COMMENT

THE INEVITABLE INTERPLAY OF TITLE VII
AND THE NATIONAL LABOR RELATIONS ACT:
A NEW ROLE FOR THE NLRB

I. INTRODUCTION

In 1935 Congress enacted the National Labor Relations Act\(^1\) (hereinafter NLRA) to promote labor peace by “encouraging
the practice and procedure of collective bargaining . . . for
the purpose of negotiating the terms and conditions of . . . em-
ployment.”\(^2\) The collective bargaining of labor unions, as rep-
resentatives of the employees, and employers was viewed as a
statutorily protected means to achieve the congressional pur-
pose of labor peace and the “free flow of commerce,”\(^3\) after a
stormy period of labor relations had rocked the nation’s econ-
omy. Almost thirty years later, after an equally turbulent period
in American life, Congress enacted the Civil Rights Act of 1964\(^4\)
to provide for means to achieve a much hoped for racial peace.
Title VII of the Civil Rights Act of 1964\(^5\) prohibited both em-
ployer and labor union discriminatory employment practices\(^6\)
in the hope of securing equal employment opportunity.\(^7\) At the
time of its enactment there was some concern that Title VII
might affect seniority rights\(^8\) created by collective bargaining
agreements as well as some of the remedies available under the
NLRA.\(^9\) Although the supporters of the Title VII bill managed
to convince their opponents during congressional debate that
there was no danger of Title VII interference with the NLRA
and its protected interests, recent developments in the law,\(^10\)
and changes in social and economic conditions since the time of
enactment, have presented several areas in which the acts may

\(^3\) 49 Stat. 449 § 1 (1935).
\(^8\) 110 CONG. REC. 7207, 7213-14, 7217 (1964).
\(^9\) Id.
conflict or overlap, both in purpose and in administration and enforcement.

The conflict between Title VII and the NLRA can be characterized as both substantive and procedural. While the NLRA generally protects collective bargaining agreements that are bargained for in good faith under the terms of the Act, many federal court decisions have intruded upon those agreements by finding violations of section 703 of Title VII11 in the implementation of bargained for seniority plans.12 A union which has bargained with the same employer for many years may regard a seniority plan as a "vested" system which is predictable and dependable and which works well to satisfy the individuals within a particular bargaining group. But, if a seniority system, even of long standing, results in discrimination13 against an individual for any of the proscribed reasons under Title VII,14 then the whole system may have to be modified, no matter how successful it may have been for the group in the past. Thus, one of the substantive rights believed to be most protected under the NLRA has been dramatically undercut by the pre-eminent need to protect individual rights guaranteed by Title VII.

The legal debate over seniority rights and Title VII guarantees is not purely abstract; it must be understood in the context of contemporary economic and societal developments. The economic contraction and unemployment of the post-Vietnam War period have emphasized the importance of seniority rights as well as the fragility of equal employment opportunity guarantees. Strict adherence to seniority plans will mean that "last hired" blacks, women, and other minorities will be the "first fired,"15 and all that has been accomplished16 in the past decade of equal employment opportunity under Title VII will be undermined. Where the decisional law of Title VII may be inadequate to deal with this problem, the processes under the

13 Throughout this Comment "racial discrimination" will be used generically for all types of employment discrimination prohibited by Title VII. "Blacks" can be read to incorporate by analogy women, national origin minorities, and other groups protected under the Act. For a case involving a seniority system held to be discriminatory on the basis of sex, see Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), aff'd, 416 F.2d 711 (7th Cir. 1969).
15 See note 52 infra; Bender, Job Discrimination, 10 Years Later, N.Y. Times, Nov. 10, 1974, § 3, at 1, col. 1.
NLRA might be utilized to help both employers and unions meet new legal obligations imposed by a deteriorating economic situation.

In addition to the substantive problems posed by the differing impact of the two acts upon seniority rights, another source of possible conflict arises from the involvement of the NLRA in prohibiting racial and sexual discrimination in duty of fair representation actions, unfair labor practice proceedings, and union certification proceedings as well as in arbitration-grievance procedures set up by collective bargaining agreements. Thus, the NLRA provides additional forums and different procedural rules for addressing the problems of employment discrimination explicitly covered by Title VII. The potential for confusion and conflict when different procedures are used by multiple forums in considering similar issues of employment discrimination, albeit in dissimilar settings, is manifest.

Several recent cases have highlighted how these inherent tensions might affect treatment of employment discrimination cases under the NLRA. In *NLRB v. Mansion House Center Management Corp.*, the Eighth Circuit held that, as a federal agency, the NLRB cannot require an employer to bargain with a union that practices racial discrimination because to do so would be to participate in the discrimination in violation of the due process clause of the fifth amendment. Where the employer properly raises the discrimination of the union as a defense to an 8(a)(5) charge, the NLRB must inquire into whether the union has satisfied its obligation not to discriminate. A union found to discriminate cannot avail itself of the

---


21 473 F.2d 471 (8th Cir. 1973).

22 To issue a bargaining order under § 8(a)(5) would, under the court's theory, involve a federal agency in complicity in the discrimination. Cf. Shelley v. Kraemer, 334 U.S. 1 (1948).

23 473 F.2d at 473.

24 Discrimination by the union is not per se an 8(b)(1)(A) violation. Id. at 474.

25 Since *Mansion House* rested on constitutional grounds the standards for discrimination would not necessarily be the same as Title VII discrimination, i.e., sex is not a suspect classification under the equal protection clause, Frontiero v. Richardson, 93 S. Ct. 1764 (1973), so the NLRB might have to apply different standards for race and sex discrimination.
Board's (or the court's) powers to compel an employer to bargain with it, even if it is the employees' exclusive bargaining representative.

However, in *Jubilee Manufacturing Co.* the NLRB refused to find an employer's alleged sex discrimination to be an unfair labor practice as long as there was no nexus of interference with the employees' section 7 rights. The decision appears to contradict the earlier decision of the D.C. Circuit in *Packinghouse Workers v. NLRB* which held that an employer's racial discrimination constituted an unfair labor practice because it interfered with the employees' section 7 rights.

Most recently, in *Alexander v. Gardner-Denver Co.*, the Supreme Court held that arbitration of an employment discrimination grievance is not a bar to a separate Title VII lawsuit although the latter would involve essentially the same issues. The Court also held that the federal labor policy of judicial deference to arbitral decisions would not apply in such a suit because the arbitrator's concern for the "industrial common law of the shop" might be inconsistent with the employment discrimination "law of the land." According the usual weight to the arbitrator's decision, the Court feared, would undermine Congress' delegation of final responsibility for enforcement of Title VII rights to the federal courts. Thus arbitrators may become less involved in claims of employment discrimination while the NLRB is given an expanding role in the area.

These recent cases frame novel questions in this context for litigators of employment discrimination cases, as well as for labor unions, employers, and the government: To what extent must the substantive law of Title VII be read into the rules and procedures of the NLRA and its instrument, the collective bargaining agreement? To what extent do the requirements of Title VII restrict labor policies and practices protected by the NLRA? To what extent can NLRA procedures and rules be used to supplement and enforce Title VII policy?

