Miranda Fuel Company, Inc. *and* Michael Lopuch *and* Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract

Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Michael Lopuch *and* Miranda Fuel Company, Inc., Party to the Contract. *Cases Nos. 2–CA–5833 and 2–CB–2179. December 19, 1962*

SUPPLEMENTAL DECISION AND AMENDED ORDER

On November 30, 1959, the Board issued a Decision and Order [1] in this proceeding in which it found that Respondent Company and Respondent Union, respectively, violated Section 8(a)(3) and (1) and Section 8(b)(2) and (1)(A) of the Act by maintaining in effect a contract provision, as set forth below,[2] which vested exclusive control in the Union over the seniority status of the Company's drivers and thus over their employment opportunities. The Board additionally found that, in any event, the Union had also caused the Company to reduce the seniority status of employee Michael Lopuch, a member of the Respondent Union, for a reason unauthorized under the contract, namely, that he had taken an early leave of absence. The Board thereupon concluded that, by surrendering to the Union the right to determine seniority in situations not covered by the contract, the Company and the Union unlawfully discriminated against Lopuch under the principles of *Pacific Intermountain Express*.[3]

On review [4] of the Board's Decision and Order in the present case, the Second Circuit, noting the presence of "objective criteria" for determining seniority, did not accept the Board's finding that the aforementioned contract delegated exclusive control over seniority rights to the Union. However, the court did agree with the Board that the reduction of Lopuch's seniority was unauthorized by the contract and that such reduction "constituted a delegation of power over seniority rights which improperly encouraged union membership

[1] 125 NLRB 454.

[2] The contract provision reads as follows:

> SEC 8. It is further understood and agreed upon that during the dull season of the year, preference shall be given to the fuel oil chauffeurs on the seniority list, and that the Shop Steward shall be the No. 1 fuel oil chauffeur on the list.
>
> During the slack season, April 15 to October 15, any employee who according to seniority would not have steady employment shall be entitled to a leave of absence and maintain his full seniority rights during that period. Any man so described must report to the Shop Steward not later than 8:00 a.m. on October 15 and sign the seniority roster in order to protect his seniority, and the Employer agrees to accept the certification of said Shop Steward as to the availability of such men when called by the Employer. If October 15 falls on Saturday or Sunday, the reporting day shall be the next work day. Any man failing to report as above specified shall forfeit all seniority rights.

[3] 107 NLRB 837, enfd. 228 F. 2d 170 (C.A. 8).

[4] *N.L.R.B.* v. *Miranda Fuel Co.*, 284 F. 2d 861 (C.A. 2).

and discriminated against employee Lopuch."[5] The Union's petition for a writ of certiorari was, with the Board's acquiescence, granted on June 5, 1961, and the case was eventually remanded to the Board for consideration in the light of the Supreme Court's supervening decision in *Local 357, International Brotherhood of Teamsters, et al. (Los Angeles-Seattle Motor Express)* v. *N.L.R.B.*, 365 U.S. 667.

Our disagreement with our dissenting colleagues as to the disposition of this case on remand stems, in part, from our differing reading of the Supreme Court's opinion in *Local 357*. It might therefore be helpful at the outset to relate the posture in which that case reached the Court.

The issues before the Board in *Local 357*[6] were whether the union's exclusive hiring agreement with the California Trucking Association was violative of the Act and whether the specific application of such agreement to one Slater also violated the Act. The contract there in question provided, in part, that association employers shall not hire without first calling the union hall for employees and that the union shall thereupon dispatch employees "on a seniority basis in the Industry." The contract prescribed that the "Seniority rating of such employees shall begin with a minimum of three months' service in the Industry, irrespective of whether such employee is or is not a member of the Union," and the contract also required the union to keep available a list containing the seniority status of all employees on the described industry basis. The contract also contained a union-security clause conforming with the proviso to Section 8(a)(3) of the Act. An employer member of the Trucking Association violated the contract by hiring Slater, a union member, without going through the union hall, and the union thereupon caused the employer to remedy this contract breach by in effect discharging Slater until the matter was corrected.

