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Labor Law—The Relationship of Title VII to the National Labor Relations Act

In *Emporium Capwell Co. v. Western Addition Community Organization*¹ the United States Supreme Court was faced with the problem of reconciling the national policy of non-discrimination in employment as embodied in Title VII of the Civil Rights Act of 1964 (Title VII)² with the exclusive bargaining principle of the National Labor Relations Act (NLRA or the Act).³ The Court held that concerted activities by a group of minority employees attempting to bargain collectively with their employer over allegedly racially discriminatory employment practices would not be protected by the NLRA. Resolving this issue in favor of the traditional approaches to exclusive bargaining, the Court dealt reformers a temporary setback, but preserved the integrity of the procedures of the Act.

The National Labor Relations Act was enacted by Congress "to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining."⁴ The Act establishes the National Labor Relations Board (NLRB or Board) to oversee and carry out its provisions.⁵ Section 7 of the Act⁶ creates certain basic rights of employees; section 8 of the Act⁷ protects these rights from interference by employers or unions.⁸ However, other sections and policies of the Act restrict the scope of section 7. Therefore, although certain employee conduct may conform to the precise language of section 7, that section will afford the individu-

1. 420 U.S. 50 (1975).

2. 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972).

3. 29 *id.* §§ 141-87 (1970).

4. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); see NLRA §§ 1, 101, 29 U.S.C. §§ 141, 151 (1970).

5. NLRA §§ 3-6, 29 U.S.C. §§ 153-56 (1970).

6. 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 or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

7. *Id.* § 158(a).

8. *Id.* § 158(b).

al no protection if his actions are repugnant to other provisions of the Act.⁹

One of the recognized section 7 rights is the employee's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁰ In cases such as *NLRB v. Allis-Chalmers Mfg. Co.*¹¹ the courts have interpreted this right to be limited by the principle of section 9(a)¹² that the authorized bargaining agent will be the exclusive representative of all employees in the bargaining unit.¹³ As a result, it has generally been held that section 7 does not protect employees who undertake to utilize economic pressure independent of their bargaining representative in seeking to deal with the employer over wages, hours or other conditions of employment.¹⁴

The underlying policy of Title VII is the achievement of equality in employment through the elimination of discrimination on the basis of race, color, religion, sex or national origin.¹⁵ The Equal Employment

9. An unprotected employee is subject to employer discipline, which is otherwise proscribed by section 8(a)(1).

10. See note 6 *supra*.

11. 388 U.S. 175 (1967).

12. 29 U.S.C. § 159(a) (1970) provides in part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

13. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

14. *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944); *Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1197, 1242 (1967).

The employee's right to individually order his relations with his employer are sacrificed under the Act in order to promote the policy that the most effective bargaining tool of employees is that of pooling their economic strength and acting through a chosen labor organization. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180. Therefore, "the majority-rule concept is today unquestionably at the center of our federal labor law policy." Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 *YALE L.J.* 1327, 1333 (1958).

However, in order to prevent a tyranny of the majority and safeguard the interests of the minority of bargaining unit members, the courts have imposed upon the bargaining agent a concomitant duty to fairly represent all members of the bargaining unit. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). *Accord*, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). The duty can be enforced either by a suit for damages, *see, e.g.*, *Steele v. Louisville & N.R.R.*, *supra*, or by filing an unfair labor practice charge with the Board, *see, e.g.*, *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

15. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

Opportunities Commission (EEOC) was created to implement this policy through a system of voluntary compliance.¹⁶ Title VII prohibits discrimination by both employers¹⁷ and unions¹⁸ and can be seen as a response to unfair treatment of minorities by both and a reflection of a national policy against discriminatory employment practices.¹⁹ One of the protections offered by Title VII is section 704(a)²⁰ which makes it unlawful for an employer to discriminate against an employee because he has opposed practices made unlawful by the statute. Although there has been no definitive pronouncement on the scope of the provision,²¹ the Supreme Court has implicitly recognized that section 704(a) will cover employee "participation in legitimate civil rights activities or protests."²²

