Employer Discrimination: How Far Does NLRB Jurisdiction Reach

Marcia L. Goldstein

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/clr/vol59/iss6/4
EMPLOYER DISCRIMINATION: HOW FAR DOES NLRB JURISDICTION REACH?

Although it is generally accepted that the National Labor Relations Board (NLRB) is an appropriate forum for hearing certain types of charges involving employment discrimination based on race, color, religion, sex, or national origin,¹ the question of whether such discrimination by an employer can independently constitute an unfair labor practice under the National Labor Relations Act (NLRA)² remains controversial. In 1969, Judge Skelly Wright, writing a rather novel opinion for the United States Court of Appeals for the District of Columbia Circuit in United Packinghouse, Food and Allied Workers International Union, AFL-CIO v. NLRB,³ answered that question in the affirmative. A recent NLRB decision, however, takes issue with Judge Wright's legal conclusion.⁴ In view of the tension between these two approaches, it is necessary to carefully examine the various legislative, judicial, and policy considerations involved in determining the scope of NLRB jurisdiction in employer discrimination cases.


² 29 U.S.C. §§ 151-168 (1970). The stated purpose of the NLRA is the elimination of "the causes of certain substantial obstructions to the free flow of commerce," caused by both employers and labor organizations, and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. Id. § 151.

Giving effect to the purpose of the Act, § 158 enumerates the unfair labor practices of both employers and labor organizations which are prohibited by the Act. Id. § 158.


EMPLOYER DISCRIMINATION

EMPLOYER DISCRIMINATION AS AN UNFAIR LABOR PRACTICE:  
THE United Packinghouse Doctrine

The United Packinghouse case involved discriminatory treatment of black and Latin American employees by a Texas cotton processing corporation.5 The union brought unfair labor practice proceedings against the company, charging that it had refused to bargain in good faith over its racially discriminatory practices.6 The Board upheld the union’s contention, finding the employer in violation of section 8(a)(5)7 of the NLRA, and ordered the company to begin good faith bargaining.8 On appeal the company contended that the Board’s order was not supported by the evidence, while the union claimed that the Board did not go far enough, arguing that the NLRB should also have found that the company’s practice of discrimination against nonwhite employees itself constituted a violation of section 8(a)(1)9 of the Act. The Board cross petitioned for enforcement of its original order.10

The court of appeals affirmed the Board’s order against the company and further held that the company’s discriminatory practices constituted a violation of section 8(a)(1) of the NLRA.11 It

---

5 Evidence indicated that: (1) the company had only a few jobs with guaranteed weekly salaries, which were all filled by whites; (2) the company’s highest hourly rate jobs—$1.80 per hour—were largely filled by whites, and nonwhites were paid less for the same type of work performed by whites in the higher paying positions; (3) overtime assignments were consistently denied to nonwhite employees; and (4) white employees received more substantial fringe benefits than nonwhite employees. 416 F.2d at 1132.

6 The union further charged that: (1) the company violated § 8(a)(5) of the NLRA (29 U.S.C. § 158(a)(5) (1970)) by refusing to bargain over alleged discrimination, and (2) the company violated § 8(a)(1) (id. § 158(a)(1)) by engaging in “interrogations, threats and promises” during the weeks before a called strike, “in an effort to undermine the Union’s bargaining power and its capacity to mount a successful strike.” 416 F.2d at 1130.

7 Section 8(a)(5) states that “[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5) (1970).

8 416 F.2d at 1133.

9 Section 8(a)(1) declares that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 [NLRA § 7] of this title.” 29 U.S.C. § 158(a)(1) (1970). Thus, to constitute a violation of § 8(a)(1), the employer conduct must interfere with or restrain the employees in the exercise of their “right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (1970).

10 416 F.2d at 1129-30.

11 Id. at 1130.
remanded the case to the Board, however, for hearings on whether the company in fact had a policy and practice of invidious discrimination on account of race or national origin. If it did, the Board was to fashion an appropriate remedy. In reaching its decision, the court of appeals acknowledged the novelty of finding an employer's policy of discrimination to be an independent violation of the NLRA. However, noting the Board's activity in examining charges of union racial discrimination, the court found no reason to exempt charges of employer racial discrimination from the Board's jurisdiction.

In order to hold the employer's discrimination to be a violation of section 8(a)(1), it must be found that the practice inhibits employees from exercising their statutory right to take concerted action for their own aid or protection, as guaranteed by section 7 of the Act. The court in United Packinghouse found that the employees' section 7 rights were thus inhibited by two consequences of the employer's discrimination:

(1) [R]acial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination.

The issue of whether the discriminatory practices of the company violated § 8(a)(1) was not litigated before the Board. The court remanded the case to the Board on this issue even though evidence of racial discrimination had been produced in connection with the charged violation of § 8(a)(5) for failure to bargain about racial discrimination. Thus, the question of the company's discriminatory practices had been litigated and the Board did find that the company discriminated on the basis of race. Nevertheless, the court believed that the company should have the opportunity to have the issue more fully and directly litigated, after having been given notice that a § 8(a)(1) violation was at issue. Id. at 1134 n.12.

