has continued to hold that an employer's submission to a union's discriminatory demands is not only a breach of the union's duty of fair representation but also an unfair labor practice on the part of both employer and union.⁹¹

III. RACIAL DISCRIMINATION AS IT AFFECTS CONTRACT BAR RULES

In order to encourage and preserve the stability of labor relations, the Board has, with certain well defined exceptions, adhered to a policy of not directing an election among employees presently covered by a valid collective bargaining agreement. The question whether a present election is barred by an outstanding contract is determined according to the Board's "contract bar" rules. Generally these rules require that in order to be a bar the contract must be in writing, be properly executed and be binding upon the parties; that the contract be of no more than "reasonable" duration (presently limited to three years); and that

⁹⁰ Most recently, the Court of Appeals for the Ninth Circuit, in *NLRB v. Tanner Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965), enforced a Board order, 148 N.L.R.B. 1402 (1964), in a case related to those detailed above. The Board had held that employees picketing their employer's premises in protest against the employer's discriminatory hiring practices concerning Negroes were engaged in protected activity within the meaning of the act. The Ninth Circuit enforced the Board's determination that such employees were engaged in protected concerted activity, relying on *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1961). However, the case was remanded to the Board to give consideration to the fact that in the instant case there was a collective bargaining representative, and the employees did not proceed through such representative.

⁹¹ *Maremont Corp.*, supra note 83. However, in March 1965, the Board held that the discharge of an employee who had refused to join a racially segregated union was not a violation of the duty of fair representation since the direct cause of discharge was an unsatisfactory work performance, and since the evidence was insufficient to show that the union attempted to cause his discharge for unlawful reasons. *Theo Hamm Brewing Co.*, 151 N.L.R.B. No. 42 (1965). Cf. *Robert Meyer Hotel Co.*, supra note 49, where the Board reversed the trial examiner in finding the discharge of its Negro maids and bus girls in violation of the act.

the contract contain substantive terms and conditions of employment which are consistent with the policies of the act.⁹²

The Board has had only one occasion to apply its contract bar rules to contracts which inherently discriminated against Negro employees. In *Pioneer Bus Co.*⁹³ the employer and the incumbent union entered into two contracts, one affecting only the white employees and the other the Negro workers. Although the contracts contained identical terms and conditions of employment, separate seniority lists were maintained and separate representational treatment took place based upon racial lines. The Board held that it would not permit its contract bar rules to be utilized to shield contracts such as the instant ones since they resulted in the disparate and discriminatory treatment of Negroes. Accordingly, the Board held that the contracts did not serve as a bar to an election.

Although instances like *Pioneer Bus Co.* have been rare, it would appear likely that the Board will, in the future, continue to treat all contracts for separate groups of employees based upon racial determinations as not being a bar to a representation petition and, accordingly, to an election.⁹⁴

IV. RACIAL DISCRIMINATION AS IT AFFECTS REVOCATION OF UNION CERTIFICATIONS

The Supreme Court has held that the authority of bargaining representatives is not absolute in that they have a statutory obligation to represent all members of the appropriate unit and must make an honest effort to serve the interest of all members equally.⁹⁵ The Board has applied such a rationale in revoking a representative's certification. The first case was *Larus & Brother Co.*⁹⁶ In that case the Board held that since the certified union had failed to perform its full statutory duty by discriminating against Negro employees, its certification would have been rescinded had it not been voluntarily relinquished.⁹⁷

⁹² *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958); *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160 (1958); *General Extrusion Co.*, 121 N.L.R.B. 1165 (1958).

⁹³ *Supra* note 77.

⁹⁴ See Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 Minn. L. Rev. 771, 778 (1965), where the author gives his views on the effectiveness of this remedy. He states, "This remedy also constitutes a serious threat only to weak unions. A strong union would win the election even if it were held."

⁹⁵ *Ford Motor Co. v. Huffman*, *supra* note 82; *Steele v. Louisville & N.R.R.*, *supra* note 57; *Tunstall v. Brotherhood of Locomotive Firemen*, *supra* note 58; *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1951).

⁹⁶ 62 N.L.R.B. 1075 (1945).

