NOTES

ADMINISTRATIVE ENFORCEMENT OF THE RIGHT TO FAIR REPRESENTATION: THE MIRANDA CASE

In Edward G. Budd Mfg. Co. v. NLRB,¹ the Third Circuit declared that an employer does not commit an unfair labor practice by discharging "an employee for a good reason, a poor reason, or no reason at all"² provided the discharge was unrelated to union activity. Miranda Fuel Co.³ gave the National Labor Relations Board an opportunity to decide whether a union's similarly arbitrary treatment of a member for reasons unrelated to union membership⁴ is also not an unfair practice.

I. THE EXTENT OF UNION POWER OVER WORKERS' RIGHTS

Collective bargaining agreements, often referred to as "industrial legislation,"⁵ prescribe detailed rules for the employment relationship, typically controlling wages, working conditions, and criteria for gaining and maintaining employment.⁶ Both in creating and in administering these agreements, decisions by labor unions bind individual workers. Under section 9(a) of the National Labor Relations Act⁷ the majority union is the exclusive representative of all employees in the appropriate collective bargaining unit.⁸ After the union has consummated the collective bargaining agreement, its influence over working conditions continues through its power to process individual grievances⁹ and perhaps through its main-

¹ 138 F.2d 86 (3d Cir. 1943) (dictum).
² Id. at 90.
⁴ 140 N.L.R.B. at 197 (dissenting opinion).
⁶ Thus, by ruling that shops may hire no new workers until employees formerly laid off are rehired, a union can restrict entry into a trade.
⁸ Normally an employer cannot separately contract with an individual worker, even to grant him specially favorable treatment. J. I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).
tenance of hiring halls 10 or its power over seniority rights.11 The union’s power to collect and disburse funds also necessarily affects each member.

Investigations have revealed that occasional abuses of union power have rendered individual workers helpless victims of arbitrary treatment.12 Since the power of a statutory bargaining agent is derived largely from legislation,13 governmental authority might be expected to insure its fair exercise. But attempts to protect individual workers must balance the individual’s claim to impartial treatment and the political,14 social, and legal15 pressures against regulating unions.

Some governmental safeguards against unfair representation have indirectly protected individual rights by insuring a democratic atmosphere in unions. For many years state courts have remedied arbitrary disciplining of members,16 ordered accounting of funds,17 and required and super-

10 Obtaining workers through union hiring halls is common in the trucking and shipping industries, or wherever labor is only temporarily employed. The legality of these halls, if operated in a nondiscriminatory manner, was affirmed in Local 357, Intl’l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961). See generally Rothman, The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 VA. L. Rev. 871 (1962).


13 Under § 9(a) of the National Labor Relations Act, a majority union is the statutory representative of all members of the bargaining unit. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1958). The union's position is strengthened by other legislation, such as the general prohibition of injunctions against labor unions, Norris-LaGuardia Act § 1, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958), the prohibition against elections within one year after a prior election, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c) (3) (1958), and the requirement that an employer recognize a union for a "reasonable time" after certification, Brooks v. NLRB, 348 U.S. 96 (1954).

14 Total membership in American labor unions was 18.1 million in 1960. Steinberg, The Statesman's Yearbook 625 (1963). Political education and political "action" committees focus the political responses of these workers. Unions have been understandably opposed to governmental regulation of their internal affairs.

15 American jurists have traditionally avoided interference with the internal workings of nonprofit organizations. See Chafee, The Internal Affairs of Associations Not for Profit, 43 HARV. L. Rev. 993 (1930).

16 See, e.g., Rueb v. Rehder, 24 N.M. 534, 174 Pac. 992 (1918) (reinstatement of employees denied a fair hearing); Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931) (reinstatement of members expelled for suing union officers); Savard v. Industrial Trades Union, 76 R.I. 496, 505, 72 A.2d 660, 665 (1950). See generally Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 YALE L.J. 175 (1960). The theory of these suits usually equates a union constitution with a contract between union and members. Thus, an equity court enforcing this contract is fulfilling its traditional role of protecting property rights. However, a court may also hold a union constitutional provision invalid as against public policy. Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921).

17 Probably the most famous situation involving an accounting of funds concerned the fight of a minority in a local of the hod carriers union against an entrenched, corrupt leadership. The New York Supreme Court, Ulster County, required both an accounting and elections in this controversy in Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941); see LABOR RELATIONS AND THE LAW 95-102 (Wollett & Aaron, 2d ed. 1960). See also Wilson v. Miller, 194 Tenn. 390, 250 S.W.2d 575 (1952).
vised elections for union officers. In addition, many states have dealt with the internal affairs of unions by legislation, some with objectivity and others with obvious antiunion overtones. More recently the federal government embarked upon statutory regulation of internal union affairs in the Labor-Management Reporting and Disclosure Act of 1959. Although this act seeks to protect individual rights primarily by compelling reporting rather than by direct regulation, it also safeguards union democracy in a bill of rights of union members that is enforceable by civil suit.

Before this legislation, a frequently employed protection for individual workers had been judicial enforcement of the "right to fair representation." In Steele v. Louisville & N.R.R., the Supreme Court recognized an action by a nonunion member of a bargaining unit against the majority representative under the Railway Labor Act to enjoin the performance of a collective bargaining agreement which discriminated against the plaintiff because of his race. Holding that the lower court had jurisdiction to grant the injunction, the Court reasoned that a duty of "fair representation" accompanied union powers delegated by the act.

The Steele doctrine has been extended to unions operating under the National Labor Relations Act and to unions which had obtained representative status from the consent of every member of the bargaining unit rather than by majority vote as described in the statute. Moreover, the doctrine has generated causes of action for both equitable and compensatory relief in cases of discrimination.


