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under a deed purporting to convey the whole and entry and possession under such foreclosure deed constitute color of title.\textsuperscript{16} No cases have been found which determine the question of whether or not a void deed of gift may be color of title.\textsuperscript{17}

Benjamin S. Marks, Jr.

Railway Labor Act—Representation of Racial Minority Groups in Bargaining and Contract Administration Without Discrimination

In \textit{Conley v. Gibson},\textsuperscript{1} petitioners, Negro members of the Brotherhood of Railway and Steamship Clerks, were segregated into a separate local union. They brought a class action for themselves and other Negro employees similarly situated against the union, claiming rights arising under the Railway Labor Act.\textsuperscript{2} The union had been designated as the exclusive bargaining representative under the act.

The collective bargaining agreement which had been negotiated by the union with the company contained among other provisions a uniform seniority clause; and a summary dismissal of an employee without cause would be a breach of the collective bargaining agreement which normally would be challenged by the union through the grievance procedure.

In substance petitioners alleged that they were discharged by the railroad in violation of the seniority agreement, ostensibly on the ground that their jobs were being abolished. They alleged that in reality their jobs were not abolished, but that the vacancies were immediately filled with white men with the exception of a few Negroes who were rehired for their old jobs with a loss of seniority. The company explained that after abolishing petitioners' jobs it found it necessary to "create" certain new positions. Petitioners alleged that the union failed to protest their discharge, protect their jobs, and process their grievances as they would have those of white employees, all "according to plan."


\textsuperscript{17} The court raised the question in \textit{Justice v. Mitchell}, 238 N.C. 364, 78 S.E.2d 122 (1953), but did not answer it since under the facts if it were color of title it would have been destroyed when claimant was made a cotenant under a will devising the property.

\textsuperscript{1} 355 U.S. 41 (1957).

The union interposed several jurisdictional objections. The most important of these was that the National Railroad Adjustment Board had exclusive jurisdiction over the disputes. But the Court pointed out that the portion of the Railway Labor Act defining the jurisdiction of the Board, by its own terms, only gives it jurisdiction over "disputes between an employee or group of employees and a carrier or carriers." Here, the dispute was between employees and their bargaining agent and not between employee and employer.

The Railway Labor Act provides that within an appropriate unit the majority of employees may select the exclusive bargaining agent, whose statutory duty it then becomes to represent all of the employees in the class or craft.

On the merits the Court held that if the facts as alleged were true, this was a flagrant violation of the union's statutory duty to bargain collectively in favor of petitioners and to represent them fairly and without hostile discrimination. Collective bargaining does not end with the making of an agreement with the employer; it is a continuing process involving day to day adjustments in the contract and the protection of employee rights already secured by the agreement. The Court therefore reversed the lower courts' dismissal of the complaint and remanded the case for further proceedings in the district court.

The unanimous decision in the Conley case was the culmination of a long line of decisions dealing with racial discrimination in collective

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3 Other jurisdictional questions were passed upon. The union contended that the Texas and New Orleans Railroad was an indispensable party defendant. The Court, however, pointed out that the suit was solely by a group of employees against their statutory bargaining representative and only incidentally concerned the carrier. No relief was asked against the railroad and there was little prospect that any would be granted which would bind it.


5 Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, and working conditions . . . ." 48 Stat. 1189 (1934), 45 U.S.C. § 153 (1952). Where a dispute is between a carrier and its employees and does involve the interpretation of a collective bargaining agreement the Court denies jurisdiction to federal and state courts until the Board has interpreted the agreement, believing that the Board is peculiarly familiar with the problems of interpreting a collective bargaining agreement. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950); Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946).


7 Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); cf. Wallace Corp. v. NLRB, 323 U.S. 248 (1944). The minority of employees in the unit is not allowed by the act to select a collective bargaining representative of its own. Virginian Ry. v. System Federation, No. 40, Ry. Employees Dep't, AFL, supra note 6; Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944); Cf. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).
bargaining, beginning with *Steele v. Louisville & N. R. R.* In that case the exclusive bargaining representative for the railway firemen working on southeastern railroads negotiated several clauses in the collective bargaining agreements with the railroads, against their initial opposition, which would have had the ultimate effect of excluding Negro firemen from the service. One of these clauses was that only "promotable" employees should be employed as firemen or assigned to new runs or permanent vacancies in established runs. Inasmuch as all railroads at that time had a policy of not promoting Negroes to serve as engineers, the provision affected, for the most part, only Negroes. The non-union Negro firemen, thus discriminated against, brought a class action against the union and the railroad alleging a breach of the duty imposed by the Railway Labor Act.9

