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## ALLOCATING JURISDICTION OVER RACIAL ISSUES BETWEEN THE EEOC AND NLRB: A PROPOSAL

The National Labor Relations Board is presently engaged in a diversified attack on racial discrimination in employment.<sup>1</sup> At the same time, the Equal Employment Opportunity Commission has the duty of administering<sup>2</sup> the prohibition against racial discrimination in employment, found in title VII of the 1964 Civil Rights Act.<sup>3</sup> The EEOC now possesses no significant enforcement powers,<sup>4</sup> so very little conflict presently exists between it and the NLRB.<sup>5</sup> Legislation now pending before Congress, however, will confer enforcement powers on the EEOC.<sup>6</sup> Passage of that legislation will create an undesirable conflict

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<sup>1</sup> Two studies on racial discrimination in employment have given special treatment to the role of the National Labor Relations Board. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 143-75* (1966) [hereinafter cited as SOVERN]; Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729, 781-98 (1965).

<sup>2</sup> Civil Rights Act of 1964, § 705, 42 U.S.C. § 2000e-4 (1964).

<sup>3</sup> Section 703 of the Act states:

(a) It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) . . . .

(c) It shall be an unlawful employment practice for a labor organization—

- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Civil Rights Act of 1964, § 703, 78 Stat. 253, 42 U.S.C. § 2000e-2 (1964).

<sup>4</sup> Its powers are limited for the most part to investigation and conciliation. *Id.* § 705(g), 42 U.S.C. § 2000e-4(f) (1964).

<sup>5</sup> Informal discussions concerning the overlap have taken place between the two agencies, however. Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846, 891 (1966).

<sup>6</sup> H.R. 6228, 91st Cong., 1st Sess. (1969); H.R. 6229, 91st Cong., 1st Sess. (1969). The two bills are identical in substance. Section 2 of H.R. 6228 continues title VII's provisions

between the EEOC and NLRB concerning their respective roles in the task of eliminating racial discrimination from employment. Prior to passage,<sup>7</sup> therefore, it should be determined how jurisdiction over racial issues will be allocated between the two agencies. The choices are three: concurrent jurisdiction,<sup>8</sup> exclusive jurisdiction in one agency,<sup>9</sup> or an apportionment of power between the two.

## I

### UNION RACIAL DISCRIMINATION

#### *A. NLRB Procedures to Eliminate Union Racial Discrimination*

Although the Labor Management Relations Act is silent on the issue of union racial discrimination, the NLRB has developed a number of procedures to sanction discriminating unions.<sup>10</sup> A review of

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directing the EEOC to defer first to state fair employment practices commissions and to seek voluntary compliance with its orders. But, if all else fails, the section empowers the EEOC to issue cease and desist orders and to provide affirmative relief. Both procedures are enforceable in the federal courts. In effect, the bills give the EEOC the same enforcement powers as the NLRB. Neither bill deals with the issue of jurisdictional conflict between the EEOC and NLRB.

The recommendations in this note are contingent upon the passage of these or similar amendments.

<sup>7</sup> Passage of this legislation is by no means certain. Title VII itself originally conferred enforcement powers on the EEOC, but the powers were deleted and the Commission limited essentially to the function of conciliation in order that title VII could pass. For the legislative history of title VII see Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Bklyn. L. Rev. 62, 64-68 (1964). Since 1964, amendments have been offered that would give the Commission enforcement powers, but none have been successful. See, e.g., H.R. 10065, 89th Cong., 1st Sess. (1965); S. 3465, 90th Cong., 2d Sess. (1968).

The EEOC clearly needs the power to enforce title VII's provisions:

. . . [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. S. 7093 (daily ed. June 12, 1968) (comments of Senator Javits on S. 3465). See also N.Y. Times, April 10, 1969, at 46, col. 2.

<sup>8</sup> See, e.g., SOVERN 174; Berg, *supra* note 7, at 95; Hickey, *Government Regulation of Union Racial Policies*, 7 B.C. IND. & COM. L. REV. 191, 230 (1966).

<sup>9</sup> Arguably, title VII preempts NLRB jurisdiction over racial issues. See, e.g., Note, *Applicability of Unfair Labor Practices to Racial Discrimination: Enforcement Under Civil Rights Act*, 50 CORNELL L.Q. 321, 327-28 (1965). But, it appears that Congress did not recognize the issue of overlapping jurisdiction in 1964 (see note 65 *infra*), and it is therefore futile to attempt to determine whether title VII was intended to preempt NLRB jurisdiction over racial issues. Instead, it should be recognized that the overlap does exist, that if the EEOC gains enforcement powers the problem will be intensified, and that a solution is required.

<sup>10</sup> A more extensive examination of the NLRB procedures outlined in this note is found in SOVERN at 155-71.

these procedures provides a basis for determining how racial issues can be divided between the EEOC and NLRB.

Section 9 of the LMRA states that the employees' bargaining representative shall be the exclusive representative of all employees in the bargaining unit.<sup>11</sup> Because of the exclusivity of this statutorily created status, the Supreme Court has held that a duty to represent *fairly* all employees in the unit is implicit in section 9.<sup>12</sup> This duty includes an obligation not to discriminate on racial grounds.<sup>13</sup> Under the Supreme Court cases, the section 9 duty of fair representation is enforceable in the federal courts in a proceeding not involving the NLRB.<sup>14</sup> Building upon the duty of fair representation implicit in section 9, however, the Board has developed two methods of opposing union racial discrimination.