The dispute before the Court in *Emporium Capwell* originated in a report issued by the Department Store Employees Union (the Union) supporting charges made by a group of employees that the Emporium Capwell Co. (the Company or the Employer) was engaging in racially discriminatory employment practices.²³ The collective bargaining agreement between the Union and the Company contained, among other provisions, a no-discrimination clause²⁴ and a system of grievance and

16. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

17. 42 U.S.C. § 2000e-2(a)(2) (Supp. II, 1972).

18. *Id.* § 2000e-2(c)(2).

19. Comment, *Federal Courts as Primary Protectors of Title VII Rights*, 28 *RUTGERS L. REV.* 162, 165 (1974).

20. 42 U.S.C. § 2000e-3(a) (Supp. II, 1972) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual; or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

21. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. at 71-72 n.25.

22. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973).

23. The main concern of the employees was the case of Russell Young, a black passed over for promotion allegedly because of his race. On the basis of the Union's report, Young was later promoted to the position of first assistant manager prior to the start of the picketing. The Emporium and Western Addition Community Organization, 192 N.L.R.B. 173, 180-81 (1971) (trial examiner's decision). The trial examiner's decision is found appended to the NLRB decision. *Id.* at 179-86.

24. Section 21(E) provided: "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex." *Id.* at 180 (trial examiner's decision).

arbitration procedures to handle all alleged contract violations.²⁵ The Union stated that it was prepared to take these allegations before the Adjustment Board and all the way to arbitration, if necessary.²⁶ A meeting of the Adjustment Board was set, and employees Tom Hawkins and James Joseph Hollins, the subjects of this litigation, were scheduled to testify on behalf of the Union. However, when called upon at the proceeding, they refused to participate,²⁷ thus preventing resolution of the grievance. Later, Hawkins and Hollins held a press conference and publicly charged the Company with employment discrimination against racial minorities.²⁸ Afterwards, they commenced picketing and pamphletting in front of the Company's store,²⁹ and were subsequently notified by the Company that repeated acts or statements of this nature would result in their discharge.³⁰ In spite of this, they resumed their activities and, as a result, received discharge slips.³¹

A charge against the Company was subsequently filed with the NLRB by the Western Addition Community Organization³² on behalf

25. Section 5(B) provided: "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement." *Id.* (trial examiner's decision).

Sections 36(B)-(F) described the functions of the Adjustment Board and provided for submission of a grievance to final and binding arbitration at the request of either of the parties if the Adjustment Board cannot settle the issue. *Id.*

The collective bargaining agreement also contained a no-strike-no-lockout clause in section 36(A), *id.*, and provided that the Union would be the sole bargaining agent for all employees. 420 U.S. at 53.

26. The feeling was expressed by some employees that the contract procedures were insufficient and that something "dramatic" was needed. They urged the Union to picket the Company. The Union responded by saying that the collective bargaining agreement prohibited picketing and that, although the proceedings would take time, the beneficial effects would be more widespread and longer lasting. 420 U.S. at 54.

27. At the meeting, Hawkins and Hollins read a statement objecting to processing the grievance on an individual basis, calling for group action and demanding a meeting with the Company's president. They then walked out. 192 N.L.R.B. at 181 (trial examiner's decision).

28. The conference was held with the local media after an unsuccessful attempt by Hollins to meet and negotiate with the Company's president. *Id.*

29. The pamphlets basically reiterated the charges made at the press conference and called for a boycott of the Employer's store. They referred to the Company as a "racist pig" and "a 20th century colonial plantation" and compared its operations to those of "the slave mines of South Africa." *Id.*

30. In a written warning, the Company claimed that the charges made by the employees were untrue and deliberately designed to injure its reputation. After stating that there were ample remedies already in existence to correct any alleged discrimination, the Company warned that discharge would follow a repetition of the same conduct. *Id.* at 181-82.