24 Id. at 199-202.
26 In Syres v. Oil Workers' Int'l Union, supra note 25, the circuit court had relied on the reasoning of Williams v. Yellow Cab Co., 200 F.2d 302, 305 (3d Cir.), cert. denied, 346 U.S. 840 (1952), that if all in the proper unit were members of the union, that union did not derive its authority as representative from § 9 of the NLRA so that the Steele reasoning did not apply.
tion for other than racial reasons, and unions encounter the duty of fair representation in the execution, as well as in the creation, of collective bargaining agreements.

The National Labor Relations Board has also encouraged "fair representation" by threat of decertification on the theory that the Board may police its own grants of authority. Although the Board has in fact decertified an unfair union to insure future bargaining freedom the mere threat of decertification usually suffices.

The effectiveness of the presently available remedies for unfair representation is questionable because of the delay, cost, and complexity of judicial enforcement and the likely failure of actual decertification to aid a persecuted minority unless it gains majority status in the unit. One possible solution is to invoke the government prosecuting machinery as well as the relative speed, flexible proof procedures, and expert knowledge of the NLRB to enforce directly the union duty of fair representation under its power to prevent unfair labor practices.

II. UNFAIR REPRESENTATION AS AN UNFAIR LABOR PRACTICE

A. The Miranda Case

Because many of the Miranda Fuel Company's truck drivers were not needed during the slack summer season, the collective bargaining agreement permitted drivers whose low seniority ranking did not entitle them to work during the summer to have a leave of absence from April 15 until October 15. The contract expressly preserved the seniority rating of drivers returning by October 15, and the company agreed to accept the union's certification that a driver returned in time to retain his seniority rights. Lopuch, a worker with sufficient seniority to work during


the summer, was nonetheless granted a personal leave of absence by the employer from April 12 to October 12 in order to help his widowed sister-in-law. His return to work was delayed until the end of October because of illness, but the union admitted that his late return did not justify a reduction in seniority. However, under pressure from other employees the union caused the employer to drop Lopuch to the bottom of the seniority list for leaving work three days before April 15. Lopuch complained to the National Labor Relations Board. Nothing in the record indicates that the union's action was designed to discipline Lopuch for conduct related to his union membership.

The original Board decision held  that the delegation of the employer's power over seniority to the union resulted in company and union violations of the National Labor Relations Act. Under the same sections of the act, the Board alternatively held that the company and union discriminated against the complaining worker by reducing his seniority for a reason unauthorized by the contract. The April 15 date in the contract did not bind Lopuch since he left pursuant to a special leave of absence granted by the employer and not because he lacked employment opportunity. Therefore, the Board found that the union request was arbitrarily based on the whims of other union members. The Second Circuit enforced the order on the narrow ground that union reduction of seniority for a reason not authorized by the contract unlawfully discriminated.

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35 Section 8(a):
It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;


37 The Board relied on its prior holding in Pacific Intermountain Express, 107 N.L.R.B. 837, 844-45 (1954), enforced, 228 F.2d 170 (8th Cir. 1955), that delegating to the union any power to determine seniority is per se illegal.

38 125 N.L.R.B. at 455-57.
against the worker to encourage union membership. The Supreme Court, at the request of the NLRB, remanded the case to the Board for further consideration in light of its decision in Local 357, Int'l Bhd. of Teamsters v. NLRB that hiring halls are not illegal per se.

On remand, the Board acknowledged that the employer's delegation of power over seniority to the union was not illegal per se. However, the majority now held that the arbitrary reduction of seniority by the union violated sections 8(b)(1)(A) and 8(b)(2), and that the company transgressed sections 8(a)(1) and 8(a)(3) by its participation.

The Second Circuit, in a two-to-one decision, denied enforcement of the Board's order. Chief Judge Lumbard and Judge Medina agreed that the evidence was insufficient to find the discrimination needed to support violations of sections 8(b)(2) and 8(a)(3), since the parties might in good faith have viewed their actions as within the contract provisions. Only Judge Medina considered the workers' right to "fair representation" and regarded it as not protected by sections 8(b)(1)(A) and 8(a)(1) against union and employer interference.

B. The Board's Finding of 8(a)(1) and 8(b)(1)(A) Violations

The Board asserted that since section 9 requires unions to represent employees fairly, section 7 "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." Therefore, the Board found that by treating the complaining employee unfairly the union had violated section 8(b)(1)(A), which prohibits labor unions from restraining employees' exercise of section 7 rights. Moreover, although the duty
of fair representation does not directly bind an employer, the Board in Miranda predicated the employer's violation of section 8(a)(1) wholly on his participation in the union's interference with the employee's right to fair representation.49

The dissenters to the NLRB opinion denied that an unfair labor practice was involved. But even assuming that unfair representation may be an unfair labor practice, they balked at the threshold finding of arbitrary discrimination in Miranda.50 Their dispute, however, may not involve the factual determination so much as the permissible scope of inquiry. They would distinguish the arbitrary action in Miranda from clearly antisocial discrimination, such as that based on race.51 A similar distinction underlies the reluctance of federal courts to enforce a union's duty of fair representation under the Steele52 doctrine when the alleged unfairness is less blatant than discrimination based solely on race or union activity.53 Language in Steele compares the union's duty with the obligation of evenhandedness imposed by the equal protection clause on state legislation.54 Following this analogy, courts have accorded unions a presumption of fairness similar to that given state legislatures.55 However, everyday union decisions are not analogous to state legislation, and judicial self-restraint in finding discrimination may merely demonstrate that courts are institutionally ill-suited to distinguish between fair and unfair treatment in a complex industrial context.56 If the Board is to enforce em-

1963), the union may exercise reasonable discretion in determining not to press all grievances against the employer, see Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 186 (2d Cir. 1962); Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 790 (D. Md. 1959). Therefore, at most the employee's right against the union might be to have the union review his grievance fairly. But if this right to fair representation is found in §7, a similar gloss would apparently attach to union representation in any collective activity. The General Counsel's indirect theory in Hughes thus seems essentially identical to Miranda's direct incorporation of a general right to fair representation into §7.