Id. at 1134. The court of appeals, however, noted that the Board had in the past examined employer racial discrimination in the context of a certification election. The court cited Sewell Mfg. Co., 138 N.L.R.B. 66 (1962), in which the Board found that an employer violated § 8(a)(1) by making flagrant appeals to racial prejudice in an attempt to defeat the union's bid for certification. 416 F.2d at 1135 n.13; see notes 38-39 and accompanying text infra.

416 F.2d at 1134-35; see notes 49-72 and accompanying text infra.

See note 9 and accompanying text supra.

416 F.2d at 1135. Sociological and psychological evidence was presented in support of this conclusion. Id. at 1136-37. But see New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (association of Negroes picketed store which ignored request to employ Negro clerks); NLRB v. Baltimore Luggage Co., 387 F.2d 744 (4th Cir. 1967) (appeals by NAACP to black employees to endorse union did not undermine results of certification election wherein union won by heavy majority). In both New Negro Alliance and Baltimore Luggage, employer discrimination apparently did not create an apathy or docility among
Judge Wright's language apparently supports the theory that an employer's policy and practice of invidious discrimination based on race or national origin is a per se interference with section 7 rights and hence a violation of section 8(a)(1). He concluded that "the employer's policy of discrimination inevitably sets group against group, thus frustrating the possibility of effective concerted action." This conclusion, said Judge Wright, seems "inescapable."

The adoption of a per se rule by the United Packinghouse court, however, stands opposed to the Board's tendency to avoid per se rules in determining what constitutes an interference with the section 7 rights of employees. For example, the Board stated in Blue Flash Express, Inc. that the standard for determining whether there has been an interference with section 7 rights should be independently applied in each factual setting. In that case the Board abandoned the traditional per se rule that an interrogation of employees with respect to union activities interfered with section 7 rights. It was the Board's conclusion that an interference with those rights was not, in fact, the necessary result of such interrogations.

A recent decision of the NLRB has challenged the seemingly per se rule announced by the United Packinghouse court. In Jubilee Manufacturing Co., the union charged that the company violated sections 8(a)(1) and (3) of the NLRA by discriminating solely on minority group members; rather, it led those who were discriminated against to take collective action against the employers.
the basis of sex in granting wage increases and in paying higher wage rates to male employees.\textsuperscript{25} It further alleged that the company violated section 8(a)(5) by insisting to the point of impasse during contract negotiations upon a contract provision which provided the basis for its discriminatory wage policies.\textsuperscript{26}

The Board dismissed the union's complaint under section 8(a)(5), concluding that the evidence failed to establish that the company refused to bargain about alleged sex discrimination.\textsuperscript{27} It also rejected the union's contention that discrimination based on race, color, religion, sex, or national origin, standing alone,\textsuperscript{28} is "inherently destructive" of employees' section 7 rights, and thus found that the alleged discrimination did not violate sections 8(a)(1) and (3) of the Act.\textsuperscript{29} The Board's position required that the union provide "actual evidence, as opposed to speculation, of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act."\textsuperscript{30} This position stands in clear opposition to the legal conclusions of the United Packinghouse court.\textsuperscript{31}

In Jubilee, the Board was of the view that employer discrimination did not inevitably set group against group. Although discrimination may have such an effect, the Board pointed out that continued discriminatory practices may, in fact, cause minority group members to coalesce, possibly leading to collective action with nonminority group members.\textsuperscript{32} In addition to rejecting the

\textsuperscript{25} 82 L.R.R.M. at 1483-84. The charges of discrimination were based on the following circumstances: under the 1969 contract, the employees were classified by groups which reflected wage rates in ascending order from Group 1 through Group X. Groups I, II, and III were composed of female employees, Group IV of male employees, and Group V of both male and female employees. The contract contained language establishing minimum rates of pay for the different classifications and called for a pay increase after 30 days. Material handlers, who were all male, had been receiving wages in excess of the minimum for five years and were customarily granted the 30-day wage increase upon being hired. In the spring of 1970, the employer gave ten-cent wage increases to two male employees in Group V. Id.

\textsuperscript{26} The employer had insisted on retaining the "minimum rates of pay" provision in the contract. The union rejected this proposal as well as one for reclassification, alleging that the employer's proposal, as it was to be applied, violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2000e-15 (1970)). 82 L.R.R.M. at 1483-85.

\textsuperscript{27} 82 L.R.R.M. at 1485. The Board concluded that it was the union, if anything, which prevented meaningful bargaining on the provision in question. Id.; see note 26 supra.

\textsuperscript{28} 82 L.R.R.M. at 1484. The discriminatory practices alleged by the union are described in notes 25-26 supra.