The first, called by Sovern "Denying the Board's Imprimatur,"<sup>15</sup> is to deny the Board's aid to a discriminating union. The Board can refuse to certify a union,<sup>16</sup> rescind certification previously granted,<sup>17</sup> withhold an order directing an employer to bargain,<sup>18</sup> or allow one union to be prematurely ousted by another.<sup>19</sup> The Board's exercise of these restraints is based on its recognition of the union's section 9 duty of fair representation and of the impropriety of giving aid to a union which has breached that duty. These steps play a role in eliminating discrimination, but because of their passive nature, they provide little deterrent to strong unions.<sup>20</sup> The second method of enforcement, which has more teeth in it, is the use of unfair labor practice proceedings against unions that engage in racial discrimination. Three such unfair labor practices have been developed by the Board.

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<sup>11</sup> Labor Management Relations Act of 1947 (Taft-Hartley Act) § 9(a), 29 U.S.C. § 159(a) (1964) [hereinafter cited as LMRA].

<sup>12</sup> *E.g.*, Syres v. Oil Wkrs. Int'l Local 23, 350 U.S. 892, *rev'g mem.* 223 F.2d 739 (5th Cir. 1955); Wallace Corp. v. NLRB, 323 U.S. 248 (1944) (dictum); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

<sup>13</sup> *E.g.*, Syres v. Oil Wkrs. Int'l Local 23, 350 U.S. 892, *rev'g mem.* 223 F.2d 739 (5th Cir. 1955); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

<sup>14</sup> See cases cited *id.*

<sup>15</sup> SOVERN 156.

<sup>16</sup> The Board has not used this sanction, but Sovern mentions it as a possibility. *Id.* at 158.

<sup>17</sup> *E.g.*, Independent Metal Wkrs. Local 1 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964); A.O. Smith Corp., 119 N.L.R.B. 621 (1957); Pittsburgh Plate Glass Co., 111 N.L.R.B. 1210 (1955).

<sup>18</sup> Like refusal of certification, this procedure has not yet been used by the NLRB. SOVERN 158-59.

<sup>19</sup> *E.g.*, Pioneer Bus Co., 140 N.L.R.B. 54 (1962) (removal of the "contract-bar").

<sup>20</sup> An employer will bargain with a strong union even if not forced to do so by the NLRB, for to do otherwise would be to invite labor strife.

The first concerns section 8(b)(1)(A).<sup>21</sup> Beginning with the *Miranda Fuel Co.* decision in 1962,<sup>22</sup> the Board has reasoned that the right to fair representation is also implicit in the section 7 right "to bargain collectively through representatives of [the employees'] own choosing . . ."<sup>23</sup> Since section 8(b)(1)(A) declares it to be an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . .,"<sup>24</sup> unfair treatment of an employee by a union violates this provision. A number of decisions since *Miranda* have held that racial discrimination by a union violates section 8(b)(1)(A).<sup>25</sup>

The second unfair labor practice is based upon section 8(b)(3).<sup>26</sup> Under that section, a union must bargain in good faith with the employer.<sup>27</sup> The Board, however, finds this duty of bargaining in good faith to be owed to the employees as well as to the employer, and then interprets "good faith" to include the duty of fair representation.<sup>28</sup> Accordingly, if racial discrimination taints any part of the collective bargaining process, a union violates its 8(b)(3) duty to bargain fairly concerning all employees.<sup>29</sup>

<sup>21</sup> LMRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964).

<sup>22</sup> 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

<sup>23</sup> LMRA § 7, 29 U.S.C. § 157 (1964).

<sup>24</sup> *Id.* § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964).

<sup>25</sup> *E.g.*, Local No. 12, United Rubber, C., L. & P. Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *enforcing* 150 N.L.R.B. 312 (1964); UAW (Maremont Corp.), 149 N.L.R.B. 482 (1964); Local 1367, ILA (Galveston Maritime Ass'n), 148 N.L.R.B. 897 (1964). *Miranda* itself did not involve a racial issue. See 140 N.L.R.B. at 181.

The Board's finding of an 8(b)(1)(A) violation based upon breach of the duty of fair representation has met with criticism:

1. As a correlative to the right of representation under Section 9(b) of the Act, a bargaining representative owes a duty fairly and impartially to represent all employees in the bargaining unit.

2. However, there is nothing in the wording of Section 7 or of Section 8(b)(1)(A), and nothing in the legislative history of the Wagner Act and of its subsequent amendments, which indicates that Congress intended to make the right of fair representation a protected Section 7 right. On the contrary, the legislative history indicates, in our opinion, that Congress had no such intention. There are also practical and policy reasons, set forth in our separate opinion in *Hughes Tool* [147 N.L.R.B. 1573, 1578 (1964)], why the Board should not read a right of fair representation into Section 7 without a clear mandate from Congress. Local No. 12, United Rubber, C., L. & P. Workers, 150 N.L.R.B. 312, 324 (1964) (Chairman McCulloch and Member Fanning, dissenting). See also *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963); Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. PA. L. REV. 711, 718 (1964).

<sup>26</sup> LMRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1964).