49 140 N.L.R.B. at 185-86.
50 140 N.L.R.B. at 200.
51 Ibid.
52 See notes 23-28 supra and accompanying text.
53 In Colbert v. Brotherhood of R.R. Trainmen, 206 F.2d 9, 13 (9th Cir. 1953), cert. denied, 346 U.S. 941 (1954), the court refused relief under Steele against an allegedly unfair seniority agreement. Relying on Ford Motor Co. v. Huffman, 345 U.S. 330 (1952), the court allowed a wide range of reasonableness to the statutory bargaining agent in serving the unit it represents. The court continued:

We think appellants fail to appreciate the essential difference between the suit laid in the complaint and cases wherein collective bargaining agreements containing invidious prescriptive factors that are inimical to statutory or constitutional right, such as racial discriminations, are presented to the court. . . . Seniority among railway workers is fundamentally and wholly contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right.


56 Id. at 1357-58.
employees' rights to fair representation, its habitual close examination of subtle factual issues would probably impel it to discard the Steele doctrine's limits on the judicial scope of inquiry. However, the resultant intrusions upon numerous aspects of union self-government that are presently regulated in less detail would significantly alter the statutory authority of unions without specific legislative authorization.

Neither the plain meaning of section 7 nor its legislative history suggests a congressional intent to include a right to fair representation. The terms of section 7 guarantee the employees' right to organize, bargain collectively, and engage in other collective activity. All of these rights involve employees' action in concert with other workers to increase their bargaining power vis-à-vis employers; none seems addressed to union interference with equal rights within employee organizations. Moreover, the legislative history confirms that section 7's statement of labor's right to bargain collectively was originally designed exclusively to mitigate the disparity in bargaining power between individual workers and corporate employers, a particularly grave inequity during the Great Depression. The Norris-LaGuardia Act, enacted specifically to rectify the prevailing economic imbalance of power, generally immunized workers' collective activities from injunctions which previously had posed an insurmountable obstacle to labor's self-organization. Shortly thereafter, the National Industrial Recovery Act established the statutory right of employees to self-organization in language similar to the subsequent National Labor Relations Act, but weak enforcing agencies destroyed the act's effectiveness. The National Labor Relations Act, attempting to remove this weakness, recognized employees' right to act collectively in section 7 and secured it by prohibiting employer interference in section 8(1). Congress was preoccupied throughout this period with the encouragement of collec-

57 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . . " National Labor Relations Act §7, 49 Stat. 452 (1935), as amended, 29 U.S.C. §157 (1958).
61 "Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . " National Industrial Recovery Act, ch. 90, §7(a) (1), 48 Stat. 198 (1933).
64 Ibid.
tive bargaining; it never purported to regulate unions' control over individual workers.

The 1947 amendments to the NLRA extended the NLRB's unfair labor practice jurisdiction for the first time to violations by unions. The bill reported out of the Senate Committee prohibited only union interference with the employer's selection of his own representatives. A minority of the committee, led by Senator Taft, objected that the prohibition was too limited in light of the many instances of union coercion and intimidation of employees that investigations had revealed. This group concluded that, once the bill established the principle of union unfair labor practices, unions should be subject "to the same rules as the employers." With this objective in mind, Senator Ball proposed an amendment that was essentially adopted as the present section 8(b) (1) (A), prohibiting unions from restraining or coercing employees in the exercise of their section 7 rights. The legislative history stresses precise correlation of union unfair labor practices with the corresponding regulation of employer interference with section 7 rights. Since section 8(a) (1) does not prevent arbitrary employer discipline that is not motivated by an employee's union status, the union's similar activity does not seem within the proscription of section 8(b) (1) (A).

This legislative development belies the Board's assertion in Miranda that section 8(b) (1) (A) circumscribes union activities more narrowly than section 8(a) (1) restricts employers. In asserting that the act imposes

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66 This bill would prohibit unions from interfering with an employer's right to join employers' associations or from compelling employers to discharge their labor relations representatives. S. REP. No. 105, 80th Cong., 1st Sess. 21 (1947).
67 S. REP. No. 103, 80th Cong., 1st Sess. 50 (1947).
69 S. REP. No. 105, 80th Cong., 1st Sess. 50 (1947). (Emphasis added.)
70 "[T]he purpose of the amendment . . . is to insert an unfair-labor practice for unions identical with the first unfair labor practice prohibited to employers in the present act . . . ." 93 CONG. REC. 4016 (1947) (remarks of Senator Ball). (Emphasis added.) Arguably the act applies a less stringent restriction on unions than on employers, because it prohibits only union activity that "restrains" or "coerces" employees, whereas it prohibits employer activity which merely "interferes" with the exercise of § 7 rights. See NLRB v. Drivers Local Union 639 (Curtis Bros.), 362 U.S. 274, 285 (1960); cf. 93 CONG. REC. 4019-22 (1947) (remarks of Senator Ives). Compare National Labor Relations Act § 8(a) (1), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (1) (1958), with National Labor Relations Act § 8(b) (1) (A), added by 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b) (1) (A) (1958). However, employer interference that did not also restrain and coerce had never been held illegal and the Conference Committee's elimination of the word "interference" in § 8(b) (1) (A) merely codified the long-standing interpretation of § 8(a) (1). H.R. REP. No. 510, 80th Cong., 1st Sess. 43 (1947). See also International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 738 (1961).
71 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); see 140 N.L.R.B. at 184-85.
72 140 N.L.R.B. at 185.
different duties on unions and employers, the Board apparently rests on
the union's duty of fair representation as developed by the Steele
doctrine under section 9 of the act. This union duty has no counterpart among
employer duties. Section 9, however, does not automatically permeate all
provisions of the act, including section 7. Steele, under the Railway
Labor Act, predicated the grant of equity relief on the absence of adminis-
trative or other remedies, a necessary precondition to the exercise of
general equity powers. The adoption in Syres v. Oil Workers' Int'l
Union of the Steele gloss into the National Labor Relations Act, accom-
plished in a per curiam reversal on the authority of Steele and its Railway
Labor Act progeny, presumably relied on the nonexistence of an adminis-
trative remedy for unfair representation, even though the general concept
of union unfair labor practices had been in the act for several years.
Steele doctrine cases under the National Labor Relations Act subsequent
to Syres have also intimated that unfair representation alone cannot
support a Board action. Similarly, these cases until recently have not
suggested complete preemption of the judicial cause of action for unfair
representation, a result that would probably attach if section 7 embodied
a right to fair representation, since the current preemption rule precludes
judicial jurisdiction of any action even arguably subject to the unfair labor
practice jurisdiction of the NLRB. The unarticulated premise of this