This Comment will attempt to answer these questions, first, by examining the impact of Title VII law on seniority and, second, by tracing NLRA treatment of employment discrimination. It will be argued that in the area of seniority, where cur-

---

27 82 L.R.R.M. at 1484.
31 415 U.S. at 55-60.
rent Title VII case law remedies may be inadequate, the NLRB has a new role to play in avoiding conflicts between the two acts. Finally, suggestions will be made for a rethinking of national labor policy in light of the interplay of these acts.

II. SENIORITY RIGHTS AND TITLE VII

A. The Significance of Seniority

Seniority plans, found in over ninety percent of all American collective bargaining agreements, have been among the most sought after terms and conditions of employment. "More than any other provision of the collective agreement, ... seniority affects the economic security of the individual employee covered by its terms." The general principle of all seniority systems is that preference will be given to the employee with the greatest length of service within the plant, the department, the line of progression, or the job.

Labor has generally demanded seniority because it places objective restraints on employer action, provides predictability for the employee, and furnishes the union leadership with a standard with which to determine individual employee disputes. Seniority systems are not without their advantages to employers as well and have traditionally been agreed to because they provide management with a useful training system for employees (where progression in a sequence of jobs determines promotion), an incentive system to retain employees (ensuring loyalty to the company as well as to the union), and an efficient and orderly system for allocating work and making what would otherwise be time-consuming ad hoc decisions. Thus, seniority systems have been freely bargained for and freely agreed to.

Although it is now fairly clear that seniority rights are not "vested" property rights, employees, employers, and Congress seem to regard seniority as something which has been "earned" and should not lightly be disturbed. The exemption

---

34 Most of the problems of employment discrimination have involved departmental or job seniority as applied to transfers and promotions. Id.
35 Cooper & Sobol, supra note 16, at 1604-05.
36 Cf. id. 1606-07.
37 See, e.g., Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516-21 (E.D. Va. 1968); Aaron, supra note 33, at 1541-42; text accompanying notes 44-46. "The union, however, has broad discretion to bargain for changes in existing seniority arrangements, even though the changes seriously curtail the expectations of some employees
given to "bona fide" seniority plans under Title VII,\textsuperscript{38} according to its proponents, was necessary to protect these very special rights thought to be earned or "guaranteed" by the NLRA. While seniority has generally been thought desirable because of its objectivity as a work allocation device, that "objectivity" is offensive to federal law when the seniority system is based on discriminatory hiring practices. A seniority system based on length of service, no matter how neutral on its face, is clearly not neutral in effect where blacks have been unable to accumulate working time on a job or in a department for which they were not, until recently, hired. Hence, a seniority system which is based on work performed during any period in which hiring (or transfer or promotion) discrimination existed, even if before the effective date of Title VII, will be a perpetuation of past discrimination resulting in present and future discrimination.\textsuperscript{39}

Legislative intent as to the effect of Title VII on seniority systems incorporated into collective bargaining contracts is sketchy at best.\textsuperscript{40} The proviso to section 703(h),\textsuperscript{41} exempting "bona fide" seniority systems, does not exempt discriminatory seniority systems. Since Congress did not specify exactly which seniority systems would be exempt and which would not, this determination has been left to the EEOC and the federal courts in applying the broad mandate of Title VII.\textsuperscript{42} While Congress recognized the potential for conflict between Title VII and seniority rights established under the NLRA,\textsuperscript{43} it abdicated,
instead of resolving the conflict, leaving to the courts the task of exposing and attempting to reconcile the tensions between the two acts.

B. The Ineffectiveness of the Current Remedial Approach

The greatest potential for conflict between the rights created by both acts is felt by courts in fashioning remedies in Title VII cases where a new seniority plan is ordered and the collective bargaining agreement must be modified. It is now clear that the provisions of collective bargaining agreements, no matter how often renegotiated, are alterable as a result of outside contingencies and by agreement of the parties. Hence, it is not so extraordinary a break from labor law that courts have ordered relief resulting in modifications of the collective bargaining agreement: "The departmental seniority rights of white employees in the fabrication department are not vested, indefeasible rights. They are expectancies derived from the collective bargaining agreement, and are subject to modification." 

---

the National Labor Relations Act . . . or deny to any union the benefits to which it is entitled under those statutes. 110 Cong. Rec. 7207 (1964) (interpretative memorandum on Title VII submitted by Justice Department). "[T]he bill would not affect seniority at all. It would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws." Id. (remarks of Senator Clark). It seems entirely plausible that Congress had envisioned concurrent jurisdiction for the Board and the courts in situations in which discrimination involved labor disputes, and sole jurisdiction for the courts in cases of employment discrimination where no labor union or collective bargaining unit was involved.

44 See Note, supra note 37, at 1264.
45 Aaron, supra note 33, at 1542.
46 Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968). The order in Quarles specified: "The company and the union shall be restrained from enforcing directly or indirectly any provision of any collective bargaining agreement or practice or from taking any other action which conflicts with the terms of this decree." Id. at 521. In reacting to what the Fifth Circuit regarded as an in terrorem argument of the union against "destruction of the collective bargaining agreement" the court said:

That hoary collective bargaining agreements now mandate perpetuation of past aberrations from the governmental policy does not affect the propriety of judicial action. . . . Such agreements do not, per se, carry the authoritative imprimatur and moral force of sacred scripture . . . . Under the Railway Labor Act, federal courts have had the power to protect employees against invidious discrimination. . . . Under the National Labor Relations Act, they have exercised an identical power. . . . Title VII has expanded the scope of judicial inquiry and augmented the power of remedial relief in cases involving discriminatory employment practices . . . .

When the current effects of past—and sometimes present—racial discrimination in entities subject to the National Labor Relations Act have come to our attention, this court has unhesitatingly required affirmative remedial relief.

Almost every seniority case decided under Title VII thus far has been brought by a class of plaintiffs seeking promotion or transfer.\textsuperscript{47} The plaintiffs were already employed and sought to improve their work or rate of pay. Within this setting, three remedial schemes have been advanced: The "status quo" approach would preserve the seniority rights of whites in every case except where the system was discriminatory on its face, and would not remedy the effect of a system which presently perpetuated past discrimination. The "freedom now" approach would displace white incumbents with blacks who, but for the discrimination they had suffered, would have had their places.\textsuperscript{48} Finally, the current approach, the "rightful place"\textsuperscript{49} remedy, would grant blacks who have been discriminated against the right to compete for a transfer or promotion on the basis of plantwide or company employment rather than job or departmental seniority.

When accompanied by backpay, the use of the "rightful place" remedy has been adequate to increase job opportunity, compensate for past discrimination, and ensure future employment security. In an expansionary economic setting, whatever conflict may have existed over "vested" seniority rights, the most the incumbents lost was the certainty or probability of getting a better job. They could still compete for that job and could win it on the basis of seniority rights as long as they were not competing against an otherwise senior worker who had been subjected to discrimination.

Future lawsuits against employers and unions will probably grow out of layoffs, computed from discriminatory seniority plans, during the recession and economic contraction of the early seventies, post-Vietnam period. With these different economic circumstances, present remedies must be re-evaluated\textsuperscript{50} and new remedies may be needed. More radical remedies are likely to collide, however, with the employment security expectations of incumbents in a much more dramatic and problematic way.