<sup>27</sup> The good faith requirement is found in § 8(d), which defines 8(b)(3)'s mandate to bargain collectively. *Id.* § 8(d), 29 U.S.C. § 158(d) (1964).

<sup>28</sup> See, *e.g.*, Independent Metal Wkrs. Local 1 (Hughes Tool Co.), 147 N.L.R.B. 1573, 1577, 1591-93, 1604 (1964).

<sup>29</sup> *E.g.*, Local 12, United Rubber, C., L. & P. Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *enforcing* 150 N.L.R.B. 312 (1964); Local 1367, ILA (Galveston Maritime Ass'n), 148

The two preceding unfair labor practices are based upon the transfer of section 9's duty of fair representation into sections 7 and 8, but a union's racial policies can constitute unfair labor practices without dependence on fair representation. Thus, a union violates section 8(b)(3) if it insists, against the wishes of the employer, upon the inclusion of racially discriminatory provisions in the collective bargaining agreement.<sup>30</sup> This violation stems from the *Borg-Warner* rule that if the employer may lawfully refuse to bargain over a particular demand, the union may not insist upon the demand.<sup>31</sup> It is clear that an employer may properly refuse to bargain over a union's racially discriminatory demands, for such demands are expressly prohibited by federal legislation.<sup>32</sup>

Another union unfair labor practice with racial application, but not based upon the duty of fair representation, involves section 8(b)(2).<sup>33</sup> The section states that a union may not "cause or attempt to cause" an employer to discriminate against employees either in violation of

N.L.R.B. 897 (1964); *Independent Metal Wkrs. Local I (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964).

The argument that the transfer of § 9's "fair representation" into § 7 and § 8 is erroneous can also be leveled against this 8(b)(3) theory. Note 25 *supra*. However, a more fundamental criticism of this 8(b)(3) interpretation is that although § 8(b)(3) appears to impose a bargaining obligation on unions that is identical to the employers' duty under § 8(a)(5), the Board has added to § 8(b)(3) an obligation of fair representation, owed to the employees, that has no counterpart in § 8(a)(5):

The difficulty with [the Board's 8(b)(3) theory] is that the context in which the words "confer in good faith" appear gives repeated evidence of concern with the duties of the employer and union to each other, but no evidence at all of concern with the duty of unions to those they represent. . . . [T]he statute speaks of the "mutual obligation of the employer and the representative of the employees," thereby implying that obligations to others are not the subject of this provision. . . . [T]he duty to "confer in good faith" is imposed upon employers and unions alike. . . . [This] imports comparable obligations and, of course, an employer can have no obligation comparable to the duty of fair representation.

Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 588 (1962).

The 8(b)(3) theory advocated by the Board has yet to be judicially recognized. The court, in *Local No. 12, United Rubber, C., L. & P. Workers v. NLRB*, 368 F.2d 12, 24 (5th Cir. 1966), found an 8(b)(1)(A) violation but did not consider the alleged 8(b)(3) violation.

<sup>30</sup> No case to date has utilized this theory. SOVERN 170.

<sup>31</sup> *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

<sup>32</sup> Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1964) (note 3 *supra*).

<sup>33</sup> Section 8(b)(2) declares it to be an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

LMRA § 8(b)(2), 61 Stat. 141, 29 U.S.C. § 158(b)(2) (1964).

section 8(a)(3), or because of the employees' unreasonable exclusion from union membership. Section 8(a)(3) prohibits employers from discriminating "to encourage or discourage" union membership.<sup>34</sup> There are two categories of such 8(b)(2) violations—those stemming from racial discrimination directed at non-union workers, and those concerning discriminatory treatment of workers who are union members.

In the former category, most violations occur in the context of closed shops,<sup>35</sup> improperly operated union shops,<sup>36</sup> or exclusive hiring hall arrangements.<sup>37</sup> In such situations union membership is often a prerequisite to gaining or continuing employment. When the union refuses membership to a worker because of his race, it "causes" the employer to wrongfully discharge or refuse to hire the worker.<sup>38</sup> The employer's refusal to hire or his discharge violates section 8(a)(3) because it "encourages" union membership;<sup>39</sup> consequently the union, in violation of section 8(b)(2), has "cause[d] . . . an employer to discriminate against an employee in violation of subsection [8](a)(3) . . ."<sup>40</sup>

The second category of 8(b)(2) violations, developed by the Board since *Miranda*, involves union racial discrimination directed at workers who are union members. Examples are the refusal to process grievances for non-white union members<sup>41</sup> and the relegation of black members to low paying positions. As stated in *Miranda*, the violation occurs when, "for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee."<sup>42</sup> The Board

<sup>34</sup> *Id.* § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

<sup>35</sup> Closed shops are outlawed by § 8(a)(3), but closed shop violations continue to occur. *E.g.*, NLRB v. American Dredging Co., 276 F.2d 286 (3d Cir. 1960); *Wolfer Printing Co.*, 145 N.L.R.B. 695 (1963); *Yuba Consol. Indus., Inc.*, 136 N.L.R.B. 683 (1962).

<sup>36</sup> Union shops are permitted under § 8(a)(3), but a union cannot deny membership for reasons that are, *inter alia*, based upon racial discrimination. LMRA §§ 8(a)(3)(A), (B), 29 U.S.C. §§ 158(a)(3)(A), (B) (1964).