73 Ibid.
75 350 U.S. 892 (1956), reversing per curiam 223 F.2d 739 (5th Cir. 1955).
76 Cf. 223 F.2d at 747 (dissenting opinion).
77 See, e.g., Alexander v. Pacific Maritime Ass'n, 314 F.2d 690, 692 (9th Cir.
78 See, e.g., Alexander v. Pacific Maritime Ass'n, supra note 77, at 692; Duran-
note 77, at 369 & n.6 (several). Compare Humphrey v. Moore, supra note 77, at 377
(separate opinion of Harlan, J.) (reserving judgment on the preemption question);
also Blumrosen, The Worker and Three Phases of Unionism: Administrative and
Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435 (1963);
Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum.
79 See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959);

The Court has consistently held that federal preemption does not prevent state
action to prevent or remedy acts of violence. International Union, UAW v. Russell,
356 U.S. 634 (1958) (suit for damages); Youngdahl v. Rainfair, Inc., 355 U.S. 131
(1957) (suit for injunction); UAW v. Wisconsin Employment Relations Bd., 351
U.S. 266 (1956) (suit for injunction). This exception at one time seemed based
on a distinction between the Board's remedies and those available in the courts.
See International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 621 (1958). But the
majority's language in San Diego Bldg. Trades Council v. Garmon, supra at 247-48,
has limited this exception to cases involving actual or threatened violence. But
see id. at 249-54 (Harlan, J., concurring). See also Local 100, United Ass'n of
Journeymen v. Borden, 373 U.S. 696-97 (1963). In state causes of action the
policy of primary jurisdiction is reinforced since congressional intent to provide
a uniform and exclusive remedy may completely preempt the application of state law
to the merits. See Garner v. Teamsters Union, supra at 499-501; Davis, Adminis-
judicial development is that Steele doctrine cases are not cognizable by the Board.

A preference for judicial safeguards against unfair representation also characterizes legislative consideration of the problem, even though the Taft-Hartley Act in 1947 empowered the NLRB to regulate certain unfair practices of unions. The 1947 Congress intentionally rejected an amendment to the NLRA that would have directly enforced workers' rights to fair representation by a section 8 unfair labor practice proceeding. In the House, the Hartley Bill emerged from committee with a new section 7(b), which guaranteed union members certain freedoms from unfair treatment by their union. Although this section 7 right would have concentrated on impartiality in internal union management, it apparently would also have encompassed the right to be free from union unfair conduct involving employer participation against individual employees—the right that the Board majority now finds in section 7. Yet this broad amendment to section 7 was expressly rejected by the Conference Committee and the more restricted Senate amendment was adopted. Furthermore, the years immediately after the passage of Taft-Hartley witnessed the unsuccessful introduction of several bills designed to insure fair treatment of members by regulating the internal affairs of unions. When Congress finally did regulate unions' internal activity in the Labor-Management Reporting and Disclosure Act of 1959, it proclaimed a members' bill of rights, including safeguards against arbitrary union discipline and made them enforceable by private civil action in federal district courts rather than by a section 8 unfair labor practice proceeding.