31. The Union did not advise the parties to picket and later urged them to follow the Union's program through arbitration, warning them that their picketing could result in their being fired. *Id.* at 182.

32. The Western Addition Community Organization is a local San Francisco civil

of Hawkins and Hollins, alleging that their discharge violated section 8(a)(1) of the NLRA.³³ After conducting a hearing, the NLRB Trial Examiner found in favor of the Company,³⁴ concluding that the conduct of the employees was not protected by section 7 because it was disruptive of the collective bargaining relationship existing between the Union and the Company.³⁵ The NLRB, on review, adopted and affirmed the findings and conclusions of the trial examiner.³⁶

On appeal, the Court of Appeals for the District of Columbia Circuit reversed,³⁷ stating that "concerted activity involving racial discrimination has a unique status"³⁸ and cannot be treated as limited by section 9(a) in the same manner as are other section 7 concerted activities. The principle of the exclusivity of the bargaining representative must be read as restricted by the national policy against racial discrimination in employment incorporated in Title VII.³⁹ On certiorari, a majority of the Supreme Court reversed the court of appeals in an opinion written by Mr. Justice Marshall.⁴⁰

rights association. Both Hawkins and Hollins were members at the time of their discharge. 420 U.S. at 57.

33. 29 U.S.C. § 158(a)(1) (1970).

34. 192 N.L.R.B. at 179 (trial examiner's decision).

35. In keeping with the traditional view that section 9(a) acts as a limitation on section 7 rights, the trial examiner stated:

[T]o extend the protection of the Act to the two employees named . . . would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put (*sic*) forth under that agreement.

Id. at 186.

36. The Emporium and Western Addition Community Organization, 192 N.L.R.B. 173 (1971) (mem.). Members Jenkins and Brown filed dissenting opinions. The former based his conclusion on the belief that the conduct was protected by section 7 as a concerted activity in spite of the limitations of section 9(a), while the latter found that the employees were not seeking to collectively bargain with the Employer, but rather to discuss the situation with the Company.

37. *Western Addition Community Organization v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973) (Wyzanski, J., dissenting).

38. *Id.* at 927.

39. The appellate court held: "[T]he Labor Board should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means*. Where the union's efforts fall short of this high standard, the minority group's concerted activity cannot lose its section 7 protection." *Id.* at 931 (emphasis in original).

In his dissenting opinion, Judge Wyzanski objected to the use of this test on the grounds that minority concerted activities in opposition to racial discrimination should be protected in all circumstances, regardless of the conduct of the union. *Id.* at 932.

40. 420 U.S. 50. The Supreme Court accepted the conclusion of both the trial

In reaching its holding that plaintiffs' picketing was not protected by the NLRA, the Court reaffirmed the traditional interpretations of three central areas of the Act. First, the Court asserted that the rights of employees as delineated in section 7 are to be viewed as collective, not individual, rights which will be protected only to the extent that employees act in furtherance of the NLRA policy of fostering collective bargaining.⁴¹ Second, the Court upheld section 9(a)'s principle of exclusive representation as a limitation on section 7, even in cases of racial discrimination, thus rejecting the view of the appellate court.⁴² Finally, the Court reemphasized the importance of the grievance-arbitration procedures established in the collective bargaining agreement, especially when, as in *Emporium Capwell*, the contract contains a no-discrimination clause.⁴³ Arbitration is to be preferred to separate bargaining or economic pressure, in keeping with the strong federal policy in favor of arbitration of labor disputes.⁴⁴

The Court also addressed itself to the question of the proper weight to be afforded the policies of Title VII in the context of an NLRA proceeding. The decision makes it clear that the NLRB is not the proper forum for the pursuit of relief for Title VII violations and that these violations will not be treated as per se unfair labor practices under the Act.⁴⁵ However, as has been required by prior Supreme Court decisions,⁴⁶ a government agency, such as the NLRB, cannot ignore other congressional policies in administering an act entrusted to

examiner and the Board that the employees were seeking to bargain collectively with the Employer, rather than just to present grievances or discuss the situation. The Court confined its consideration of the case to this issue. *Id.* at 60-61.

