

Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*

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Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.

—Mr. Justice Douglas concurring in
Jones v. Mayer.¹

[Industrial peace] would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. *The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the [Railway Labor] Act seeks to avoid.*

—Chief Justice Stone in *Steele v. Louisville & N. R. Co.*²

[T]here can be no separate answers. No white answers. No black answers.

—UAW International Executive Board.³

Black workers, ignoring the justifications provided in the past for discrimination, are today less willing to tolerate a position of subordination in the house of labor. The willingness of workers to “down tools” in protest against racial discrimination, coupled with an abrasive “black power” rhetoric, has clearly caught the unions off guard. Racial strife comes as a somewhat bitter surprise to the relatively progressive industrial unions with large Negro memberships.⁴

* Although this article is primarily concerned with the problems of black workers, the author recognizes that some of its assumptions and arguments are equally applicable to other racial minorities. See Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969); *Jones v. Mayer*, 392 U.S. 409 (1968).

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1. 392 U.S. 409, 447 (1968) (Douglas, J., concurring).

2. 323 U.S. 192, 200 (1944) (emphasis added).

3. United Automobile Workers International Executive Board, Letter to Membership, March 10, 1969, 70 LRRM 347 (1969).

4. See generally Hill, *Black Protest and the Struggle for Union Democracy*, 1 ISSUES IN INDUSTRIAL SOCIETY 19 (1969); Henle, *Some Reflections on Organized Labor and The*

Black Power in the Unions

Its fury and anger promise to leave none of the labor organizations in the craft and industrial sectors unscathed.⁵ In the skilled crafts, "black unions" have been organized outside of the traditional AFL structure—attempting to secure for blacks some of the many jobs created by construction within the ghetto community.⁶ Since blacks are excluded from most leadership positions in both craft and industrial unions and have a disproportionately small representation at the staff level,⁷ the

New Militants, 92 MONTHLY LAB. REV. 20 (1969); Widick, *Minority Power Through Unions*, THE NATION 206, September 8, 1969; Bernstein, *Fervor of Racial Protest Starting to Press Unions*, DENVER POST, June 15, 1969, § J., at 1; Raskin, *Labor and Blacks: The Unions Wear Two Faces Where Race is Involved*, THE N.Y. TIMES, September 7, 1969, Sec. 4; p. 4, col. 2. Stetson, *Negro Members Are Challenging Union Leaders*, N.Y. TIMES, June 29, 1969, at 37, col. 2. For an example of the UAW reaction to black militant organizations in and near Detroit such as the Dodge Revolutionary Union Movement (DRUM), see Kerwin, *Mazey Calls Black Militant Violence Great Peril to UAW*, DETROIT NEWS, March 16, 1969, at 4B, col. 1. However, "[t]hrough DRUM exemplifies only an extreme fringe element, the forces that gave rise to it are at work in plants across the country. These forces include an expansion in the ranks of Negro blue-collar workers an awakening of black employees' ambitions, a militancy in their demands and an alleged lag in response by unions and management." Gannon, *Black Unionists: Militant Negroes Press for a Stronger Voice in the Labor Movement*, WALL STREET JOURNAL, November 29, 1968, at 1, col. 1.

5. In the industrial unions, a minority of black workers can disrupt, at least temporarily, the entire operation. In Mahwah, New Jersey, for example, a walkout by approximately 500 Negro workers, lead by the United Black Brothers of Mahwah Ford who claimed to represent all 1700 black workers at the plant, temporarily closed the plant. Approximately 53% of the 4 p.m. production line consisted of Negroes. The UAW unsuccessfully urged the workers to return to work. See Waggoner, *Ford Plant Shut in Racial Dispute*, N.Y. TIMES, April 29, 1969, at 23, col. 1; Detroit Free Press, April 26, 1969, at 6B. See also Chrysler Corporation v. Baker, Civil No. 113-761 (Mich. Circuit Court, July 16, 1968); Owens, *Black Unionists Posing Chrysler Wildcat Threat*, DETROIT FREE PRESS, August 16, 1968, at 3A; N.Y. TIMES, July 4, 1968, at 8, col. 2; Detroit Free Press, January 28, 1969, at 9A; Kerwin, *UAW Action Promised to Militants*, DETROIT NEWS, February 11, 1969, at 8; Detroit Free Press, February 11, 1969, at 6A. See especially Flint, *UAW Backs G.M. on Negro Hiring*, N.Y. TIMES, July 16, 1967, at 53, col. 1.

6. See Corner, *Blacks Remain on Building Job in Interunion Truce*, THE DETROIT NEWS, November 21, 1968, at 10B; Herbers, *infra*; Hill, *supra* note 4; Detroit Free Press, June 11, 1969, at 11C; Kerwin, *Union Rivalry on Project is Threat to "Black Local"*, THE DETROIT NEWS, November 19, 1968; Orr, *Building-Trade Jobs Elude Negroes*, DETROIT FREE PRESS, December 26, 1968, at 3.

It is also unlikely that black communities will take kindly to all-white construction crews working in the midst of black unemployment. See Gould, *The Negro Revolution and Trade Unionism*, in 114 CONG. REC. 7226 (daily ed. July 31, 1968) (remarks of Rep. Ryan); Flint, *Detroit Building Trades Agree on New Pacts to Spur Housing*, N.Y. TIMES, June 4, 1969, at 22, col. 1; N.Y. TIMES, March 31, 1968, at 77, col. 1; Herbers, *Model Cities Struggle: Black Jobless vs. Unions*, N.Y. TIMES, April 3, 1969, at 41; Robbins, *Building Union Aids Mass Housing Drive*, N.Y. TIMES, June 18, 1969, at 1, col. 8. See also Address of George Romney, Secretary of Housing and Urban Development, to Fourteenth Nat'l Legislative Conference, AFL-CIO Building & Construction Trades Dept., May 12, 1969; The Report of the President's Commission on Urban Housing 169-71 (1968); Givens, *Job Security in the Building Industry—A High Quality of Low-Rent Housing*, 18 LABOR L.J. 468 (1967).

7. See note 4 *supra*. See also Steelworkers Debate Black Representation, 91 MONTHLY LAB REV. 16 (1968); Owens, *UAW's Blacks Seek Powers*, DETROIT FREE PRESS, September 30, 1968, at 3; N.Y. TIMES, February 27, 1967, at 16, col. 1.

At the same time, blacks have made inroads into some unions' leadership. In 1962, the United Automobile Workers elected a Negro Board Member-at-Large, and, more recently, the first elected Regional Director-Board Member has been elected. N.Y. TIMES, August 1, 1968, at 19, col. 8; Owens, *Negro Is Pilot For 74,000-member UAW Region*, DETROIT

struggle has often taken the form of a rank-and-file revolt against the men at the top.⁸ The inclusion of no-discrimination clauses in union contracts has been of little significance. Both white union leaders and company officials, insensitive in many cases to undesirable working conditions which affect blacks, have not stressed implementation of the clauses. Tension is particularly acute where unions like the United Steelworkers insist upon defending seniority systems which have harmed black workers in the past and continue to do so.⁹ In such struggles for racial justice in unions, the wildcat strike and picketing may be an appealing weapon for the minority.

The National Labor Relations Board and the courts, faced with self-help measures by those against whom discrimination has been practiced, are beset by conflicting and at times ambiguous public policies. On the one hand, the National Labor Relations Act establishes a framework of exclusive bargaining representatives for all workers¹⁰ and a policy opposed to work stoppages which bypass the more peaceful

Free Press, August 15, 1968, at 2E. Some of the plants where the greatest amount of conflict between the UAW and black workers has taken place have elected black officials. UAW International Executive Board Letter, *supra* note 3. However, the United Steelworkers has not been nearly as successful in this regard. Loftus, *Steel Union Gets a Rebuke on Race*, N.Y. Times, August 24, 1968, at 23, col. 1; Detroit News, August 21, 1968, at 8A. Subsequent to the United Steelworkers Convention, the first Negro candidate ran for the United Steelworkers executive board and lost. The candidate blamed black unionists' "apathy" for his defeat since he tallied 40% of the total vote but didn't win the support he expected in heavily black locals. Wall Street Journal, Feb. 18, 1969, at 1, col. 5. See, however, Wall Street Journal, May 23, 1969, at 4, col. 2, which indicates that the Alliance for Labor Action, composed of United Automobile Workers and the International Brotherhood of Teamsters is forming a new union to be called the National Council of Wholesale, Retail, Office and Processing Workers of America, which will have black leadership.

It seems clear that, in some instances, unreasonable requirements for eligibility for office which may violate the Landrum-Griffin Act have a discriminatory effect on the ability of black workers to be elected to office. See *Wirtz v. Hotel, Motel and Club Employees Union*, 391 U.S. 492 (1968); *Wirtz v. National Maritime Union of America*, 284 F. Supp. 47 (S.D.N.Y. 1968); *aff'd*, 399 F.2d 544 (2d Cir. 1968); Hill, *supra* note 4. Moreover, the problem of black representation in desegregated and merged locals promises to be raised under Title VII. Cf. *United States v. Local 198, United Papermakers* (Civil Action No. 68205, Section B, September, 1968) (On file at Wayne State University Law Library); *Chicago Federation of Musicians, Local 10 v. American Federation of Musicians*, 57 LRRM 2227 (N.D. Ill. 1964); *Daye v. Tobacco Workers*, 234 F. Supp. 815 (D.D.C. 1964). The Court has attempted to thwart any dilution in Negro voting strength in administering the Voting Rights Act of 1965. See *Allen v. State Board of Elections*, 393 U.S. 541 (1969).

8. See Gould, *Non-Governmental Remedies for Employment Discrimination*, 20 SYRACUSE L. REV. 865 (1969).

9. See, e.g., *Whitfield v. United Steelworkers of America*, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959); *United States v. H.K. Porter Co.*, 70 LRRM 2131 (N.D. Ala. 1968). On racial discrimination by unions, see generally H. CAYTON & G. MITCHELL, *BLACK WORKERS AND THE NEW UNIONS* (1939); M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966); R. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* (1965); H. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* (1944); S. SPERO & A. HARRIS, *THE BLACK WORKERS* (1936); *THE NEGRO AND THE AMERICAN LABOR MOVEMENT* (J. Jacobson ed. 1968).

10. 29 U.S.C. § 159(a) (1964).

Black Power in the Unions

and supposedly rational machinery of impartial grievance arbitration.¹¹ At the same time, the Supreme Court's holding in *New Negro Alliance v. Sanitary Grocery Co.*¹² would appear to give economic pressure against racial discrimination in employment at least equal standing with the ordinary labor-management dispute. The Court, holding that picketing to force the employment of blacks was a "labor dispute" within the Norris-LaGuardia Act (and thus could not be enjoined in a federal court),¹³ stated:

The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the expressed terms of the [Norris-LaGuardia] Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and the conditions of employment based upon differences of race or color.¹⁴

The passage of a federal fair employment practices statute in opposition to racial discrimination (Title VII of the Civil Rights Act of 1964),¹⁵ may be seen as supporting self-help measures.¹⁶ At the same

11. Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 173(d) (1964).

12. 303 U.S. 552 (1938).

13. Act of March 23, 1932, c. 90 § 13, 47 Stat. 73, 29 U.S.C. §§ 113(a), 113(b), and 113(c) (1964).

14. 303 U.S. at 561.

15. Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000 e-2 (1964). For other weapons against racial discrimination in employment, see Exec. Order No. 11246, 3 C.F.R. § 579, 42 U.S.C. § 2000e (Supp. III 1967); *Jones v. Mayer*, 392 U.S. 409 (1968). In connection with *Jones* in the employment area, compare *Dobbins v. Local 212 I.B.E.W.*, 292 F. Supp. 413, 69 LRRM 2313 (S.D. Ohio 1968), with *Waters v. Wisconsin Steelworkers of International Harvester Co.*, 71 LRRM 2886 (N.D. Ill. 1969); *Harrison v. American Can Co.*, 2 FEP Cases 1 (S.D. Ala. 1969). The development of a new constitutional protection of the right to join unions for public employees is of some importance to black workers in the South without statutory protection. See *AFSCME v. Woodward*, 70 LRRM 2317 (8th Cir. 1969); *Atkins v. City of Charlotte*, 70 LRRM 2732 (W.D.N.C. 1969); *McLaughlin v. Tilendis*, 59 CCH Lab. Cas. 13, 219 (7th Cir. 1968).