81 "Members of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization, to freely express their views either within or without the organization on any subject matter without being subjected to disciplinary action by the organization, and to have the affairs of the organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members." H.R. Rep. No. 245, 80th Cong., 1st Sess. 52 (1947). (Emphasis added.) Cf. id. at 77 (minority report denouncing excessive federal control of unions' internal affairs).
82 See text accompanying notes 66-70 supra.
83 H.R. Rep. No. 510, 80th Cong., 1st Sess. 7 (1947). The American Civil Liberties Union had also presented to the House Committee a very detailed bill regulating discrimination in unions. See Hearings Before the House Committee on Education and Labor on Bills To Amend and Repeal the National Labor Relations Act, 80th Cong., 1st Sess. 3633-43 (1947).
84 The most restrictive was the American Civil Liberties Union bill originally proposed to the House Committee in 1947. See Hearings, supra note 83, at 3633-43 (1947). See generally Aaron and Komaroff, Statutory Regulations of Union Affairs—I, 44 I.L.L. Rev. 631, 636-49 (1949).
Traditionally, the ultimate function of NLRB jurisdiction has been to protect "public" rights by removing impediments from the collective bargaining relationship, the enforcement of private rights being only incidental. The policy decision in the LMRDA to have the judiciary rather than the NLRB redress "private" wrongs committed by unions against individual members thus comports with this overriding concept. The union’s introduction of the employer as the disciplining agent, as in Miranda, should not by itself alter the essentially private character of the union-employer dispute so as to remove it from the scope of the LMRDA. If the employer’s participation in the union discipline should also have a demonstrable impact on the collective bargaining relationship, accepted unfair labor practices seem sufficiently broad to permit the Board to protect the public interest affected. Moreover, although the LMRDA’s requirements of notice and fair hearing before union discipline of individual workers are procedurally oriented, courts obviously must attribute some substantive content to them to prevent unions from masking truly groundless discipline behind the formal statutory procedures. Hence, if section 7 of the NLRA embodied a right to fair representation enforceable in unfair labor practice proceedings, parts of the labor bill of rights would be redundant and, due to its cumbersome and expensive judicial enforcement, of little value to aggrieved employees. The contemporaneous introduction of new unfair labor practices in the Landrum-Griffin Act suggests that the legislators were critically considering both judicial and administrative enforcement measures when they chose the judicial channel in the LMRDA to protect employees from union unfairness. If Board jurisdiction were to exist, it probably would not not
preempt the parallel LMRDA substantive provisions with their specific grants of judicial jurisdiction. However, the enactment of these judicially enforceable rights seems incompatible with overlapping jurisdiction in the Board, especially in light of the congressional policy favoring uniform application of the National Labor Relations Act through the primary jurisdiction of a centralized administrative agency with specialized procedures. Admittedly, certain factual situations could give rise to either a judicial action under the LMRDA or a Board proceeding under an accepted unfair labor practice. But expansion of section 7 to encompass the previously unannounced unfair practice of union unfair representation unnecessarily accentuates the conflict.

Still another possible judicial action lies under section 301 to redress union unfair representation in administering collective bargaining contracts. In Smith v. Evening News Ass'n, the Supreme Court established an important exception to the Board's primary jurisdiction by upholding state court jurisdiction over a section 301-type action even though the alleged facts also constituted an unfair labor practice. The direct regulation of the internal affairs of unions in the ultimately enacted bill of rights, which was adopted by only one vote on the Senate floor after rejection by the Senate Committee. Hickey, The Bill of Rights of Union Members, 48 Geo. L.J. 226, 227 (1959). See also Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960).

For example, if a union were groundlessly to induce an employer to discharge an employee for failure to obey union rules, the union would violate both NLRA § 8(b) (2) and LMRDA § 101 (a) (5) (arbitrary discipline unlawful).

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

Smith v. Evening News Ass'n, supra at 196. In Smith, Board and court jurisdiction could not possibly conflict since the six-month statute of limitations on unfair labor practices
Court also for the first time extended section 301 jurisdiction to suits by individual employees, although they were not parties to the collective agreement.104 But the Court reserved the question of an individual employee's standing to sue under the specific collective agreement involved in Smith.105 Similar contracts have generally been held not to grant individual employees even the right to court enforcement of arbitration and grievance procedures,106 despite the paramount policy favoring nonjudicial settlement of industrial disputes.107 Parties to collective agreements probably do not intend to confer upon individual employees the right to enforce the collective bargaining contract judicially, especially since repetitious or trivial claims would restrict the desired flexibility of union and employer to adapt the contract to changing circumstances.108 However, in Humphrey v. Moore,109 the Supreme Court by reaching the merits assumed that an employee had standing to sue both his union and employer under section 301. The plaintiff failed to establish breach of a limitation on the contracting parties' power to integrate seniority lists after a corporate merger, and also could not sustain his claim that the union breached its duty of fair representation. The majority opinion discusses the union's breach of duty to carry out the contract impartially as an element of plaintiff's contract claim.110 Although an employee's standing to sue his union under section 301 for unfair administration of the contract without joinder of the employer may not necessarily follow from Humphrey,111 at

had passed prior to the court action, id. at 197 n.5, and even the NLRB urged that judicial jurisdiction be sustained, id. at 197-98. The Court refused to indicate the disposition it would make in a case of actual "conflict" between Board and court jurisdiction. Perhaps future decisions will restrict Smith to cases in which the procedural posture similarly precludes Board jurisdiction over the particular action. 104 Smith v. Evening News Ass'n, supra note 103, at 200. See also General Drivers Union v. Riss & Co., Inc., 372 U.S. 517 (1963) (per curiam).

105 Smith v. Evening News Ass'n, supra note 103, at 201 n.9.


109 Supra note 108.

110 84 Sup. Ct. at 368-69. Justices Goldberg, id. at 375-76, and Harlan, id. at 377, attribute to the majority the direct incorporation of protection against unfair representation into a § 301 breach of contract action, although neither would agree with this doctrine.

111 Mr. Justice Harlan seems to permit the employee standing to sue the employer only because the union has refused to enforce the collective rights of employees against the employer. See id. at 377.
least those cases in which the employer is a party are now cognizable by
the courts, whether or not the Board should also assume jurisdiction.

Union unfair labor practices have been enforced by the Board since
1947; only now is the Board claiming authority over unfair representation
cases. Although the indirect legislative and judicial authorities available
are not decisive, they tend to refute the proposition that section 7 includes
rights to fair representation. In the absence of conclusive guides, the
consistent pattern of enforcing members' private rights against unions in
the courts looms as an additional factor militating against the Board's
sudden expansion of its section 7 jurisdiction to absorb fair representation
rights without a clear congressional mandate.