\textsuperscript{29} 82 L.R.R.M. at 1484.

\textsuperscript{30} Id.

\textsuperscript{31} See notes 15-19 and accompanying text supra.

\textsuperscript{32} 82 L.R.R.M. at 1484; see cases cited note 16 supra.
section 8(a)(1) charge against the company on the above grounds, the Board also found no merit in the union's contention that a "policy and practice of invidious discrimination in the face of a union's ineffective efforts to eliminate such discrimination has the 'foreseeable consequence' of discouraging union membership within the meaning of Section 8(a)(3) . . . ."33

II

EMPLOYER DISCRIMINATION AND THE NLRB:
BASES OF JURISDICTION

The NLRB's determination in Jubilee does not mean that the Board is necessarily without jurisdiction in cases dealing with employer discrimination on the basis of race, color, religion, sex, or national origin.34 However, in previous cases, the discriminatory practices dealt with by the NLRB were collaterally involved with other unfair labor practices. In Ozan Lumber Co.,35 for example, the application of a company rule which excluded white employees from company-owned "colored quarters" for the alleged purpose of barring union organizers and the president of the union from the colored area, when contrasted with the nonenforcement of the rule prior to the advent of the union and with respect to nonemployees not connected with the union, was found discriminatory and violative of section 8(a)(1).36 The Board has also found violations of section 8(a)(1) in the discharge of employees who picketed against their company's discriminatory hiring policies. The concerted effort of the employees in making this protest was held by the Board to be activity within the protection of section 7 of the NLRA.37

33 82 L.R.R.M. at 1484.
34 See literature cited note 1 supra.
35 42 N.L.R.B. 1073 (1942).
36 Id. at 1079. In this instance the Board found that the employer's practices clearly interfered with the § 7 rights of the employees. Since the majority of the employees were black, it was impossible for white employees alone to organize a bargaining unit which would be entitled to exclusive recognition. See American Cyanamid Co., 39 N.L.R.B. 1129 (1942) (company-established racial segregation interfered with § 7 rights).
37 Tanner Motor Livery, Ltd., 166 N.L.R.B. 551 (1967). In Tanner, unlike the United Packinghouse case, the violation of § 8(a)(1) resulted from the discharge of two employees who were engaged in what the Board held to be a protected activity, not merely from the employer's discriminatory policy. Under the United Packinghouse rationale, it appears that Tanner Motor Livery would have committed an unfair labor practice even had it not discharged the employees; that is, its discriminatory policy alone would have constituted an interference with § 7 rights.
The NLRB has also heard and decided issues involving racial discrimination by employers where there has been a direct relationship between the alleged discrimination and [the Board's] traditional [function] . . . of conducting elections in which the employees have the opportunity to cast their ballots for or against a union in an atmosphere conducive to the sober and informed exercise of the franchise.38

In this context, the Board has determined that flagrant and inflammatory appeals to racial prejudice made by an employer in an effort to defeat a union in a certification election will be grounds, as a violation of section 8(a)(1), for setting aside that election.39

Where an employer has refused to bargain in good faith over the elimination of existing or alleged racially discriminatory practices, the Board has found a violation of section 8(a)(5).40 In the context of sex discrimination, the Board, in Edmund A. Gray Co.,41 found an unfair labor practice under section 8(a)(5) where an
employer attempted to bypass bargaining with a union over equal pay for its female employees by unilaterally eliminating all of the female employees who worked in its plant at the very time the union undertook to negotiate equal pay for them. In that same case the Board found the discharge of the female workers unlawful under section 8(a)(3) of the NLRA because the employer's motivation for the discharge was the union's attempt to negotiate better compensation and working standards for the female employees.  

III

THE NLRB AND UNION DISCRIMINATION: BASIS FOR ANALOGY IN EXTENDING NLRB JURISDICTION

In the United Packinghouse case, the court noted that the NLRB had examined charges of union racial discrimination as independent violations of the NLRA. Moreover, it asserted that there was no reason why employer discrimination should not come within the scrutiny of the Board as well.

Discriminatory union practices have been held to violate the NLRA because of the union's duty under the Act to represent all bargaining unit employees fairly and impartially. The union's duty of fair representation was first articulated by the United States Supreme Court in a decision construing the Railway Labor Act. In a landmark decision, Steele v. Louisville & Nashville R.R., the Court decided that a union, because it is by statutory authority the exclusive bargaining agent for a unit of employees, could not enter into a labor contract that discriminated against black employees in

\[\text{References:}\]

42 The discharge of the female employees by Edmund A. Gray was clearly an act of discrimination based on sex. Despite this fact, the Board based its determination of a § 8(a)(3) violation on the finding that the discharges were the immediate result of union activity. 142 N.L.R.B. at 599. Therefore, the charges made by the union in jubilee are distinguishable. In the latter case, the union charged that the employer's practice of sex discrimination by itself amounted to unlawful behavior under §§ 8(a)(1) and (3). See note 25 and accompanying text supra. See also Banker's Warehouse Co., 146 N.L.R.B. 1197 (1964) (discharge of female employee because she joined union constituted violation of §§ 8(a)(1) and (3)).