16. The constitutional avenues for self-help measures to be used by the civil rights movement in pursuit of such goals as desegregation of public education is treated in H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1966).

time, the statute's broad prohibitive language and the availability of statutory machinery to implement these prohibitions would appear to make such measures unnecessary. In fact, however, statutory sanctions provided by the act have proven ineffective. The Equal Employment Opportunity Commission, which administers the statute,¹⁷ is not afforded cease and desist powers,¹⁸ and the individual usually must vindicate his rights through burdensome and expensive court action. The Commission must depend on a conciliation process which has proven fairly unsuccessful to date. Suits to enforce the union's duty of fair representation, which can be brought before the NLRB and the courts, and the various remedies created by the NLRB in response, have proven similarly ineffective.¹⁹

Leaving aside the policy conflicts which Title VII may create, it is clear that its passage reflects a general distrust of arbitration and the bargaining table insofar as the handling of racial discrimination grievances is concerned. In view of this distrust and the proliferation of wildcat strikes and picketing, the question arises as to whether special machinery is needed to cope with the racial grievance; *i.e.*, whether in terms of labor policy there are "separate" answers for the troublesome problems of minority action to combat racial discrimination. This article attempts to explore the problems which arise because of racial discrimination in employment, in the context of Title VII as well as other civil rights legislation, the National Labor Relations Act, and the first amendment.

17. 42 U.S.C. § 2000(3)(9)(a) (1964).

18. The Commission lacks cease and desist powers to enforce the statute and is totally dependent upon a conciliation process which itself is impaired by unrealistically small appropriations. See JOBS & CIVIL RIGHTS (Report for U.S. Civil Rights Commission prepared by Brookings Institute, 1969); Statement of Herbert Hill, Labor Secretary for NAACP, December 5, 1968, DAILY LABOR REPORT No. 237, E-1 (December 5, 1968); Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834 (1969).

Even under the National Labor Relations Act where the Board, under Section 10, has enforcement powers, the argument has not been made that the availability of statutory machinery impliedly limits self-help measures. Of course, Congress was careful to note that the passage of the Act (Section 13) did not in any way impair the right to strike. Cf. NLRB v. Teamsters Local 639, 362 U.S. 274 (1960).

President Nixon has recently proposed legislation which would broaden the authority of the Equal Employment Opportunity Commission. See N.Y. Times, August 9, 1969, at 1, col. 5. Compare the legislation introduced by Senator Philip A. Hart, S.2029, 91st Cong., 1st Sess. (1969).

19. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Conley v. Gibson*, 355 U.S. 41 (1957); *Syres v. Oil Workers*, 350 U.S. 892 (1956); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Graham v. Bhd. of Locomotive Firemen*, 329 U.S. 232 (1949); *Tunstall v. Bhd. of Locomotive Firemen*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Goodyear Tire & Rubber Co.*, 45 Lab. Arb. 240 (1965); *Independent Metal Workers Union, Local 1*, 147

I. Arbitration

The National Labor Relations Act of 1935²⁰ codified the principles on which modern labor relations are based. Congress there established the doctrine that a union which possesses a majority status in an appropriate unit of workers²¹ is entitled to be the exclusive bargaining representative for all employees in that unit.²² The Supreme Court, in its landmark *Steelworker Trilogy*,²³ later interpreted Section 301²⁴—which had been passed as part of the 1947 Taft-Hartley amendments—as manifesting a Congressional preference for the use of voluntary grievance arbitration in exchange for the commitment of labor to refrain from striking for the duration of a labor contract.²⁵

The exclusive bargaining agent concept has been tempered somewhat by the statutory proviso that “any individual, employee or group of employees [has] the right at any time to present grievances to the employer and to have such grievances adjusted.”²⁶ In such cases, the bargaining agent must be given the option of being present during adjustment negotiations and adjustments must not be inconsistent with the labor contract.

In the face of these qualifications, the Supreme Court has held that employer negotiations with individual employees is “subversive of the mode of collective bargaining which the statute has ordained”²⁷ Consequently, the unions have exercised a near plenary power in determining whether an employee’s grievance should be processed through arbitration.²⁸ The Court has been motivated here not only by what it considers to be the proper application of exclusivity to labor arbitration, but also by a desire not to disturb a system which it regards as a workable substitute for industrial strife.²⁹

NLRB 1573 (1964); *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); Herring, *The “Fair Representation” Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964).

20. 29 U.S.C. §§ 151 *et seq.* (1964) [hereinafter referred to as the National Labor Relations Act].

21. 29 U.S.C. § 159(b) (1964).

22. 29 U.S.C. § 159(a) (1964).

23. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

24. 29 U.S.C. 301 (1964).

25. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). The no-strike obligation can be implied as the result of a broad arbitration clause. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

26. 29 U.S.C. § 159(a) (1964).

27. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944). *Accord*, *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

28. *Vaca v. Sipes*, 386 U.S. 171 (1967).

29. *See* notes 18 and 19 *supra*.

Yet the Court's veneration for the arbitration process has its limits. Although, generally speaking, employees must exhaust contractual grievance procedures before bringing a contract action,³⁰ the Court held in *Glover v. St. Louis-San Francisco Railway Co.*³¹ that dissident workers alleging racial discrimination in promotion could proceed directly into court even though their complaint alleged a contract violation as well as discrimination. *Glover* cannot be read to say unequivocally that certain kinds of racial discrimination grievances are exempt from the exhaustion requirements;³² the facts presented to the Court included allegations that the union and company had been extremely hostile to the black plaintiffs and their grievances. Moreover, the Court stressed the fact that the plaintiffs had "called upon" the union to take action in regard to their grievance, thus *attempting* to

30. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). *But see* *United States v. Georgia Power Co.*, 71 LRRM 2784 (N.D. Ga. 1969); *King v. Georgia Power Co.*, 69 LRRM 2094 (N.D. Ga. 1968); *Reese v. Atlantic Steel Co.*, 282 F. Supp. 905 (N.D. Ga. 1967); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *reversed*, 2 FEB Cases 121 (7th Cir. 1969); *Dent v. L.S.F. Ry.*, 265 F. Supp. 56 (N.D. Ala. 1967), *rev'd on other grounds*, 406 F.2d 339 (5th Cir. 1969). However, in none of the above noted cases did the plaintiff accuse the defendant *both* of racial discrimination and of a contract violation, which could appropriately be handled by grievance-arbitration machinery. Where the allegation of contract violation as well as discrimination has been made, *Glover* has been distinguished on the grounds that futility was evidenced in that specific case. *See* *Waters v. Wisconsin Steelworkers of International Harvester Co.*, 71 LRRM 2886 (N.D. Ill. 1969). *Cf.* *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418 (1968); *Brady v. TransWorld Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

The Court has stated:

[B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement [in a *Vaca*-type case], a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would in our opinion, be a great injustice.

Vaca v. Sipes, 386 U.S. 171, 185-186 (1967).

31. 393 U.S. 324 (1969).

32. E.g., "[T]he attempt to exhaust contractual remedies required under *Maddox*, is easily satisfied by petitioner's repeated complaints to company and union officials and at no time should consuming formalities be demanded of them." 393 U.S. at 331 (1969).

exhaust their contractual remedies.³³ Since the *Glover* exception to the exhaustion requirement is based on the Court's conclusion that the black workers' efforts to employ the union-management procedures would be "wholly futile," one wonders whether a good many racial discrimination grievances can be distinguished from non-racial grievances for which the contract procedures were created. This speculation, if valid—and the typicality of the *Glover* fact situation would argue for such validity—, implies that normal arbitration procedures are not adequate fairly to handle grievances involving charges with elements of racial discrimination.

Elsewhere, I have argued that normal arbitration procedures, which have proven effective in solving many types of grievances and avoiding labor strife, suffer from certain institutional shortcomings that render them totally incapable of dealing with the racial problems that beset the labor movement today.³⁴ A brief restatement of those conclusions should provide insights into the institutional framework in which the wildcat strikes and picketing by racial minorities will be discussed below.

One difficulty with submitting racial discrimination grievances to arbitration is that the union and employer, who select the arbitrator, are quite often both alleged to have participated in the discrimination. While impartial arbitration has an integrity which makes it superior to devices such as labor-management committees, it is difficult to ignore its responsiveness to the parties to the agreement under which the arbitration takes place. Black workers and their allies have no standing to intervene in the arbitration proceeding,³⁵ and, moreover, it is labor and management—not rebellious minority employees—who will decide whether the arbitrator is selected to arbitrate in the future. This is not to cast ethical aspersions on arbitrators, but only to highlight

33. The Court pointed out that in previous cases the exhaustion rule was relaxed to the extent that the employee need only have attempted to exhaust the available remedies and been prevented from doing so by the union. 393 U.S. at 330-31. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); note 30 *supra*.

34. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969).

35. The leading case is *Acuff v. United Papermakers*, 404 F.2d 169 (5th Cir. 1968), cert. denied, 89 S. Ct. 1466 (1969) (Mr. Justice Black was of the opinion that certiorari should have been granted). See generally Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 MO. L. REV. 233 (1964); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962).

an institutional fact of life:³⁶ each arbitration process serves those who have created it.

This responsiveness of the arbitrator to the labor-management team precludes the formulation of "affirmative action" remedies for black workers. Even where a contract contains a no-discrimination clause,³⁷ as well as a separability provision which provides that an illegal clause does not taint the remainder of the contract,³⁸ it is doubtful that an effective remedy can be formed which does not controvert some expectation of the parties.³⁹

Arbitrators are also reluctant to rely on public laws such as Title VII in issuing awards since they have no particular competence in this realm.⁴⁰ Indeed, the Supreme Court's requirement that the arbitrator maintain a measure of fidelity to the contract terms⁴¹ gives legal justification to this rationale. Even in those instances where there is a clear conflict between civil rights legislation and the privately negotiated contract,⁴² the existing arbitration system does not impel opti-

36. See Gould, *Non-Governmental Remedies for Employment Discrimination*, 20 SYRACUSE L. REV. 865 (1969); Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191 (1968); Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215 (1964).

37. See Brief for Petitioner at 14, *NLRB v. Tanner Motor Livery Ltd.*, 394 F.2d 1 (9th Cir. 1965).

38. The unanswered question is whether, even though the parties clearly intended to act in accordance with the law by negotiating a separability clause which presumes that the illegal clause will be void and not relied upon by the parties, they intended to bestow this function upon an arbitrator or a court. See generally *UAW Local No. 985 v. W.N. Chace*, 262 F. Supp. 114 (E.D. Mich. 1966); Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 RUTGERS L. REV. 217 (1960); Denau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 439-47 (1969); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963); Note, *Arbitrability of Labor Disputes*, 47 VA. L. REV. 1183 (1961).

39. Most arbitrators, for example, would be going astray in this regard by revising discriminatory seniority systems in a manner which would antagonize white incumbents who have benefited from segregated job patterns. On the nature of such practices, see generally Cooper & Sobel, *Seniority and Testing Under Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEXAS L. REV. 1039 (1969); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967).

40. But see Howlett, *The Arbitrator, NLRB and the Court*, National Academy of Arbitrators, Proceedings of the 20th Annual Meeting (BNA, Inc. 1967). See also Platt, *The Relationship between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398 (1969); Meltzer, *Ruminations About Ideology, Law and Arbitration*, National Academy of Arbitrators, Proceedings of the 20th Annual Meeting (BNA, Inc. 1967).

41. He [the arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity of this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

42. See, e.g., *Local 12, United Rubber Workers*, 150 NLRB 312 (1964), *enforcement granted*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), where the collective bargaining agreement was interpreted by the parties in a racially discriminatory manner and, pursuant to the doctrine of past practice, a conflict between a law and contract arose. See *Goodyear Tire & Rubber Co.* 45 Lab. Arb. 240 (1965).

mism as to the arbitrators' reaction.⁴³ This recognition of the conflicting roles forced upon the union where racial cleavages within the membership have resulted in strife of various types and the black workers' distrust of the union where racial grievances have existed for some time with the union's passive or active cooperation has serious implications for labor law policy beyond the realm of arbitration.⁴⁴

II. Racial Discrimination and Work Stoppages

The National Labor Relations Act prohibits employer retaliation in the form of discharge and discipline against workers who protest through the walkout what they regard to be poor working conditions.⁴⁵ But when unions negotiate a collective agreement which prohibits such protests through, for example, a no-strike clause,⁴⁶ the walkout becomes unprotected and the worker is exposed to the above-noted penalties. The Supreme Court has limited the ability of employers to discipline workers even where no-strike clauses exist. In *Mastro Plastics v. NLRB*,⁴⁷ the Court held that a no-strike clause could not be read to prohibit a strike which was called in response to unfair labor practices by the employer.⁴⁸ The *Mastro Plastics* opinion noted that

43. Of course, there are situations such as discharge cases where the union, albeit prompted to process the grievance due to fear of a duty of fair representation suit by the worker, moves for reinstatement vigorously and where the arbitrator, operating under a "just cause" provision in the agreement, can comfortably insert Title VII substantive law notions into the general language of the clauses. Here, some of the assumptions noted above have less validity but the skepticism about no-discrimination clauses expressed by Judge Wright has general applicability: one can find "that such a clause meant little if a company would not also work to correct individual grievances." *United Packing House v. NLRB*, 70 LRRM 2489, 2492 n.10 (D.C. Cir. 1969).