Mr. Justice Douglas filed the lone dissent and would have affirmed the appellate court decision based on the belief that minority concerted activities are protected by section 7 and that to find otherwise is to make all employees prisoners of their union. *Id.* at 73.

41. *Id.* at 61-62.

42. *Id.* at 65-66.

43. *Id.* at 66-67.

44. The federal policy favoring the arbitration process is specifically recognized by the NLRA in section 203(d), 29 U.S.C. § 173(d) (1970), and has been judicially developed in a long line of cases. See, e.g., *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974); *Boys Market, Inc. v. Clerks Local 770*, 398 U.S. 235 (1970); *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

45. 420 U.S. at 70-72. The contrary result has been argued for by a number of parties, including respondents in this case, because of what is seen as the inadequacy of the Title VII remedies and the ineffectiveness of the EEOC in processing complaints.

46. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); cf. *McLean Trucking Co. v. United States*, 321 U.S. 67, 80 (1944).

it. As the Court conceded,⁴⁷ the rights created by the Act might have to be broadened to accommodate the policies of Title VII, under the proper circumstances. Nevertheless, although such outside policies should be considered, the Court implied that they should not be given preeminence over policies inherent in the Act without a more express congressional mandate.

Specifically, the Court announced that the primary policy of the NLRA will continue to be the encouragement and protection of the system of collective bargaining. The standards and requirements of Title VII will not be read into the Act. As the Court stated:

This argument [by employee-plaintiffs] confuses employees' substantive rights to be free of racial discrimination with the procedures available under the NLRA for securing these rights. Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective bargaining process contemplated by the NLRA.⁴⁸

The Court thus refused to follow the recommendations of certain commentators that the role of the Board and of the Act be expanded in the area of racial discrimination.⁴⁹ The contentions that concerted activities aimed at the elimination of racial discrimination should receive special status under the Act and that the NLRA should thus provide yet another remedy for aggrieved racial minorities were rejected. Policies of racial non-discrimination were treated as secondary to the NLRA's preeminent policy of insuring industrial tranquility through a system of collective bargaining.

Although not expressed by the Court, the subordination of the policy of antidiscrimination in employment to that of fostering collective bargaining can be explained in the following manner. The elimination of racial discrimination has always been a valid concern of the NLRA, as safeguards have been provided against its occurrence.⁵⁰ However,

47. 420 U.S. at 73 n.26.

48. *Id.* at 69.

49. Gould, *Racial Protest and Self Help Under Taft-Hartley: The Western Addition Case*, 29 ARB. J. (n.s.) 161 (1974); Comment, *Labor Law Meets Title VII: Remedies for Discrimination in Employment*, 6 CONN. L. REV. 66 (1974); Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158 (1974).

50. These safeguards include, among others, the duty of fair representation imposed upon the bargaining agent. See note 14 *supra*. Also, the Board has held that racial discrimination on the part of the union is an unfair labor practice. *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

this concern springs not out of an express policy within the Act, but from the realization that the existence of racial discrimination in employment invites industrial strife. Employees are thus protected from discriminatory practices by the Act not as an end in itself, but as a means to the end of industrial peace. This conclusion is supported by recent statements made by the Board's former General Counsel⁵¹ and the Board decision in the case of *Jubilee Mfg. Co.*⁵²

There appear to be only two flaws in this otherwise well-reasoned opinion by the Court. The first of these involves the Court's reaffirmation of the arbitration process in the context of charges of employer racial discrimination.⁵³ This language would seem to run counter to the Court's decision in *Alexander v. Gardner-Denver Co.*⁵⁴ which held that weaknesses present in the arbitration system render it inferior to the federal courts as a proper forum for determination of Title VII violations. However, this inconsistency may be resolved by reading the Court's approval of arbitration in *Emporium* to be limited solely to its appropriateness as a procedure for determining whether racial discrimination has in fact occurred, when the collective bargaining agreement contains a no-discrimination clause.⁵⁵