The Court's unanimous decision was that petitioners' complaint stated facts which if proved would entitle them to the relief of a declaratory judgment, damages, and an injunction against further discrimination by the union on the basis of race. The union was held to be under a duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in making contracts with the railroad.10 Concerning the contract clauses the Court said, "Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."11

To grasp the real significance of the holding in the *Conley* case it is important to notice two differences between it and the *Steele* case. In the latter case, the union bargained as exclusive representative with the railroad for a collective agreement which was discriminatory *on its face* and in operation.12 In the *Conley* case there was no such dis-

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8 323 U.S. 192 (1944).
9 "[T]he right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct." *Id.* at 204.
11 323 U.S. at 203.
12 Unions may negotiate collective bargaining agreements which are discriminatory in some respects, but such discriminations must not be based on color. Such contracts may have unfavorable effects on some members of the craft represented provided such differences are relevant to authorized purposes of the act, such as differences in seniority, type of work performed, and the competence and skill with which it is performed. *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 203 (1944). Much litigation has arisen where returning war veterans have been given
criminatory contract; rather, it was administered in a discriminatory manner. Secondly, in the Steele case the Negro petitioners were excluded entirely from membership in the union, while in the Conley case they were union members, though segregated into a separate local.

In reaching a decision on the sufficiency of the complaint in the Steele case the Court had to pass upon several jurisdictional problems which apply equally to the situation in the Conley case. The most important of these was that under the Railway Labor Act aggrieved employees could file their own grievances with the National Railroad Adjustment Board. But, the Court pointed out that the Board has consistently declined in over four hundred cases to hear grievance complaints by individual members of a craft represented by a union. "The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board." Therefore, said the Court, there is no administrative remedy available which would be a condition precedent to equitable relief.

During the next few years after Steele was decided, its doctrine was supported in other cases with almost identical facts. Higher seniority ratings than others who had worked for the company for some time. See Huffman v. Ford Motor Co., 345 U.S. 330 (1953); Hartley v. Brotherhood of Clerks, 283 Mich. 201, 277 N.W. 885 (1938). The Court also disposed of the following contentions: (1) The question was not one of a jurisdictional dispute determinable under the administrative scheme set up by the act. Cf. Switchman's Union v. National Mediation Bd., 320 U.S. 297 (1943). (2) The question was not restricted by the act to voluntary settlement by recourse to the traditional implements of mediation, conciliation, and arbitration. Cf. General Comm. of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-K.-T. R.R., 320 U.S. 323 (1943). (3) No question of who was entitled to represent the craft or who were members of it was involved, issues which would have been relegated for settlement to the Mediation Board. Cf. Switchman's Union v. National Mediation Bd., supra. (4) There was no difficulty as to the interpretation of the contract which by the act is committed to the jurisdiction of the Railroad Adjustment Board.


Ibid.

It is fairly obvious why the Court would not want to limit petitioners to an action before the Board even if it found that the Board had jurisdiction in such cases. The Board's members are chosen by groups of carriers and the large national unions. 48 Stat. 1189 (1934), 45 U.S.C. §§ 153 First (a), (b), (c), (g) (1952). There are few procedural safeguards. There is no process for compelling the attendance of witnesses or the production of evidence, and no official record is kept except the informal pleadings. Hearings are conducted without witnesses. Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess. 11-14 (1941). Finally, the statute provides no relief for a petitioning party—he individual, union, or carrier—against an erroneous order of the Board. 48 Stat. 1191 (1934), 45 U.S.C. §§ 153 First (m), (p) (1952).

Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232 (1949). In this case the Court held specifically that the anti-injunction provisions of the Norris-La Guardia Act, 47 Stat. 70 (1932), 20 U.S.C. §§ 101-15 (1952), do not prohibit injunctions of the type which petitioners sought. "In Virginian R. Co. v. System Federation . . . we held that the Norris-La Guardia Act did not deprive federal courts of jurisdiction to compel compliance with positive
was somewhat extended in *Brotherhood of Railway Trainmen v. Howard.* There, the Negroes discriminated against were not within the class of workers which the union had a statutory duty to represent, *i.e.*, they were not within the bargaining unit. The Negroes filed a complaint similar to that in the *Steele* case. The union's contention was that the act imposed no duty upon them to bargain collectively for persons not in their craft or class and that they had no statutory duty to refrain from discriminating against persons whom they had no duty to represent. The Court held that this was not a significant distinction. The case therefore means that unions protected by the act must not use their power to negotiate collective bargaining agreements which discriminate on the grounds of race or color regardless of the classification of the victims.