44. The implications *within* the realm of arbitration lead inevitably to the conclusion that, absent even more drastic change in public institutions, workers alleging racial discrimination by both union and management should be permitted trilateral arbitration procedures in order to reflect the actual character of the conflict. See Gould, *supra* note 34, at 46-52.

45. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). The statutory basis is provided in 29 U.S.C. §§ 157, 158(a) (1964):

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

It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

46. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1938). Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). However, a more limited no-strike obligation will protect the walkout. See *Ford Motor Co.*, 131 NLRB 1462 (1961); *Young Spring & Wire Corp.*, 133 NLRB 643 (1962); *Mid-West Metallic Prods., Inc.*, 121 NLRB 1317 (1958).

47. 350 U.S. 270 (1956).

48. The no-strike clause could not, however, be read to specifically preclude its application to the situation involved in *Mastro Plastics*.

such unfair labor practices were destructive of the "foundations" of the negotiated labor contract.⁴⁹ This language has convinced the NLRB, over the strong objections of member Fanning, that the *Mastro Plastics* exception to the unprotected nature of no-strike violations was to be afforded only where the employer engaged in "serious, unfair labor practices."⁵⁰

Even without the presence of a labor contract or a no-strike clause, where a union is on the scene as the exclusive representative, some strikes, called without union authorization, are unprotected within the meaning of the Act. In *NLRB v. Draper Corp.*,⁵¹ the Fourth Circuit stated the proposition in its boldest terms. Emphasizing the concept of exclusivity and the disruption which unauthorized stoppages can cause in interstate commerce, the court stated:

Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work. . . .

The employees must act through the voice of the majority or the bargaining agent chosen by the majority. Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as the minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority. The proviso to

49. 350 U.S. at 281.

50. *Arlan's Department Store*, 133 NLRB 802, 807 (1961) (emphasis added).

51. *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944). See also *NLRB v. Serv-Air, Inc.*, 69 LRRM 2476 (10th Cir. 1968); *Rubber Rolls, Inc. v. NLRB*, 388 F.2d 71 (3d Cir. 1967); *Packers Hide Ass'n. v. NLRB*, 360 F.2d 59 (8th Cir. 1966); *NLRB v. Cactus Petroleum, Inc.*, 355 F.2d 755 (5th Cir. 1966); *NLRB v. R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963); *NLRB v. Kearney & Trecker Corp.*, 237 F.2d 416 (7th Cir. 1956); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *NLRB v. Lundy Mfg. Corp.*, 316 F.2d 921 (2d Cir.), cert. denied, 375 U.S. 895 (1963); *NLRB v. Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366 (9th Cir. 1954); *Simmons, Inc. v. NLRB*, 315 F.2d 143 (1st Cir. 1963); *Confectionery & Tobacco Drivers Union v. NLRB*, 312 F.2d 108 (2d Cir. 1963); *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960); *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953); *NLRB v. American Mfg. Co.*, 203 F.2d 212 (5th Cir. 1953); *NLRB v. J.I. Case Co.*, 198 F.2d 919 (8th Cir. 1952); *NLRB v. Deena Artwear, Inc.*, 198 F.2d 645 (6th Cir. 1952); *NLRB v. Warner Bros. Pictures, Inc.*, 191 F.2d 217 (9th Cir. 1951). See generally *Cox, The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 332 (1951); *Gould, The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967).

section 9 . . . preserving to individuals or groups of employees the right to present grievances to the employer, negatives by necessary inference the right on their part to call strikes for the purpose of influencing the bargaining being carried on by the chosen representatives of all the employees.⁵²

The NLRB has attempted to proclaim its fidelity to *Draper*⁵³ while at the same time holding that stoppages called without the union's authorization do not subvert majority rule where their objectives coincide with those held by the exclusive representative.⁵⁴ It is with this background as precedent that the Board dealt with its first racial discrimination walkout. In *Tanner Motor Livery Ltd.*,⁵⁵ two white drivers employed by the company were active in civil rights organizations, and demanded that a black driver be hired. Subsequent to the demand, one of the drivers was fired and filed a timely grievance under the labor contract. The union first decided against processing the grievance, and a subsequent union-company panel proceeding ruled against his reinstatement. Shortly after the discharge, the second employee joined a picket line outside the establishment with a sign which bore the emblem "Jim Crow Shop." He was quickly fired.

The Trial Examiner found that both employees were discharged because of their protest against the alleged discriminatory hiring practices of the employer. He determined, however, that such practices were not an unfair labor practice under the Act. A unanimous Board reversed. Citing *New Negro Alliance*,⁵⁶ the Board held that the workers involved had engaged in protected concerted activity within the meaning of the Act:

It is true . . . that not every concerted activity in furtherance of a labor dispute is protected by Section 7. However, an employer's hiring policies and practices are of vital concern to employees inasmuch as such policies and practices inherently affect terms and conditions of employment. Thus, in our opinion, the concerted activities of employees in protest of what they consider unfair

52. *NLRB v. Draper Corp.*, 145 F.2d 199, 202-03 (4th Cir. 1944).

53. See *Consul Lee A. Co.*, 175 NLRB No. 93 (1969); Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967).

54. I have taken the position that union involvement and notification from union officials are a prerequisite for the exercise of protected rights under Section 7 where an exclusive bargaining representative has been selected by the employees. *Id.* at 696-697. However, as indicated here, I would not apply such standards to disputes which have their origin in protest concerning racially discriminatory practices. Public policy and statutory considerations concerning racial equality argue for a different approach to this problem.

55. 148 NLRB 1402 (1964), *remanded*, 349 F.2d 1 (9th Cir. 1965), *aff'd* in Supplemental Decision and Order, 166 NLRB No. 35 (1967).

56. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

hiring policies and practices are clearly within their Section 7 right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"⁵⁷

On appeal, the Ninth Circuit remanded for the Board to consider the question of whether employees who protested discriminatory hiring practices were required to act through their collective bargaining representative where the representative had negotiated a contract with the employer.⁵⁸ The court said that this question, "stated another way," was "to what extent does Section 9(a) [providing for exclusive bargaining authority] limit or remove the protection afforded by Section 7?"⁵⁹ The court expressed the view that the purposes of the Act, which in large part support the principle of collective bargaining, might be undermined if the employees could resort to picket line activity in connection with "grievances" which were to be settled in a "proscribed manner," *i.e.* by arbitration.

The Board on remand stated that the record did not indicate whether the employees had attempted to act through their exclusive bargaining representative.⁶⁰ They found it unnecessary to decide whether the employees were filing a "grievance" under the §9(a) proviso⁶¹ or whether they were attempting to bargain individually with the employer. Holding that the employees were not "acting in derogation of their established bargaining agent by seeking to eliminate what they deemed to be a morally unconscionable, if not an unlawful, condition of employment,"⁶² the Board stated:

[T]he Board cannot presume or conclude that, contrary to the course being urged by [the discharged employees], . . . the Union knowingly would have taken the unlawful position that it would refuse to represent Negro drivers fairly if hired. Rather, we must assume that these employees were acting in accord with, and in furtherance of, the lawful position of their collective-bargaining agent. For the Board to find, therefore, that the employees' otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between the Union and the Respondent would be offensive to public policy.⁶³

57. *Tanner Motor Livery Ltd.*, 148 NLRB 1402, 1404 (1964).

58. 349 F.2d 1 (9th Cir. 1965).

59. *Id.* at 3.

60. *See* p. 51 *supra*.

61. 166 NLRB No. 35 at 2-3 (slip opinion), 65 LRRM 1502, 1503 (1967).

62. 65 LRRM at 1503.

63. *Id.* But *see* *The Emporium*, Trial Examiner's Decision, October 24, 1969, Case No. 20-CA-5304. *Daily Labor Report*, Oct. 24, 1969, No. 207 D-1.

The Board did not hold that the employer was in fact guilty of discrimination in hiring or that a violation of a civil rights law had occurred.⁶⁴ Consistent with its general refusal to examine the reasonableness of employee protests in the walkout context,⁶⁵ the Board found only that there was a reasonable basis for believing that the concern of the two workers was genuine, in the sense that it was not "grounded on contrived or flimsy evidence."⁶⁶ The evidence presented was the complete absence of black employees in the defendant's concern. Given a reasonable basis for belief, the activity was declared to be protected within the meaning of the Act.

The *Tanner* decision reflects both: (1) the Board's unrealistic and rarefied approach to wildcat strikes in all contexts; and (2) its inability to articulate the unique role which racial discrimination grievances play in our collective bargaining system. The Board, with some approval from the courts,⁶⁷ assumes that if an identity between the objectives of the union and unauthorized strikers can be found or inferred, the stoppage is not subversive of the collective bargaining process and is consequently protected by the *Draper* rule.⁶⁸ This has led the Board to the completely erroneous conclusion that a mere disagreement about the timing of a strike, as distinguished from its substantive objectives, does not destroy the rapport between the union and the striking workers.⁶⁹ But the question of timing economic action, as the Court has noted in the context of lock-outs, is critical in the strategy of both the union and the company and specifically in the union's decision to use or withhold the strike weapon.⁷⁰ If the trade union leadership believes that September is the best time to shut down auto companies because the model changeover imposes greater economic pressure and therefore increases the likelihood that management will settle at union terms, dissidents who choose to walk out in July are at

64. *Id.*

65. See e.g., *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409 (5th Cir. 1955); *NLRB v. Cowles Publishing Co.*, 214 F.2d 708 (9th Cir. 1954); *NLRB v. Southern Silk Mills, Inc.*, 209 F.2d 155 (6th Cir. 1953); *Modern Motors, Inc. v. NLRB*, 198 F.2d 925 (8th Cir. 1952); *Carter Carburetor Corp. v. NLRB*, 140 F.2d 714 (8th Cir. 1944); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942).

66. *Tanner Motor Livery, Ltd.*, 65 LRRM 1502, 1503. Thus far, the use of statistics as a basis for finding discriminatory exclusion of Negroes has not found general acceptance. See *United States v. Local 38, IBEW*, 70 LRRM 3019 (N.D. Ohio 1969); *Dobbins v. Local 212, IBEW*, 69 LRRM 2313 (S.D. Ohio 1968); *United States v. H. K. Porter Co.*, 70 LRRM 2131 (N.D. Ala. 1968). But see *United States v. Sheet Metal Workers International Association*, 2 FEB Cases 127 (8th Cir. 1969).

67. See especially *NLRB v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964).

68. See note 54 and accompanying text *supra*.

69. *R. C. Can Co.*, 140 NLRB 588, 596 (1963), *enforcement granted*, 328 F.2d 974 (5th Cir. 1964).

70. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 302-04 (1965).

odds with the union's objectives. This is simply one example of the Board's willingness to give the walkout protected status in defiance of the realities of industrial relations.⁷¹

The Board's notion in *Tanner* that the fair employment activities and picket line conduct of the two workers were "in accord with, and in furtherance of the lawful position of their collective bargaining agent"⁷² requires an even greater act of faith. It is quite clear that the union was unenthusiastic at best about the civil rights goals of the two workers. Although the Board found that the dismissal of the first worker was based upon grounds which were a "pretext" for the employer's desire to rid itself of employees who took issue with hiring policy, the union representative twice refused to vote for the worker's reinstatement. If anything, the evidence adduced in *Tanner* indicates that the union sympathized with the employer's position.