43 416 F.2d at 1134-35. For articles discussing NLRB jurisdiction over cases involving union discrimination, see note 1 supra.

44 416 F.2d at 1135.

45 See generally Herring, The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?, 24 Md. L. Rev. 113 (1964); Sovern, supra note 1, at 576-614.


47 323 U.S. 192 (1944).
the unit. Although there is no mention of the duty of fair representation in the Railway Labor Act, the Court nonetheless found that the language of the Act . . . read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.\(^{48}\)

About ten years later, the Supreme Court extended the union's duty of fair representation to cases arising under the NLRA.\(^{49}\) The language of the NLRA, like that of the Railway Labor Act, is silent as to this duty.

It was in *Miranda Fuel Co.*\(^{50}\) that the NLRB first held that a union's breach of its duty of fair representation was a violation of the unfair labor practice provisions of the NLRA. *Miranda Fuel* itself did not involve discrimination on the basis of race, color, religion, sex, or national origin.\(^{51}\) Nevertheless, the opinion is significant in that it arms the aggrieved party in such discrimination cases with the doctrine of fair representation in his appeal for remedial support from the Board.\(^{52}\) The Board in *Miranda Fuel* decided that the union's arbitrary and invidious discrimination against a white employee who took an early vacation violated section 8(b)(1)(A)\(^{53}\) of the NLRA. Interpreting section 8(b)(1)(A) in light of equal protection considerations, the Board concluded that the section "prohibits labor organizations, when acting in a statu-

---

\(^{48}\) *Id.* at 202-03.

\(^{49}\) Syres v. Oil Workers Int'l Union, Local 23, 350 U.S. 892 (1955), *rev'd* 223 F.2d 739 (5th Cir. 1955).

\(^{50}\) 140 N.L.R.B. 181 (1962).

\(^{51}\) In *Miranda Fuel*, the union insisted that its contract with the company required that an employee lose his seniority position for taking a leave of absence, although with his employer's consent, before the summer slow period.

\(^{52}\) In later cases involving union racial discrimination, the Board found union unfair labor practices arising from the breach of the duty of fair representation. See, e.g., United Rubber Workers, Local 12 (Goodyear Tire & Rubber Co.), 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); International Longshoremen's Ass'n (Galveston Maritime Ass'n), 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Independent Metal Workers Union, Locals 1 & 2 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964).

\(^{53}\) Section 8(b)(1)(A) of the NLRA provides that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

EMPLOYER DISCRIMINATION

tory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. In addition, the Board found that the union had also violated section 8(b)(2) because its “arbitrary or irrelevant” discrimination was accomplished by inducing the employer to engage in the discriminatory treatment of the employee.

According to the Miranda Fuel decision, an employer who participates with the union in the breach of the union’s duty of fair representation is derivatively liable under the NLRA. The Board found that when the employer yielded to the union’s demand to reduce the seniority of the employee, it “interfered with, restrained, or coerced” the employee in violation of section 8(a)(1) and discriminated against the employee in violation of section 8(a)(3). The reasoning of the Board in Miranda Fuel, however, did not persuade the Court of Appeals for the Second Circuit, which denied enforcement of the Board’s order.

Despite the Second Circuit’s denial of enforcement in Miranda Fuel, the Board reaffirmed its decision in that case only one year later in litigation involving racial discrimination by a union. In Independent Metal Workers Union, Locals 1 and 2 (Hughes Tool Co.), the certified local unions declined to process the grievances of black employees. Relying on Miranda Fuel, the Board found the union’s failure an unfair labor practice in violation of sections 8(b)(1), 8(b)(2), and 8(b)(3) of the NLRA.

Under the facts of Hughes Tool, the Board’s finding of an 8(b)(2) violation appears to be a further extension of the doctrine

