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Labor Law--Civil Rights--Invidious Discrimination by Employer Does Not Per Se Violate N.L.R.A.

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LABOR LAW—CIVIL RIGHTS—INVIDIOUS DISCRIMINATION BY EMPLOYER DOES NOT PER SE VIOLATE N.L.R.A.

In an unfair labor practice proceeding, the complaint alleged that the employer engaged in sexually discriminatory wage treatment of his employees, and that such conduct per se violated sections 8(a)(1)[1] and (3)[2] of the National Labor Relations Act (cited hereinafter NLRA). Finding it unnecessary to resolve the factual issue,[3] the National Labor Relations Board went beyond the narrow question presented to hold generally that discrimination based on sex, race, religion, or national origin, without more, is not "inherently destructive"[4] of employees' section 7 rights and thus does not vio-

1. Section 8(a)(1), 29 U.S.C. § 158(a) (1970) provides:

> 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 by [Section 7] ...

Section 7, 29 U.S.C. § 157 (1970) provides:

> 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 and protection....

2. Section 8(a)(3), 29 U.S.C. § 158(a) (1964) provides:

> It shall be an unfair labor practice for an employer (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization.

3. The majority did reach the issue of the employer's alleged refusal to bargain on the issue of discrimination—a recognized Section 8(a)(5) violation—and found that no such refusal existed. 82 L.R.R.M. at 1485. Member Fanning, concurring, resolved all factual issues against the petitioner and thus did not reach the legal issues. *Id.* Member Jenkins, in dissent, would have resolved all factual and legal issues in favor of the petitioner. *Id.*, at 1486.

4. By the phrase "inherently destructive," the Board invokes the test for finding per se violations of Section 8(a)(1) and (3) without a showing of unlawful anti-union motivation; an employer is "held to intend the very consequences which foreseeably and inescapably flow from his actions." NLRB v. Erie Resistor Corp., 373 U.S. 221 at 228-29 (1963). Under the Court's most recent formulation of this doctrine:

> If it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proven to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish

late sections 8(a)(1) or (3). For invidious discrimination to violate the Act, there must be "actual evidence" of interference with the rights of employees. *Jubilee Mfg. Co.*, 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482 (1973).[5]

The Board specifically refused to acquiesce in the novel doctrine of *United Packinghouse Workers v. NLRB*[6], that an employer's discrimination based on race or national origin violates section 8(a)(1) because

> (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 facts sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*[7] (emphasis supplied)

In rejecting this *Packinghouse* rationale, the Board adhered to its prior holdings and refused to extend its influence in the area of invidious discrimination by employers. It thus limited the proliferation of remedies for employment discrimination that has concerned writers[8] and members of Congress,[9] but did little to clarify the overall picture.

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that he was motivated by legitimate objectives since proof of motivation is most accessible to him. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967)

The Board thus failed to apply the second part of the two-tier test; had it found that racial discrimination must always harm employee rights to some extent, the employer would then have been required to show legitimate motivation. *But see* text accompanying note 53 *infra.*

5. Fanning, member, concurring; Jenkins, member, dissenting.

6. 416 F.2d 1126 (D.C. Cir.) (Wright, C. J.) *cert. denied* 396 U.S. 903 (1969) *noted in* 57 Geo. L. Rev. 1313 (1969), 44 N.Y.U. L. Rev. 855 (1969), *and* 23 Vand. L. Rev. 867 (1970). *See also* Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973), decided after the principal case, but citing with approval the Packinghouse decision (in dicta) without mentioning the principal case.

7. 416 F.2d at 1135 (emphasis in original).