Relying upon its so-called *Mountain Pacific* doctrine,[7] the Board concluded that the *Local 357* contract was unlawful and that its implementation in Slater's case also was unlawful. "The contract," said the Board (121 NLRB at 1630)—

> plainly obligates the Respondent Company to hire casual employees exclusively through the Respondent Union. Such an exclusive hiring agreement between an employer and a union, the Board has recently held, constitutes an inherent and unlawful encouragement of union membership *unless* the agreement explicitly provides that: (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations,

[5] *Id* at 863.

[6] *Los Angeles-Seattle Motor Express, Inc (IBT, Local 357)*, 121 NLRB 1629

[7] *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al*, 119 NLRB 883.

constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements; (2) the employer retains the right to reject any job applicant referred by the union; and (3) the parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards deemed by the Board to be essential to the legality of an exclusive hiring agreement. None of these safeguards essential to the legality of an exclusive hiring arrangement is contained in the contract to which Respondents are parties. Under all the circumstances, we conclude that the Respondent Company has violated Section 8(a)(3) and (1) of the Act, and the Respondent Union has violated Section 8(b)(2) and (1)(A) of the Act, by giving effect to the hiring provisions of their contract.

Having found the *Local 357* contract to be illegal, the Board further held in that case that "the Respondents have unlawfully encouraged employees to join the Respondent Union in order to obtain . . . employment, thereby inevitably coercing those employees to pay union initiation fees and dues. It would not effectuate the policies of the Act to permit the retention of the payments of these union initiation fees and dues which have been unlawfully exacted from casual employees. As part of the remedy, therefore, we shall order the Respondents jointly and severally to refund to the casual employees involved the initiation fees and dues paid by them as a price for their employment. This remedy of reimbursement is, we believe, appropriate and necessary to expunge the coercive effect of Respondent's unfair labor practices." (*Id.* at 1631.)

The Circuit Court of Appeals for the District of Columbia enforced the Board's *Local 357* decision by a *per curiam* opinion, but limited the dues reimbursement order to Slater (275 F. 2d 646). A divided Supreme Court [8] reversed the judgment below, holding that exclusive hiring agreements are not unlawful *per se* and stating that unions are not to be presumed to administer hiring hall arrangements in an unlawful manner. We accordingly do not find in the present case that the mere delegation to the Union of authority to determine seniority status is itself sufficient predicate for a finding of discrimination. However, we do not believe that the Supreme Court decision in *Local 357* requires a construction, as in the case of Lopuch's seniority reduction, that the Act permits a union to affect an employee's employment status for any reason merely so long as it is not based on that employee's union membership or activities.

[8] Justices Harlan and Stewart joined in a concurring opinion, Justices Clark and Whittaker issued a dissenting opinion, and Justice Frankfurter did not participate.

What our colleagues' proposition comes down to is that the Act lawfully entitles a statutory bargaining representative to refuse to refer an individual under an exclusive hiring arrangement for reasons other than a failure to tender dues and initiation fees, and that a union, no matter how arbitrary or unfair or disparate its action may be, may close the doors of employment to such individuals so long as the union's action is not motivated by the individual's union membership or activities. Thus, to cite an example, Union Business Agent Smith, who runs a union hiring hall under an exclusive hiring hall arrangement, places union member or nonmember Jones at the bottom of the referral list and causes his discharge, or otherwise refuses to refer Jones, because Jones refuses to court Smith's daughter. Our colleagues' syllogism would read as follows: Courting is not a protected right under Section 7 of the Act, and an employer may discharge Jones for such reason; therefore, as an employer is free to act on such basis under the Act, a union also does not violate the Act by causing the employer to take such action even in the context of an exclusive hiring agreement.

This syllogism has an appealing rationality *if* the Act treats and regards labor organizations no differently than it does employers. Therein lies the issue.