54 140 N.L.R.B. at 185.
55 Section 8(b)(2) of the NLRA deems it “an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3).” 29 U.S.C. § 158(b)(2) (1970).
56 140 N.L.R.B. at 186.
57 Id. at 185-86.
58 NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). Speaking for the court, Judge Medina acknowledged the union’s duty of fair representation; however, he found no support for enforcement of that duty in § 8(b)(1)(A) or § 8(b)(2) unless the breach of the duty on the part of the union occurs as a result of the aggrieved employee’s union activity or inactivity. In Miranda Fuel, the employee’s choice of vacation time was unrelated to union activity. The discrimination on the basis of vacation choice thus may be viewed as analogous to any discrimination on the basis of race, color, religion, sex, or national origin which is clearly unrelated to union activity or inactivity.
60 See notes 53 & 55 supra. Section 8(b)(3) of the NLRA states that “[i]t shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees.” 29 U.S.C. § 158(b)(3) (1970).
61 147 N.L.R.B. at 1574-75.
announced in *Miranda Fuel*. In *Miranda Fuel*, the union unquestionably acted to induce the employer to discriminate against an employee. However, in *Hughes Tool*, the union's failure to process the grievances of black employees, although not an active inducement to the employer to discriminate, was found to fall within the language of section 8(b)(2) which makes it an unfair labor practice for a union "to cause or attempt to cause" an employer to engage in discriminatory conduct. The Board seemed to extend the *Miranda Fuel* doctrine even further by also finding a violation of section 8(b)(3) grounded upon the union's breach of its duty of fair representation. The Board thus concluded that the union's duty to bargain collectively with an employer also encompasses a duty to represent the claims of all employees in the bargaining unit, and that a breach of the duty of fair representation in this context constitutes bad faith bargaining in violation of section 8(b)(3).

The Board in *Hughes Tool* expressly reasserted the position it took in *Miranda Fuel*—that a violation of the union's duty of fair representation was an unfair labor practice to be remedied by the NLRB. In subsequent decisions involving racial discrimination by a union, moreover, the Board continued to apply the *Miranda Fuel* doctrine. In *International Longshoremen's Association (Galveston Maritime Association)*, an arrangement between a union and an employer whereby three of every four job referrals from the union's hiring hall were to be given to white employees and white and black employees were to be segregated from each other on the job was found by the Board to violate sections 8(b)(1), 8(b)(2), and 8(b)(3) of the NLRA. Similarly, in *United Rubber Workers, Local 12*.

---

62 See note 51 supra.
64 29 U.S.C. § 158(b)(3) (1970); see note 60 supra.
65 The Board asserted that the duty of fair representation was enforced by the courts under the Railway Labor Act only because there was no available administrative remedy. When the Supreme Court enunciated the duty of fair representation in... Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical to certain unfair labor practice provisions of the National Labor Relations Act are enforceable by the Federal courts, not by an administrative agency... After enactment of the Taft-Hartley Act, however, an administrative remedy became available in our view...
EMPLOYER DISCRIMINATION

1974]

(Goodyear Tire & Rubber Co.), the conduct of the union in refusing to process grievances for black employees who challenged segregated plant facilities and who sought to recover lost wages resulting from the employer's discriminatory layoff practices was found by the Board to violate those unfair labor practice provisions. In both of these decisions, the Board relied on the doctrines it had announced in Miranda Fuel and Hughes Tool. And notwithstanding the Second Circuit's denial of enforcement in Miranda Fuel, the Board's orders in both Galveston Maritime and Goodyear Tire & Rubber were enforced by the Court of Appeals for the Fifth Circuit.

The Board extended the reach of the fair representation doctrine even further in combatting union racial discrimination in Houston Maritime Association. There, the union had replaced its practice of refusing to refer blacks from its hiring hall with a policy of refusing to refer anyone, regardless of race, unless he had been referred from the hiring hall at a previous time. Although the new practice technically applied equally to job applicants of all races, the Board found it to be a violation of sections 8(b)(1) and 8(b)(2) because it preserved the effects of the former racially discriminatory practices. Thus, the Board's interpretation of the duty of fair representation appears to require that unions not only avoid engaging in racially discriminatory conduct, but also take affirmative steps to eliminate the effects of any former discriminatory conduct.

---

68 In United Rubber Workers, Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967), a unanimous panel of the court of appeals agreed with the Board that a breach of the duty of fair representation violated § 8(b)(1) of the NLRA. The court found the argument that the union's refusal to process the grievances of black employees constituted a violation of § 8(b)(1) so persuasive that it found it unnecessary to pass upon the contention that such conduct also violates § 8(b)(2) and § 8(b)(3).
69 168 N.L.R.B. 615 (1967).
70 Id. at 616-17.
71 In addition to taking jurisdiction over cases involving union racial discrimination under the unfair labor practice provisions of the NLRA, the Board has taken remedial action against such discrimination in the context of its duty to administer representation proceedings under § 9 of the Act. See 29 U.S.C. § 159(c) (1970); note 38 supra. For example, the Board has adopted the policy of withholding the benefit of the contract-bar rule from the parties to contracts which discriminate between groups of employees by reason of race, and which thus are violative of the duty of fair representation. When a contract is not
Although the Board has articulated no counterpart to the union's duty of fair representation which may constitute a basis for challenging discrimination on the part of employers as an unfair labor practice under section 8(a) of the NLRA, the Board has made it clear that it is not precluded from hearing and deciding cases involving discrimination on the basis of race, color, religion, sex, or national origin. Nor, according to United Packinghouse, are there any reasons why the Board should not take the active role in employer discrimination cases that it has taken in cases involving union discrimination.  