C. The Board's Finding of 8(a)(3) and 8(b)(2) Violations

The Board, in reaffirming its finding of an unfair labor practice, rea-
soned that the union's demand for reduction of the complainant worker's
seniority was not supported by the collective bargaining contract.\footnote{140 N.L.R.B. at 188.} Although the Board did not justify its conclusion that the employer's conduct
encouraged union membership, it probably reasoned that the employer's
obedience to an arbitrary union demand demonstrates union power to
the members of the bargaining unit. Moreover, the Board, having found
no legitimate business purpose for this action, interpreted \cite{140 N.L.R.B. at 187-88.} as requiring such
purpose in order to prevent a finding that the employer intended to en-
courage union membership.\footnote{Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).} Therefore, the Board found the employer's
alteration of Lopuch's seniority rights a violation of section 8(a)(3), and
the union's activity causing the employer's conduct a violation of section
8(b)(2).

In reversing the Board's decision, Chief Judge Lumbard and Judge
Medina held insufficient the Board's finding that the seniority reduction
was arbitrary discrimination rather than a good faith attempt to execute
the contract terms.\footnote{Second Circuit opinion at 380, 390.} Moreover, these judges contended that even arbi-
trary discrimination does not violate section 8(a)(3) unless it is proven
actually to have been intended to encourage or discourage union member-
ship or is apparently based solely on union activity.\footnote{Second Circuit opinion at 388, 389, 390.} Neither alternative
was proven in this case. Judge Friendly's dissent accepted the Board's

\footnote{Id. at 677 (concurring opinion).}

\footnote{First Circuit opinion at 388, 389, 390.}
findings of unjustified discrimination and concluded that since the Board could have reasonably decided that this discrimination encouraged union membership and was not justified by a legitimate business purpose, the court should affirm the Board's finding of an 8(a)(3) violation.

Under section 8(a)(3) it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Section 8(b)(2) prohibits a labor organization from causing or attempting to cause an employer to discriminate against an employee in violation of section 8(a)(3). Thus, whether or not a union's attempt to cause an employer to alter an employee's status violates section 8(b)(2) depends on whether the desired employer action would violate section 8(a)(3). The legislative history of section 8(a)(3) discloses a primary concern with prohibiting employers from encouraging or discouraging union activities by singling out employees for special treatment on the basis of their participation in these activities. Obedient to this congressional direction, courts have consistently demanded two elements to establish a violation of section 8(a)(3): the employer's discriminatory treatment of employees and his motivating purpose to encourage or discourage union activity. Even if the employer's activity affects union membership, the employer may escape illegality if his motivation is justified as a legitimate business purpose.

In the past, two concepts of "discrimination" have appeared. Mr. Justice Clark has urged in a separate opinion that discrimination in section 8(a)(3) carries its ordinary meaning of distinguishing or differentiating for any reason whatsoever. However, in all cases holding a violation of section 8(a)(3), the employer's discrimination has been traceable to the union activities of the discriminate. The resultant theory, implicit in the plurality opinion in Local 357, Int'l Bhd. of Teamsters v. NLRB, }
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is that the statute reaches only discrimination that is based on union membership. The Second Circuit adopted this limitation in NLRB v. Local 294, Int'l Bhd. of Teamsters, and it is one ground on which that court reversed the Board's finding of an 8(a)(3) violation in Miranda. Before Miranda and Local 294, however, in no case had the differing definitions of statutory discrimination been critical to the outcome, since the challenged discrimination had always been based on the union activities of the affected employees. Nevertheless, employer acquiescence in a union demand to "discriminate" arbitrarily against a random employee without regard to his union activity may so emphatically demonstrate union power to other employees that the employer's intent to encourage union membership is obvious. For example, if the employer knew that the union leaders, before demanding the discharge of an unpopular worker, had predicted his dismissal to members of the bargaining unit, the employer would unavoidably be alerted to the potential pro-union impact of his special treatment of the unfortunate worker. Under the Second Circuit's restrictive definition of "discrimination," however, the employer's acquiescence in this union demand would not violate section 8(a)(3). As a result, activity which seems flagrantly to violate the policy of section 8(a)(3) is technically removed from its scope because an artificial use of language has accidentally evolved from the cases. A literal and suitable meaning for "discrimination" in section 8(a)(3)—the making of any distinction or differentiation among employees—would postpone consideration of the absence of "union" criteria underlying the discrimination until the assessment of the employer's motive and the effect of his action.

Even if the employer discriminated in Miranda, the decisive question remains whether the Board reasonably concluded that the employer's purpose was to encourage union membership. The settled rule, recognized by the Board, is that "the true purpose or motive of the employer" determines whether he violates section 8(a)(3). Interpretation of the section has forbidden the motive of encouraging or discouraging not only

127 317 F.2d 746, 750 (2d Cir. 1963). The court refused to hold that an employer could violate § 8(a)(3) because its acquiescence to union demands demonstrated union power, since this was not "the kind of discrimination" proscribed by the act.

128 Second Circuit opinion at 388-90.

129 Furthermore, this court denied that a union can violate § 8(b)(2) by causing an employer to discriminate unless the employer's action alone would have violated § 8(a)(3).

130 Mr. Justice Clark's motive-free definition of discrimination, Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 688 (1961) (separate opinion), was not accepted by the Court. Adoption of this definition, however, need not also invoke Mr. Justice Clark's dilution of the unlawful motive requirement of § 8(a)(3).

131 140 N.L.R.B. at 186.

132 E.g., Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961); Associated Press v. NLRB, 301 U.S. 103, 132 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937); NLRB v. Community Shops, Inc., 301 F.2d 263, 266 (7th Cir. 1962); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); NLRB v. Kohen-Ligon-Folz, Inc., 128 F.2d 502 (5th Cir. 1942).
union membership but also active or loyal membership. However, the suggestion in Judge Friendly's dissent that any mere tendency of the employer's actions to encourage union membership violates section 8(a)(3) without any showing of an employer intent finds little support in the act's history. The burden of proving illegal motivation rests on the General Counsel. The employer may legally affect the employee's status for any purpose, no matter how capricious, unless the proscribed encouragement may be attributed to him.