<sup>37</sup> Hiring hall agreements are not prohibited, but the hall must not be restricted to union members. *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961).

<sup>38</sup> *E.g.*, *El Diario Publishing Co.*, 114 N.L.R.B. 965 (1955); *Peerless Quarries, Inc.*, 92 N.L.R.B. 1194, *enforced*, 193 F.2d 419 (10th Cir. 1951). In a union shop, the discharge is "wrongful" only if the 8(a)(3) provisos, (A) or (B), are violated. Note 36 *supra*.

<sup>39</sup> See cases cited in note 38 *supra*. The encouragement is of two types. First, Negroes are encouraged to become union members, even though they are ineligible because of their race. Second, the employer's actions encourage membership in general, black or white, for it is made clear that without such membership employment will be impossible.

<sup>40</sup> LMRA § 8(b)(2), 29 U.S.C. § 158(b)(2) (1964).

<sup>41</sup> *E.g.*, *Independent Metal Wkrs. Local 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964).

<sup>42</sup> *Miranda Fuel Co.*, 140 N.L.R.B. 181, 186 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

applies its 8(b)(2) theories<sup>43</sup> very broadly in both categories, and SOVERN notes that the combination of the two categories of 8(b)(2) violations, neither based upon the duty of fair representation, makes 8(b)(2)'s coverage coextensive with the duty of fair representation under section 8(b)(1)(A).<sup>44</sup>

### B. *A Proposal for Allocating Jurisdiction*

Of the two schemes of enforcement just outlined, the first, denying the Board's imprimatur, should be retained in its entirety by the NLRB. Arguably this retention is constitutionally required.<sup>45</sup> Even if

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<sup>43</sup> As applied to union members, the Board's 8(b)(2) theory has been criticized. To violate § 8(b)(2) a union must "cause or attempt to cause" an employer to engage in discrimination that violates § 8(a)(3); the latter section requires that the employer discriminate "to encourage or discourage" union membership. Absent either causation, or encouragement or discouragement, there appears to be no violation. The Board's application of § 8(b)(2) to discrimination against union members has run afoul of both requirements.

In *Hughes Tool* and *Local 12, United Rubber Workers*, the Board found 8(b)(2) violations where the union refused to process grievances because of race. As pointed out by SOVERN, neither case involved any recognizable "causing or attempting to cause" vis-à-vis the employer. SOVERN 169. The Board seems to equate an employer's acquiescence in union discrimination with the employer himself being "caused" to discriminate; the validity of this reasoning is doubtful. For a fuller discussion of this criticism see *Independent Metal Wks. Local 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573, 1591 (1964) (Chairman McCulloch and Member Fanning, dissenting); *Miranda Fuel Co.*, 140 N.L.R.B. 181, 193 (1962) (Chairman McCulloch and Member Fanning, dissenting).

Even if a causal relationship is present, § 8(a)(3) is usually thought to require employer discrimination that is intended to encourage or discourage union membership. But if the worker being discriminated against is a union member, the employer's motivation for the discrimination is most likely race—not the encouragement or discouragement of union membership. For a discussion of this criticism see *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 179 (2d Cir. 1963); *Independent Metal Wks. Local 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573, 1591 (1964) (Chairman McCulloch and Member Fanning, dissenting); *Miranda Fuel Co.*, 140 N.L.R.B. 181, 193 (1962) (Chairman McCulloch and Member Fanning, dissenting). *Contra*, *NLRB v. Miranda Fuel Co.*, *supra* at 181-84 (dissent).

<sup>44</sup> SOVERN 169. None of the 8(b)(1), (2), or (3) theories has been reviewed by the Supreme Court, and the Court has expressly declined to decide the issue of whether a breach of the duty of fair representation constitutes an unfair labor practice. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965); *Humphrey v. Moore*, 375 U.S. 335, 344 (1964); *Plumbers' Union v. Borden*, 373 U.S. 690, 696 n.7 (1963). One might argue that if the Supreme Court upholds these unfair labor practices, the NLRB will preempt the EEOC and have exclusive jurisdiction under the *Garmon* rule. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). However, this position has been effectively rebutted by Rosen, *supra* note 5, at 889-90. Professor Rosen points out that exceptions to the *Garmon* rule are many, and that one would certainly be formulated in this area if necessary.

<sup>45</sup> In finding the duty of fair representation to be implicit in § 9 of the LMRA the Supreme Court indicated that the holding was constitutionally required because of the otherwise unbounded powers of the statutorily created bargaining representative. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198 (1944). Accordingly, it might also be constitutionally required that the Board not assist unions that violate the duty.

not, it would be anomalous for the LMRA to prohibit unfair representation in section 9 and, at the same time, allow the Board to support discriminating unions through certification, orders to bargain, and application of the contract-bar doctrine. Since the Board's refusal to give such aid is essentially passive, its retention of this power presents little opportunity for conflict with the EEOC. To eliminate any conflict which might develop, however, the Board could require a preliminary EEOC finding of racial discrimination before refusing to give aid to a union.