Discriminatory application of the contract-bar rule would preclude a challenge to a union's status as bargaining representative by means of a Board election during the first three years of a contract entered into by the union. See Pioneer Bus Co., 140 N.L.R.B. 54 (1962).

In Pioneer Bus, the Board declared that

where the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election.

Id. at 55. Citing Brown v. Board of Educ., 349 U.S. 294 (1954), among other cases, the Board asserted that its position in Pioneer Bus was "[c]onsistent with clear court decisions in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory." 140 N.L.R.B. at 55.

In Hughes Tool, the Board went so far as to revoke union certification where two jointly certified locals had exclusionary membership policies, one consisting solely of white members, the other of black members. For a discussion of the unfair labor practice charges considered in Hughes Tool, see notes 59-65 and accompanying text supra.

In two recent cases, the Board inquired into charges of sexual and religious discrimination by unions in determining whether or not their representation petitions would be processed. See American Mailing Corp., 197 N.L.R.B. No. 33, 80 L.R.R.M. 1294 (1972) (charges of sex discrimination not proven); E. & R. Webb, Inc., 194 N.L.R.B. 1135 (1972) (charges of religious discrimination not proven). The implication of the Board's action in both cases was that if the charges of discriminatory conduct had been proven, a representation petition by the discriminating union would have been barred. But see Alto Plastics Mfg. Corp., 136 N.L.R.B. 850 (1962) (Board would not inquire into union's background in certification proceeding). In fact, the rule of Alto Plastics recently has been affirmed. See Desert Palace, Inc., 194 N.L.R.B. 818 (1972); Landmark Hotel & Casino, 194 N.L.R.B. 815 (1979).

The remedial powers of the NLRB under § 9 of the NLRA are limited, however, as a means of eliminating employment discrimination on the basis of race, color, religion, sex, or national origin. The certification provisions offer no remedy to an aggrieved individual and include no measures enabling enforcement of an order to eliminate discriminatory practices. The importance of the Board's actions under these provisions is that they have enabled the Board to establish a policy condemning discrimination by certified bargaining representatives by using its procedures to place sanctions upon those unions. Of course, discriminatory practices of employers fall outside the reach of the provisions dealing with union certification.

Prior to the United Packinghouse decision, holding employer racial discrimination an unfair labor practice under the NLRA, employer discrimination on the basis of race, color, religion, sex, or national origin had been proscribed primarily by the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964. The two statutes, when read together, appear to reflect a division of authority between the two agencies. Although Title VII expressly prohibits an employer from discriminating against individuals on the basis of race, color, religion, sex, or national origin with respect to terms and conditions of employment, the NLRA was enacted primarily for purposes other than preventing that type of employment discrimination and does not contain such an express prohibition. The findings and policy declaration preceding the substantive sections of the NLRA indicate the desire of Congress to relieve interstate commerce from the burden of strikes and industrial unrest and to equalize the relative bargaining powers of employers and employees. The type of discrimination expressly prohibited under the NLRA as an unfair

73 Id.

[It shall be an unlawful employment practice for an employer ... to fail or refuse 
to hire or to discharge any individual, or otherwise to discriminate against any 
individual, with respect to his compensation, terms, conditions, or privileges of 
employment, because of such individual's race, color, religion, sex, or national 
origin.
75 In fact, Congress has rejected amendments to the NLRA which would expressly make both employer and union discrimination unfair labor practices. See, e.g., S. 1897, 83d Cong., 1st Sess. (1953); S. 1831, 83d Cong., 1st Sess. (1953); 99 Cong. Rec. 4437, 4908 (1953).

However, the rejection of these amendments does not mean that the Board is excluded from jurisdiction in cases dealing with employment discrimination. Indeed, the courts' interpretation of the legislative history of both the Civil Rights Act of 1964 and the NLRA has been to the contrary—that is, that Congress did not intend to establish the enforcement provisions of Title VII as the exclusive remedy in employment discrimination cases. See United Packinghouse, Food & Allied Workers Int'l Union, AFL-CIO v. NLRB, 416 F.2d 1126, 1133 n.11 (D.C. Cir. 1969); United Rubber Workers, Local 12 v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); notes 78-84 and accompanying text infra.

labor practice is that which encourages or discourages union membership.\textsuperscript{77}

Even so, the availability of Title VII as an alternate route for redress of the type of employer discrimination challenged in \textit{United Packinghouse} need not compel a conclusion that the court's finding of an unfair labor practice based upon such discrimination was beyond the scope of the NLRA. The language of the Civil Rights Act of 1964 does not preclude NLRB jurisdiction in these matters. Indeed, the legislative history of Title VII indicates that it was not intended to limit NLRB jurisdiction. During the Senate debate over Title VII, Senator Clark introduced a statement from the Department of Justice indicating that Title VII would not prevent concurrent jurisdiction under the NLRA.\textsuperscript{78} Furthermore, the Senate rejected a proposed amendment to the Civil Rights Act of 1964 which would have made the provisions of Title VII the exclusive means of relief for discriminatory employment practices.\textsuperscript{79}

These actions are evidence that Congress, realizing the differences between Title VII and the NLRA, intended to permit concurrent jurisdiction over employment discrimination cases under these two statutes. In fact, recognition of the differences between the NLRA and Title VII in their application to employer discrimination cases led the Court of Appeals for the Sixth Circuit to conclude that Congress could not have intended to allow a decision under one statutory provision to automatically bar a suit under the

\textsuperscript{77} Id. § 158(a)(3) (1970); see note 24 \textit{supra}.