If the General Counsel directly proves the employer's motive of encouraging union membership, the Board may find an 8(a)(3) violation, even if the employer's action did not succeed in encouraging union membership. Direct evidence of the employer's unlawful state of mind is usually difficult to obtain, however, and none was introduced in the Miranda case. The Board also may infer the employer's motive from his actions. The Supreme Court, in Radio Officers' Union v. NLRB, delineated the Board's power to make these inferences. Radio Officers involved three Board holdings consolidated for review; all found discrimination by the employer solely on the grounds of union activity. One employer had granted a retroactive wage increase only to union members and the others had disciplined workers for failure to pay union dues and refusal to obey union work rules. The Supreme Court, affirming findings of employer discrimination to encourage union membership in all three cases, held that direct evidence of the indispensable element of unlawful employer motive was not necessary since employer discrimination based solely on union activity inherently encourages union membership. Extending the common-law presumption that a man intends the foreseeable consequences of his conduct, the Court inferred that the employer intended to influence union activity. The amendments to the National Labor Relations Act which had invoked more critical review of Board findings were held not to have withdrawn the Board's power to draw reasonable inferences of motive from an employer's actions.

133 Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690, 695 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).
134 Second Circuit opinion at 392 (dissenting opinion).
135 See notes 122 and 132 supra and accompanying text.
139 Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961); NLRB v. Link-Belt Co., 311 U.S. 584, 588 (1941). The Court is not justified in reversing the Board merely because it would not have reached the same conclusion on the evidence. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 542-43 (1943); NLRB v. Nevada Copper Corp., 316 U.S. 105 (1942) (per curiam).
140 347 U.S. 17 (1954).
141 Id. at 45.
142 Id. at 44-45.
143 Id. at 49-50; see 49 Stat. 453 (1935), as amended, 29 U.S.C. §160(c), (e) (1958); note 160 infra.
The Board has refused to apply the *Radio Officers* standard to find unlawful employer motivation from the mere granting by an employer of a union's request to alter an employee's status. This question was first discussed by the trial examiner in *Studebaker Corp.*, but was not passed on by the Board. Since that time the Board and the courts have attempted to draw a fine line between legitimate employer acquiescence in a union's request for adherence to "objective" criteria, such as hiring by geographical location or skill rating, and unlawful employer acquiescence which enables the union to use the employer's power over conditions of employment to encourage loyal union membership by enforcing internal union rules.

In finding a violation of section 8(a)(3), the Board in *Miranda* reasoned that employer acquiescence in an unjustified union demand for arbitrary discrimination resembled employer enforcement of union rules and inherently encouraged union membership—a natural result which the employer was presumed to have intended. However, although Lopuch was a union member, the union demand for unfavorable action against him did not seem related to any union activity. Testimony indicated that the union action was instigated only upon the complaints of other members of the bargaining unit.

If the employer's discrimination had been based solely on the employee's union activities, as in *Radio Officers*, the nexus between union activities and favorable or unfavorable treatment would support the Board's presumption that the employees would perceive the pattern of employer

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144 110 N.L.R.B. 1307, 1319-27 (1954), aff'd *sub nom.* Kovach v. NLRB, 229 F.2d 138 (7th Cir. 1956). The Trial Examiner stated that the Board may infer that the employer intended to encourage union membership if employer acquiescence in the union's demand demonstrates union power and there is no other credible reasonable explanation of the employer's activity. 110 N.L.R.B. at 1327.

145 *Id.* at 1307 n.1. The Board and the reviewing court held the evidence insufficient to establish a union demand and therefore did not reach the question of the legality of an employer's acquiescence in such a demand. *Id.* at 1307; Kovach v. NLRB, *supra* note 144, at 145.


147 "When the insulation of the act between the rights of employment and organization is pierced by the employer or union for the enforcement of union rules, valid union security provisos excepted, no direct evidence of specific intent to encourage membership in a labor organization is required." NLRB v. *Brotherhood of Painters*, 242 F.2d 477, 481 (10th Cir. 1957). See also NLRB v. *Local 542, Int'l Union of Operating Eng'rs*, 235 F.2d 703, 705 (3d Cir. 1956); NLRB v. *Local 1423, United Bhd. of Carpenters*, 238 F.2d 832 (5th Cir. 1956), enforcing 111 N.L.R.B. 206, 216-17 (1955).

148 Animated Displays, 137 N.L.R.B. 999 (1962), illustrates the difficulty of applying this test. The Board split over whether a cause an employer to discharge an employee carpenter rather than a decorator was based on legitimate criteria of skill or the unlawful standard of local union membership. Compare United Bhd. of Carpenters, 238 F.2d 832 (5th Cir. 1956), with *Bricklayers Union*, 134 N.L.R.B. 751 (1961), for an example of differing conclusions concerning the lawfulness of similar criteria.

149 140 N.L.R.B. at 189-90; *id.* at 197 (dissenting opinion).