The difficulty may be illustrated by an example, not altogether fictional, of a large, nationally based defense contractor, Company, that experienced great expansion and increased employment opportunities during the Vietnam War.\textsuperscript{51} From 1964

\textsuperscript{48} Note, supra note 32, at 1158.
\textsuperscript{49} Note, supra note 37
\textsuperscript{50} Adams, Krislov, Laitson, Plantwide Seniority, Black Employment, and Employer Affirmative Action, 26 IND. & LAB. REL. REV. 686 (1972).
\textsuperscript{51} Compare the similar factual setting of Watkins v. United Steelworkers Local 2369, 7 CCH EMP. PRAC. DEC. ¶ 9130 (E.D. La., Jan. 14, 1974), appeal docketed, No. 74-2604, 5th Cir., June 21, 1974.
on, Company began hiring blacks, women, and other minorities in order to comply with Title VII, and was party to a collective bargaining agreement that provided for layoffs and recalls on a company employment seniority basis. By 1974, after termination of the Vietnam conflict and reductions in the space program, Company's work has diminished considerably and it wants to lay off a sizable portion of its work force. A large percentage of the employees with low seniority are the blacks and others, hired in the post-1964 period, who were not hired earlier only because of Company's discriminatory hiring policies. If they are laid off now, they are victims of the "present perpetuation of past discrimination" held to be violative of Title VII in the transfer and promotion cases. The "rightful place" remedy of plantwide seniority will do these workers no good because the plantwide seniority system is the instrument perpetuating the discrimination. Title VII case law does not provide a solution to this problem, nor does the language of the Act itself. While it might be argued that the seniority system used to lay off the workers is a "bona fide" seniority system because it is not based on a racial classification and does not discriminate intentionally, the argument should be rejected when the effect of using such a seniority schedule is no more "accidental" than the effect of the seniority schedules in the transfer and promotion cases: at the time the employer and the union agreed on the seniority layoff provision they knew what the probable racial consequences would be. If one agrees that the seniority plan is not a protected "bona fide" seniority plan under section 703(h) and that the plan is in violation of sections 703(a) and 703(c) of the Act, then the difficult question of remedy is reached.

C. The "Freedom Now" Approach

One possible remedy is based on the "freedom now" theory. It could be argued that discriminatory layoffs are qual-

52 This analysis is based on Title VII and not on OFCC (Office of Federal Contract Compliance) "affirmative action" requirements which, under Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.), and Exec. Order No. 11,375, 3 C.F.R. 320 (1967 comp.), would make the necessity of a "freedom now" remedy even more compelling on federal contractors.

53 See text accompanying notes 57-59 infra.

54 This inadequacy of Title VII remedies is lessened, of course, when the "rightful place" approach is rejected in favor of the "freedom now" remedy. There is some movement in this direction. Where the plant-wide seniority already exists, the "rightful place" approach can afford no relief even in promotion cases.


56 See Cooper & Sobol, supra note 16, at 1674-75.
itatively different from transfers and promotions and justify imposition of a “freedom now” remedy, meaning the displacement of white incumbents with blacks. To do otherwise would be to “treat the recently hired and governmentally twice emancipated Blacks as persons who once again [have] to go to the foot of the line.” Such an argument would be based on the “but for” aspect of the white incumbents’ expectations: “Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity.” To lay off blacks at this point would create a spiraling effect, increasing the economic disabilities resulting from the discrimination thought to be remedied by the 1964 Act.

The ordering of such a remedy would, however, raise other legal issues under Title VII. Would a modification of the plantwide seniority system used for layoffs constitute unlawful “preferential treatment” proscribed by section 703(j) of the Act? If the statute is construed narrowly it could be argued that the provision applies only to quota systems, used to correct “an imbalance which may exist with respect to the total number or percentage of persons of any race . . . .” The remedy proposed here is not intended to achieve a general racial balance in the place of employment itself, but to provide relief for both particular individuals and the victimized class whose interests have been harmed by past actions prohibited by the Act. Moreover, preferential treatment remedies have been upheld in employment discrimination cases when they were found to

---

57 Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972).
Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual’s sharing in the “outer benefits” of being an American citizen, but rather the ability to provide decently for one’s family in a job or profession for which he qualifies and chooses.

Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970). It is this concern—the ability to provide for one’s family—that distinguishes the layoffs from transfers. Since the economic stakes are so crucial in the layoff context, more affirmative remedies designed to lessen the impact on those who are least able to bear the burdens are justified. For a discussion of the considerations involved in determining who is in the “affected class” of workers discriminated against for purposes of fashioning relief, see Cooper & Sobol, supra note 16, at 1634-35.

59 See H. Rodgers & C. Bullock, supra note 16.
62 See Cooper & Sobol, supra note 16, at 1634-35. Although relatively new minority hires will not be the same persons who were directly harmed by past discrimination, particularly in a layoff situation, class relief may be justified where previous discrimi-
be reasonable. Furthermore, the Act gives the courts power to order "such affirmative action as may be appropriate," and the courts have already expressed their willingness to go further than "simply parroting the Act's prohibitions" by granting injunctions.

While a "freedom now" remedy may be justified by the policy of the Civil Rights Act, the ultimate success of such a remedy might be threatened by the racial tensions it would be likely to provoke. A new labor battleground could threaten our "labor peace." However, procedures and additional remedies under the NLRA might be used to legitimize such remedies and to work out solutions that would satisfy all the affected parties: "It is possible that traditional procedures, protected by the National Labor Relations Act, may aid in the equitable allocation of the costs of the overriding task of providing equal employment to black workers. Black workers might well support such an effort, in order to promote unity and reduce backlash."  

D. Freedom Now Remedies in an NLRA Framework

Several alternatives can be considered. First, the collective bargaining process provided for by the NLRA could be used to force bargaining of nondiscriminatory or compensatory seniority and work allocation systems. Several proposals have already been suggested:  

(1) Layoffs could be based on chronological age, giving to each black worker the average seniority of work-
The advantage of this proposal is that it preserves the seniority system virtually intact and gradually ceases to be a “compensatory” scheme as the young workers accumulate “real” seniority. (2) Seniority could be “wholly inverted, with the oldest employees laid off first but paid nearly full wages during their absence.”70 (3) Employees to be laid off could be selected by lot.71 (4) Layoffs could be apportioned among whites and blacks on the basis of the proportion of each group in the total work force. (5) Finally, the system most likely to preserve the “labor peace” of national labor policy as well as the social and psychological wellbeing of the individual worker would be a “sharing” of available work by all workers by reducing the work week during a slack period. Refusal by an employer or a union to agree to such a nondiscriminatory plan could be challenged in an 8(a)(5) or 8(b)(3) proceeding72 under the NLRA.

Second, the NLRA machinery could be used to prevent discrimination before it occurs, or before the affected individuals bring a lawsuit to challenge the discrimination, through the NLRB proceedings of certification and unfair labor practices. Finally, the arbitration process might be utilized to a limited extent73 to deal with problems of employment discrimination.

One thing is clear: prior seniority precedent in the transfer and promotion cases under Title VII is unequal to the task of remedying discriminatory layoffs based on seniority systems which perpetuate past discrimination. In such cases, seniority systems and the collective bargaining agreement are put to their severest test. Rather than exacerbate such a potential conflict between the rights created by Title VII and the NLRA, the processes of the NLRA should be used to reconcile the com-
peting rights of employment opportunity and employment security in a way that will promote "labor peace." The next section will examine the appropriateness, perhaps the necessity, of such a function for the NLRA.