8. *See, e.g.,* Alleyne, *Legal Remedies for Racial Discrimination in Employment,* 2 Black L. J. 282 (1972); Beaird, *Racial Discrimination in Employment Rights and Remedies,* 6 Ga. L. Rev. 469 (1972); Bloch, *Race Discrimination in Industry and the Grievance Process,* 21 Lab. L. J. 627 (1970); Boyce, *Racial Discrimination and the National Labor Relations Act,* 65 Nw. U. L. Rev. 232 (1970); Farmer, *Chaotic Administration,* 44 Fla. B. J. 400 (1970); Gould, *The Emerging Law Against Racial Discrimination in Employment,* 64 Nw. U. L. Rev. 359 (1969); Gould, *Racial Equality in Jobs and Unions, Collective Bargaining and the Burger Court,* 68 Mich. L. Rev. 237 (1969); Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination,* 46 N.Y.U. L. Rev. 449 (1971); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies to Employment Discrimination,* 39 U. Chi. L. Rev. 30 (1971); Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums,* 46 Wash. L. Rev. 455 (1971); Silberman, *The Search for an Effective Remedy in*

Under present law, victims of discrimination may seek relief under state Fair Employment Practices laws,[10] the Civil Rights Act of 1866,[11] or Title VII of the Civil Rights Act of 1964[12] as amended by the Equal Employment Opportunity Act of 1972.[13] The position of the NLRA in the area, however, has been ambiguous. In large part the ambiguity is due to the separate treatment under the Act of invidious discrimination by unions and employers. Courts have long recognized for unions a "duty of fair representation"[14] correlative to their position as exclusive bargaining representative.[15] The Board has enforced this duty by withholding certification from unions that discriminate,[16] and by refusing to apply the contract bar rule to labor agreements with discriminatory provisions.[17] Recently, in fact, the Supreme Court settled the principle that breach of the duty is an unfair labor practice under section 8(b)(1) of the Act.[18] Furthermore, an employer may violate sections 8(a)(1) and (3)[19] by participating in invidious discrimination in concert with a union.

Until *Packinghouse,* however, neither the Board nor the courts had been willing to reason that since discrimination by an employer in concert with a union violates the Act, such discrimination by an

Employment Discrimination, Proc. 23d N.Y.U. Ann. Conf. Lab 133 (1971); Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 Colum. L. Rev. 563 (1962); M. Sovern, *Legal Restraints on Racial Discrimination in Employment,* 73 (1966); Note, *Allocating Jurisdiction over Racial Issues Between the EEOC and NLRB: A Proposal,* 54 Cornell L. Q. 943 (1965); Note, *Implementing Governmental Policy Against Racial Discrimination in Employment: Fair Employment Practices Laws, Title VII, National Labor Relations Act, and the Philadelphia Plan,* 23 U. Fla. L. Rev. 157 (1970).

9. *See* 118 Cong. Rec. 3172 (1972) (remarks of Senator Hruska); *but see* 118 Cong. Rec. 3369 (1972) (remarks of Senator Javits).

10. *See* Note, *Implementing Governmental Policy Against Racial Discrimination in Employment: Fair Employment Practices Laws, Title VII, National Labor Relations Act, and the Philadelphia Plan,* 23 U. Fla. L. Rev. 157, 158-162 (1970); BNA Fair Employment Practices Manual 451: 26-27 (1972).

11. 42 U.S.C. §1981 (1970), by analogy to the principle announced in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See* Note, *Racial Discrimination in Employment and the Civil Rights Act of 1866,* 36 U. Chi. L. Rev. 615 (1969), and Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973).

12. 42 U.S.C. § § 2000e to 2000e-15 (1970).

13. Act of March 24, 1972, Pub. L. No. 92-261 *amending* 42 U.S.C. § § 2000e-2000e-15 (1970).

14. The duty was first recognized in *Steele v. Louisville & N. R.R.,* 323 U.S. 192 (1944) under the Railway Labor Act, 45 U.S.C. § § 151-62 (1970). It was subsequently applied to cases arising under the NLRA. Syres v. Oil Workers, Local 23, 350 U.S. 892 (1955).

15. NLRA § 9(a), 29 U.S.C. § 159(a) (1970).

16. *See e.g* Larus & Bros., 62 N.L.R.B. 1075 (1945).