⁹⁷ *Coleman Co.*, 101 N.L.R.B. 120 (1952); *Bronx County News Corp.*, 89 N.L.R.B. 1567 (1950); *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973 (1945); *General Motors Corp.*, 62 N.L.R.B. 427 (1945); *Southwestern Portland Cement Co.*, 61 N.L.R.B. 1217 (1945); *R.K.O. Radio Pictures, Inc.*, 61 N.L.R.B. 112 (1945); *Carter Mfg. Co.*, 59 N.L.R.B. 804 (1944); *Bethlehem-Alameda Shipyard, Inc.*, 53 N.L.R.B. 999 (1943).

More recently, in *Hughes Tool Co.*,⁹⁸ the Board had occasion to further detail its revocation rule. In that case the union required the payment of certain monies by non-members for the handling of grievances. The Board held that inasmuch as the union was obliged to represent all employees, union or non-union equally, this practice abused the standard of conduct to which the certified union must adhere. The Board noted that although there may be a concurrent remedy under the unfair labor practice provisions of the act, this was not a barrier to its consideration of a motion to revoke under section 9. It is interesting to note that the dissent in *Hughes* was of the opinion that such conduct committed by the statutory bargaining representative could be brought to the Board's attention only through the unfair labor practice procedure. However, it wasn't until the *Miranda* case came before the Board that the unfair labor practice procedure was utilized.⁹⁹ Since the *Larus* case and the 1953 *Hughes* case the Board, in several other cases not involving racial matters, has revoked the certification where the bargaining representative has not fairly represented all the employees in the appropriate unit.¹⁰⁰ It appears clear that Board policy, as recently stated in the latest *Hughes* case,¹⁰¹ requires certification revocation when a statutory bargaining representative engages in racial discrimination.

V. RACIAL DISCRIMINATION AS IT AFFECTS APPROPRIATENESS OF BARGAINING UNITS

The NLRA requires an employer to bargain with the representative designated by a majority of its employees in a unit appropriate for collective bargaining.¹⁰² Moreover, the Board has the power to determine the unit of employees appropriate for collective bargaining purposes.¹⁰³ In the past the Board has consistently held that racial distinctions are irrelevant in determining the appropriateness of a bargaining unit.¹⁰⁴ Where a party insists on the inclusion or exclusion of individ-

See also *Veneer Prods.*, 81 N.L.R.B. 492 (1949). In these cases the Board reminded the parties that later evidence of discrimination will cause revocation of a certification.

⁹⁸ 104 N.L.R.B. 318 (1953).

⁹⁹ *Miranda Fuel Co.*, supra note 50.

¹⁰⁰ *A. O. Smith Corp.*, 119 N.L.R.B. 621 (1957); *Pittsburgh Plate Glass Co.*, 111 N.L.R.B. 1210 (1955).

¹⁰¹ *Hughes Tool Co.*, supra note 98.

¹⁰² 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1964).

¹⁰³ 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(b) (1964).

¹⁰⁴ *Andrews Indus., Inc.*, 105 N.L.R.B. 946 (1953); *Norfolk Southern Bus Corp.*, 76 N.L.R.B. 488 (1948); *F. S. Royster Guano Co.*, 71 N.L.R.B. 1465 (1947); *Foley Lumber & Export Corp.*, 70 N.L.R.B. 73 (1946); *Colorado Fuel & Iron Corp.*, 67 N.L.R.B. 100 (1946); *Tobacco By-Products & Chem. Corp.*, 64 N.L.R.B. 252 (1945); *U.S. Bedding Co.*, 52 N.L.R.B. 382 (1943); *Southern Wood Preserving Co.*, 37 N.L.R.B. 25 (1941); *Aetna Iron & Steel Co.*, 35 N.L.R.B. 136 (1941); *Georgia Power Co.*, 32 N.L.R.B. 692 (1941). Cf. *Syracuse Chilled Plow Co.*, 61 N.L.R.B. 717, 719 (1945).

TITLE VII: RELATIONSHIP AND EFFECT ON THE NLRB

uals based on racial grounds, the Board has refused to consider such arguments but rather has determined the appropriateness of units upon relevant considerations. It would appear that the Board will adhere to this consistent practice, especially in view of its more recent determinations concerning racial discrimination in other areas referred to herein.