Unfair labor practice proceedings present a more complex problem. If they are retained in their entirety by the Board, and if the EEOC gains enforcement powers so that it too can sanction discriminating unions, conflict will develop between the two agencies, probably resulting in administrative inefficiency and its consequent injustices. On the other hand, the Board should not be stripped of all unfair labor practice jurisdiction over racial issues, for in some instances racial issues are integrally involved with other non-racial unfair labor practices.<sup>46</sup> Accordingly, a method of apportionment must be developed under which the Board can continue to prohibit union racial practices that substantially undermine the efficacy of the LMRA, and at the same time defer to EEOC jurisdiction in matters that are peripheral to organizational and collective bargaining processes. Put another way, the EEOC should have primacy in the field of racial discrimination, but not to such an extent that the NLRB is hindered in administering the Labor Management Relations Act. Such apportionment can be effectuated if the Board's scope of authority is limited to handling racial issues only when they are connected with some other independent exercise of its jurisdiction.

Two changes are necessary to effect this allocation. First, the union's duty of fair representation, in those cases in which it overlaps title VII's prohibitions,<sup>47</sup> should be denied its implicit presence in sections 7 and 8 of the LMRA.<sup>48</sup> This completely eliminates the 8(b)(1)(A) violations based upon racial discrimination.<sup>49</sup> Although the 8(b)(3) *Borg-Warner*

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<sup>46</sup> As will become apparent in the ensuing discussion, many unfair labor practices involve some degree of union racial discrimination. Only when racial discrimination is the central issue should the EEOC have priority; otherwise the Board's power in the field of labor relations is unduly hindered.

<sup>47</sup> The overlap occurs when the unfair representation is based upon "race, color, religion, sex, or national origin." Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2(c) (1964).

<sup>48</sup> The 8(b)(1)(A) violation depends upon the presence of the right of fair representation in § 7, while the 8(b)(3) violation depends upon 8(d)'s "good faith" being interpreted as containing the duty of fair representation.

<sup>49</sup> *Miranda* is an example of a fair representation case involving no racial issue and

violations would be retained,<sup>50</sup> the only non-*Borg-Warner* 8(b)(3) violations within NLRB jurisdiction would be those based on grounds other than union racism.<sup>51</sup> The Board would thus be prevented from declaring racial discrimination by itself to be an unfair labor practice under either section.<sup>52</sup>

The fundamental argument for the apportionment suggested here is that the NLRB's primary concern is with labor relations, not race relations, and that the Board should not extend itself into an area with which another agency, the EEOC, is better equipped to deal. Additional support, however, derives from the questionable statutory foundation of the 8(b)(1)(A) and the non-*Borg-Warner* 8(b)(3) violations.<sup>53</sup> By itself, this lack of statutory basis seems not so great as to support an argument that the Board should abandon entirely these violations. But when the express grant of power over racial issues to the EEOC is added to the NLRB's expansion of section 8, the combination arguably supports the selective limitation suggested here.

A second necessary change involves section 8(b)(2). Under the Board's interpretation this section subjects the union to a duty almost as broad in scope as 8(b)(1)(A)'s duty of fair representation. Consequently, limiting sections 8(b)(1)(A) and 8(b)(3) will accomplish little if the Board's 8(b)(2) theories remain unaltered. The pre-*Miranda* 8(b)(2) violations based on racial discrimination against non-union workers should be retained, but the Board should be deprived of jurisdiction over the post-*Miranda* violations involving racial discrimination against union members. Like the apportionment suggested under sections 8(b)(1)(A) and 8(b)(3), this division is supported by a recognition of the proper sphere of activity of each agency. The Board has a clear

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therefore it would be unaffected by these limitations of NLRB jurisdiction. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

<sup>50</sup> Although racial discrimination might be the subject upon which an impasse is reached in the *Borg-Warner* 8(b)(3) violation, the fundamental issue raised by such violations is the viability of the collective bargaining process. The Board must retain its power to supervise collective bargaining even if in so doing it enters into the EEOC's sphere of race relations.

<sup>51</sup> Because *Borg-Warner* 8(b)(3) violations are not based upon the right of fair representation, p. 947 *supra*, they are not affected by removing fair representation from § 7 and § 8. Non-*Borg-Warner* 8(b)(3) violations that are not based upon racism will be eliminated if the courts reject the Board's theory that the union's bargaining duty is owed to the employees as well as the employer. See note 29 *supra*.

<sup>52</sup> Union conduct merely involving racial discrimination, however, could still constitute an unfair labor practice so long as the discrimination was not the touchstone of the violation. For example, a union would violate § 8(b)(1)(A) if it brutalized black workers for attempting to organize. The violent interference with § 7 rights, not the underlying discrimination, would be the basis for the violation.

<sup>53</sup> See notes 25 & 29 *supra*.

statutory interest in assuring that non-union workers receive no stigma because of their lack of membership (except to the extent that a properly operated union shop allows otherwise<sup>54</sup>). This issue remains important to the Board even when the lack of union membership stems from racial prejudice. However, once the worker becomes a union member, the principal issue is racial discrimination. In this area the EEOC has a clearly defined statutory interest which should take priority.<sup>55</sup>

## II

### EMPLOYER RACIAL DISCRIMINATION

Until recently, it was thought that the NLRB did not possess statutory authority to prohibit an employer from engaging in racially discriminatory employment practices. Such practices have been collaterally involved in employer unfair labor practices,<sup>56</sup> but employer racial discrimination alone was never considered to violate the LMRA. Accordingly, there appeared to be no significant conflict between title VII's prohibition of employer racial discrimination and the Labor Act. Recently, however, in *United Packinghouse v. NLRB* the Court of Appeals for the District of Columbia ruled that an employer's policy and practice of invidious racial discrimination constituted a violation of section 8(a)(1).<sup>57</sup> If the decision is followed, the potential jurisdictional conflict between the EEOC and NLRB is clear.