It may be argued that the union's hostility toward its civil rights conscious members in no way establishes its hostility to the goal of non-discrimination. It is quite possible for the union to take the most severe measures against various types of independent action such as wildcat strikes⁷³ and yet be in total agreement with a policy which would remedy the irritations or injustices which gave rise to the stoppage. An initial problem with this approach in *Tanner*, however, is the difficulty of translating this absence of hostility into the kind of accord between the parties required by the *Draper* rule. Unions as well as employers are responsible for much of the racial discrimination which exists in the country today.⁷⁴ There was no evidence in *Tanner* that the international union would back up the strikers' objectives, let alone any indication of sympathy on the part of the local. It does not seem possible that the Board could have indulged in such an unjustified inference in light of the pattern of employment discrimination that has been evidenced.⁷⁵

71. The Board refuses to regard a walkout as unprotected where the international representative's "reservation concerning the walkout appears to relate to its tactical wisdom." *R. C. Can Co.*, 140 NLRB 588, 596 (1963).

72. 65 LRRM 1502, 1503 (1967).

73. See *Parks v. International Bhd. of Elec. Workers*, 314 F.2d 886, 905 (4th Cir.), cert. denied, 372 U.S. 976 (1963); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951). See, e.g., Hofmann, *UAW Takes Over Rebel Ohio Local*, N.Y. Times, Mar. 9, 1967, at 29, col. 1. Cf. Jones, *Wirtz Upset by Workers' Rejection of Accords*, N.Y. Times, Jan. 3, 1967, at 16, col. 4; Raskin, *Why Labor Doesn't Follow Its Leaders*, N.Y. Times, January 8, 1967, § 4, at 6, col. 1.

74. For one of the more recent authoritative statements on this subject, see Equal Employment Opportunity Commission, REPORT NO. 1 (1969).

75. R. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* (1965); M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966).

Moreover, despite the fact that the unions may discipline wildcatters and yet find them-

It is particularly interesting that the holding in *Tanner* not only sanctions a protected status for employees who did not proceed through their exclusive bargaining representative, but at the same time declares "offensive to public policy" any collective bargaining agreement negotiated by the parties which would alter this result. But if one assumes, as the Board does, that the union's position was not being undermined by the workers' independent action, the procedures outlined in the collective bargaining agreement would seem to be the appropriate forum for the resolution of the dispute. The procedure used in the case was a joint union-employer committee where both the employer charged with discrimination and an unsympathetic union voted against reinstatement. It is possible that the Board would have overcome its normal suspicions regarding grievance procedures controlled by the union and employer⁷⁶ and found this procedure fair. One can assume, however, that the procedural unfairness involved would provide a sensible rationale for the Board's holding insofar as it relates to the relevance of the collective bargaining agreement to the dispute.⁷⁷

The record in *Tanner* did not reveal whether, had this procedure proven unfair to the Board, the parties could have turned to impartial arbitration.⁷⁸ As previously mentioned, arbitration has serious deficiencies for the resolution of racial grievances and, although this view appears to be at odds with that held by the NLRB,⁷⁹ the hollow ring

selves in agreement with their objectives, this would not be true in a case like *Mastro Plastics*, where employer unfair labor practices are aimed at the union's existence. While logically one can separate the union's response to two separate issues (the cause of the stoppage and the allegedly improper conduct of the strikers), the realities of industrial relations are that the union does not so respond in the *Mastro Plastics* context or where the union officers find it politically unwise to do so. Thus, the union's refusal to vote for reinstatement of the discharged grievant in *Tanner* may have some bearing on what the union would do in the area of fair hiring. In any event, this fact hardly buttresses the Board's views about the union's position on this issue.

76. However, the critical question is whether "... the procedures adopted meet normal standards as to sufficiency, fairness and regularity" and whether there is "evidence of irregularity, collusion or inadequate provisions for the taking of testimony." *Denver-Chicago Trucking Co., Inc.*, 132 NLRB 1416, 1421 (1961).

77. Such an approach coincides with the position taken by the Supreme Court in *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969), where the Court refused to require exhaustion of administrative remedies where union-employer controlled proceedings under the Railway Labor Act were involved. See pp. 52-55 *supra*.

78. 148 NLRB 1402, 1410.

79. See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955): The arbitration award will not be set aside where the proceedings "have been fair and regular, all parties have agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and policies of the Act . . ." See also *Cloverleaf Div. Adams Dairy Co.*, 147 NLRB 141 (1964); *Raley's Inc.*, 143 NLRB 256 (1963); *International Harvester Co.*, 138 NLRB 923 (1962), *enforced sub. nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964). But see *A. O. Smith Corp.*, 174 NLRB No. 41 (1969); *Horn & Hardardt Co.*, 173 NLRB No. 164, 69 LRRM 1522 (1968); *Westinghouse Electric Corp.*, 172 NLRB No. 763 (1967); *Hotel Employers Ass'n. of San Francisco*, 159 NLRB 143, 148 (1966); *Ford Motor Co.*, 131 NLRB 1462 (1961).

of the Board's stated faith in the rapport of the union leadership with its activist members implies that something else is at issue.

It is somewhat more likely that the Board, rather than limiting the application of arbitration to contract disputes, desired only to exclude a category of cases not covered by the negotiated agreement. In *Tanner*, the dispute concerned discrimination in hiring. The Board, while addressing itself to the question of whether the objectives of the union and employees were compatible, stated that it would not presume or conclude that "the Union knowingly would have taken the unlawful position that it would refuse to represent Negro drivers fairly if hired."⁸⁰ It is then possible to rationalize *Tanner* as a case in which the collective bargaining agreement is irrelevant to the dispute because it does not deal with the subject matter, *i.e.* hiring, but rather with conditions of employment after the employee is on the job. Inasmuch as the industrial unions are generally unconcerned with the hiring of employees, the contract's prohibitions against economic action would have no meaning: the *quid pro quo* relationship exists only between the no-strike clause and the benefits which are traditionally part of the collective bargain. Following this analysis, stoppages which protest discriminatory union hiring halls would become vulnerable because the union would be involved in the hiring process and the use of independent pressure would undermine exclusivity.⁸¹

The problems with this approach are manifold. The no-strike clause often speaks in the most absolute language and obligates the employees to refrain from economic warfare unconditionally. The Court has stated in this context:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . .

. . . .
. . . The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time.⁸²

80. *Tanner Motor Livery Ltd.*, 65 LRRM 1502, 1503 (1967).

81. See *Hotel Employers Ass'n.*, 47 Lab. Arb. 873 (1966). The Board, because it did not correct Trial Examiner dicta, has unwisely permitted this approach to be moved a step further, *i.e.*, acceptance of the proposition that a walkout concerning a condition of employment not incorporated in the agreement is protected activity. *Norfolk Conveyor*, 159 NLRB 464, 468-69 (1966). See generally *Cox, Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956). Cf. *B & M Excavating, Inc.*, 155 NLRB 1152, 1160 (1966); *Jacobs Manufacturing*, 94 NLRB 1214 (1951).

82. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 580 (1960).

In regard to the no-strike question, the Court further added that "in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes."⁸³ The Court's statements are inconsistent with the proposition that the legal status of a stoppage is determined by whether or not the issue which triggered it was dealt with by the parties at the bargaining table. Insofar as this rationale would weaken the no-strike clause in the contract, it would come as a rude surprise to most employers who have viewed the clause as a much firmer pledge.⁸⁴

If *Tanner*, despite the irrationality of its arguments, stands for the proposition that racial disputes have a unique importance in the scheme of national labor policy, it contains a holding which deserves support. Congress has, albeit through a statute which is thus far more promise than accomplishment,⁸⁵ has made clear its hostility to racial discrimination in employment. This commitment, coupled with the history of deliberate bondage and racism which has been the lot of the black worker in this country, warrants a special solicitude on the part of administrative agencies and courts. Labor stoppages arising from issues of racial discrimination should not be declared unprotected out of hand simply because they are not authorized by the union or are in defiance of the no-strike clause and peaceful procedures provided in the collective agreement. At the same time, workers and management deserve some stability in their economic affairs; the factory should not become a battlefield where economic pressure is used to settle issues unrelated to work and production. What then for the limits within which the right to strike will be protected? And what is the proper rationale to reach the laudable result inarticulately sponsored in *Tanner*?

The scheme of labor-management relations created by Congress is designed to deal with factors relating to employment and production. The use of authorized weapons such as the strike to achieve objectives

83. *Id.* at 583.

84. Moreover, insofar as racial problems are concerned, many of the industrial unions are becoming increasingly enmeshed in programs for the hiring of the "disadvantaged" such as that sponsored by the National Association of Businessmen. See *N.Y. Times*, May 16, 1968, at 46, col. 1; *id.*, Mar. 21, 1968, at 46, col. 1; *id.*, Feb. 27, 1968, at 22, col. 2; *id.*, Feb. 25, 1968, at 1, col. 3. See also 71 LRRM 252 (1969); 70 LRRM 247 (1969); 70 LRRM 196 (1969); 70 LRRM 152 (1969); 69 LRRM 245 (1968); 68 LRRM 258 (1968); 68 LRRM 93 (1968).

85. For some of procedural problems which have raised havoc in the enforcement of civil rights legislation aimed at racial discrimination, see, for instance, *JOBS & CIVIL RIGHTS* (Report for U.S. Civil Rights Commission prepared by Brookings Institute, 1969).

unrelated or only distantly related to these factors should not be allowed. Suppose, for example, that demands are made on General Motors, Chrysler, and Ford that they pay reparations to black workers because of what is alleged to be the involvement of these companies in this nation's subjugation of Negro workers. Such a protest seemed too generalized and unrelated to plant employment conditions—at least in terms of the particular issues with which the National Labor Relations Board normally deals⁸⁶—to be the kind of “labor dispute” which falls within the Congressional scheme, and which consequently is entitled to the protection of *Tanner* or *New Negro Alliance*. The reparations example smacks too much of a political issue best suited for another forum.

The problem becomes considerably more difficult when one considers, for example, a stoppage by black workers aimed at making the anniversary of Martin Luther King's death a holiday.⁸⁷ This dispute, like the demand for reparations, has its genesis in a situation which is not directly related to the employer-employee relationship at a particular establishment. At the same time, however, the desired result—a new holiday—is, unlike reparations, quite commonly a subject of collective bargaining. Furthermore, this particular demand, involving the commemoration of a revered civil rights leader, is, at least symbolically speaking, enmeshed in the protest against discriminatory hiring practices. This aspect of the example argues for classifying it with those disputes involving demands to revise seniority systems⁸⁸ or to upgrade black workers, both of which are clearly within the rubric “labor dispute.”

Even where racial disputes are clearly related to the employer-employee relationship, not all walkouts should be protected. One factor to be considered is the importance of the economic issues involved to those who have negotiated the collective agreement. In some cases

86. In determining whether a particular subject matter is a condition of employment within the meaning of the National Labor Relations Act for duty to bargain purposes, the Supreme Court attempts to discern whether unions and employers normally deal with the subject at the bargaining table. See *Fibreboard Paper Products, Inc. v. NLRB*, 379 U.S. 203, 212 (1964). Cf. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

87. N.Y. Times, Jan. 20, 1969, at 26, col. 2. Cf. *Sligo Inc.*, 50 Lab. Arb. 1203 (1968); *American Standard, Inc.*, 52 Lab. Arb. 736 (1969).

88. Cf. *Local 189, United Papermakers and Paperworkers v. United States*, 71 LRRM 3070 (5th Cir. 1969); *United States v. Hayes International Corp.*, 2 FEP Cases 67 (5th Cir. 1969); *U.S. v. Local 38 IBEW*, 70 LRRM 3019 (N.D. Ohio 1969); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Dobbins v. Local 212 IBEW*, 292 F. Supp. 418 (S.D. Ohio 1968); *U.S. v. H. K. Porter Co.*, 70 LRRM 2131 (N.D. Ala. 1968). On the issue of past discrimination and the Court's willingness to tolerate its embodiments in the present system, see generally *Gaston County v. United States*, 395 U.S. 285 (1969); *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

this should preclude the protection of those who would disrupt implementation of the agreement. In regard to the holiday hypothetical, for example, it must be said that the negotiation of holidays involves considerations which, because of their cost, are extremely important to the employer. Holiday benefits, unlike such costs as retraining hard core unemployed, recur year after year. Before entering into an agreement providing for more of such benefits, the average employer weighs carefully the cost of the concession and may successfully attempt to recapture some of these losses by gaining union concessions in other areas or by making use of technological innovations which save labor costs.