III. THE APPROPRIATENESS OF THE NLRA AS A MECHANISM FOR ACHIEVING EQUAL EMPLOYMENT OPPORTUNITY

The NLRB has traditionally been an agency expert in reconciling differences between employers and unions. The Board might therefore be able to apply its expertise to the task of reconciling the differences between discriminated-against employees on one side and the employer and other employees on the other. If the NLRB handles employment discrimination disputes, the question remains what standards the NLRB should apply: Must Title VII be fully incorporated into the NLRA? Three recent cases, all from different sectors of the labor law judiciary, have attempted to answer this question.

A. The NLRA and Racial Discrimination

1. The Collateral Relief of the Early Years

The courts, not the NLRB, first linked the racial discrimination of unions to the labor statutes. In Steele v. Louisville & Nashville R.R. the Supreme Court declared that unions had a duty to represent fairly all the employees for whom it had statutory authority to act as exclusive bargaining representative under the Railway Labor Act. The union, which had bargained for a discriminatory contract, was ordered to represent nonunion or minority union members "without hostile discrim-

74 The NLRB's expertise in dealing with discriminatory discharges (on the basis of union affiliation) in 8(a)(3) proceedings might indeed be helpful in the racial discrimination area.
75 Cases cited note 10 supra.
77 For an historical discussion, see F.R. Marshall, The Negro and Organized Labor (1965); H. Northrup, Organized Labor and the Negro (1944); S. Spero & A. Harris, The Black Worker (1960); The Negro and the American Labor Movement (Jacobson ed. 1968).
78 323 U.S. 192 (1944).
79 The Steele decision rested on a statutory, not a constitutional, basis. The court reasoned that an act authorizing a union to be the exclusive bargaining representative for all employees meant that the union could not favor some employees over others. A concurring opinion would have based the decision on the fifth amendment of the Constitution: the NLRA being an act of Congress, no union authorized to act as exclusive bargaining agent under it could deny those it represented equal protection.
ination, fairly, impartially, and in good faith." Although the Court recognized that unions would sometimes have to differentiate between different classes of workers \(^8^1\) discrimination based on race was "irrelevant and invidious." \(^8^2\) The duty of fair representation was held to apply under section 9(a) of the NLRA \(^8^3\) as well as under the Railway Labor Act, but for many years the duty was enforced through the courts, not the Board. \(^8^4\) During this period the NLRB restricted its action to withholding or revoking certain statutory benefits from unions that discriminated on a racial basis. For example, where a union had executed a discriminatory contract, the Board has revoked certification and allowed an election sought by an outside union. \(^8^5\)

The NLRA has also been interpreted to grant protection to employee concerted activity protesting alleged racial discrimination. This is based on a Supreme Court holding that picketing by a group of blacks in protest of discrimination in employment constituted a "labor dispute" immune from injunction under the Norris-LaGuardia Act:

The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor

\(^8^0\) 323 U.S. at 204. The duty of fair representation has subsequently been found to have been breached by executing a discriminatory contract or separate contract for white and black employees, Pioneer Bus Co., 140 N.L.R.B. 54 (1962), or by refusing to consider a grievance filed by an employee, because of his race, Hughes Tool Co., 147 N.L.R.B. 1573 (1964). \(\text{But see}\) Hairston v. McLean Trucking Co., 6 F.E.P. Cas. 779 (M.D.N.C. 1972).

\(^8^1\) 323 U.S. at 203:

Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit.

\(^8^2\) Id.

\(^8^3\) Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). \(\text{See also}\) Syres v. Local 23, Oil Workers, 350 U.S. 892, rev'g mem. 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

\(^8^4\) Sovern, supra note 76, at 611. This is because most of the duty of fair representation cases arose under the Railway Labor Act, over which the Board did not have jurisdiction.

\(^8^5\) Int'l Metal Workers, Local 1, 147 N.L.R.B. 1573 (1964) (Hughes Tool Co.); Pioneer Bus Co., 140 N.L.R.B. 54 (1962). For a thorough discussion of the range of sanctions available to the Board, See M. Sovern, note 76 supra.
organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.\(^86\)

The NLRB has held that employer interference with such protected concerted activities constitutes an unfair labor practice.\(^87\) Recently, the District of Columbia Circuit has affirmed this position, in *Western Addition Community Organization v. NLRB (Emporium)*,\(^88\) where employees bypassed the union grievance procedure to picket in protest of employer discrimination. Although the court accepted the trial examiner's findings that the actions of the employees were "'inconsistent with and disruptive of' the procedures for settling grievances under the collective bargaining agreement,"\(^89\) the court held that the exclusivity principle of section 9(a) did not apply. The court read Title VII into the NLRA and held that because this concerted action was protected under Title VII it could not be punished under the NLRA.\(^90\) In support, the *Emporium* court used the Supreme Court's observation in *Southern Steamship Co. v. NLRB*:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task.\(^91\)

---


\(^87\) Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402 (1964), remanded, 349 F.2d 1 (9th Cir. 1965), orig. decision aff'd., 166 N.L.R.B. 551 (1967), remanded, 419 F.2d 216 (9th Cir. 1969). When the case came before the court for the second time, it held again that concerted activity lost its § 7 protection when that activity violated § 9's exclusivity principle, because § 9 was controlling over § 7. In this case, however, the employer had failed to warn the protesting employees that it objected to their picketing and would insist on dealing only with the union. The court suggested that the Board might find that the employer thereby waived its right to object and made § 7 operative again. Presumably, if the employer had warned the employees of his insistence on § 9, the employees could have been fired for protesting against racial discrimination!


\(^89\) Id. at 923.

\(^90\) Id. at 928-29:

Where, as here, both the subject matter of the concerted activity and the right to engage in such activity are safeguarded by legislation, we feel such concerted activity cannot be treated identically with other concerted activity which is not so safeguarded for the purpose of determining whether it so violated section 9(a) as to lose section 7 protection.

\(^91\) 316 U.S. 31, 47 (1942).
The court in *Emporium* reasoned that the underlying premise of the exclusivity principle, majority rule, is not applicable in racial discrimination cases, because such discrimination is illegal under Title VII and is not a matter for disposition by the union, even by majority choice. Thus, said the court, "the Labor Board should inquire . . . whether the union was actually rem-
edying the discrimination to the fullest extent possible, by the most expedient and efficacious means. Where the union's efforts fall short of this high standard, the minority group's concerted ac-
tivities cannot lose its [sic] section 7 protection."98

2. Race Discrimination as an Unfair Labor Practice

If Title VII can be incorporated into the NLRA, several additional and nonexclusive remedies become available to ame-
liorate many of the tensions between seniority and equal em-
ployment opportunity outlined in section II of this Comment. In 1962 the NLRB took a more aggressive stance in this direc-
tion: *Miranda Fuel Co.*94 decided that discriminatory conduct by a union against member-employees was both a union and an employer unfair labor practice.95 The Board reasoned that among an employee's section 7 rights was the right to be fairly represented, without discrimination, by his exclusive bargain-
ing agent.96 The union that did not fairly represent the employ-
ees thus violated the Act and caused the employer to violate the Act as well.97 The Second Circuit, with three separate opinions, denied enforcement,98 holding that the Board cannot find a section 7 violation unless the discrimination was deliberately de-
signed to encourage or discourage union membership. In *Local 12, United Rubber Workers*99 the NLRB repeated its position that a union's violation of its duty to represent fairly was an unfair labor practice, and ruled that the duty could be breached by in-
action, that is, the failure or refusal to process a grievance.100