17. Pioneer Bus. Co., 140 N.L.R.B. 54 (1962).

18. The Court in *Vaca v. Sipes,* 386 U.S. 171 (1972), endorsed the Board's holding to this effect in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied,* 326 F.2d 172 (2d Cir. 1963). *See also,* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (15th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

19. Miranda Fuel Co., 140 N.L.R.B. 181, 185-86 (1962).

employer acting alone violates the Act as well.[20] On the other hand, an employer's discriminatory pronouncements that may inflame racial feelings are grounds for setting aside an election,[21] and sexually discriminatory action that by its peculiar circumstances could have the foreseeable consequence of encouraging or discouraging union membership violates section 8(a)(3) of the Act.[22] Furthermore, since such discrimination clearly affects "terms and conditions of employment,"[23] concerted activity to eliminate it is protected,[24] and a refusal to bargain on the subject violates section 8(a)(5) of the Act.[25]

In refusing to extend existing NLRA remedies for employment discrimination, the Board in the instant case, did not decide whether discrimination had in fact occurred,[26] issuing, in effect, an advisory opinion binding on the parties and with the force of precedent. As to the legal issue, it rejected the *Packinghouse* formulation[27] as indicating merely possible effects of invidious discrimination.[28] nstead, the Boârd required

> actual evidence, as opposed to speculation of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act.[29]

In rejecting the per se rule, however, the board emphasized as it had in earlier cases[30] that invidious discrimination by employers that has

20. *See* text accompanying note 45.
21. Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).
22. Edmund A. Gray Co., 142 N.L.R.B. 590 (1963).
23. NLRA Section 8(d), 29 U.S.C. § 158(d) (1970), Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482, 1485 (1973).
24. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969); Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973).
25. *See e.g.* Farmer's Cooperative Compress, 169 N.L.R.B. 290 (1968), *enforcement* granted this ground, 416 F.2d 1126 (D.C. Cir.) *cert. denied* 396 U.S. 903 (1969).
Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1970) provides that it shall be an unfair practice for an employer
> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of (Section 9(a) of the Act).

26. While we have serious doubts about the validity of the Administrative Law Judge's finding of nondiscrimination, we find it unnecessary to resolve this question, for in our view, discrimination based on race, color, religion, sex, or national origin . . . is not violative of Section (sic) 8(a)(1) and (3) of the Act.
82 L.R.R.M. at 1484 (1973) Member Fanning, concurring, resolved all factual issues against the union and (implicitly) criticized the majority for stating "a legal conclusion . . . (that is) at best, mere dicta," 82 L.R.R.M. at 1486 (1973).
27. *See* text accompanying note 7, *supra.*
28. 82 L.R.R.M. 1484 (1973).
29. *Id.*
30. *See* notes 20 and 25, *supra.*

a necessary relation to the Board's proper function may violate the Act.

What should be the treatment of invidious discrimination by employers under the NLRA? The treshold policy question of whether another agency should oust the board's jurisdiction in the area seems to turn on the effectiveness of remedies under Title VII.[31] Prior to 1972, the EEOC had no enforcement powers,[32] and legislative history[33] as well as policy considerations suggested that courts should not limit existing remedies[34] since other forums provided more effective relief. One writer went so far as to question, in light of the rule announced in *Packinghouse,* the justification for the EEOC's continued existence without "cease and desist" powers.[35] The Equal Employment Opportunity Act of 1972[36] attempted to meet the need by granting the EEOC power to enforce its orders through judicial process.[37] Contrary to its original purpose,[38] however, it did not grant power to issue cease and desist orders. As a result, by way of compromise, all existing remedies were specifically left intact.[39]