The governing consideration in determining whether to protect walkouts over these kinds of disputes is one of contractual obligation and not whether the stoppage can be properly characterized as a labor dispute. To give legal protection to economic pressure which upsets such basic expectations would interfere too severely with the foundations upon which collective bargaining is predicated. Moreover, any number of groups might persuasively argue that special holiday adjustments should be made in their case also.⁸⁹ Here the balance must be resolved in favor of the employer who has bargained in good faith with the workers' representatives—who presumably have resolved differences among employees through internal union debate.

The importance of other areas of dispute may vary from industry to industry. Retraining unemployed blacks, for example, may be a small expense in an industry where job skills are relatively similar and uncomplicated. Consequently, such a demand would not greatly endanger the contract which had been negotiated between management and the union. In the steel industry, however, such a program might require massive expenditures and probably some loss of production; consequently, where the union and management have made a good faith effort to integrate black workers into the better paying jobs, a dispute arising from this demand should be treated similarly to one arising from the demand for a new holiday. Disputes arising from a discriminatory hiring system will probably not interfere with the economic assumptions upon which collective agreements are based. The overriding theme in all of these cases is the same: a consideration of the walkout's compatibility with the industrial relations system's fundamental assumptions as well as a requirement of a conscious, good

89. Cf. *Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709 (W.D. Mich. 1969).

faith exploration of the issue in dispute by the parties at the bargaining table.

The expectations of management and labor in regard to the contract which they have negotiated must be balanced against the discriminatory effect which the contract has on black workers. (The Martin Luther King holiday issue, for example, does not involve discrimination as such.) Where the discrimination involved is illegal under Title VII or another public law, there is no question that a stoppage resulting from that discrimination should be protected despite the reliance of union and management.⁹⁰ The more difficult problem is posed by the reference in *Tanner* to "unconscionable" discrimination of the kind necessarily alleged in the holiday dispute example as well as the seniority system which is not unlawful but adversely affects the job security of black workers. Such problems are likely to arise from programs involving the hiring of hard core unemployed since the job tenure of blacks employed in such programs—without adequate seniority credits—is threatened by layoffs. Another possibility is a stoppage aimed at obtaining the company's consent to an "inverse" seniority system, such as that which the United Auto Workers recently supported.⁹¹ Such a system would allow whites with greater seniority to opt for layoffs with supplemental unemployment compensation. Here, neither law nor arbitration will protect the black worker against the inherently adverse impact of a "last to be hired, first to be fired" policy. It seems unfair to ask black workers to compete under such rules, which apply equally to blacks and whites, where the inability of blacks to compete has been caused by previous unequal rules.⁹² Thus, in the absence of a good faith effort by the parties to the bargaining relationship to mitigate the undesirable affects of the system, the stoppage should be viewed as protected.

90. See the discussion of *Mastro Plastics v. NLRB*, pp. 69-70 *infra*, concerning the protected nature of the stoppage in defiance of a no-strike clause where the stoppage protests unlawful conduct.

91. See *Auto Workers Proposal for Inverted Seniority*, 70 LRRM 313 (1969); Dietsch, *Hardcore Blacks and the Shiny Auto*, THE NEW REPUBLIC, Mar. 10, 1969.

92. While such seniority systems may not be unlawful under Title VII, see cases cited note 88 *supra*, it is important to keep in mind that prohibitions contained in the Executive Order are apparently broader than those in Title VII. See *In re Allen Bradley*, OFCC Docket No. 101-68, Exec. Order 11,246, Decision of the Secretary of Labor (Jan. 17, 1969). Cf. Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968).

On the difference between Title VII and the duty of fair representation obligation contained in the National Labor Relations Act as well as the Railway Labor Act, see *United States v. Hayes International Corp.*, 2 FEP Cases 67, 69 n.6 (5th Cir. 1969); *Norman v. Missouri Pacific Railroad*, 71 LRRM 2940, 2947-8 (8th Cir. 1969); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 24 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

Black Power in the Unions

An even more formidable problem arises in the case of disputes protesting disciplinary action taken because of absenteeism and poor work habits.⁹³ While such factors as inferior housing, education, and family environment argue for a dual standard in these cases, it is extremely difficult to sanction such a walkout where it seems to alter the uniform application of regulations which have a bona fide economic justification. One factor which must be considered here is the ability of the Board to make the distinctions necessary to decide cases of unconscionability. It is ill-suited by way of tradition and expertise to second guess the judgment of the parties in this critical area.⁹⁴ The solution would be for the Board to stay out of this quagmire of bitter conflict and resentment, although in some cases the unsympathetic nature of union and management reactions may require it to act.

In terms of the relationship between black dissidents and exclusive bargaining agents, the Board's approach to both *Draper* and *Tanner* has it all backwards. In cases involving walkouts which arise from discrimination or unconscionable practices, the Board should not strain to discover a rapport between the union and the workers, for in most cases no such rapport exists in fact. Rather, such walkouts should be presumed to be protected under Section 7 of the National Labor Relations Act *because they are disruptive of the role played by the exclusive representative*. If the union behaves properly in such cases, it is the agent through which conflicts should properly emerge. Where the activities of the unions are so unresponsive as to require blacks to act on their own, the necessity of ending discrimination requires that they be protected. If, on the other hand, a union is in accord with the workers on the racial issue and would support the protest, the conduct of the black employees should be unprotected. In such circumstances, there is no justification for bypassing the exclusive representative. The question to be answered, of course, is how to determine the nature of the union's policy.

The past few years have shown that unions hardly have "clean hands" in matters relating to discrimination. Consequently, the party which attempts to establish the union's good faith should have to over-

93. "Some unions have been willing to negotiate special probationary arrangements to apply to their companies' hard-core employment programs. But this has been far from universal." Wallen, *Industrial Relations Problems of Employing the Disadvantaged*, Paper delivered at 22nd Annual Meeting of National Academy of Arbitrators, Jan. 31, 1969.

94. See, e.g., *NLRB v. Insurance Agents' Int. Union*, 361 U.S. 477 (1960); *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953); *American Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100 (1953); *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

come the presumption that labor has behaved poorly. In addition to an examination of the union's response to the issue in the particular case before the Board, evidence of good faith would require a showing of some kind of affirmative effort on the part of the union at both the international and local levels to resolve race issues amongst its membership. The establishment of a civil rights department devoted exclusively to the problems of the black worker is not enough. A prerequisite for such proof should be the integration of leadership positions inside the union at both the international and local level, or in its absence, a bona fide effort by the leadership to achieve this result. This aspect of good faith is particularly significant where blacks constitute a large percentage of the union's membership. The leadership's activities are crucial since, despite protestations about the democratic nature of unions,⁹⁵ it is normally the "slate" sponsored by the leadership, on either a formal or informal basis, which is all-important in the electoral process.

To render the black protest unprotected where the evidence reflects an effort at racial justice seems more sensible than the analysis adopted by the Board which rewards the strikers when the union is purported to have acted properly. Unlike the Board's views as expressed in *Tanner*, it does not presume good faith by the unions, and does give the Board a means of judging those cases which involve unconscionable as opposed to illegal conduct. Such cases, posed as discharge and discipline issues, often arise from black workers' refusal to tolerate what they regard as poor or unsafe working conditions.⁹⁶ Rather than judge the nature of the conditions, the Board can judge the motives of the union and allow the unions to decide the substantive issues. Again, the union's failure to show that it had exerted all reasonable efforts to integrate leadership positions would be fatal to any effort to undermine the employee's protected status.

As stated above, the Congressional scheme for maintaining peace between labor and management has revolved around the idea of a *quid pro quo* relationship between the right to arbitration and the no-strike pledge. Changes should be made in arbitration to make this

95. See generally LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* (1956).

96. The no-strike clause does not govern where workers walk out in protest against unsafe working conditions. See, e.g., *Fruin-Colmon Construction Co.*, 139 NLRB 894 (1962); *Knight Morley Corp.*, 116 NLRB 140 (1956), *enforced*, 251 F.2d 753 (6th Cir. 1957). An objective test is used to determine if the employment conditions are "abnormally dangerous." *Redwing Carriers, Inc.*, 130 NLRB 1208 (1961). If the work is "highly unpleasant" rather than "abnormally dangerous" the walkout is unprotected. *Curtis Mathes Mfg. Co.*, 145 NLRB 473 (1963).

tool more applicable to racial disputes: the minimum to be imposed on the union and management in the handling of such grievances is a right of third party intervention for the racial minority group.⁹⁷ Such third party procedures, or trilateral arbitration where a civil rights agreement is involved,⁹⁸ would provide a type of "standing" which would be of special value in those cases involving what black workers believe are inferior working conditions.

The justification for these changes may be found in the Supreme Court's clarion call for "judicial inventiveness," in *Textile Workers Union v. Lincoln Mills*.⁹⁹ The decision held that judicially created arbitral remedies might be devised in the light of guidelines from federal labor law. Third party representation is certainly not too much of a burden for unions and managements to bear under the agreement. On the contrary, unless there is a contract or agreement negotiated by a civil rights organization or an agency such as the Equal Employment Opportunity Commission, which the arbitrator is given the authority to construe, intervention does not provide much more than a minimal due process protection.

Enforcement of a no-strike pledge should be dependent on the parties' acceptance of the procedures described above. Where no changes are made in the essential concept of two-party arbitration, the no-strike clause should not be allowed to hinder attempts to alter unconscionable practices. Where, however, unlawful discrimination has been practiced by unions or employers, adoption of the procedures *in toto* ought not to exculpate the parties from the obligation to reinstate with back pay in the event of a walkout. *Mastro Plastics*, where the employers' unfair labor practices in effect exonerated the violation of a broad no-strike ban, provides the analogue for such a policy.¹⁰⁰ While the Board has limited the *Mastro Plastics* doctrine to "major" unfair labor practices, public policy considerations argue against a similar limitation of the rule in regard to racial disputes. If—as it was in *Mastro Plastics*—the goal of industrial peace can be so substantially

97. See Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969).

98. But see *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

99. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of expressed statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

100. *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956). See pp. 55-56 *supra*.

qualified when the union's existence is at stake, surely the federal policy against discrimination should protect this kind of walkout. The latter policy is even more fundamental to our country than the protection of collective bargaining.

If the Board can determine that actions by a union violate the law, the no-strike pledge should clearly be of no consequence. Such a conclusion need not await the decision of the Equal Employment Opportunity Commission or the courts, for the Board is experienced in making determinations in this area.¹⁰¹ Where no changes are made in the arbitration procedure, the same policy should hold, but where the parties accept third party intervention, the strikers' case should become considerably more difficult. Far more should be required than the *Tanner* standard that they have a "reasonable basis for believing that discrimination exists." In short, the requirement of the *Mastro Plastics* rationale where arbitration procedure has been revised is that the practices must offend the law itself.¹⁰² In light of the havoc caused by labor stoppages, this does not seem to be an unreasonable requirement.

These procedures and policies also provide a means of protection for the non-discriminatory employer who is faced with an unfair union. In such cases, the employer can claim with some justice that it is unfair to hinge the protected status of a dispute on the good faith of the union and particularly its failure to establish an integrated leadership. Management, which suffers substantial harm from such stoppages, cannot use its influence to effectively prevent such walkouts. This, of course, is precisely the position in which the employer now finds himself when the Board, as it often does, plunges into internal union machinations in a futile quest to discover whether or not the striking workers are acting in derogation of their exclusive bargaining agent.¹⁰³ When faced with a recalcitrant union and conditions which could lead

101. *United Packinghouse v. NLRB*, 70 LRRM 2489 (D.C. Cir. 1969); *NLRB v. Local 1367, I.L.A.*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

102. Professor Cox has taken the position that *Mastro Plastics* should have been rationalized as involving a material breach of contract thereby immunizing employee conduct which was in violation of the no-strike clause. See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 18 (1958). *Contra*, Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 544-47 (1969). See generally *United Packinghouse Workers Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964); *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254 (1962); *Local 748, International Union of Electrical Workers v. Jefferson City Cabinet Co.*, 314 F.2d 192 (6th Cir. 1963). But see *Danner Press, Inc.*, 153 NLRB 1092 (1965), *enforcement denied*, 374 F.2d 230 (6th Cir. 1967); *San Juan Lumber Co.*, 154 NLRB 1153 (1965). Cf. *Ford Motor Co.*, 131 NLRB 1462 (1961).