92 485 F.2d at 928-29.
93 Id. at 931 (emphasis in original).
94 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). *Miranda Fuel* involved a white employee whose seniority standing had been lowered by the employer on the demand of the union, because the employee had taken an early leave of absence in violation of union policy. The Board read the § 9 duty of fair representation into § 7.
95 The Board found union violations under 8(b)(1)(A) and 8(b)(2) and employer violations under 8(a)(1) and 8(a)(3). 140 N.L.R.B. at 190.
97 140 N.L.R.B. at 185-86.
98 326 F.2d 172 (2d Cir. 1963) (2-1 decision).
100 Id. Employees had raised grievances that racial discrimination existed in the
The Board's view of the union unfair practice was supported and enforced by the Fifth Circuit. The court rejected the claim that Title VII provided the only remedies for labor union discrimination, citing the rejection of the Tower amendment, which would have made Title VII the exclusive means for enforcing the rights of equal employment opportunity, in support of its conclusion.

The 1969 decision by the District of Columbia Circuit in United Packinghouse Workers v. NLRB went further than either Miranda Fuel or Rubber Workers by holding that an employer, acting independently of the union, commits an unfair labor practice when he engages in racially discriminatory practices and when he refuses to bargain about them. The court held that such a refusal would interfere with section 7 rights by inhibiting employees "from asserting themselves against their employer to improve their lot." The court found:

that an employer's invidious discrimination on account of race or national origin has such an effect. This effect is twofold: (1) racial 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).

Maintenance of separate seniority lists, segregated recreational activities, and racially segregated plant facilities. The union refused to process and actively opposed these grievances and grievances regarding back pay (for the layoff period) occasioned by application of the seniority system. Id. at 316-19. The union was found to have violated §§ 8(b)(1)(A), (2), and (3). The Supreme Court approved the NLRB's position in Vaca v. Sipes, 386 U.S. 171, 181-83 (1967).

The court expressly did not consider the Board's finding of violations of §§ 8(a)(2) & (3). The Tower amendment was rejected by a vote of 59 to 29.

101 386 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967). The court expressly did not consider the Board's finding of violations of §§ 8(a)(2) & (3).

102 110 CONG. REC. 13550-52 (1964). The Tower amendment was rejected by a vote of 59 to 29.


104 Id. at 1135. The employer had allegedly classified workers into three categories (blacks, Mexicans, and whites) and had given the better and higher salaried jobs to the whites. When the union asked for a seniority system that would provide for open bidding on jobs the employer allegedly refused to bargain about it. On remand the Board ordered a factual hearing and stated that it would not decide, as the court had, whether employer discrimination would constitute an 8(a)(1) violation as a matter of law. Farmers' Cooperative Compress, 72 L.R.R.M. 1251 (1969). After the hearing, the Board concluded that the record did not support a finding of invidious racial discrimination by the employer. Farmers' Cooperative Compress, 194 N.L.R.B. 85 (1971).

105 416 F.2d at 1135 (emphasis in original).
The NLRB, however, mindful of the nonenforcement order in Miranda Fuel, refused to follow this theory in Jubilee Manufacturing Co.\textsuperscript{106} It was argued there that the employer’s job classification system and bidding system resulted in discrimination against women, who were generally found in the lower paying classifications. The Board rejected the argument that discrimination on the basis of race or sex was a per se violation of the NLRA because it could not consider such discrimination “inherently destructive” of employee section 7 rights.\textsuperscript{107} The Board dismissed the complaint. The Board’s theory of 8(a)(1), following that of the Second Circuit in Miranda Fuel, was that some nexus had to be established between the discrimination and employee section 7 rights. The Board also dismissed the 8(a)(5) charge on the ground that the evidence was insufficient to establish the employer’s refusal to bargain about alleged sex discrimination. Thus Jubilee signals a refusal on the part of the Board fully to incorporate Title VII rights into employees’ section 7 rights so that any discrimination on the part of an employer or a union would be remediable under the NLRA.\textsuperscript{108} Although it has been argued that this approach is correct\textsuperscript{109} because Congress did not intend the NLRA to be a general civil rights act, and because the EEOC has greater expertise than the Board in these matters, the decision in Mansion House\textsuperscript{110} sheds doubt on the correctness, if not the validity, of the Jubilee decision.

\textbf{B. NLRB v. Mansion House: A Framework for NLRB Consideration of Employment Discrimination}

The issue framed by the Eighth Circuit in Mansion House\textsuperscript{111} was “[w]hether or not the National Labor Relations Board may require an employer to bargain with a labor organization if that organization practices racial discrimination in its member-

\textsuperscript{106} 82 L.R.R.M. 1482 (1973).
\textsuperscript{107} 82 L.R.R.M. at 1484.
\textsuperscript{108} See notes 125-37 infra & accompanying text. It has been suggested that courts may distinguish Packinghouse Workers from Jubilee because the former involved racial discrimination and the latter involved sex discrimination. The theory is that although sex discrimination is illegal and resembles racial discrimination in the first part of the Packinghouse Workers court’s twofold effect, note 105 supra & accompanying text, it does not create the same “docility” in its victims. Comment, supra note 96, at 33-34. Although most discrimination cases brought to the Board have been racial, this Comment argues that sex discrimination is equally likely to have a divisive effect on employees’ ability to act in concert in accordance with their § 7 rights.
\textsuperscript{110} 473 F.2d 471 (8th Cir. 1973).
\textsuperscript{111} Id.
The court held that the fifth amendment of the Constitution, which encompasses the equal protection guarantee in the due process clause, prohibits any governmental agency from discriminating on the basis of race, color, or religion. The court went on to state that "[w]hen a governmental agency recognizes such a union [one which discriminates] to be the bargaining representative it . . . becomes a willing participant in the union's discriminatory practices." Aside from its action as a government instrumentality, the NLRB, in seeking judicial enforcement of its bargaining order, was attempting to procure an unconstitutional judicial enforcement of private discrimination. The court concluded that the racial discrimination allegedly practiced by a union seeking certification or recognition as a bargaining agent under the NLRA was a proper area of inquiry for the Board when the defense was appropriately raised in a refusal to bargain case. The court deferred to the Board in fleshing out standards for what would be a good faith, rather than a pretextual, defense. The court ruled that, in considering the claim of racial discrimination, the Administrative Law Judge had erroneously excluded statistical evidence of discrimination in the union's membership. The court cited several Title VII cases to support the proposition that statistics could make out a prima facie case of discrimination. The court concluded that the remedial machinery of the NLRA could not be available to unions which discriminated.