Congressional intent is thus clear: the present proliferation of rem-

31. 42 U.S.C. § § 2000e to 2000e-15 (1970). Some writers favor unification of remedies, but on the condition that the agency given exclusive jurisdiction also be given adequate enforcement powers. Alternatively, they argue, agencies should coordinate their efforts and apply principles of res judicata and collateral estoppel. Beaird, *Racial Discrimination in Employment: Rights and Remedies,* 6 Ga. L. Rev. 469, 487 (1972); Farmer, *Equal Employment Opportunity–Case Study of Chaotic Administration,* 44 Fla. B. J. 400, 403 (1970); Note, *Implementing Governmental Policy Against Racial Discrimination in Employment: Fair Employment Practices Laws, Title VII, National Labor Relations Act, and the Philadelphia Plan,* 23 U. Fla. L. Rev. 157 (1970). One writer favors retention by the Board of those powers "essential to (its) duty of administering the LMRA," Note, *Allocating Jurisdiction Over Racial Issues Between the EEOC and the NLRB: A Proposal,* 54 Cornell L. Rev. 943, 955 (1969), or, in effect, all those existing prior to Packinghouse. *See* text accompanying notes 17-21, *supra.* The Packinghouse remedy, he argues, should be allocated to a strengthened EEOC. *Id.* at 956.

32. Act of July 2, 1964, Pub. L. 88-352, Title VII, *R* 705(a)-(d), (f)-(j), 78 Stat. 258, 259.

33. *See* 110 Cong. Rec. 7207 (1964) (Letter from Justice Department read by Senator Clark), 110 Cong. Rec. 13650-52 (1964) (Tower amendment that would have made EEOC exclusive remedy rejected by vote of 59 to 29).

34. In fact, courts did not. *See, e.g.* United Packinghouse Workers v. NLRB, 416 F.2d 1126, 1133, note 11 (D.C. Cir. 1969); United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

35. Sovern, *An Overview of Equal Employment Opportunity,* unpublished paper read to 1969 symposium sponsored by ABA Section of Labor Relations, *quoted in* Meltzer, Labor Law, Cases, Materials and Problems 910-911 (1970).

36. U.S.C. § § 2000e-2000e-15.

37. 42 U.S.C.A. § 2000e-5 (Supp. 1970-72).

38. "The basic purpose of H.R. 1746 is to grant the Equal Employment Opportunity Commission authority to issue, through well established procedures, judicially enforceable cease and desist orders." H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971), 1972 *U.S. Code Cong. and Adm. News* 2137.

39. 42 U.S.C.A. § 2000e-16(e) (Supp. 1970-1972).

edies,[40] including the union's duty of fair representation under the NLRA,[41] should continue until the EEOC is able to deal with all aspects of the problem. One could argue, in fact, that Congress specifically intended that the remedy formulated in *Packinghouse* be retained.[42] Even at that, however, certain aspects of the problem could be allocated between the EEOC and the Board by a consistent policy[43] to avoid conflicts that would defeat the efforts of both agencies.[44]

There remains, then, the legal question—not necessarily separate from these policy considerations[45]—of whether the NLRA, as amended, encompasses invidious discrimination by employers acting alone. The legislative history of the Act certainly does not support the proposition.[46] It is true that the same could be said about the

40. Senator Javits, speaking against the Hruska Amendment that would have granted the EEOC exclusive authority over case of invidious discrimination, read with approval a letter from the Assistant Attorney General which stated:

> Although we favor the granting of judicial enforcement authority to EEOC, we are concerned at this point in time there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination . . .
>
> At this juncture, when we are all agreed that some improvement in the enforcement of Title VII is needed, it would be, in our judgment, unwise to diminish in any way the variety of enforcement means already available to deal with discrimination in employment. The problem is widespread and we suggest that all available resources should be used in the effort to correct it.

118 Cong. Rec. 3369-70 (1972). The Hruska Amendment was rejected first by a vote of 33 to 33, 118 Cong. Rec. 3373 (1972), then, on a vote to reconsider, 50 to 37, 118 Cong. Rec. § 1797 (daily ed. Feb. 15, 1972).