103. For an example of the difficulties see Office of the General Counsel, NLRB, Quarterly Report on Case Developments, November 1, 1966, at 12.

to a protected stoppage, the employer can—after bargaining—unilaterally institute appropriate changes.¹⁰⁴ Where there is a reasonable basis for believing that working conditions meet the *Tanner* discrimination standard, the union should be held to have bargained in bad faith under the Act.¹⁰⁵ The Board should then use its authority to proceed into federal court and obtain an injunction against a strike by the union.¹⁰⁶ Any other result would penalize the employer who attempts to eliminate discriminatory conditions.

Finally, it is interesting to note that many of the racial wildcat strikes to date have arisen out of tensions between black workers and white foremen and demands that more black foremen be hired.¹⁰⁷ While a walkout protesting management's selection of foremen is a protected activity under certain circumstances,¹⁰⁸ the employer is not required to

104. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). Here, however, since a finding would be made that the working conditions which the employer sought to eliminate are unconscionable or unlawful, presumably, there would be no duty to bargain to the point of impasse as is the case with mandatory subjects of bargaining. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

105. See generally Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 589-590 (1962).

106. 29 U.S.C. § 160(1) (1964). The employer could presumably discharge workers engaged in such a strike inasmuch as it would be aimed at preventing the elimination of unconscionable or unlawful discrimination against Negro workers the activity would be unprotected. See *Hesmer Foods, Inc.*, 161 NLRB 485, 491 n.3 (1966); Administrative Ruling of the General Counsel No. 56, 27 LRRM 1442 (1951). The injunction would be applicable to a strike which attempts to obtain an objective in violation of Executive Order or Title VII. See *United States v. Local 189, United Papermakers and Paperworkers*, 282 F. Supp. 59 (E.D. La. 1968); *Central Contractors Association v. Local 46, IBEW*, 2 FEP Cases 189 (W.D. Wash. 1969). On the labor injunction, see generally FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930); Aaron, *The Labor Injunction Reappraised*, 10 UCLA L. REV. 292 (1963); Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 HARV. L. REV. 757 (1966).

107. See note 5 *supra*.

108. The cases do not appear to show any instance of wildcat activity. Concerted activity short of work stoppage is protected; *Colson Corp. v. NLRB*, 347 F.2d 128 (8th Cir. 1965) (walkout protest was held protected, but the position of "lead man," the eye of the dispute, was found to be a non-supervisory position); *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8 (6th Cir. 1960) (presenting a grievance over appointment of operations manager's son-in-law as foreman, causing increased work burdens due to the man's inexperience); *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948), *cert. denied*, 335 U.S. 845 (1948) (protesting a letter recommending promotion of assistant cashier to cashier, whose function had a material effect on the earnings of the salesmen, was also held protected). Similarly, a walkout in protest of assigning an underexperienced helper is also protected concerted activity. *Hagopian & Sons*, 395 F.2d 947 (6th Cir. 1963). On the different but related issue of the status of strikers protesting the discharge of a person already in the position of foreman, the authorities are divided. Holding such activity protected are: *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961); *Summit Mining Corp. v. NLRB*, 260 F.2d 894 (3d Cir. 1958); *NLRB v. Solo Cup Co.*, 237 F.2d 521 (8th Cir. 1956). Holding or stating that such activity is not protected are: *American Clay Co. v. NLRB*, 328 F.2d 88 (7th Cir. 1964); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963); *NLRB v. Ford Radio and Mica Corp.*, 258 F.2d 457 (2d Cir. 1958); *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1947). It is interesting to note in passing that the 7th Circuit in writing what became the leading authority, cited no authority or statutory provision to support their assertion—whether or not any were available to them. A comment to the effect that selection of foremen is exclusively the prerogative of

bargain with the union on this issue; appointments may be made unilaterally. Accordingly, employers are relatively unlikely to be presented here with the quandary which exists in other types of racial issues.

II. The Lawfulness of Picketing

A. *Picketing as an Unfair Labor Practice*

In 1947 and 1959 Congress amended the National Labor Relations Act to immunize employers dealing with an exclusive bargaining representative from economic pressure by another "labor organization" to deal with it. Specifically, Congress stated in Section 8(b)(4)(C) that it was an unfair labor practice to exert such pressure where "an object" is "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9"¹⁰⁹ In response to the same problem in cases where the employer dealt with a lawfully recognized union which had not been certified under the Act, Congress, in 1959, enacted Section 8(b)(7)(A). The section provides that it is unlawful to picket or threaten to picket where "an object" of the action is recognition or commencement of bargaining with a "labor organization," or the acceptance of the labor organization as the collective bargaining representative where "the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act."¹¹⁰

One can readily appreciate that the above-quoted provisions are at odds with some disruptive tactics employed by parties outside the employer-exclusive representative relationship. Thus under some circumstances, the picketing which is part and parcel of the walkout over discrimination issues may be an unfair labor practice under the Act.¹¹¹ Preliminarily, however, two significant prerequisites are required to trigger either Section 8(b)(4)(C) or 8(b)(7)(A): (1) the existence of a

management, made by the union president, is referred to in the opinion. *NLRB v. Reynolds International Pen Co.*, 162 F.2d 680, 684 (7th Cir. 1947).

109. 29 U.S.C. § 158(b)(4)(A) (1964).

110. 29 U.S.C. § 158(b)(7)(A) (1964).

111. The Supreme Court has equated the right to picket with the right to strike, at least in some contexts. *NLRB v. Teamsters Local 639*, 362 U.S. 274 (1960).

“labor organization” which is attempting to disrupt the relationship; and (2) the unlawful objective of recognition or bargaining.

To what extent is the term “labor organization” as used in the Act¹¹² applicable to committees of black workers and civil rights organizations which intervene on behalf of minority group employees and their allies? To date, the term “labor organization” has been given an expansive interpretation. In *NLRB v. Cabot Carbon Co.*,¹¹³ the Court held that Congress intended the term to include those groups which merely “deal” with the employer as well as the more traditional union structure which bargains collectively as a majority representative.¹¹⁴ This, however, does not meet the question of whether a “group of employees” allowed to present grievances to the employer for adjustment under the proviso clause of Section 9(a) could “deal” with an employer in regard to some issues despite the exclusive representative. And, of course, the question remains whether a “group of employees” specifically constituted to deal with problems of racial discrimination might possess a different legal status than other groups. It does seem quite clear that the thrust of *Cabot Carbon* argues for the inclusion of a good number of black workers’ organizations and groups like the NAACP and the Urban League, when they become involved in disputes over employment conditions.

Even if a labor organization is involved in the economic pressure and picketing, evidence of an unlawful “object” must still be presented to enjoin the action under the amendments. Prior to the adoption of the 1959 amendments, the Board held the view that picketing by an outside labor organization was equated with picketing for an unlawful object, *i.e.*, recognition or bargaining.¹¹⁵ This approach was attacked by Professor Cox,¹¹⁶ and, in *Ford Fanelli Sales*,¹¹⁷ the Board specifically overruled its prior holding that a “strike or picketing by a union to obtain reinstatement of a discharged employee ‘necessarily’ is to compel recognition or bargaining on such matters”¹¹⁸ Adopting a fact-oriented test, the Board stated:

112. “The term ‘labor organization’ means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (1964).

113. 360 U.S. 203 (1959).

114. *Id.* at 211-12.

115. *Meat & Provision Drivers Union*, 115 NLRB 890 (1956).

116. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 266-270 (1959).

117. 133 NLRB 1463 (1961).

118. *Id.*

It may not be gainsaid, of course, that picketing for an employee's reinstatement may in some circumstances be used as a pretext for attaining recognition as collective-bargaining representative of all the employees in a certain unit. But before we are willing to infer such broader objective, some more affirmative showing of such object must be made than exists here.¹¹⁹

The *Ford Fanelli* doctrine brings into play the same considerations which prompted the Fourth Circuit to declare wildcat strikes unprotected in *Draper*. To sanction this use of economic pressure is to permit some kind of contact and, perhaps, negotiation between the pickets and the employer—at least when both are ready for accommodation. In the much publicized arbitration award in *Hotel Employers Association*,¹²⁰ the arbitrator concluded that negotiations and an agreement between a civil rights organization and an unionized employer were unlawful under Section 9.¹²¹ The civil rights agreement was inconsistent with the labor contract and entered into outside the exclusive bargaining representative's presence; thus, the award would appear to be correct on that score.

It is by no means clear, however, that it would be unlawful for an employer to deal with a civil rights organization or a black workers' committee so long as the union was involved in any negotiations and settlement entered into by management. In the *Tanner*¹²² context of hiring disputes and industrial unions, the bargaining agent's presence might not be necessary so long as nothing agreed upon was inconsistent with the collective agreement itself. Certainly, *in vacuo*, the civil rights group is a less disruptive element in the exclusive bargaining framework than a rival union which, by definition, seeks to oust the incumbent union.¹²³ The same is not necessarily true of an organization concerned with the special problems of black workers.

One circuit court has also applied a strict test in determining what constitutes bargaining. In *National Packing Co., Inc.*,¹²⁴ the

119. *Id.* at 1468-69. See also *Bldg. & Const. Trades Council v. NLRB*, 396 F.2d 677, 683 (D.C. Cir. 1968); *Restaurant Management, Inc.*, 147 NLRB 1060 (1961); *Eastern Camera & Photo Corp.*, 141 NLRB 991, 997 (1963); *Mission Valley Inn*, 140 NLRB 433 (1963); *Woodward Motors, Inc.*, 135 NLRB 851 (1962). Cf. Weiss, *The Unlawful Object in §(b)(7) Picketing*, 13 LAB. L.J. 787 (1962).

120. 47 Lab. Arb. 873 (1966).

121. 29 U.S.C. § 159(a) (1964). See note 26 *supra*.

122. Discussed pp. 57-64 *supra*.

123. Cf. *Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 170 F.2d 695 (2d Cir. 1948). See generally *Bronian v. Great Atlantic & Pacific Tea Co.*, 353 F.2d 559 (6th Cir. 1965); *Black-Clawson Co. v. Lodge 355, IAM*, 313 F.2d 179 (2d Cir. 1962); *Fed. Tel. & Radio Co.*, 107 NLRB 649 (1953); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731, 751-760 (1950).

124. 147 NLRB 446 (1964), enforcement denied, 352 F.2d 482 (10th Cir. 1965), original order *aff'd.*, 158 NLRB 1680 (1966), enforcement denied, and order set aside, 377 F.2d 800

NLRB had to decide whether employees whose strike over dangerous working conditions, subsequent to a union's defeat in Board-conducted elections, had been enjoined were entitled to reinstatement and back pay. The Board initially held for the dismissed workers because the employer had engaged in unfair labor practices.¹²⁵ The Tenth Circuit remanded the case to the Board, questioning whether the picketing by the workers violated Section 8(b)(7)(B).¹²⁶ If, the opinion reasons, the employees had in fact violated the above noted provision through unlawful picketing, "they should not be able to use the Act to compel reinstatement after the discharge which followed the picketing."¹²⁷

Despite the fact that the strikers had indicated a desire for "something in writing," the Board found on remand that the picketing had not been for an unlawful object, *i.e.* the establishment of a "bargaining" relationship:

We do not view this as an attempt to establish a continuing relationship, but only as an attempt to bind the Respondent to its promises. To accomplish this might have required discussions to the extent necessary to resolve the issues in dispute. This is not to be equated, however, with an attempt to negotiate an overall formal collective-bargaining agreement covering wages, hours, and working conditions.

... We have held that Section 8(b)(7)(B) does not preclude picketing to protest an employer's unfair labor practices. We find that Section 8(b)(7)(B) does not preclude employees from protesting, by a peaceful walkout and picketing, their employer's broken promises. To read Section 8(b)(7)(B) as precluding such action would place employees under due pressure to vote for a union in an election or lose the right for a year thereafter to engage in a concerted protest against any action taken by their employer, however unfair or disadvantageous to the employees.¹²⁸

When the case returned to the Tenth Circuit, the court decided that a finding of an unlawful object as far as bargaining is concerned could not be avoided by the Board's holding that there was no attempt to establish a continuing relationship. "The statute refers to bargaining—not to bargaining for any period of time."¹²⁹

This holding, however, is simply wrong. There is a fundamental

(19th Cir. 1967). See generally Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 396-403 (1969); Comment, *Employee Picketing and Section 8(b)(7)(B)*, 47 TEX. L. REV. 294 (1969).

125. 147 NLRB 446 (1964).

126. 352 F.2d 485.

127. *Id.*

128. 158 NLRB at 1686.