The significance of this decision should not be underestimated. Although it could be argued that Jubilee is not subject to the same requirements as Mansion House, since the former involved no affirmative governmental action in support of discrimination, such an argument should be rejected, if not from constitutional necessity, then from general policy. Mansion House now requires the Board to investigate the alleged discriminatory practices of the parties before it in a refusal to bargain proceeding since it cannot constitutionally grant a remedy

112 Id. at 472 (footnote omitted).
113 Id. at 473.
115 473 F.2d at 474-75.
117 A possible corollary of this decision is that the remedial machinery of the NLRA could not be made available to an employer who discriminates.
119 It has been argued that in certain contexts state inaction is the equivalent of state action. Hawkins v. Shaw, 461 F.2d 1171 (5th Cir. 1972).
to a discriminatory union or employer. But, by refusing to grant a remedy in an unfair labor practice proceeding based on a claim of racial discrimination, the Board may be encouraging discrimination in much the same way as it would if it were to grant a remedy in a refusal to bargain case. Since the Board has held in Local 12, United Rubber Workers\textsuperscript{120} that a union's inaction—failure to process a grievance—can be a violation of the duty of fair representation,\textsuperscript{121} it is inconsistent for the Board to hold that its own inaction does not contribute to the union's or employer's discrimination. Thus, the Mansion House rationale should force the NLRB to recognize discrimination by the employer or union as an unfair labor practice so the Board, by withholding a remedy, does not "participate" in the discrimination.\textsuperscript{122}

Furthermore, whatever arguments can be made to support the result in Jubilee do not survive Mansion House. In deciding whether to issue a bargaining order the NLRB must look to the facts of the alleged racial discrimination and is therefore necessarily involved in the same analysis under Title VII which it sought to avoid in Jubilee. In addition, the Eighth Circuit has suggested in Mansion House that the Board must use the same standards as those in Title VII—for example, statistical evidence must be admitted for purposes of establishing a prima facie case of discrimination.\textsuperscript{123} Since the NLRB already considers racial discrimination in so many contexts, an examination of a union's or employer's discrimination will generally be no harder in the unfair labor practice context than in any of the others.

Several cases recently decided by the NLRB indicate that the Board (no majority opinion existed in the three cases) has accepted a very limited view of the Eighth Circuit's Mansion House rule. In Bekins Moving & Storage Co.\textsuperscript{125} the Board held that it would permit a postelection, precertification attack on the victorious union by the employer where the employer alleged discrimination on the part of the union. The plurality opinion, written by Members Miller and Jenkins, based the decision on constitutional necessity: following the reasoning of

\textsuperscript{120} See text accompanying notes 99-102 supra.

\textsuperscript{121} Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), enforced, 368 F.2d 12 (5th Cir. 1966); Hughes Tool Co., 147 N.L.R.B. 1573 (1964).

\textsuperscript{122} See NLRB v. Longshoremen, Local 1581, 489 F.2d 635 (5th Cir. 1974) (union that induced employer to give preference to workers on basis of national origin violated 8(b)(2)). Significantly, the Board's order required the union to cease and desist from causing the employer to violate 8(a)(3).

\textsuperscript{123} For a discussion of this point, see text accompanying note 116 supra.

\textsuperscript{124} For a discussion of this point, see text accompanying notes 85-105 supra.

\textsuperscript{125} 86 L.R.R.M. 1323,(1974).
Mansion House, the NLRB, as a federal agency, could not entangle itself in unconstitutional discrimination by certifying a discriminatory union without running afoul of the equal protection guarantee of the due process clause of the fifth amendment. The Board was rather cautious in its discussion of unlawful discrimination, stating that while it must interpret its own Act "with due regard for Federal policy against racial or other arbitrary or invidious discrimination" it would not "usurp the functions which Congress entrusted to the Equal Employment Opportunity Commission." Thus, the Board will enter the area of alleged employment discrimination only in the clear cases of constitutional violation, not simply Title VII violation: "It is not our intention . . . to regard every possible alleged violation of Title VII, for example, as grounds for refusing to issue a certificate."

One obvious difficulty with this position is the current status of sex discrimination under the Constitution. Sex classifications, under traditional equal protection analysis, are not suspect but are "inherently invidious." The status of a sex discriminating union asking for certification might thus be different than a racially discriminating union. Furthermore, the Bekins decision refused to come to grips with the standards to be applied to determine if discrimination does in fact exist:

[W]e have concluded that we are not yet sufficiently experienced in this newly developing area of the law to enable us to codify, at this time, our approach to such issues, either procedurally or substantively. We also believe that the parties are entitled to judicial review of our determinations as to the proper scope of our duty and authority to conform our own law and procedure to the requirements of both the Constitution and legislation against invidious discrimination in employment.

Following the Board's decision in Bekins these two problem areas were further complicated by decisions in Bell & Howell Co. and Grant's Furniture Plaza. In Bell & Howell the

---

126 Id. at 1325.
127 Id. at 1326.
129 Id at 682; Reed v. Reed, 404 U.S. 71 (1971).
130 See notes 132-36 infra & accompanying text. Ironically, Bekins itself involved alleged sex discrimination.
131 86 L.R.R.M. at 1327.
Board certified a union alleged to be discriminating on the basis of sex because sex was not a suspect class under the Constitution\textsuperscript{134} and since the area was new and the Board was unfamiliar with proper standards and procedures it would refuse to certify "only in areas of most egregious discrimination"—that is, constitutionally suspect classes. Obviously, one very important form of employment discrimination under Title VII, sex discrimination, is not being remedied under NLRB procedures.\textsuperscript{135}

In \textit{Grant's Furniture} the Board certified a union over employer objection that it discriminated on the basis of sex and Spanish surname, holding that statistical evidence of an "affirmative factual nature" would be required to sustain such a certification objection. This decision seems to reject the Title VII standards of proof for employment discrimination as supported by the \textit{Mansion House} court.\textsuperscript{136}

Thus, to summarize the effect of these recent opinions, it seems that the NLRB has accepted the \textit{Mansion House} rationale in \textit{Bekins} in constitutionally limiting its own power to give remedies to discriminatory unions, but has refused to use Title VII standards to define "discrimination," and most certainly has refused to read into the NLRA the standards or requirements of Title VII.\textsuperscript{137} The Board's reluctance in this area should not be construed as correct or even wise. The Board's stated reasons for its positions are that it cannot encroach upon the functions of another agency, the EEOC. But what the Board fails to consider is that by adopting Title VII standards it will be more efficient in dealing with these cases, since it will not have to fashion procedural rules and substantive standards in a case-by-case manner. The Board, instead of usurping another agency's function, would be supplementing it, providing additional, cumulative means for the enforcement of Title VII without contravening any of the policies of its own Act.

\textsuperscript{134} Geduldig v. Aiello, 94 S. Ct. 2485 (1974).
\textsuperscript{135} Perhaps one could make out a case for NLRB discrimination against women in light of the Board's refusal to remedy sex-related problems and its willingness to remedy other forms of discrimination.
\textsuperscript{136} The Eighth Circuit in \textit{Mansion House} relied on Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (a Title VII case), for the proposition that statistical evidence was relevant and sufficient in a finding of union discrimination precluding certification of that union by the NLRB. \textit{See also} Defender Security Services, 86 L.R.R.M. 1490 (1974), where the Board rejected an employer's attempt to raise claims of union discrimination at the pre-election stage. The Board made it clear that it would require a high degree of proof before it would hold a hearing on an employer's claim of union discrimination.
\textsuperscript{137} This area is still in great flux and can be considered still open since there was no majority opinion and Member Miller is leaving the Board in 1975.
C. Reading Title VII into Section 7

Whether or not the exact rationale of Packinghouse is used, section 7 of the NLRA could be read to incorporate the Title VII rights of equal employment opportunity so that any discrimination on the part of the employer or union would be an unfair labor practice because it would be an interference with those section 7 rights. Recalling the analysis of the District of Columbia Circuit in Emporium, in which concerted action protesting racial discrimination was held protected under section 7 because protected under Title VII, it is difficult to understand how the Board can refuse to find discrimination a per se violation of section 8 of the NLRA.