\textsuperscript{78} That letter stated in part:

\begin{quote}
If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction . . . . [T]itle VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now.
\end{quote}

110 CONG. REC. 7207 (1964).

\textsuperscript{79} This amendment was proposed by Senator Tower and subsequently defeated in the Senate by a vote of 59-29. It would have precluded "any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States," other than the EEOC, from granting relief. 110 CONG. REC. 13,650-52 (1964).

When the Equal Employment Opportunity Act of 1972 (42 U.S.C. §§ 2000e-2000e-17 (Supp. II 1972)) was passed, amending the provisions of Title VII (see note 74 and accompanying text \textit{supra}), the House and Senate Conference Committee also excluded a provision from the final version of the bill which would have made the EEOC the sole federal authority to combat employment discrimination. Supporters of the House version of the bill, which would have included an exclusive jurisdiction provision, were of the view that the failure to make the EEOC an exclusive remedy merely encourages an individual who lost his case in one forum under one statute to relitigate his case in still another forum under another federal statute. \textit{See} H.R. REP. No. 238, 92d Cong., 1st Sess. 12-13 (1971).
other statutory scheme. This particular result of concurrent jurisdiction was cautioned against by supporters of provisions to make Title VII an exclusive federal remedy in employment discrimination cases.

The case before the Sixth Circuit, *Tipler v. E.I. duPont de Nemours*, involved an action under the Civil Rights Act of 1964 by a discharged employee seeking reinstatement, back pay, general relief, and an injunction against future racially discriminatory practices. This action followed a dismissal of the employee's claim by the NLRB. The court of appeals affirmed a district court ruling that the determination of the NLRB trial examiner that the employee was not dismissed because of personal malice in the form of racial bias, did not, under the doctrine of res judicata or collateral estoppel, preclude the employee from subsequently asserting, in an action under the Civil Rights Act of 1964, that he had been discharged because of racial prejudice.

Although the *Tipler* court acknowledged the applicability of the doctrines of res judicata and collateral estoppel to administrative decisions, it asserted that the differences between Title VII and the NLRA make the application of these doctrines inappropriate to suits brought under both statutes. Although it cited the *United Packinghouse* decision, the court explained that racial discrimination in employment may be an unfair labor practice under section 8(a)(1) of the NLRA if the discrimination is unjustified and interferes with the employees' right to take concerted action for their own aid or protection. On the other hand, discrimination in

---

80 *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125, 128-30 (6th Cir. 1971).
81 See note 79 and accompanying text supra.
82 443 F.2d 125 (6th Cir. 1971).
83 The plaintiff was a black laborer who successfully participated in a union election which ousted the employer's white foreman from a position of leadership in a 95% black union. The plaintiff was subsequently discharged on May 5, 1967. On May 8, he filed a charge of discrimination with the EEOC alleging that the discharge was racially motivated. Based upon an investigation in which it found reasonable cause to believe the employer had violated Title VII of the Civil Rights Act of 1964, the EEOC issued a Notice of a Right To Sue on August 19, 1969, more than two years later.
84 During the interim period, on May 11, 1967, the plaintiff also filed a charge with the NLRB alleging that he had been discharged in violation of § 8(a)(1) and § 8(a)(3) of the NLRA. The NLRB accepted the trial examiner's recommendation that the charges be dismissed. *Id.* at 127.
85 *Id.* at 128-29.
86 *Id.* at 129. The Sixth Circuit clearly indicates in its analysis of employer discrimination under the NLRA that it does not interpret the *United Packinghouse* case as establishing a per se rule with respect to employer discrimination as a violation of § 8(a)(1). Indeed, the need to show an interference with the employees' right to unite under the NLRA is
employment is prohibited under Title VII without reference to the
effect on the employees' right to act concertedly for their own
benefit. Hence, Title VII may prohibit discriminatory practices
which are valid under the NLRA. It is therefore evident, accord-
ing to the reasoning of the Sixth Circuit, that a determination
under one of these statutes does not preclude a determination
under the other because the variant standards of the statutes
require the consideration of different factors.