The Employer in the present *Miranda* case has accorded exclusive recognition to the Union for the employees in a bargaining unit, which included Lopuch, and this recognition as statutory representative has been memorialized in a series of collective-bargaining agreements. The privilege of acting as an exclusive bargaining representative derives from Section 9 of the Act, and a union which would occupy this statutory status must assume "the responsibility to act as a genuine representative of all the employees in the bargaining unit."[9] Thus, the Supreme Court has observed that: "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. *By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.*" [Emphasis supplied.] *The Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248, 255. "When the . . . union accepted certification [under the Act] as the bargaining representative for the group it accepted a trust. It became bound to represent equally and in good faith the interests of the whole group." *Hughes Tool Company* v. *N.L.R.B.*, 147 F. 2d 69, 74 (C.A. 5).[10]

A statutory representative under this Act, as under the Railway Labor Act, exercises a grant of powers "comparable to those possessed

[9] *Peerless Tool and Engineering Co*, 111 NLRB 853, enfd 231 F. 2d 298, 302 (C.A. 7), cert. denied 352 U.S. 833.

[10] See also *International Union of Electrical, Radio and Machine Workers, Frigidaire Local 801* v. *N.L.R.B.*, and *N.L.R.B.* v. *General Motors Corporation, Frigidaire Division*, 307 F. 2d 679 (C.A.D.C.)

by a legislative body" and must, as stated in *Steele* v. *Louisville & Nashville Railroad Co., et al.*, 323 U.S. 192, 202, "give equal protection to the interests of those for whom it legislates." [11] This does not mean, the Supreme Court in effect pointed out in the *Steele* case (*id.* at 203) that a statutory bargaining representative "is barred from making contracts which may have unfavorable effects on some of the [employees] . . . represented." What it does mean is that differences in treatment must relate to "relevant" differences, and the Court thereupon concluded that "discriminations based on race alone are obviously irrelevant and invidious." (*Id.*[12]) The Board has accordingly recognized the *Steele*, *Wallace*, and *Tunstall* [13] cases as establishing "a duty on the statutory bargaining agent to represent all members of the unit *equally and without discrimination on the basis of race, color, or creed.*" [14] [Emphasis supplied.] It is noteworthy, moreover, that in its *Radio Officers* [15] decision the Supreme Court cited these same cases for the proposition that "statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless 'to make agreements more favorable to the majority than to the minority.' Such discriminatory contracts are illegal and provide no defense to an action under Section 8(a)(3)."

Viewing these mentioned obligations of a statutory representative in the context of the "right" guaranteed employees by Section 7 of the Act "to bargain collectively through representatives of their own choosing," we are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.[16] Thus, we answer the issue posed earlier: namely, 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. To the extent, however, that an employer participates in such union's arbitrary action against an employee, the employer himself violates Section 8(a)(1)

[11] See, also, *Conley* v. *Gibson*, 355 U.S. 41, 45–46; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 773–774.

[12] See *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 337.

[13] *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210.

[14] *Hughes Tool Company*, 104 NLRB 318, 325.

[15] *The Radio Officers' etc.* (*A. H. Bull Steamship Company*) v. *N L R B*, 347 U.S. 17, 47–48.

[16] See, generally, Cox, "The Duty of Fair Representation," 2 Vill. L. Rev. 151 (1957); Wellington, "Union Democracy and Fair Representation," 67 Y L J. 1327 (1958).

of the Act. This would obtain, for example, where, for arbitrary or irrelevant reasons, a statutory bargaining representative attempts to cause an employee's discharge and the employer then becomes party to such violation of Section 7 rights by acceding to the union's efforts.

We further conclude that a statutory bargaining representative and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee. Here a question is whether such action may be said to "encourage membership in any labor organization," which finding is a necessary element of a violation of Section 8(a)(3) and 8(b)(2). We turn for guidance to the Supreme Court's opinions in the *Radio Officers* and *Local 357* cases, *supra;* for it was the *Radio Officers* case upon which the Board predicated its *Mountain Pacific* doctrine [17] which in turn underlies the Board's decision in *Local 357*.