There are two possible rationales for finding employment discrimination a violation of the NLRA. The first, which is essentially the rationale of Packinghouse, applies particularly well in the context of seniority. So long as either the employer or the union bargains for, or operates with, a seniority plan that discriminates between blacks and whites, or women and men, a wedge will be driven between these two, or four, groups of workers that effectively destroys the communality of their interests in concerted action and collective bargaining. While some distinctions between workers do exist and do serve to destroy unity of interest, discrimination based on race or sex is unlawful and, therefore, cannot be used for such purposes. Second, in the context of sections 8(a)(5) and 8(b)(3) the duty to bargain "in good faith" may be read to mean "in compliance with the law"—including Title VII. Employees' Title VII rights would be adequately protected in this process since "[t]he rights assured by Title VII . . . [cannot] be bargained away—either by a union, by an employer, or by both acting in concert." Thus, using the NLRA as a mechanism for enforcing equal opportunity rights would be consistent with Title VII, with the national labor policy, and would avoid the inevitable conflicts between the two acts. For example, where a union bargains for a seniority plan that may be in violation of Title VII the validity of the plan could be tested, prior to its implementation, in a refusal to bargain complaint brought by the union.

---

141 Note 43 supra.
Similarly, if section 7 is read to include Title VII equal employment rights, a discriminatory discharge could be handled by an agency already expert in handling of section 8(a)(3) cases. By using these mechanisms the NLRA, as enforced by the NLRB, could force employers and unions to draw up collective bargaining agreements that would require nondiscriminatory employment practices and could provide an additional mechanism for their enforcement. If Mansion House requires the Board to withhold its remedies from discriminatory unions and employers, the Board should not be permitted to withhold its remedies when it could prevent such discrimination.

D. Alexander v. Gardner-Denver Co.: The Distinctions Between Arbitration and NLRB Action

The Supreme Court held in Alexander v. Gardner-Denver Co. that an arbitrator's finding of no discrimination could not bar a Title VII lawsuit and that very little deference need be given to the arbitrator's decision in such a lawsuit because the congressional policy of Title VII vested final responsibility for the enforcement of its provisions in the federal courts. The Court also held that the statutory scheme would not permit an election of remedies doctrine to be applied in this area. Although it might be contended that the decision in Alexander forecloses NLRB consideration of Title VII issues, careful analysis of the Alexander opinion reveals that it actually lends

---

142 For a discussion of the apparent difference between the 8(a)(3) standard, which is sometimes said to require a finding of intent, and the Title VII standard, which does not, and a conclusion that the difference is more "apparent" than real, see Comment, supra note 96, at 43-44. But cf. Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971).

143 415 U.S. 36 (1974). A discharged employee brought a grievance proceeding contesting his discharge under the collective bargaining agreement without making an explicit claim of racial discrimination until the final prearbitration stage. (The collective bargaining agreement contained a general no-discrimination clause.) The arbitrator ruled that the employee had been discharged for just cause without making reference to the petitioner's claim of racial discrimination. The employee then filed a Title VII lawsuit, after receiving his right-to-sue letter from the EEOC, which was dismissed by the district court on the ground that the claim of racial discrimination had been submitted to and adversely decided by the arbitrator. The Alexander decision finally resolved an issue which had received disparate treatment in the circuits. See Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973); Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd without opinion by an equally divided Court, 402 U.S. 689 (1971); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). See also Gould, Labor Arbitration of Grievances Involving Racial Discrimination, 118 U. Pa. L. Rev. 40 (1969); Platt, The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964, 3 Ga. L. Rev. 398 (1969); Note, Judicial Deference to Arbitrators' Decisions in Title VII Cases, 26 Stan. L. Rev. 421 (1974).

144 415 U.S. at 44.
support to a proposal for increasing NLRB involvement in the employment discrimination field.

The *Alexander* Court was concerned with the fact that arbitrators generally apply the "common law of the shop" formalized in the contract and do not have the authority to invoke the public "law of the land" which might conflict with the bargain reached by the parties. These considerations do not apply to the NLRB since it has a duty to enforce federal laws and cannot, under *Mansion House*, participate in racial discrimination by compromising a grievance. The Court also refused to let an arbitrator’s decision preclude a Title VII lawsuit because the national labor policy expressed in the *Steelworkers Trilogy* would have required the courts to give great deference to the arbitrator’s award, in order to ensure the effectiveness of the arbitration clause as an instrument for preserving "labor peace." This would violate the policy behind Title VII requiring the federal courts to be the final interpreters of Title VII law. Having the NLRB litigate and consider Title VII issues would not violate this policy. All NLRB decisions are reviewable by the circuit courts of appeal, as are NLRB enforcement orders, so that the federal courts would rule on the Title VII issues decided by the NLRB. Thus, *Alexander* does nothing to foreclose NLRB consideration of employment discrimination issues. There is none of the danger of compromise that exists in arbitration since a governmental agency cannot be a party to discrimination under *Mansion House*.

At least one other federal court has imposed the law of Title VII on the labor arbitration process to the extent of upholding an employer refusal to arbitrate a seniority grievance

---

145 *Id.* at 53.
146 For a discussion of this point see text accompanying note 92 *supra.* “[T]he Board has an obligation in construing the acts which it administers to recognize and sometimes reconcile coexisting and perhaps inconsistent policies embodied in other legislation.” *Western Addition Community Org. v. NLRB,* 485 F.2d 917, 927 (D.C. Cir. 1973), *cert. denied sub nom., Emporium Capwell Co. v. Western Addition Community Org.,* 415 U.S. 913 (1974).
147 See text accompanying note 30 *supra.*
150 Obviously, the circuit court's decision would be as binding on the NLRB for cases within that circuit as they would be on federal district courts in that circuit.
151 473 F.2d 471 (8th Cir. 1973). Arbitrators are chosen in a private process, by the parties, to compromise their differences. The NLRB is a public agency with public obligations.
when whites who were laid off under a new affirmative action seniority plan had more departmental, but less plantwide, seniority than the blacks who were not laid off. The district court held that the dispute was not arbitrable since the arbitrator had no power to alter a system commanded by the law of Title VII. Title VII and not the collective bargaining agreement, was held to govern the dispute.

Yet, even arbitration may be useful in resolving some Title VII issues and it should not be conclusively ruled out of the equal employment opportunity process if the paramount purpose of Title VII is to eliminate employment discrimination. Arbitration can be a useful first step in a discrimination charge. If the collective bargaining agreement contains a no-discrimination clause which tracks Title VII language a particular arbitrator may be willing to look to Title VII law. As long as a particular claim is individual and not likely to involve large class issues an arbitration award may be the most efficient and effective remedy. As long as the courts can still consider the matter de novo after Alexander, there need be no worry that a just claim will go unremedied. Title VII encourages the "consideration of employment-discrimination claims in several forums" because the elimination of employment discrimination is to be given the "highest priority."