V

THE NLRB AND THE EEOC: COMPARISON OF FORUMS

Title VII, as originally drafted, conferred enforcement powers
on the EEOC. However, these powers were deleted in the final
version of the 1964 Civil Rights Act, leaving the Commission only
advisory and conciliatory responsibilities. Until 1972, attempts to
pass amendments giving the Commission enforcement powers had
failed. As a result of the EEOC's lack of enforcement powers it
had no more than a minimal impact in eliminating employment
discrimination based upon race, color, religion, sex, or national
origin. The provisions creating the Commission therefore were
subject to severe criticism.

considered by the court to be the feature which distinguishes the grounds for relief under
that Act from the grounds for relief under Title VII. See notes 86-87 and accompanying text
infra.

86 443 F.2d at 129.

87 The primary concern of the NLRB trial examiner was the relationship of the
employee's union activities to his discharge. See note 83 supra. Consequently, according to
the Sixth Circuit, the trial examiner did not fully explore the racial aspects of the case which
would be considered in an action under Title VII. 443 F.2d at 129.

However, if the United Packinghouse decision were accepted as establishing that employer
discrimination on the basis of race, color, religion, sex, or national origin constituted a per se
violation of § 8(a)(1) of the NLRA, it would appear that the grounds for relief under both
the NLRA and Title VII would, in effect, be the same. Under this interpretation, a finding
of discrimination under one of these statutes would apparently mandate a similar finding
under the other.

88 See Note, supra note 1, at 944 n.7.

89 See, e.g., S. 3465, 90th Cong., 2d Sess. (1968); H.R. 10065, 89th Cong., 2d Sess.
(1966).

90 Statistics on the progress of equal employment opportunities clearly reveal that the
voluntary approach has failed. Of 34,455 charges before the EEOC that were recommended
for investigation, reasonable cause was found in over 63% of the cases, but in less than half
of these cases was the Commission able to achieve a successful conciliation. H.R. Rep. No.
298, supra note 79, at 3-4.

91 For example, Senator Javits, speaking on behalf of an amendment to Title VII
granting enforcement powers to the EEOC, commented:
In light of these facts, Judge Wright's opinion in *United Packinghouse* in 1969 may be viewed as a response to the need for a means of administrative enforcement of the national policy against discrimination by employers. The opinion notes that the EEOC has no enforcement powers of its own, thereby leaving the individual with only judicial remedies to enforce his rights. By actively asserting the concurrent jurisdiction of the NLRB to hear and decide cases involving employer discrimination which are not directly related to union activity, the District of Columbia Circuit offered to employees aggrieved by racial discrimination a far more attractive means of relief than could be provided by the EEOC alone. The advantages of the NLRB as a forum for hearing racial discrimination cases had been previously enumerated in 1966:

Primarily because the NRLB bears the expenses of enforcement of the NLRA, offers the other general advantages of administrative enforcement, has a backlog...six months shorter than...the federal district courts, and has no express requirement to defer to state FEP [Fair Employment Practices] agencies, representatives of civil rights organizations have preferred NLRB enforcement over title VII enforcement of FEP.

By 1972, discontent with the EEOC's lack of enforcement powers had grown sufficient to move the Congress to pass the Equal Employment Opportunity Act of 1972, which granted new powers to the Commission. The purpose of the new legislation, as indicated in the House Report on the bill, was to grant the EEOC "authority to issue, through well established procedures, judicially enforceable cease and desist orders." Thus, under the new amendments to Title VII, the EEOC has the power to seek preliminary injunctive relief where an employer is shown to be engaging in discriminatory employment practices and has the authority to bring civil actions in pattern and practice discrimination suits.

...[T]itle VII pays lip service to the idea of equal employment opportunity, but the hard fact is that the compromise worked out in 1964 under which the Equal Employment Opportunity Commission was emasculated, has gone far to destroy the act as an effective tool to end discrimination in employment in this country.

114 CONG. REC. 16,910 (1968).

416 F.2d at 1133 n.11.


Id. at 1.


Id. § 2000e-6(c).
CONCLUSION

An examination of the legislative history of both the NLRA and the Civil Rights Act of 1964 reveals that Congress did not intend to preclude the NLRB from taking jurisdiction in cases involving employment discrimination on the part of unions or employers. However, the position taken by the United Packinghouse court, if viewed as a rule making employer discrimination a per se violation of section 8(a)(1) of the NRLA, seems to stretch the language of the statute to cover situations where the employees’ rights under section 7 of the Act are at most only remotely endangered.

In retrospect, the United Packinghouse decision seems to have filled a gap created by the EEOC's lack of enforcement powers to deal with the employer discrimination which was challenged. However, with increased powers of enforcement granted the EEOC in 1972, the broad pronouncements of the United Packinghouse court no longer serve a necessary function. Under these circumstances, the NLRB's approach in Jubilee, which demanded evidence of a nexus between the employer's discriminatory practices and the interference with the employee's rights under section 7 of the NLRA, appears to be the better reasoned statutory interpretation.

Marcia L. Goldstein