150 140 N.L.R.B. at 188.
action and would adjust their union activity accordingly. However, even accepting the Board's finding in *Miranda* that the discrimination against Lopuch was arbitrary rather than a "good faith" interpretation of the collective bargaining agreement, any resulting encouragement of union activity seems less inherently probable than if Lopuch had been singled out because of his union status. Encouragement of loyal union membership in *Miranda* might have tended to flow either from the belief of fellow workers that Lopuch lost seniority because he was a "bad" union member or from a demonstration of the union's ability to wield arbitrary power. But the Board cited no evidence of either sort of encouragement of union membership. Indeed, it is equally likely that some workers were completely unaware of the entire controversy, and the fact that the union's request originated because of other worker's complaints tends to disprove the employees' belief that Lopuch's loss of seniority resulted from any problems he might have had with the union. Therefore, the General Counsel would have been forced to rely on the subtle presumption that encouragement of union activity probably results from any employer compliance with arbitrary union demands. Only from this "proof" of encouragement could the Counsel have raised the added presumption of employer knowledge of, and intent to bring about, such encouragement. This attenuated series of inferences seems inappropriate, especially after the Supreme Court in *Local 357, Int'l Bhd. of Teamsters v. NLRB* reemphasized that more than a mere possibility of union aggrandizement is needed to presume an employer's unlawful motive from his actions.

To find the employer's unlawful intent to encourage union membership, the majority of the Board and Judge Friendly stressed the absence of a legitimate business purpose to justify the employer's discrimination. Employer compliance with an arbitrary union demand may more frequently accompany encouragement of union membership than requested discrimination sanctioned by a provision in the collective bargaining agreement or required by independent and significant business needs. Nevertheless, absence of legitimate business purpose only negatively supports the existence of the proscribed motive, and affirmative proof has been generally required. The proper function of an inquiry into the possible business

150 140 N.L.R.B. at 189-90; see notes 116 and 118 *supra* and accompanying text.

151 Several circuit courts have concluded that the presumption of an unlawful intent under *Radio Officers* applies only if the employer action is based *solely* on union membership. See, e.g., NLRB v. Intercoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961); Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 83 (9th Cir. 1960).

152 Second Circuit opinion at 396 (Friendly, J., dissenting).


154 140 N.L.R.B. at 187-88; *cf.* id. at 196 (dissenting opinion).

155 Second Circuit opinion at 399.

156 *Cf.* Local 357, Int'l Bhd. of Teamsters, 365 U.S. 667, 680-82 (1961) (Harlan, J., concurring). One of the few cases that Mr. Justice Harlan concedes as not requiring affirmative proof of motive is Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), which Congress disapproved as supported by insufficient evidence. See note 160 *infra*. 

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purposes of the employer's discrimination is to determine whether business advantage really motivated his actions despite the tendency to encourage union membership already proven to exist. Thus, Mr. Justice Harlan's concurring opinion in *Local 357* offset the inevitable encouragement of union membership growing out of a union hiring hall by recognizing the employer's legitimate business need for a hiring hall. This balancing of interests was made more explicit in the recent case of *NLRB v. Erie Resistor Corp.* The Supreme Court held that the legitimate employer interest in continuing operations during a strike could not excuse the powerful discouragement of union activity caused by offering twenty years superseniority to replacements and returning strikers. But no tendency to influence union membership had been established in *Miranda*, and without a prima facie case against the employer, a defense of legitimate business purpose serves no function. The lack of legitimate employer business purpose should not alone sustain a finding of unlawful intent to encourage union membership.

To meet his burden of proof of a section 8(a)(3) violation, the General Counsel in *Miranda*, having established discrimination by the differential treatment of employee Lopuch, should have proven unlawful motivation by substantiating either (1) actual motivation to encourage union membership, (2) employer activity the natural consequence of which under circumstances known to the employer rendered such encouragement clearly foreseeable, or (3) an actual encouragement of union membership that was potentially so significant that the employer should be held to have anticipated and intended it. The Board's finding of unlawful discrimination in *Miranda* is not supported by "substantial evidence on the record considered as a whole" and the decision, if not the reasoning, of the Court of Appeals' refusal to enforce the Board order seems desirable.

III. Conclusion

Although the Board's finding of a section 8(b)(1)(A) violation in *Miranda* presents an appealing mode for rectifying injustices imposed by

157 365 U.S. at 684 (Harlan, J., concurring).
159 Id. at 228-37.
160 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(e) (1958). Congress has restricted the Board's latitude in finding unfair practices. Originally, § 10(e) stated that "the findings of the Board as to the facts, if supported by evidence" were conclusive. Congress amended this section to require increased Board caution in inferring unlawful employer motivation and more scrupulous judicial review of Board findings of fact. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951). Congress also amended § 10(e) to require reinstatement of an employee "discharged for cause." 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(c) (1958). Prior to these amendments, courts often refrained from overruling Board inferences of unlawful motivation even though the decisions "strained their credulity." E.g., *NLRB v. Columbia Prods. Corp.*, 141 F.2d 687 (2d Cir. 1944); *Wilson & Co. v. NLRB*, 126 F.2d 114, 117 (7th Cir.), cert. denied, 316 U.S. 699 (1942). One of the decisions specifically condemned by Congress for inferring unlawful employer intent from insufficient evidence was *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). See H.R. Rep. No. 510, 80th Cong., 1st Sess. 56 (1947). This decision was favorably referred to by Judge Friendly. Second Circuit opinion at 398.
unions on their members, it appears to expand the Board's powers beyond those intended by Congress. Moreover, the Board's assumption of unfair labor practice jurisdiction over union unfair representation, reinforced by concepts of preemptive and primary jurisdiction, would severely disrupt the accepted enforcement responsibility exercised in this area by the courts. On the other hand, the Board's finding that the Miranda Fuel Company and the union unlawfully discriminated to encourage union activity merely extends the enduring uncertainty surrounding sections 8(a)(3) and 8(b)(2). Despite legislative and judicial pronouncements restricting easy conclusions from tenuous inferences and assumptions, the Board's resolution in Miranda is not obviously improper. However, adding union causation of arbitrary employer action to the 8(a)(3) hotchpot may only hinder the development of stable, reviewable guidelines for findings of unlawful discrimination.

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161 See note 160 supra.