In the House, the Erlenborn Substitute, containing a little-noticed provision making the EEOC the exclusive remedy for employment discrimination, was passed by a vote of 202 to 197, 118 Cong. Rec. 32111 (1971), but the Conference Report, adopted by both the Senate, 118 Cong. Rec. 7170 (1972) (62 for, 10 against), and the House, 118 Cong. Rec. 7573 (1972) (303 for, 110 against), specifically retained all existing remedies. 42 U.S.C.A. § 2000e-16(e) (Supp. 1970-1972).

41. Both Senator Williams, 118 Cong. Rec. 3371 (1972), and Senator Javits, 118 Cong. Rec. § 1794 (daily ed. Feb. 15, 1972), noted the special capabilities of the Board in dealing with unions.

42. Senator Hruska specifically noted the case and the holding in the course of arguing that the only reason the EEOC was not the exclusive remedy was that it had no enforcement powers. 118 Cong. Rec. § 1792 (daily ed., Feb. 15, 1972).

43. *See* note 26, *supra.*

44. *See, e.g.,* Farmer, *Equal Employment Opportunity—Case Study in Chaotic Administration,* 44 Fla. B.J. 400, 403 (1970).

45. Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482. 1487 (Jenkins, member, dissenting). *Cf.* Western Addition Community Organization v. NLRB, 485 F.2d 97 (D.C. Cir. 1973) (concerted activity involving racial discrimination given greater latitude than other types of concerted activity).

46. "Even its [Packinghouse's] wildest proponents must concede that Congress did not have racial discrimination in mind when it devised section 8(a)(1)." Boyce, *Racial Discrimination and the NLRA,* 65 Nw. U. L. Rev. 232, 256 (1970). Congress has refused specifically to make racial discrimination an unfair labor practice, 23 Vand. L. Rev. 867, 870, note 16 (1970).

union's duty of fair representation and few would now doubt its legitimacy.[47] But, the union's duty is based on sound statutory construction wholly inapplicable to employers.[48] To say that an employer discriminating in concert with a union violates the Act does not imply, despite the suggestions in *Packinghouse*[49] and the dissent in the principal case,[50] that an employer acting alone in his discriminatory conduct therefore violates the Act as well.[51] The Act confers on the union special responsibilities that the employer, who represents no one, does not bear.

One may not, therefore, reason over from the duty of fair representation to the employer's duty of non-discrimination. There is, however, the independent question of whether invidious discrimination by an employer either necessarily or under certain circumstances amounts to unlawful interference or coercion. The Court in *Packinghouse* reached its per se rule by two lines of reasoning. First, it adopted as a means of statutory construction the psychological arguments here embodied in Brown v. Board of Education,[52] that racial discrimination induces feelings of inferiority and docility.[53]

47. Vaca v. Sipes, 386 U.S. 171 (1967).
48. . . . the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Id.* at 177.
49. United Packinghouse Workers v. N.L.R.B., 416 F.2d 1126, 1135 (1969).
50. Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 LRRM 1482, 1488 (1973).
51. As the Board pointed out in Miranda Fuel Co.:
[A] labor organization as a statutory bargaining representative is *not* the same entity under the statute as an employer; for labor organizations, because they *do* represent employees, have statutory obligations to employees which employers do not." 140 N.L.R.B. 181, 185 (1962).
Furthermore, the Supreme Court has rejected the argument that the union's duty of fair representation necessarily implies a duty of non-discrimination for employers:
It is true that in several cases we have held that the exclusive bargaining agents authorized by the Act must not use their powers to discriminate against minority groups whom they are supposed to represent. And we have held that employers too may be enjoined from carrying out provisions of a discriminatory bargaining agreement. But the duty the Act imposes is one of fair representation and it is imposed upon the union. The employer is merely prohibited from aiding the union in breaching its duty. Nothing in the Railway Labor Act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. Colorado Anti-Discrimination Comm. v. Continental Air Lines, 372 U.S. 714, 724 (1963).
52. 347 U.S. 483 (1954).
53. The Court quoted with approval the Kansas court's finding that:
[S]egregation of white and colored children in public schools has a detrimental effect on the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law,