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<sup>54</sup> See notes 36 & 38 *supra*. When the union's discrimination does not cause loss of employment to non-union workers, it is more difficult to fulfill § 8(b)(2)'s two requirements. See note 43 *supra*. Thus most such 8(b)(2) violations will probably entail dismissals or refusals to hire by the employer.

<sup>55</sup> As with the removal of jurisdiction under § 8(b)(1)(A) and § 8(b)(3), the apportionment suggested here has additional support (*see* note 56 *infra* & accompanying text) because the second category of 8(b)(2) racial violations stands on a questionable statutory interpretation (*see* note 43 *supra* & accompanying text).

<sup>56</sup> *E.g.*, *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965) (employees wrongfully discharged for protesting company's discriminatory hiring policies); *Ozan Lumber Co.*, 42 N.L.R.B. 1073 (1942) (company rules and action based on racism prevented employees from exercising their § 7 rights); *American Cyanamid Co.*, 37 N.L.R.B. 578 (1941), *as amended*, 39 N.L.R.B. 1129 (1942) (racial segregation by company resulted in interference with § 7 rights).

<sup>57</sup> *United Packinghouse v. NLRB*, Civil No. 21-627 (D.C. Cir. Feb. 7, 1969), *enforcing and modifying* *Farmers' Cooperative Compress*, 169 N.L.R.B. No. 70 (1968). The case was remanded to the NLRB to determine whether racial discrimination was in fact present, the remand was probably unnecessary in light of the evidence showing discrimination, but the 8(a)(1) theory had not been fully litigated below, and the court therefore found a new hearing desirable. The court also instructed the Board, if it found such discrimination to be present, to "devise an appropriate remedy." *Id.* at —.

### A. *United Packinghouse*

Three company policies in *United Packinghouse* evidenced racial discrimination: White employees received higher wages and positions; overtime work was given only to whites; and vacation benefits were better for whites than for non-whites. The union attempted to eliminate these discriminatory practices through collective bargaining, but the bargaining sessions ended in a strike and the filing of charges with the NLRB. Among the union's allegations was the charge that the company's racial practices violated section 8(a)(1) of the LMRA.<sup>58</sup> This particular charge was ignored by the trial examiner and the Board,<sup>59</sup> but the union was successful on this point before the court of appeals.

Section 8(a)(1) states that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ."<sup>60</sup> Section 7 guarantees, *inter alia*, the employees' right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ,"<sup>61</sup> and the Board construes this guarantee as protecting employee activities aimed at eliminating an employer's racially discriminatory employment practices.<sup>62</sup> In *United Packinghouse* the court held that an employer's racial discrimination inhibits these protected activities and therefore violates section 8(a)(1).<sup>63</sup> The court found that

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<sup>58</sup> In addition to charging that racial discrimination violated § 8(a)(1), the union alleged two other unfair labor practices. One involved the company's attempts to undermine the collective bargaining process in violation of § 8(a)(1), and the other related to the company's failure to bargain in good faith in violation of § 8(a)(5). Both violations were established.

<sup>59</sup> Farmers' Cooperative Compress, 169 N.L.R.B. No. 70 (1968); Farmers' Cooperative Compress, 169 N.L.R.B. No. 70 (Tr. Examiner 1967). Apparently the General Counsel did not issue a complaint for the 8(a)(1) charge. There was precedent for this refusal. Case No. K-311, 37 L.R.R.M. 1457 (General Counsel, 1956); Case No. 1047, 35 L.R.R.M. 1130 (General Counsel, 1954).

<sup>60</sup> LMRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).

<sup>61</sup> *Id.* § 7, 29 U.S.C. § 157 (1964).

<sup>62</sup> Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402 (1964), *modified*, 349 F.2d 1 (9th Cir. 1965).

<sup>63</sup> — F.2d at —. *Compare* Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402 (1964), *modified*, 349 F.2d 1 (9th Cir. 1965). In that case the employer discharged two employees for picketing against the company's discriminatory hiring policy. Since the employer had interfered with a protected activity, there was an 8(a)(1) violation. Under *United Packinghouse*, however, it appears that Tanner would commit the unfair labor practice even without the discharges; its discriminatory hiring policy alone would interfere with the employees' § 7 right to act concertedly for the elimination of racial discrimination.

*United Packinghouse* leaves the scope of this new unfair labor practice uncertain. If the case is limited to its particular facts, the violation occurs only if employees are engaged in protected activities aimed at eliminating discrimination. In such situations it can be said that the activities are interfered with by the presence of discrimination.

racial discrimination has a twofold effect: First, it divides employees and reduces their opportunities to work in concert; second, it instills docility in non-white workers and discourages them from asserting their section 7 rights.<sup>64</sup>

The result reached in *United Packinghouse* is admirable on policy grounds, but its validity in terms of legislative intent<sup>65</sup> and statutory

However, the case can also be interpreted to say that employer racial discrimination interferes with all protected activities, whether or not the activities have as their purpose the elimination of racial discrimination. Even in the absence of any activities on the part of the employees, it might be argued that the racial discrimination interferes with inchoate § 7 rights, thus creating a per se violation in every situation where an employer engages in racial practices. The decision is also unclear in that the court provided no guidelines on what constitutes "invidious" discrimination.