VI. THE CIVIL RIGHTS ACT AND ITS EFFECT UPON THE NATIONAL LABOR RELATIONS ACT

Title VII of the Civil Rights Act of 1964¹⁰⁵ very generally proscribes as *unlawful employment practices* discrimination relating to the hiring, firing and other conditions of employment of an individual because of his or her race, color, religion, sex or national origin and for a union to do likewise, particularly with respect to membership in a union. The NLRA, on the other hand, generally proscribes, as *unfair labor practices*, discrimination practiced against an employee because of his union activities or because of his concerted activities for mutual aid or protection in matters relating to wages, hours or other conditions of employment. As regards unions, the act forbids them to coerce or restrain an employee in the exercise of his section 7 rights¹⁰⁶ or to cause or attempt to cause his discharge for reasons other than the failure of the employee to tender his periodic dues and initiation fees.

Thus, a literal reading of the NLRA shows that there is nothing in the act to prevent an employer from discharging an employee because he does not like the color of his eyes, or for any reason or no reason, provided that the discharge is not attributable to the employee's activities on behalf of the labor organization or because he engaged in concerted activities for mutual aid or protection. On the other hand, the Civil Rights Act would make many of such discharges unlawful employment practices.

There are certain statutory procedural distinctions between the two agencies. Title VII provides that the Civil Rights Commission shall "cooperate with and, with their consent, utilize regional, state, local, and other agencies, both public and private, and individuals."¹⁰⁷ Moreover, after having reasonable cause to believe that a violation has been committed, the Commission is instructed to eliminate such unlawful employment practice by informal methods of conference, conciliation and persuasion.¹⁰⁸ Where such efforts do not achieve compliance, the aggrieved person then may file a civil action in the federal

¹⁰⁵ 78 Stat. 241 (1964), 42 U.S.C. § 2000a (1964).

¹⁰⁶ See note 56 supra.

¹⁰⁷ 78 Stat. 258 (1964), 42 U.S.C. § 2000e-4(f)(1) (1964).

¹⁰⁸ 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(a) (1964).

courts. However, the Commission itself may not file such enforcement action, and must, in several instances, await action by the state before it or the aggrieved person may proceed.¹⁰⁹ Thus, the Commission's activities are highlighted by their conciliatory characteristics, as distinguished from the NLRB which is primarily an enforcement agency which is neither self-energizing nor empowered to engage in conciliation or mediation.

The new act does not vest exclusive jurisdiction in the Civil Rights Commission over matters relating to employment discrimination. In this connection, on April 8, 1964, Senator Clark stated, Title VII "would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws."¹¹⁰ Moreover, as noted above,¹¹¹ Senator Tower offered an amendment to the Civil Rights Act on June 12, 1964 giving to the Commission exclusive jurisdiction in the disposition of civil rights cases, and such proposal was rejected by the Senate, thus lending support to the conclusion that the Civil Rights Act has no pre-emptive effect on rights arising under the NLRA. Consistent with this view is the recent Board determination in *Business League of Gadsden*.¹¹²

In contrast to this, the jurisdiction of the NLRB has not been extended by recent legislation. Thus, bills such as Senator Prouty's, which would have made racial discrimination an unfair labor practice under the jurisdiction of the Board, as a substitute for Title VII, were defeated.¹¹³ As far back as May 5, 1953, a bill introduced in the Senate to make it an unfair labor practice to discriminate on the basis of race, religion, color or national ancestry was not even reported out of the Committee on Public Welfare.¹¹⁴ Therefore, it appears clear that while racial discrimination is not a literal violation of the NLRA, nothing contained in the Civil Rights Act detracts from or affects the statutory authority of the NLRB to proceed affirmatively in appropriate cases involving discrimination.

Despite the mild expressions of concern voiced by some commentators,¹¹⁵ the overlapping jurisdiction of the Board and the Commission does not appear to pose a threat to the effective operation of either

¹⁰⁹ Robert L. Carter, General Counsel of the National Association for the Advancement of Colored People, classified Title VII as a most significant breakthrough but felt that Board procedures would be easier, less costly to the individual, and more widely applicable than the fair employment provisions of the Civil Rights Act. 56 LRRM Analysis 39.