The employer thus renders his employees docile and inhibits them from asserting their section 7 rights.[54] Second, the discrimination divides workers by creating an "unjustified clash of interests," setting workers against themselves and deflecting them from their common purpose of self-organization. In answer to the docility argument, one may say with some force that it is dated,[55] that blacks are increasingly militant and may assert their rights even more vigorously in the face of discrimination.[56] It is suggested, however, that one cannot defeat the argument that discrimination divides workers of different races.[57] Although the court in *Packinghouse* relied so heavily on the psychological argument that invidious discrimination induces docility that the opinion may be subject to justifiable criticism, the "clash of interests" argument, standing alone, may independently support a per se rule in section 8(a)(1) cases.

Even if invidious discrimination by employers is not "inherently destructive" of the rights of employees in all circumstances, it may yet cause "slight harm" in all circumstances. In that case, under the test set forth in *NLRB v. Great Dane Trailers,*[58] the burden could be shifted to the employer to show legitimate business motivation.[59] This is similar to the test suggested by one writer[60] that an estab-

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therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system. Brown v. Board of Ed., 347 U.S. 483 at 494 (1954).

54. "Self-organization" in Section 7 need not be limited to present efforts, but may also include a general ability to act concertedly. *See,* 57 Geo. L. J. 1313, 1314, n. 13 (1969).

55. Bloch, *Race Discrimination in Industry and the Grievance Process, 21 Lab. L. J. 627 (1970).*

56. *Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 92 L.R.R.M. 1482, 1484 (1973).*

57. *One writer, while refuting the "docility" argument in Packinghouse, unwittingly* reinforced that case's "clash of interest" argument when he wrote:

> In 1970 the aggrieved black is not reacting with docility, but, at least, with vigorous resistance and at times open revolt. *He sees the need to organize, but often feels a certain futility in identifying with the accepted bargaining units.* He is aware that, even when acting in good faith, the employee representatives may be unable to represent his best interests or successfully deal with the overwhelming problem peculiar to minority groups. In response, the black worker has contemplated organizing along racial lines or has at times rejected the bargaining process *in toto . . . The union . . . is faced with its own inabilities to fairly represent black members.* Bloch, *Race Discrimination in Industry and the Grievance Process,* 21 Lab. L. J. 627, 627-28 (1970). (Emphasis supplied)

58. 388 U.S. 26, 34 (1967).

59. *See* note 3, *supra.* The Court has applied this test in cases involving "discrimination" and "interference" under sections 8(a)(3) and (1), but in each, the employer's acts were brought on through the active exercise, by employees, of their section 7 rights. Shieber, *Section 8(a)(3) of The National Labor Relations Act; a Rationale: Part I, Discrimination,* 29 La. L. Rev. 46, 59, n. 33 (1968). It would thus require a substantial step to find unlawful interference and discrimination merely from arbitrary actions by an employer not in response to any specific protect conduct by employees.

60. 57 Geo. L. Rev. 1313, 1319 (1969).

lished pattern or practice of invidious discrimination has a "natural tendency" to interfere with section 7 rights and that once the Board shows such a pattern or practice the employer should be required to come forward with evidence of the lack of adverse effect on his employees.

If one concludes, as did the Board in the instant case, that the mere fact of invidious discrimination carries with it no presumption, conclusive or otherwise, of adverse effect of section 7 rights, the question becomes under what circumstances such discrimination would violate the Act. There are two tests suggested by the majority opinion in the principal case, but which one the Board intended is unclear. The first test would require, after the discrimination has been established, "actual evidence"[61] of the adverse effect on the employee's rights, or "an independent factual determination" of the harm in each case.[62] As a practical matter, under present board procedures, such a test would be unworkable. As two writers have recently noted:

> Although it has been administering the NLRA for over thirty-five years, the Board has never engaged in an effort to determine empirically whether a particular type of conduct has a coercive impact. The Board has not required, or even permitted, the introduction of evidence as to whether particular conduct had a harmful effect on employees.[63]

Furthermore, it seems inappropriate as a matter of policy to require the petitioner having once established a pattern of discrimination to then, in all cases, show a harmful effect as well.