It will be observed that a common feature of every case considered thus far prior to *Conley* is that the unions had negotiated through collective bargaining a clause in a collective bargaining agreement which was discriminatory on its face. It was after the decision in the *Howard* case that those unions desiring to discriminate against Negro

mandates of the Railway Labor Act . . . enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-La Guardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.'" *Id.* at 237. See also, *Rolax v. Atlantic Coast Line R.R.,* 186 F.2d 473 (4th Cir. 1951); *Mitchell v. Gulf, M., & O. R.R.,* 91 F. Supp. 175 (N.D. Ala. 1950). For later decisions see *Brotherhood of Locomotive Firemen v. Mitchell,* 190 F.2d 308 (5th Cir. 1951); *Central of Ga. R.R. v. Jones,* 229 F.2d 648 (5th Cir. 1955), *cert. denied,* 352 U.S. 848 (1956).

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Despite the fact that the case is so regarded, the Negro "train porters" were only nominally in a different craft or class from the white employees. The bargaining unit was made up of white brakemen. It is true that the company and the union had always considered the Negroes as members of a different class from the white brakemen for collective bargaining purposes and that the Negroes had been represented for bargaining by a separate union of their own choosing but, in addition to performing the same duties as regular white brakemen, they spent only about five percent of their time sweeping aisles and helping patrons on and off trains. Thus, they were in reality brakemen.

The comments of Justice Minton, with whom Chief Justice Vinson and Justice Reed joined in dissenting, are of interest: "The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to fair representation by the Brotherhood, but because they are Negroes who were discriminated against by the carrier at the behest of the Brotherhood. I do not understand that private parties may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not. That is the whole problem underlying the proposed Federal Fair Employment Practices Code. Of course, this court by sheer power can say this case is *Steele,* or even lay down a code of fair employment practices. But sheer power is not a substitute for legality. I do not have to agree with the discrimination here indulged in to question the legality of today's decision." *Id.* at 777.
workers became more subtle in their approach. This subtlety led to a serious conflict among the circuits.

Petitioners' complaint in *Hayes v. Union Pac. R.R.* did not allege, either directly or indirectly, that the collective bargaining agreement by its terms provided for discrimination against petitioners. But petitioners did allege that the union entered into a collective bargaining agreement with an undisclosed intention of administering it in a discriminatory manner. The trial court dismissed the complaint for lack of jurisdiction, stating that it was clear that the federal courts are not charged with the duty of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. The Court of Appeals for the Ninth Circuit affirmed, pointing out that the National Railroad Adjustment Board had been established to afford relief for the breach of collective bargaining agreements. "It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect, that the federal courts may act." The Third and Fifth Circuits quickly fell into line.

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22 *Hayes v. Union Pac. R.R.*, 184 F.2d 337, 338 (9th Cir. 1950).
23 *Williams v. Yellow Cab Co.*, 200 F.2d 302 (3d Cir. 1952), *cert. denied*, 346 U.S. 840 (1953). In this case we are dealing not with the Railway Labor Act but with the National Labor Relations Act. 49 STAT. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1952). There would seem to be no reason why the doctrine as enunciated in the line of railway cases from *Steele* to *Conley* would not pervade the entire field of labor, embracing those unions and employers covered by the provisions of the National Labor Relations Act. As under the Railway Labor Act, the majority of the employees is entitled to select the exclusive collective bargaining representative whose statutory duty it becomes upon certification to represent not only the majority but all of the employees in the bargaining unit. *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953); *Larus and Brother Co.*, 62 N.L.R.B. 1075 (1945). The minority of employees is not entitled to select a collective bargaining representative of its own, and the company is not allowed to treat with such a representative.

There has been almost no litigation involving this question outside of the railway field. However, the Supreme Court apparently agrees with the above conclusion in the one case in point which it has decided. In *Syres v. Oil Workers Int'l Union*, 350 U.S. 892 (1955), the Court reversed in a per curiam decision, which cited only the *Steele*, *Tunstall*, and *Howard* cases, a court of appeals decision dismissing plaintiffs' complaint for lack of jurisdiction. *Syres v. Oil Workers Int'l Union*, Local 23, 223 F.2d 739 (5th Cir. 1955). In this case a Negro local and a white local of the Oil Workers were certified as joint bargaining representatives in a single unit. The two locals "amalgamated," forming a single bargaining committee with an agreement that there should be but one line of seniority. The committee, which was all white, made a contract providing for two lines of seniority. The effect was to freeze the Negroes in their jobs. The court of appeals, following *Williams v. Yellow Cab Co.*, *supra*, attempted to distinguish the *Steele* case, pointing out that here the petitioners were actually members of the union whereas there plaintiffs were not union members and were excluded from membership. The Supreme Court obviously did not feel that this was a sufficient distinction. The court of appeals had pointed out in its opinion that no administrative remedy was available from the National Labor Relations Board.