¹¹⁰ 110 Cong. Rec. 7207 (1964).

¹¹¹ Supra note 89.

¹¹² Supra note 84.

¹¹³ S. 1837, 83d Cong., 1st Sess. (1953).

¹¹⁴ S. 1831, 83d Cong., 1st Sess. (1953).

¹¹⁵ Sherman, supra note 94; Note, The Civil Rights Act of 1964, 78 Harv. L. Rev. 684, 690 (1965).

TITLE VII: RELATIONSHIP AND EFFECT ON THE NLRB

agency or create a serious conflict when their day-to-day operations are considered. Thus, such matters under the NLRA as (a) setting aside representation elections where there is a deliberate attempt to overstress and exacerbate racial feelings and emotions by irrelevant inflammatory appeals; (b) revoking a union's certification where the union violated its duty of fair representations; (c) departing from the Board's general contract bar rule by holding that an existing collective bargaining agreement will not constitute a bar to a present election because of the incumbent union's failure to abide by its duty of fair representation; and (d) refusing to consider racial distinctions in unit determinations, all clearly pose no conflict between the Board and the Commission.

In these highly specialized areas the Board has jurisdiction as well as the expertise to make determinations in accordance with the authority vested in it under the NLRA. Notwithstanding the Board's mandate in the representation field, the Commission undoubtedly will have limited occasion to act concurrently with the Board in connection with identical factual situations involving discriminatory practices, and there may well be dual remedies depending upon the nature of the proceeding before each agency. The only significant area in which an overlapping of jurisdiction may occur relates to the finding by the Board that under some circumstances the duty of fair representation constitutes an unfair labor practice, relying on its rationale in the *Miranda* and *Hughes* cases.

In assessing the assertion of jurisdiction by the Board in unfair labor practice cases involving racial discrimination, not only does the overlapping appear more technical than real but, in fact, may be almost nonexistent, depending upon the ultimate court review of the Board's decisions in this area. Thus, one commentator takes the position that whatever position a court might have adopted concerning an extension of *Miranda* to racial discrimination cases prior to the enactment of Title VII, it is now proper to consider Title VII in construing the application of the NLRA in this area.¹¹⁶

Arnold Ordman, the General Counsel of the NLRB, in a July 1965 address to investigators affiliated with the Civil Rights Commission, discussed the possible overlapping of lines of jurisdiction between the Board and the Commission, and pointed out that although courts have not finally ruled upon the Board's position with respect to race issues, such decisions will be forthcoming in the next year or two.

VII. CONCLUSION

A review of federal legislation during the past three decades highlights the progress made in the general elimination of discriminatory

¹¹⁶ Sherman, *supra* note 94, at 818, n.184.

practices. This evolution of the sustained attack on discriminatory practices has been accomplished through the mutual cooperation and efforts of civic minded organizations, communities and individuals, and has been implemented and enforced by the three branches of state and federal government as well as numerous administrative agencies, all of whom coordinated their activities to reach the desired results.

Thus, it is clear that the Board and the new Commission, both charged with the duty of enforcing public service statutes, will, in the event of any overlapping, readily reach mutual accommodation in the interest of effectuating the purposes of both acts. This is amply demonstrated by the Board's practice of reaching an accommodation where concurrent jurisdiction with other forums is involved.¹¹⁷ It may well be that both organizations will proceed on a complaint arising out of the same set of facts, but with different approaches and different remedies combine to produce an even more effective result. If, in fact, an overlap of jurisdiction arises at all, it would appear that it would be *de minimis*; and, if it does occur, it may well prove desirable, since it will provide dual protection for the individual discriminated against, affording him an opportunity to choose his own forum and the election of remedies.

¹¹⁷ Modern Express, Inc., 149 N.L.R.B. 1507 (1964); The Flintkote Co., 149 N.L.R.B. 1561 (1964); Kentile, Inc., 147 N.L.R.B. 981 (1964); International Harvester Co., 138 N.L.R.B. 923 (1962); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961); Continental Baking Co., 128 N.L.R.B. 937 (1960); Clyde Taylor Co., 127 N.L.R.B. 103, 109 (1960); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).