<sup>64</sup> As stated by the court:

(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. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8 (a)(1).*

— F.2d at — (emphasis by the court; footnote omitted).

<sup>65</sup> Board enforcement of the duty of union fair representation and employer non-discrimination are both suspect on the grounds of legislative intent. Congress has rejected amendments to the LMRA which would expressly make both union and employer racial discrimination unfair labor practices. *E.g.*, S. 1831, 83d Cong., 1st Sess. (1953); S. 1897, 83d Cong., 1st Sess. (1953). In the 1964 Civil Rights Act, a grant of enforcement powers similar to the NLRB's was removed from title VII in order that the Act could pass, thereby indicating Congress's disfavor with Board-type enforcement of racial impartiality. *See Berg, supra* note 7, at 64-68. Board enforcement of the employer duty formulated in *United Packinghouse* is even more subject to criticism than is the correlative enforcement of union fair representation, since the union duty of fair representation is admittedly part of the LMRA, albeit that part is § 9, while the employer's duty not to discriminate has no identifiable source in the Act. Congress has amended the Labor Act two times since the Supreme Court first held that unions have a duty of fair representation under the Act, both times implicitly accepting the substantive principle. No similar argument is possible in support of the substantive principle developed in *United Packinghouse*.

The court noted in *United Packinghouse* that in 1964 Congress explicitly refrained from ousting any agency from jurisdiction over racial matters. — F.2d at — n.11. That is correct, but it is incorrect to infer that Congress thereby endorsed NLRB jurisdiction over racial matters; the evidence shows that Congress's silence on this point merely indicated its failure to foresee the Board's entry into the field. Although a Department of Justice memorandum read to the Senate by Senator Clark said that title VII would not deprive the NLRB of any jurisdiction, the memorandum referred only to jurisdiction then exercised by the Board. 110 CONG. REC. 7207 (1964). *See United Packinghouse v. NLRB*, — F.2d —, — n.11 (D.C. Cir. 1969). At that time, *Miranda* presaged the Board's involvement in the area of union fair representation, but *Miranda* involved no racial issue. Likewise, it was certainly not contemplated in 1964 that an employer's racial practices alone would violate § 8(a)(1). Significant also was Senator Tower's unsuccessful amendment to make title VII remedies exclusive. 110 CONG. REC. 13650-52 (1964) (*cited* in *United Packinghouse v. NLRB, supra* at — n.11). Read in context, however, it is clear that it was proposed only as a limitation upon the President's Equal Opportunity Com-

interpretation<sup>66</sup> is doubtful. Nevertheless, the decision might be followed,<sup>67</sup> thereby creating a jurisdictional conflict between the EEOC and NLRB. An assessment of the proper roles of the two agencies in the field of employer racial discrimination is therefore required.

### B. *Apportioning Jurisdiction over Employer Racial Discrimination*

As in the sphere of union racial discrimination, the NLRB should not be completely stripped of its power to act against an employer's racial practices. In particular, four types of Board intervention should be retained: (1) An employer's refusal to bargain in good faith concerning the elimination of discriminatory racial practices should violate section 8(a)(5);<sup>68</sup> (2) employer interference with the employee right to act concertedly toward the elimination of racial discrimination should constitute an 8(a)(1) violation;<sup>69</sup> (3) the Board should have the power to set aside elections when inflammatory racial propaganda has influenced their outcome;<sup>70</sup> and (4) NLRB activity premised on other jurisdictional grounds should not be eliminated merely because of tangential racial discrimination.<sup>71</sup> These activities are all essential to the Board's duty of administering the LMRA. The EEOC, however, should have concurrent jurisdiction in these areas.<sup>72</sup>

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mission. See 110 CONG. REC. 13650 (1964). Consequently, although the Civil Rights Act did not remove any racial jurisdiction from the NLRB, neither did it endorse any.

<sup>66</sup> The main issues concerning statutory interpretation relate to the scope of the unfair labor practice and the type of discrimination prohibited. Both are briefly discussed in note 63 *supra*.

<sup>67</sup> It seems probable that the General Counsel will continue to refuse to issue complaints on this 8(a)(1) theory (*supra* note 59), and the Board itself argued against the theory before the court of appeals. — F.2d at —. Accordingly, only when a complainant can allege another violation upon which the General Counsel will issue a complaint will the issue reach the Board. Even then, the Board might reject the 8(a)(1) theory, and the complainant would be forced to go to a court of appeals.

<sup>68</sup> *United Packinghouse v. NLRB*, — F.2d —, — (D.C. Cir. 1969). No other decision has been found which reaches this result, but it appears to be a valid application of the rule that both employer and union have a duty to bargain in good faith concerning "wages, hours, and other terms and conditions of employment." LMRA § 8(d), 29 U.S.C. § 158(d) (1964). In this area the Board cannot force an employer to refrain from discrimination—it can only force him to bargain. Thus there is no significant conflict between this procedure and the EEOC's activities.