The second problem presented by the Court's decision occurs in part III of the opinion. Having established that the concerted activities of the employees were not protected by section 7 and, therefore, that discharge by the Employer was proper, the Court stated that this "does not mean that the discharge is immune from attack on other statutory grounds in the appropriate case."⁵⁶ The Court implied that, in a

51. Nash, *Board Referral to Arbitration and Alexander v. Gardner-Denver: Some Preliminary Observations*, 25 LAB. L.J. 259, 264-65 (1974).

52. 202 N.L.R.B. 272 (1973), wherein the Board stated:

[I]n our view, discrimination based on race, color, religion, sex or national origin, standing alone . . . is not "inherently destructive" of employees' Section 7 rights and therefore is not violative of Section 8(a)(1) and (3) of the Act. There must be actual evidence . . . 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.

Such discrimination can be violative of Section 8(a)(1), (3) and (5) in certain contexts. . . . However, in each of these areas in which we have decided issues involving discrimination there has been the necessary direct relationship between the alleged discrimination and our traditional and primary functions of fostering collective bargaining. . . .

Id. at 272-73.

53. 420 U.S. at 66-67.

54. 415 U.S. 36 (1974). The Court held that an adverse arbitration decision will not foreclose to the employee-complainant the right to file charges with the EEOC.

55. The Court stated: "The grievance procedure is directed precisely at determining whether discrimination has occurred." 420 U.S. at 66 (footnote omitted).

56. *Id.* at 72.

separate action filed before the EEOC challenging the validity of the discharge under section 704(a), the Employer's conduct might be found to violate Title VII. Thus, under the remedial provisions of Title VII, Hawkins and Hollins could conceivably be reinstated in their jobs and awarded back pay.⁵⁷ The end result of the *Emporium Capwell* litigation would then be merely that plaintiffs sought a proper remedy through an improper forum. This incongruous result seems to stem from the Court's overly zealous desire to segregate the spheres of influence of Title VII and of the NLRA. Although the Court's language was purely dictum, this possibility of an inconsistent result under Title VII should have been foreclosed.

Another significant aspect of the *Emporium* opinion is presented in footnote 12,⁵⁸ wherein the Court for the first time dealt with the question of the proper interpretation of the proviso of section 9(a).⁵⁹ Although this treatment is dicta, the Court took the opportunity to endorse the interpretation of the proviso advanced by the Second Circuit in *Black Clawson Co. v. International Ass'n of Machinists*.⁶⁰ *Black Clawson* held that the individual employee's "right" under the proviso to approach the employer to present grievances was not an "absolute" right, but rather conferred upon the employee only the privilege of presenting such grievances. The employer is not placed under a duty to entertain these complaints.⁶¹ With regard to the purpose of the statutory language, the Second Circuit stated:

The proviso was apparently designed to safeguard from charges of violation of the act [section 8(a)(5)⁶²] the employer who voluntarily processed employee grievances at the behest of the individ-

57. *Id.*

58. *Id.* at 61 n.12.

59. 29 U.S.C. § 159(a) (1970), wherein the proviso states:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

For a history of the section 9(a) proviso prior to the passage of the Taft-Hartley amendments to its language and a discussion of those amendments, see Sherman, *The Individual and His Grievance—Whose Grievance Is It?*, 11 U. PITT. L. REV. 35 (1949).

60. 313 F.2d 179 (2d Cir. 1962); *accord*, Broniman v. A.&P. Tea Co., 353 F.2d 559 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966).

61. 313 F.2d at 185.