129. 377 F.2d at 804.

difference between a full-fledged collective bargaining relationship and the adjustment of particular grievances, even when the adjustment is formalized in writing as a "contract." Section 9(a) itself recognizes this difference by permitting a degree of individual or group adjustment of grievances in the teeth of the exclusive representative concept.

The Board's recent decision in *Moss-American, Inc.*¹³⁰ is the first application of the 8(b)(4) and 8(b)(7) provisions to a racial dispute. There, the company rejected a request by the NAACP—acting as a representative of the members of the Local—to cease forwarding dues and assessments to the international union (the exclusive bargaining representative) under the checkoff provision until written permission has been obtained from each member of the Local. The production and maintenance employees then struck, shutting down the plant. The leaders of the employees' group, which included the officers of the Local, stated that they did not consider the contract signed by the international union to be binding and in effect. The Trial Examiner stated that since the employees in the plant were "predominantly Negro, it seems natural and fitting that the Local's officers sought the counsel and assistance of the local head of the NAACP."¹³¹ The Board agreed with the Trial Examiner that the Local was not operating as a distinct entity but could constitute a "labor organization" within the meaning of Section 2(5) of the Act. Since the Local was "not seeking to be recognized or bargained with apart from the certified representative," the Board did not consider their conduct to violate Sections 8(b)(4)(C) or 8(b)(7)(A).¹³²

One of the demands made by the Local, however, was "for a contract." This, coupled with the NAACP's letter concerning dues authorizations, brings the case perilously close to the kind of activity which is prohibited by the statute. The statute does not tolerate economic pressure which attempts to circumvent the NLRA election procedures pursuant to which the majority representatives are chosen. *Moss-American* aside, it is clearly inconsistent with *Ford Fanelli* to say that, in the absence of a finding that the exclusive representative has engaged in unlawful racial discrimination,¹³³ the local black workers'

130. 178 NLRB No. 30, 72 LRRM 1078 (1969). The trial examiner's decision appears in Cases 14-CP-110 and 14-CE-500 (TXD-730-68, Dec. 31, 1968).

131. Trial Examiner's Decision at 8.

132. 72 LRRM at 1080.

133. Presumably, § 8(b)(4) and (7) cannot be used as a shield by parties that discriminate, any more than § 9. *Hughes Tool Co.*, 147 NLRB 1573 (1964); *Pioneer Bus Co.*, 140 NLRB 54 (1962). Cf. *Hughes Tool Co.*, 104 NLRB 318 (1953). In the absence of racial discrimination, collective bargaining relationship is preserved by the Board through § 9. See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962).

committee or organization which seeks to oust the international or local union will not violate Sections 8(b)(4)(C) and 8(b)(7)(A).

The Trial Examiner in *Moss-American* commented in his decision: "The record shows that the great majority of the Company's production and maintenance employees are black; the regional director of the International and his assistants are white men."¹³⁴ All too often the heart of current tensions between unions and the black rank-and-file may be found in the insensitivity of white leadership to poor or unsafe working conditions which affect black workers. The solution to this problem demands, as a first step, the development of black leadership at the local and international levels. This requirement suggests that the proper policy for the Board is to apply Sections 8(b)(4)(C) and 8(b)(7)(A) only in instances where there is an outright conflict concerning the continuing exclusive status of the majority representative. Economic pressure may be one of the few viable means by which the unions can be impelled to share elected leadership positions with Negro workers and to involve themselves in the problems of the newly hired "disadvantaged" worker. Although I am somewhat skeptical about the long range usefulness of the "black union" trend,¹³⁵ one must recognize that if the walkouts and pickets do not succeed in their legitimate objectives, black workers may well seek another representative not part of the traditional union structure or reject trade unionism altogether.

B. Constitutional Problems in Race-Related Picketing

Quite apart from the question of the legal status of picketing by black workers under the national labor laws, state or federal courts may be persuaded to issue injunctions against such picketing on other grounds. Little imagination is needed to realize that such proceedings will raise constitutional problems, although the resolution of the first amendment issues presented by the situations likely to arise are by no means clear.

In *Hughes v. Superior Court*,¹³⁶ the Supreme Court affirmed the California Supreme Court's finding that peaceful picketing for the purpose of inducing an employer to hire a number of Negro workers

134. Trial Examiner's decision, *supra* note 130, at 8 n.11.

135. See Gould, *Discrimination and the Unions*, DISSENT, Sept.-Oct. 1967, at 564, reprinted in *POVERTY: VIEWS FROM THE LEFT* 160-83 (Larner & Howe ed. 1963). Cf. N.Y. Times, Feb. 2, 1969, at 60.

136. 339 U.S. 460 (1950). For discussions of this case, see Rosen, *The Law and Racial Discrimination in Employment*, 53 CAL. L. REV. 729, 763-68 (1965); Weiner, *Negro Picketing for Employment Equality*, 13 HOWARD L.J. 271, 284-301 (1967).

in proportion to Negro patronage was unlawful and could be enjoined. The majority of the California Supreme Court had upheld a contempt citation on the theory that the picketing had as its unlawful objective the creation of a "closed Negro shop" which was a "specific unlawful purpose" regardless of whether the employer was in fact engaging in racial discrimination.¹³⁷ Judge Traynor's dissent, however, remains a very persuasive argument for the legality of economic pressure by racial groups to achieve equality in employment opportunities:

Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done without reference to race or color, or by demanding a certain number of jobs for members of their group. The majority opinion holds that economic equality cannot be sought by the second method if picketing is adopted as the means of attaining that objective. In the absence of a statute protecting them from discrimination it is not unreasonable for Negroes to seek economic equality by asking those in sympathy with their aims to help them secure jobs that may be opened to them by the enlistment of such aid. In their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. . . . There are so few neighborhoods where Negroes can make effective appeals against discrimination that they may reasonably regard the seeking of jobs in neighborhoods where their appeal may be effective the only practical means of combating discrimination against them. In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other. Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality. . . . There is no reality in the reasoning that those who seek to secure jobs where they have an opportunity to enlist public support on their behalf are thereby seeking illegal discrimination in their favor, for the fact remains that everywhere they turn for jobs they are likely to encounter the barrier of discrimination.¹³⁸

Mr. Justice Frankfurter, for a unanimous Court,¹³⁹ stated that California's affirmative response to the problems of racial discrimination¹⁴⁰ was "relevant" to the California Supreme Court's judgment that quotas were inconsistent with that state's public policy, and that

137. *Hughes v. Superior Court* 32 Cal. 2d 850, 856, 198 P.2d 85 (1948).

138. 32 Cal. 2d at 868.

139. Mr. Justice Douglas did not participate in the decision. 339 U.S. at 469.

140. 339 U.S. at 463.

picketing might exacerbate community tensions and conflicts. He also reiterated that picketing is a "mode of communication," something "more and different" than free speech itself:

Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences different from other modes of communication. Loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed words.¹⁴¹

The unlawful purpose test, as used by the Court in picketing cases, is not unique to *Hughes*. The Court had proclaimed picketing to be a form of first amendment speech in *Thornhill v. Alabama*.¹⁴² The doctrine was soon qualified, however, in *Giboney v. Empire Storage & Ice*,¹⁴³ which held that picketing with a purpose to violate state anti-trust law could be constitutionally enjoined. Under the steady rein of Justice Frankfurter, the Court began to defer to the state's judgment concerning the conflict between picketing and public policy, usually resolving the matter in favor of the latter.¹⁴⁴ This trend eventually prompted Mr. Justice Douglas to remark in one dissent that the retreat from the principles articulated in *Thornhill* had blossomed into a "formal surrender."¹⁴⁵

However, the first amendment protection afforded picketing seems to have revived a bit in recent years.¹⁴⁶ In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*,¹⁴⁷ for example, the Court—still adhering to the unlawful purpose test—held that peaceful picketing on private property "open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment."¹⁴⁸

141. *Id.* at 465.

142. 310 U.S. 88 (1940).

143. 336 U.S. 490 (1949).

144. See *Plumbers Union, Local 10 v. Graham*, 345 U.S. 192 (1953); *Teamsters Union v. Hanke*, 339 U.S. 470 (1950); *Building Service Employees International Union v. Gazzam*, 339 U.S. 532 (1940). See generally Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951).

145. *International Bhd. of Teamsters v. Vogt*, 354 U.S. 284, 297 (1957).

146. See, e.g., *NLRB v. Fruit and Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58 (1964); *NLRB v. Drivers Local Union*, 362 U.S. 274 (1960); *Teamsters Local 795 v. Newell*, 356 U.S. 341 (1958). This constitutional revival of the first amendment could have implications for Section 7 of the NLRA. See *Solo Cup Co.*, 172 NLRB No. 110, 63 LRRM 1385 (1968), and the Board's reliance upon *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), discussed *infra*. Compare notes 160 and 162 *infra*.

147. 391 U.S. 308 (1968).

148. *Id.* at 313. See generally Gould, *Union Organizational Rights and the Concept of Quasi-Public Property*, 49 MINN. L. REV. 505 (1965).

Even assuming that state court jurisdiction over cases like *Hughes* is not preempted because it is arguably protected or prohibited activity under the National Labor Relations Act,¹⁴⁹ *Hughes'* rationale is open to considerable attack. One argument rests upon the emphasis in *Giboney* that the union's "sole" and "immediate" object was an unlawful one.¹⁵⁰ Assuming for the moment that the aims of the picketing can be characterized as unlawful, one wonders whether picketing against what is believed to be a discriminatory employment policy, and demanding a "proportional hiring" remedy, can be said to be concerned with the remedy alone.¹⁵¹ Certainly, the protest has a broader focus than the quota issue.

149. In addition to the problems of protected activity under *Tanner*, even stranger picketing of the *Hughes* type might raise Section 8(b)(4) and 8(b)(7) problems under the Act. Therefore, absent violence or a threat to order, it would appear as though a substantial portion of racial discrimination walkout and picketing cases are preempted under the Act. See *San Diego Building Council v. Garmon*, 359 U.S. 236 (1959) (subject matter arguably protected or prohibited under the Act is preempted for the primary jurisdiction of the National Labor Relations Board). Cf. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 37 U.S.L.W. 4247 (U.S. Mar. 25 1969); *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173 (1962). However, there are certain areas in which the states have been permitted to exercise jurisdiction despite *Garmon*. See *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966); *Hanna Mining Co. v. District 2, Marine Engineers*, 382 U.S. 181 (1965). But in the area of duty of fair representation the normal rules of preemption do not apply. *Vaca v. Sipes*, 360 U.S. 171 (1967). Therefore, racial discrimination is within the reach of state courts.

Inasmuch as the Board has assumed jurisdiction in *Tanner* over walkouts protesting "unlawful" discrimination, it is even arguable that the state courts are thereby deprived of enjoining picketing with an object which they i.e. the state courts, regard as unlawful, as was the case in *Hughes*. If state jurisdiction is preempted, it would appear that state court injunctions could be properly defied if there is an attempt to challenge the injunction's validity; *In re Green* 369 U.S. 689 (1962). Cf. *Walker v. City of Birmingham*, 388 U.S. 307, 316 n.6 (1967). The National Labor Relations Board can enjoin state court action when it touches areas within the Board's unfair labor practice jurisdiction. *Capital Serv., Inc. v. NLRB*, 347 U.S. 501 (1954). Cf. *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955); *Cameron v. Johnson*, 36 U.S.L.W. 4319 (1968). If an injunction against a civil rights organization, black workers' committee, or individual strikers is granted upon a violation of the labor contract, i.e., the no-strike clause, the suit could be removed to federal court on the ground that the court would have "original jurisdiction" of the subject matter. *Avco Corp. v. Machinists, Aero Lodge 735*, 36 U.S.L.W. 4288 (1968). The result would probably be the same even if the civil rights group could not properly be regarded as a labor organization. See *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Cf. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 n.7 (1962). However, it is not yet clear whether the federal court is required or merely empowered to dissolve the previously issued state court injunction. See *Lesnick, supra*. An attempt to remove on the theory that First Amendment and Title VII rights would not be vindicated otherwise would probably be unsuccessful. *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). The fair employment practices provisions of the Civil Rights Act of 1964 do not appear to be as specific on this score as the public accommodations provisions were found to be in *State of Georgia v. Rachel*, 384 U.S. 780 (1966).

Colorado Anti-Discrimination Comm'n v. Continental Airlines Inc., 372 U.S. 714 (1963), and, indeed, the statutory scheme of Title VII of the Civil Rights of 1964, encourage the state to exercise jurisdiction. But, in light of the above-noted considerations, it is doubtful that most picketing against racial discrimination in employment is properly within state court jurisdiction.