The Supreme Court held in effect in the *Radio Officers* case that the requisite showing of encouragement of union membership was met in that case upon affirming the Board's rationale that such encouragement was the "foreseeable result" of conduct which had union causation. Extending this "foreseeable result" concept, the Board then held in effect in *Mountain Pacific* and in *Local 357* that all conduct is necessarily violative of Section 8(b)(2) and 8(a)(3) which has the "foreseeable result" of such encouragement or discouragement. The Supreme Court in *Local 357* treated its *Radio Officers* holding, in part, as follows (365 U.S. 667, at 675): "It is the 'true purpose' or 'real motive' in hiring or joining that constitutes the test [of unlawfulness under 8(a)(3) or 8(b)(2). Citing *Radio Officers*], *Id.*, 43. Some conduct may, by its very nature, contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. *Id.*, 45 . . . . The existence of discrimination may at times be inferred by the Board, for it 'is permissible to draw on experience in factual inquiries.' *Radio Officers* v. *Labor Board*, *supra*, 49." Justice Douglas, speaking for the Court, opined that "It may be that the very existence of the hiring hall encourages union membership" (365 U.S. 667, at 675); the Court nevertheless concluded that the *Local 357* hiring hall agreement was not unlawful, and the Court mentioned among other things in this connection that the agreement contained a "protective clause . . . and there is no evidence that it was in fact used unlawfully." (*Id.* at 676.) And referring to the Union's enforcement of the hiring agreement against union member Slater, the Court commented that "we cannot say without more that either in-

[17] *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB 883, 895–896

dulges in the kind of discrimination to which the Act is addressed." (*Id.* at 675.)

Justice Harlan's concurring opinion, in which Justice Stewart joined, gave what he called "explicit articulation" to "considerations . . . doubtless implicit" in Justice Douglas' opinion. (*Id.* at 677.) Justice Harlan pointed out, in explaining the Court's *Radio Officers* decision, that an employer may violate Section 8(a)(3) even though his own motive is nondiscriminatory where his action was caused by union coercion, and which thus "incidentally encourages union membership." (*Id.* at 681.) Mentioning the Court's assumption that an 8(a)(3) or 8(b)(2) violation generally requires an "affirmative showing of a motivation of encouraging or discouraging union status or activity" (*id.* at 680), Justice Harlan further discussed the Court's holding that a violation does not necessarily follow wherever such foreseeable encouragement exists. Justice Harlan then has the following to say, which we consider most significant in its application to the present case (*id.* at 681–682):

> There is no reason to decide now whether there are other contexts in which a showing of an actual motivation of encouraging or discouraging union activity might be unnecessary to a finding of a union or employer unfair labor practice. For present purposes, it is sufficient to note that what is involved in the general requirement of finding of forbidden motivation, as well as in the limited scope of the heretofore recognized exceptions to this general requirement, is a realization that *the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit* all *the represented employees.* It is against this policy that we should measure the Board's action in finding forbidden the incorporation in collective bargaining contracts of the "hiring hall" clause. We must determine whether the Board's action is consistent with the balance struck by the Wagner and Taft-Hartley Acts between protection of employee freedom with respect to union activity and the privilege of employer and union to make such nondiscriminatory decisions as seem to them to satisfy best the needs of the business and the employees. [Emphasis supplied.]

Justice Harlan later observed that the Board "has not found that this [*Local 357* hiring hall] clause was without substantial justification in terms of legitimate employer or union purposes." (*Id.* at 684.)

As we read *Local 357*, the Supreme Court did not overrule its holding in *Radio Officers* that union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status. What it does hold, in our opinion, is that an 8(a)(3) or 8(b)(2) violation does not necessarily flow from con-

duct which has the foreseeable result of encouraging union membership, but that given such "foreseeable result" the finding of a violation may turn upon an evaluation of the disputed conduct "in terms of legitimate employer or union purposes." [18] Unlike our colleagues, we do not interpret the Court's opinion as permitting unions and their agents an open season to affect an employee's employment status for any reason at all—personal, arbitrary, unfair, capricious, and the like—merely because the moving consideration does not involve the specific union membership or activities of the affected employee. Our colleagues, however, miss the essence of our position when they view our present decision as resting on the theory rejected by the Supreme Court in *Local 357*.