More likely, the second, more traditional test suggested in the Board's opinion was intended. Under this test, once petitioner shows discrimination, if the particular form of discrimination has the "necessary direct relationship"[64] with the Board's traditional functions, it violates the Act. The Board here does not determine whether the employees were actuall harmed, but instead "whether it would be reasonable to conclude" that the employees rights were violated.[65]

61. Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482, 1484 (1973).

62. 23 Vand. L. Rev. 867, 873 (1970).

63. Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. Chi. L. Rev. 681, 682 (1972). *See also* Marshall Field & Co., 34 N.L.R.B. 1 (1941) where the Board stated at 10; that "Evidence concerning the effect or lack of effect of the respondent's conduct on particular individual is not decisive of" the issue of interference or coercion.

64. Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482, 1484 (1973).

65. 33 NLRB Ann. Rep. 60 (1969). The Board's statement here related to conduct of elections, but the same techniques apply in unfair labor practice cases. Thus, in Edmund A. Gray Co., 142 N.L.R.B. 590 (1963), dismissal of all female employees violated sections 8(a)(1) and (3) because the purpose of the discharge was to avoid collective bargaining on the issue of equal pay; whether employees were actually harmed by the dismissals was not discussed.

However, since the Board established no guidelines other than through citation of earlier cases involving discrimination, it is impossible to predict what forms of discriminatory conduct would amount to interference or coercion. Clear principles rather than consistency with these prior holdings should be the controlling criteria.

This comment has dealt extensively with methodology since the Board's opinion in the noted case leaves the issue of invidious discrimination under the NLRA in an unacceptable posture. Further adjudication is required because the Board's decision in the instant case is inadequately reasoned,[66] too vague to reveal a discernable test, and, because of the majority's technique, "mere dicta."[67] In the absence of clarifying Congressional action, the Board should determine its jurisdiction over cases of employment discrimination in light of its own particular areas of influence and with awareness of the overlapping jurisdictions of other agencies.

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66. The reasons assigned by the Board to refute the arguments set forth in Packinghouse were taken virtually word for word from a student Note of Packinghouse appearing at 57 Geo. L. J. 1313 (1969). That Note stated at 1318:

> In supporting the first "effect" of employer racial discrimination, the court stated that "the employer's policy of discrimination *inevitably* sets group against group, thus frustrating the possibility of effective concerted action." Although employer discrimination may have this effect, it is by no means inevitable. It has been demonstrated that a continued practice of discrimination causes minority groups to coalesce internally, and it is possible that this could lead to collective action with nonminority group members.
>
> Docility is only one of several possible consequences of an employer's racial discrimination. In light of the increased militancy of minority groups today, both on a local and a national level, it seems inevitable that minority groups in different areas of the country will react dissimilarly to discriminatory practices.

Compare the language of the Board's opinion, 82 L.R.R.M. 1482, at 1484:

> Although employer discrimination may have the effect of setting group against group, that result is by no means inevitable. A continued practice of discrimination may in fact cause minority groups to coalesce, and it is possible that this could lead to collective action with nonminority group union members. Furthermore, docility is only one of several possible consequences of an employer's discrimination. In light of the increased militancy of minority groups today, it seems apparent that minority groups in different areas of the country, in different situations and at different times, react dissimilarly to discriminatory practices.

The footnotes are omitted, but are also (with the exception of the omission by the Board of one newspaper article) identical. Although the Board adopted the reasoning of the Note, it did not, unfortunately, adopt the conclusions. *See,* 57 Geo. L. J. 1313, 1319.

67. 82 L.R.R.M. 1482, 1486 (concurring opinion). By answering far more than was called for, and by failing to resolve the factual issues, the Board lost the issue-narrowing benefits of case-by-case adjudication; by using the *form* of adjudication, the Board lost the benefits of administrative rule making. *See* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 Yale L. J. 571, 587-590 (1970).