150. 336 U.S. 490, 492 (1949).

151. See *Rosen, supra*, note 136.

If this point needs emphasis it is to be found in *New Negro Alliance*,¹⁵² where the Court in a similar fact situation made it clear that picketing against racial discrimination in employment is entitled to even more protective scope than is labor union picketing. Of course, that decision was handed down two years before the Court's clear statement in *Thornhill* that picketing enjoys first amendment protection. But, despite the willingness of state courts to enjoin similar kinds of picketing,¹⁵³ the fact of the matter is that supreme federal law¹⁵⁴ as reflected in Title VII and the National Labor Relations Act is not clearly hostile to the quota—let alone the fixing of numbers of minority group workers to be employed in the trade. Even assuming that Title VII forbids the Equal Employment Opportunity Commission from remedying unlawful employment practices through such means, the Office of Federal Contract Compliance is not similarly restrained.¹⁵⁵

152. *New Negro Alliance v. Sanitary Drouwry Co.*, 303 U.S. 552 (1938).

153. See *NAACP v. Webb's City, Inc.*, 152 So.2d 179 (Fla. Dist. Ct. App. 1963), vacated mem. 376 U.S. 190 (1964); *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), cert. dismissed as improvidently granted 384 U.S. 118 (1966) (Mr. Justice Douglas dissenting with Chief Justice Warren, Justice Brennan and Justice Fortas); *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc.*, 151 So. 2d 877 (Fla. Dist. Ct. App. 1963); *Fair Share Organization, Inc. v. Mitnick*, 245 Ind. 324, 198 N.E.2d 765 (1964) cert. denied 379 U.S. 849 (1964); *Fair Share Organization, Inc. v. Philip Nagdeman & Sons*, 193 N.E.2d 257 (Ind. Ct. App. 1963) cert. denied 379 U.S. 818 (1964); *City of Sumpter v. Lewis*, 241 S.C. 364, 128 S.E.2d 684 (1962), *A.S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363 (S. Ct. 1934); *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935); *Lifshitz v. Straughn*, 261 App. Div. 757 (1941); *Brandenburg v. Metropolitan Package Store Ass'n*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (S. Ct. 1961). Cf. *Curtis v. Tozer*, 374 S.W.2d 557 (Mo. App. 1964); federal habeas corpus dismissed in *Ford v. Boeger*, 249 F. Supp. 475 (E.D. Mo. 1965), affirmed, 362 F.2d 999 (8th Cir. 1966), cert. denied 386 U.S. 914 (1967), reh. denied 387 U.S. 949 (1967); *Potomac Elec. Power Co. v. Washington Chapter of CORE*, 209 F. Supp. 559 (D.D.C. 1962); *Clemmons v. Congress of Racial Equality*, 201 F. Supp. 737 (E.D. La. 1962).

154. See Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3344-45 Gould, *The Negro Revolution and the Law of Collective Bargaining*, 34 FORDHAM L. REV. 207 (1965). Pub. L. 88-352, Title, VII, § 703, July 2, 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2. Cf. N.Y. Times, July 15, 1969, p. 24, col. 1.

155. Legal Memorandum of Solicitor of Labor to Comptroller General on Legal Authority under E.O. 11246 for "Revised Philadelphia Plan," Daily Labor Report, No. 136 E-1, July 16, 1969. See also Opinion of Attorney General John Mitchell on Legality of Revised Philadelphia Plan, Sept. 22, 1969, reported in Daily Labor Report, Sept. 23, 1969, No. 184, E-1, approving the Plan's lawfulness.

The quota controversy has been triggered anew by the Nixon Administration's acceptance of the Revised Philadelphia Plan. The Philadelphia Plan, which Secretary of Labor Schultz, described on July 3, 1969, as a "fair and realistic approach" to providing greater equal employment opportunity for minority group workers in federally assisted construction, provides that contractors must employ a certain number of minority group workers—the number of workers to be ascertained in light of the following principal factors: (1) the current extent of minority group participation in the trade; (2) the availability of minority group persons for employment in such trade; (3) the need for training programs in the area and/or the need to assure demand for those in or from existing training programs; (4) the impact of the program upon the existing labor force. The Plan has been declared legal by both Attorney General John Mitchell and the Solicitor of Labor. See Naughton, U.S. to Start Plan Giving Minorities Jobs in Building, N.Y. Times, Sept. 24, 1969, p. 13, col. 5; Legal Memorandum of Solicitor of Labor to Comptroller General on Legal Authority Under E.O. 11246 for "Revised Philadelphia

Another basic flaw in *Hughes* is Justice Frankfurter's failure to distinguish between labor and civil rights picketing in terms of their respective impacts upon the intended audience. As Professor Cox has said:

Unions exercise . . . power not by appealing to the public but because of the discipline of their members. The critical point, however, is not the success of such tactics but the fact that the union members respect the picket line because of a group discipline based partly on common loyalties, partly on the force of habit, partly on fear of social ostracism but also on severe economic sanctions. The truck driver who crosses a teamsters' is subject not only to union fines but also to expulsion, and in the trucking industry suspension or expulsion from the union may carry with it loss of employment.¹⁵⁶

This kind of background appears to be responsible for much of the

Plan," July 16, 1969, Daily Labor Report E-1 (No. 136), July 16, 1969; Herbers, Nixon Aides Explain the Goal of Job Plan, The New York Times, Oct. 29, 1969, p. 27, col. 1. The Nixon Administration has stated that the Plan will be extended to other urban areas, See Naughton, U.S. Will Extend Minority Job Aid, N.Y. Times, Sept. 30, 1969, p. 1, col. 2. The building trades have not taken kindly to these developments. See Stetson, Meany is Doubtful on U.S. Plan to Set Minority Hiring Quotas, N.Y. Times, Aug. 9, 1969, p. 11, col. 5; Stetson, Building Unions Spur Negro Jobs, N.Y. Times, Sept. 23, 1969, p. 1, col. 6; Stetson, Meany Criticizes Nixon on Racism, N.Y. Times, Sept. 25, 1969, p. 25, col. 1; Wicker, Adventures in the Building Trade, N.Y. Times, Sept. 25, 1969, p. 44, col. 3.

Even if Title VII of the Civil Rights Act of 1964 could be read to say that the Philadelphia Plan's proposed "quotas" are unlawful under that statute, it seems clear that Congress specifically contemplated the existence of an independent federal agency which would prescribe its own rules and regulations relating to fair employment practices. See Section 709(d). The obligations that employers have under the Executive Order are broader than those which pertain to Title VII. See Note 88. But even assuming that Title VII applies to the Executive Order insofar as this problem is concerned, or that it has some relevance because of a need for uniformity in federal labor law and civil rights law, it would seem that the quota is not unlawful *per se*. For Section 703(j) prohibits "preferential treatment" where "an imbalance" may exist when one compares a particular work force with the racial composition of the "area" or "community, State, section, or other area." Title VII thus does not state that preferential treatment or a quota is unlawful where discrimination rather than a mere imbalance is found to exist.

While the more crude quota demand which does not take into account relevant criteria may leave *Hughes* intact for some purposes it would seem clearly inapplicable where discrimination has been practiced or where the demand takes into account such factors as the current extent of minority group participation, the availability of black workers for employment and the impact of the demand upon the white incumbents. The emotive quality of words like "quota" and "preferential treatment" obfuscate the need for "affirmative action" against discrimination practices to be race conscious in devising remedies and to seek out the minority group for employment. See Order Requiring Specific Goals for Hiring Minorities in Better-Paying Philadelphia Construction Jobs issued by Labor Department, June 27, 1969, Memorandum from Assistant Secretary of Labor Fletcher to Heads of All Agencies, June 27, 1969. For recent developments in this area see generally Bray, Bucking Big Labor: Negro Drive for Jobs in Construction Unions is Gaining Momentum, The Wall Street Journal, Sept. 26, 1969, p. 1, col. 6. See also Local 53, International Ass'n of Heat and Frost Insulators, 407 F.2d 1047 (5th Cir. 1969); *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967); *Weiner v. Cuyahoga Comm. Coll. Dist.*, 19 Ohio St.2d 85 (Ohio S. Ct. 1969). Cf. *United States v. Montgomery Board of Ed.*, 37 U.S.L.W. 4461 (1969).

156. Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591 (1951). See Gould, Book Review, COMMONWEAL, Apr. 25, 1969.

Court's thinking on the picketing question. But the assumptions engaged in are not applicable to civil rights picketing of the *Hughes* type, aimed at potential customers or even to picketing by workers engaged in walkouts to protest discriminatory employment conditions. Certainly the characteristics of labor picketing noted by Professor Cox have *some* relationship to the picketing that takes place within the context of the *Tanner*-type dispute, but hardly enough to make applicable the characteristics which Professor Cox noted. While it is possible that black workers' organizations may eventually gain sufficient power to exert the type of influence upon black workers which Professor Cox notes with regard to labor unions, that day appears to be in the distant future.

In the years since *Hughes*, the Supreme Court has demonstrated a solicitude for civil rights picketing, sometimes referring to it as speech in its most "pristine" form.¹⁵⁷ One cannot ignore the possibility that the freedom of association doctrine evolved in response to the South's hostility toward the civil rights movement¹⁵⁸ will have some relevance to the right of black workers to push their demands through committees and civil rights organizations. One crucial problem is that the black workers and civil rights protestors who are apt to be involved in these disputes—unlike the mild, polite, self-restrained demonstrators in the South who prompted wide admiration¹⁵⁹—will probably be militant and their language abusive.¹⁶⁰ The cases should test clearly the proposition that it is the duty of the police to control the hostile audience rather than the speaker in the interest of protecting expression.¹⁶¹

157. *Edwards v. South Carolina*, 372 U.S. 229 (1963).

158. See *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

159. See H. KALVEN, *THE NEGRO & 1ST AMENDMENT* (1966).

160. See the language used in *The Emporium, Trial Examiner's Decision*, Case No. 20-CA-5304, reported in *Daily Labor Report*, October 24, 1969, No. 207, D-1, which the General Counsel referred to as in "common usage" in the "contemporary civil rights struggle." Cf. *NLRB v. Electrical Workers*, 346 U.S. 464 (1953); *Patterson-Sargent Co.*, 115 NLRB 1627 (1956).

161. See *Gregory v. City of Chicago*, 37 U.S.L.W. 4213 (1969); *Adderly v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Fields v. South Carolina*, 375 U.S. 44 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Feiner v. New York*, 340 U.S. 315 (1951); *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964); *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964). Cf. Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U.L. REV. 177 (1966). Where labor unions are involved, the Court, at least formerly, does not seem hesitant about protecting First Amendment picketing despite abusive language. See *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943).

Conclusion

Two assumptions must underlie any approach to law and racial job discrimination. The first is that legal tools are not presently achieving their objectives.¹⁶² If it has any effect at all, the existence of law without enforcement simply antagonizes and embitters the class which it is supposed to aid.

The second assumption is that self-help measures can be of assistance. While the industrial relations system's concept of exclusive bargaining rights for the majority has obvious merit and should be preserved, it must be accommodated to the policies contained in civil rights legislation, policies designed to eliminate the exclusion of the black worker and his interests from the bargaining table. The aim of this article is not to divide black and white workers or to encourage industrial stoppages. On the contrary, the purpose of my proposals is to devise rules of law which will encourage the union and management to be more responsive to the grievances of minority groups and to create special machinery which will bring dissident black workers into the collective bargaining process. To say that legal rules which promote a degree of independence for the black worker are at complete odds with the goals of industrial peace is like arguing that the unions should not have retained the right to strike under the National Labor Relations Act because of its similar objectives. The labor movement knows full well that peaceful substitutes for strife are more likely to be forthcoming when the law favors economic pressure.

Even more important is the need to bring the black worker into policy-making, elected positions on both the international and local level. We will have domestic peace only when the races unite and share power equitably. Unlike the case with business and "black capitalism," black power in the industrial unions is, by sheer numerical strength, within striking distance in many sectors.¹⁶³

162. See, e.g., Jobs Panel Heads Finds Lag by Goal, N.Y. Times, July 21, 1969, at 30, col. 1. *Quaere*, whether in light of the public importance of racial discrimination in employment, picketing ought to be constitutionally protected except where misrepresentations are apparent of a type condemned in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

163. See Gould, *Black Workers in White Unions*, THE NATION, Sept. 8, 1969, p. 203.

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