<sup>69</sup> *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965). The *Tanner* rule is arguably too great an infringement upon the EEOC's domain, yet the Board should recognize the § 7 right to protest racial discrimination. As long as the employer does not unlawfully interfere with such protests (through discharge or other penalties), the Board would have no jurisdiction.

<sup>70</sup> *E.g.*, *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 140 N.L.R.B. 220 (1962). The function of supervising representation elections is peculiar to the NLRB, and there is no conflict here with the EEOC procedures against discriminating unions.

<sup>71</sup> See examples cited in note 56 *supra*.

<sup>72</sup> Concurrent jurisdiction creates little or no conflict in the first or third situations,

The 8(a)(1) violation formulated in *United Packinghouse* is not essential to the Board's functions. The NLRB has operated for thirty-four years without the power to prohibit employer racial discrimination, and it can continue to so operate. If the EEOC had possessed enforcement powers similar to those of the NLRB, it is possible that no court would have found it necessary to formulate a theory like the one propounded in *United Packinghouse*.<sup>73</sup> Accordingly, if the EEOC does acquire such powers, it alone should act in this field.<sup>74</sup>

### CONCLUSION

This allocation of power seeks an operative solution to a problem of jurisdictional overlap between the NLRB and EEOC.<sup>75</sup> It continues NLRB jurisdiction in those areas where it is essential, but recognizes that the EEOC should shoulder the major responsibility of eliminating racial discrimination from employment.<sup>76</sup> Because of the EEOC's primacy in the field, no limitations are imposed on its jurisdiction over racial issues. In those situations where the NLRB retains jurisdiction,

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because the remedies of the NLRB and EEOC are different. Moreover these situations are analogous to the *Borg-Warner* 8(b)(3) violations (*see* p. 947 *supra*) in that although racial discrimination is present, there are other independent bases for NLRB jurisdiction. In the second and fourth situations, although the EEOC and NLRB remedies can be identical, the Board has a jurisdictional basis apart from racial discrimination. If conflict does arise, it will have to be dealt with by the two agencies.

<sup>73</sup> In rebutting the argument that the EEOC was the proper forum, the court noted that while the EEOC has no enforcement powers, the NLRB can issue cease and desist orders. — F.2d at — n.11.

<sup>74</sup> If *United Packinghouse* reaches the Supreme Court and is reversed, no further action is necessary in the area of employer racial discrimination. If followed, however, Congress should act. *See* note 75 *infra*.

<sup>75</sup> In the area of union racism, a similar allocation is proposed in Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771, 803-19 (1965). There appear to be a number of ways in which this scheme of apportionment can be implemented. Congress, in amending title VII, can define each agency's jurisdiction. If Congress fails to face the issue, the agencies themselves can enter into an agreement concerning their roles in the field of racial discrimination. The judicial technique of case-by-case development is ill-suited to draw the fine lines that are necessary if each agency's sphere of operation is to be clearly fixed. Although courts could accomplish an allocation of power by finding the NLRB's procedures invalid, thus leaving the field to the EEOC, it is doubtful that such judicial action would be responsive to the particular interests of each agency. If the choice is therefore between Congress and the agencies, action by the former seems preferable. Congress can be explicit, its directives have the force of law, and its duties include the determination of which agency should administer its laws.

<sup>76</sup> In addition to the arguments presented earlier, if the EEOC gains enforcement powers, it should acquire a greater degree of expertise than the NLRB in handling racial issues because of the commission's continual exposure to them.

therefore, the EEOC has concurrent power;<sup>77</sup> in all other situations the EEOC has exclusive jurisdiction. Hopefully Congress will resolve the jurisdictional overlap when and if it confers enforcement powers on the EEOC. If it does not, judicial or administrative action will be necessary. In any event, Congress, the courts, and the two agencies should be prepared to do more than "rock along in a kind of non-definitive approach."<sup>78</sup>

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<sup>77</sup> Arguably, the NLRB should have exclusive jurisdiction in those areas where concurrent jurisdiction is recommended, thus eliminating all overlap between the two agencies. However, although the major premise of this note is that the EEOC should have exclusive jurisdiction over solely racial issues, the converse—that the NLRB should have exclusive jurisdiction in those situations in which it may properly act—is not necessarily true. When only racial discrimination is involved, there is no reason, and possibly no statutory authority, for the NLRB to duplicate the EEOC's efforts. When racial discrimination and a separate § 7 or § 8 issue are involved, however, both agencies have the power to intervene, and in neither case does a valid policy consideration vitiate the power.

Practically, conferring exclusive jurisdiction upon the NLRB would impose upon the EEOC the difficult task of attempting to predict whether the first category of 8(b)(2) violations or a *Borg-Warner* 8(b)(3) violation preempted its exercise of jurisdiction over racial discrimination. The Board has no similar difficulty where the EEOC has exclusive jurisdiction, for it has only to avoid racial "fair representation" violations and the second category of 8(b)(2) violations.

In the areas of concurrent jurisdiction, a theory of *res judicata* should be formulated so that a complainant disappointed before one agency cannot thereafter bring the same complaint before the other. In addition, it might be desirable to institute a transferral procedure under which the NLRB can transfer complaints to the EEOC when the latter is the proper forum.

<sup>78</sup> Excised from Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 494 (1967).