62. 29 U.S.C. § 158(a)(5) (1970), which states: "It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) [NLRA 9(a)] of this title."

ual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.⁶³

Thus, the Supreme Court adopted the so-called "employer defense" reading of the section 9(a) proviso. By so doing, the Court further indicated that the NLRA does not permit employees to utilize economic pressure in order to influence the employer's decision whether to exercise his proviso option. This conclusion is consistent with the Court's disposition of *Emporium*.⁶⁴

The *Emporium* decision raises a significant question: Would the result have been the same had the union been unwilling and unready to properly process the employees' grievances? Although a resort to self-help by minority employees would appear to be more easily justified in this situation, there are several factors that militate towards an extension of the application of the picketing prohibition of *Emporium* to these facts as well. First and foremost, employees have access to a sufficient number of alternative remedies to preclude the need for the additional one sought by respondents. The most obvious remedy is a suit against the union for breach of its duty to ensure fair representation of all employees.⁶⁵ Employees can also utilize the statutory cause of action for employment discrimination provided by Title VII. Finally, the District of Columbia Circuit has held that racial discrimination by an employer sufficiently interferes with an employee's section 7 rights to constitute an unfair labor practice under section 8(a)(1) of the NLRA.⁶⁶ Although these remedies may arguably lack the speed and effectiveness of picketing, they should be preferred because they are less disruptive of the labor-management relationship than picketing, provide for an orderly determination of whether racial discrimination does in fact exist before action is taken and are already in existence and would not require any strained re-interpretation or restructuring of the provi-

63. 313 F.2d at 185.

64. A resort to self-help either for the purpose of forcing an employer to bargain collectively with a minority of employees or to pressure an employer to hear individual grievances under the section 9(a) proviso is proscribed by the opinion in *Emporium*. Therefore, the proviso has been rendered a hollow promise, since it cannot be enforced by a proceeding under the Act or by economic coercion.

65. See note 14 *supra*. However, a violation of the duty of fair representation occurs only when the union's conduct is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), citing *Humphrey v. Moore*, 375 U.S. 335 (1964) and *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

66. *United Packinghouse Workers Union v. NLRB*, 416 F.2d 1126 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969). However, the Board has specifically refused to follow this approach in *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973).

sions of the Act.⁶⁷ Second, to allow minority self-help, even when the union is not aiding the minority, would be inequitable to the employer. In addition to the examples mentioned by the Court,⁶⁸ the prejudice to the employer is demonstrated by the fact that during the course of collective bargaining, an employer will make concessions in order to avoid the disruption of his business occasioned by employee picketing. To allow minority employees to picket him because of derelictions on the part of the union is to injure him doubly. Therefore, industrial peace will be preserved without undue interference with the rights of the minority employees by prohibiting minority economic pressure in accordance with the decision in *Emporium*.

The decision in *Emporium* should not be read to indicate a weakening of the Supreme Court's commitment to the eradication of racial discrimination in employment. Rather, it evidences a balancing of policy considerations, resulting in the emphasis of the smooth operation of the federal system of labor relations at what the Court views as a nominal inconvenience to the civil rights movement. If employee protection beyond that offered by the present provisions of Title VII is needed, Congressional legislation is the proper solution. The Supreme Court should not, and apparently has declined to, judicially redirect the NLRA to achieve this result.

STEVEN WILLIAM SUFLAS

Securities Regulation—United Housing Foundation, Inc. v. Forman: The Supreme Court Refines the Howey Formula

For the sixth time¹ since the passage of the Securities Act of 1933, the United States Supreme Court in *United Housing Foundation, Inc. v. Forman*² has gone in search of a workable definition of "security." The

67. For a discussion of these and other alternative remedies see Note, *Racial Discrimination in Employment and the Remedy of Self-Help: An Unwarranted Addition*, 15 WM. & MARY L. REV. 615 (1974).

68. 420 U.S. at 67-69.

1. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943); SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967); Tcherepnin v. Knight, 389 U.S. 332 (1967).

2. 421 U.S. 837 (1975).