A unique feature of the *Williams* case was that the Negro petitioners were
The lines of conflict were clearly drawn, however, when the Court of Appeals for the Fourth Circuit decided *Dillard v. Chesapeake & O. R.R.*.\(^{25}\) There, petitioners were Negroes who had been working as machinists' helpers and laborers, jobs requiring little skill. Some of these workers were not represented by a labor union. All of the more skilled crafts, however, were represented by unions which had negotiated collective bargaining agreements with the company. These contracts set up uniform rules for the promotion of company employees from one class to another and within a class and were not discriminatory on their face. The plaintiffs charged that the company, pursuant to union pressure and solely on the ground of race, failed to promote them according to the uniform rules. They alleged that they had been qualified, eligible, and entitled for years to be upgraded to higher job classifications, but that instead white employees with less seniority and no more competence were promoted ahead of them.

The court specifically indicated its disapproval of the decision of the Ninth Circuit in the *Hayes* case. Speaking for the court, the late Judge John J. Parker said, "It is immaterial that the unions in exerting their power to discriminate against the Negro employees did not do so by entering into a formal bargaining contract. It is the unlawful use of power vested in the unions by the Railway Labor Act which gives rise to the jurisdiction of the court to afford relief, not the particular form which such abuse of power takes."\(^{26}\) The court concluded that it is just as unlawful to use the power of the bargaining organization to prevent advancement of Negroes as to use it to destroy their jobs. Since some of the employees were not represented by the union, this case is an extension of both the *Howard* and *Steele* cases.

This was followed by interesting developments in the Fifth Circuit when the principal case of *Conley v. Gibson* arose. The district judge actually members of the union. Petitioners were also members of the union in the *Hayes* case, but the Ninth Circuit did not discuss that point at length. In the *Williams* case the court held this to be a matter of some weight, pointing out that the taxicab drivers' union derived its authority to bargain for petitioners from their own consent and not from section 9(a) of the National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 159(a) (1952), which declares that the collective bargaining representative selected by a majority of the employees in the unit is the exclusive bargaining representative of all employees therein. On this basis no federal question was involved. The Supreme Court reviewed none of these cases. The Court has since held, however, that the mere fact that petitioners are members of the union is not a sufficient distinction; that a federal question is still involved. Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Conley v. Gibson, 355 U.S. 41 (1957).


\(^{26}\) Id. at 951.
dismissed the plaintiffs' complaint, and the circuit court affirmed in a per curiam opinion. The Supreme Court granted certiorari. While Conley v. Gibson was pending before the Supreme Court, the Fifth Circuit reversed itself in the case of Richardson v. Texas & N.O. R.R. Here, the white and Negro workers had become segregated into two groups, and by custom the Negroes had been discriminated against as far as seniority was concerned. There was a contract clause, non-discriminatory on its face, which merely stated that the current method of assigning crews was satisfactory and that no change would be made during the life of the contract. In holding that the union must not discriminate in collective bargaining on the grounds of race the court said, "Any other rule would permit a bargaining union and its railroad-employer to practice or perpetuate jointly, through custom and under an agreement innocuous in terms, that very abuse of the bargaining representative's power of representation directly proscribed by the Steele and Tunstall decisions."

What then is and will be the effect of the Supreme Court's decision in Conley v. Gibson? It resolves the conflict which had developed among the circuits by specifically overruling the Hayes case from the Ninth Circuit, and by following in effect the holdings of the Fourth Circuit in the Dillard case and of the Fifth Circuit in the Richardson case. This means that a union breaches its statutory duty imposed by the Railway Labor Act when it uses its power derived from the act to discriminate against a group of minority workers on the grounds of race and color whether or not they be within the class of employees for which the union has a statutory duty to bargain and whether or not the union negotiates a collective bargaining agreement with an employer which is discriminatory on its face. All discriminatory action on the part of labor unions which is based on race or color alone is forbidden.

But the case goes further than this. In the complaint petitioners did not allege that the union procured their discharge. They rather alleged that the union "according to plan" failed to represent them in collective bargaining and to process their grievances as they would have for a white employee discharged in a similar manner. It would seem that the Court is not only forbidding the union from taking discriminatory action against any employees but is requiring the union to represent all employees affirmatively and without discrimination in all respects, including representation against unilateral discriminatory action of the employer.

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27 138 F. Supp. 60 (S.D. Tex. 1955). 28 229 F.2d 436 (5th Cir. 1956). 29 352 U.S. 818 (1957). 30 242 F.2d 230 (5th Cir. 1957). 31 Id. at 234. 32 Some states have gone much further in their holdings on this subject than have the federal courts. Generally, there has been no attempt by the states to