Thus, reading Alexander, Emporium, and Mansion House together it can be concluded that Title VII is "preemptive" of any conflict it presents with the NLRA and it can, by its incorporation into the NLRA, give new life to the NLRA as a vehicle for enforcement of employment civil rights. If the Emporium incorporation of Title VII into section 7 is fully adopted by the NLRB and the other circuits, NLRB involvement in employment discrimination will be vastly expanded. Although this new NLRB function is not without problems that must be resolved before the two acts can be worked into a harmonious scheme of equal employment opportunity en-

\begin{references}
\item[153] E.g., CLIO Education Ass'n, 61 Lab. Arb. 37 (1973). Under the Steelworkers doctrine, text accompanying note 147 supra, arbitrators must "interpret" the contract and can choose to do so by reading in the law.
\item[154] 415 U.S. 36, 47 (1974). This could raise an interesting question whether the employer would be entitled to a de novo hearing under Title VII, if he could argue that the arbitrator, in finding against him, had not considered the law.
\item[155] Id.
\item[159] 473 F.2d 471 (8th Cir. 1973).
\item[160] See text accompanying notes 167-68 infra.
\end{references}
forcement, this new function is certainly worth pursuing in order to strengthen such enforcement.

IV. CONCLUSION: A FRAMEWORK FOR RECONCILING TITLE VII AND THE NLRA TO PROMOTE LABOR PEACE AND EQUAL EMPLOYMENT OPPORTUNITY

The National Labor Relations Act has been the instrument for reconciling conflicts between employers and employees. Its agency, the NLRB, has become expert in managing the tensions between two parties who frequently have competing interests. The Civil Rights Act protects the rights of individual employees to equal employment opportunity which brings those employees into conflict with both employers and other employees. This Comment has explored how one of the interests of employees bargained for collectively, but intended to protect the individual worker—seniority—may operate to deny some workers their rights under Title VII. It has been suggested that some of the machinery of the NLRA could be used to help reconcile these competing interests, rather than exacerbate them. Such a proposal is not without its own difficulties, however, and before the NLRA can realize its full potential as a promoter of employment civil rights, those difficulties will have to be dealt with by Congress or the courts, with perhaps a major reassessment of national labor policy. The holding of Mansion House may have already entangled the NLRB in employment discrimination litigation. If so, the result is not entirely inconsistent with the NLRA’s history as a watchdog over race relations in the labor field.

The framework for reconciling the two Acts and for meeting the strict requirements of Title VII can be stated simply: If the primary policy is the amelioration of discrimination in employment then the most effective means should be used to achieve that purpose. As long as there are several possible ways to redress this problem and they can be made to supplement, rather than conflict with, each other, the law should favor the use of many remedies. The propriety of the NLRA as a

161 Others have made similar suggestions. B. MELTZER, LABOR LAW 908 (1970); Cooper & Sobol, supra note 16 at 1679. Still others have argued vigorously against them. Comment, supra note 96. One would guess that the NLRB might itself oppose such suggestions since it claims severe overwork already.
162 For a discussion of this history, see text accompanying notes 76-110 supra.
mechanism for enforcing labor civil rights is suggested by three sources: (1) the constitutional requirement of Mansion House, (2) the history of NLRA involvement in race relations in the labor field, and (3) federal court modification of collective bargaining agreements bargained for under, and heretofore protected by, the NLRA where those agreements conflict with Title VII.165

Rather than waiting for a court challenge to a collective bargaining agreement, the NLRB machinery can be used to provide efficient and expert remedial and monitoring assistance to equal employment opportunity in two ways. First, since collective bargaining agreements in violation of Title VII will be struck down in later challenges, the NLRB can use its certification, election, 8(a)(5), and 8(b)(3) machinery to prevent agreement to a contract that is in violation of the Act. Second, the Board could utilize its unfair labor practice machinery to provide affirmative relief for employment discrimination not contained within a collective bargaining agreement, rather than simply withholding remedies from a union or employer who discriminates.166

Several problems remain. First, the language of section 7 protects collective, not individual rights, so seniority systems which do not have an adverse effect on an identifiable group of workers may not be covered by the NLRA. This problem is met by the fact that Title VII remains to protect all individual employment rights;167 the NLRA is merely supplementary. Second, having the NLRB look into the substance of collective bargaining agreements is contrary to the governmental "hands-off" policy articulated in the history and case law of the NLRA.168

Thus, a rethinking of national labor policy and priorities may be necessary. Since the enactment of the NLRA the government has intruded into the labor-management relationship increasingly and the decision of Mansion House may signal increasing NLRB involvement in union and management areas generally thought to be outside the realm of the NLRA.169

There is an even more compelling reason for NLRB involvement in the consideration of the substantive terms of the

165 For a further discussion, see text accompanying notes 44-46 supra.
166 If concerted activity on behalf of racial equality in employment is treated as a protected activity under § 7, the Board could prevent a seniority plan which had a discriminatory impact from being agreed to. The "good faith" requirement of §§ 8(a)(5) and 8(b)(3) could be read as coextensive with Title VII standards, allowing the NLRB to require bargaining consistent with them.
169 Such involvement may eventually lead to a form of tri-partite bargaining, with a government agency or minority group representative involved in the collective bargaining process in order to protect minority civil rights.
collective bargaining agreement and employer and union discriminatory practices. While the employer-employee battleground may have subsided under the NLRA, a new battle threatens to erupt—the result of black versus white employee tensions.\textsuperscript{170} It is possible that with some alteration in the focus of national labor policy, the NLRA's procedures can be used to avoid this eruption. When, in the case of seniority plans, groups of white workers and groups of black workers are pitted against each other, the bargaining and conciliation process, with Title VII incorporated, can be used to promote labor peace in the earliest stages of the process: before the contract is negotiated, before layoffs occur, before racial tensions and backlash divide the workplace, and before the time-consuming and expensive process of settling these issues by means of lawsuits is begun.

This Comment has argued, in summary, that if employment discrimination is to be given the highest remedial priority, many forums should be made available to those aggrieved. Title VII precedent, however, has been inadequate to remedy discrimination in the context of complex labor situations such as seniority systems. The NLRB already has expertise in the area of discriminatory discharges, and the Board could expand its role to encourage and provide mechanisms for reconciliation before racial tensions reach crisis proportions.

The policy is clear. Under \textit{Mansion House} and \textit{Alexander} the goals of Title VII are of primary concern to our nation. With the NLRB inevitably entwined in Title VII law\textsuperscript{171} and the ever-present possibility of conflict in the two acts, the NLRB, consistent with Title VII,\textsuperscript{172} could take a more aggressive role in the area of civil rights in labor relations and thereby promote the purposes of both Acts: labor peace and equal employment opportunity.

\textsuperscript{170} See Purcell & Rodgers, \textit{Young Black Workers Speak Their Minds}, 14 Calif. Management Rev., Summer 1972, at 45, 50, suggesting that racial tensions could affect the efficiency of the plant where blacks felt discriminated against and whites felt that blacks were getting preferential treatment.

\textsuperscript{171} See text accompanying notes 111-17 supra.

\textsuperscript{172} Using guidelines suggested by such cases as \textit{Mansion House}, \textit{Emporium}, and \textit{Alexander}, the NLRA could be used to supplement and complement Title VII by incorporating it and using its standards for finding employment discrimination.