We now reach the Lopuch matter. Lopuch was a member of the Union and within the Union's bargaining unit. Under pressure from some employees in the unit, the Union sought to have Lopuch forfeit his contract seniority, first on one groundless basis and finally on another basis which the circuit court agrees to have been "in conflict with the agreement" (284 F. 2d at 863). It is immaterial whether the situation be viewed as one where the Union caused Miranda to reduce the seniority or, having been delegated the power, the Union did so itself. The right to hire and fire and to control tenure of employment is an employer's alone; and where an employer does delegate or surrender hiring and firing and related authority to a labor organization, the employer is responsible, so far as this Act is concerned, for the unlawful manner in which the Union exercises the delegation.[19]

In sharp contrast with Slater's case in *Local 357*, where the union caused Slater's discharge in conformity with a valid hiring hall agreement, the case of Lopuch presents a situation where a union caused an employee's contract seniority to be reduced [20] "against and not under the agreement" (284 F. 2d at 863). In acceding to the unjustified pressures of some employees within the unit, all of whom were union members, and thereupon causing, in violation of contract, a forfeiture of Lopuch's contract status in relation to other employees in the unit, Respondent Union exceeded a legitimate union purpose in clear violation of Lopuch's right to fair and impartial treatment from his statutory representative, and it thereby violated Section 8(b)(1)(A) of the Act.

Moreover, apart from the invalidity under the Act of the Union's exercise of an arbitrary power against an employee to affect his em-

[18] The preamble to the Act, as amended in 1947, sets forth a legislative purpose "to protect the right of individual employees in their relations with labor organizations." See, also H. Conf. Rept. 510, 80th Cong., 1st sess., p. 41, showing congressional concern for "protection to the individual worker against arbitrary action by the union."

[19] *Morrison-Knudsen Company, Inc* v. *N.L.R.B.*, 275 F. 2d 914 (C.A. 2), cert. denied 366 U.S. 909.

[20] Reduction of seniority is a form of discrimination. *The Radio Officers' etc.* (*A. H. Bull Steamship Company*) v. *N.L.R.B.*, 357 U.S. 17, 39

ployment status, the Union's actions herein may also, in our opinion, be considered as differing little if at all from a union's enforcement of its own rules. Thus, as there was nothing in the contract which compelled a loss of seniority for an early departure, the Union's insistence can be taken, in the circumstances, as nothing more than an arbitrary imposition of an *ex post facto* rule of its own making, and its alleged breach by Lopuch resulted in a discriminatory reduction of his seniority status not sanctioned by Section 8(a)(3) of the Act.[21] Indeed, we can see no essential difference between the decision reached here and our recent decisions in *Brunswick Corporation*, 135 NLRB 574; *International Union of Operating Engineers, Local 12, AFL-CIO (Engineers, Limited and Pacific Pipeline Construction Company)*, 135 NLRB 1252; and *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Valetta Motor Trucking Co.)*, 137 NLRB 1023.

Our overall conclusions herein find additional support in the following observations made recently by the court in *International Union of Electrical Radio and Machine Workers, Frigidaire Local 801* v. *N.L.R.B.*, and the companion case of *N.L.R.B.* v. *General Motors Corporation, Frigidaire Division*, 307 F. 2d 679, 683 (C.A.D.C.):

> Among the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of unions in their dealings with employees. See NLRB v. International Woodworkers, 264 F. 2d 649, 657 (9th Cir.), cert. denied, 361 U.S. 816 (1959). The requirement of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power vested in the union with respect to the individual. See NLRB v. International Woodworkers, *supra*. The requirement of fair dealing is not limited to union members; when an individual becomes an employee of a company having a union security clause in its contract the new employee is not free to join or refuse to join a union, nor does he have a voice in the selection of his bargaining representative. He takes the existing union and its contract in effect as one of the conditions of his employment. From the beginning of his employment, the union which can require his membership or command his discharge is therefore charged with an obligation of fair dealing which includes the duty to inform the employee of his rights and obligations so that the employee may take all necessary steps to protect his job.

[21] *Ibid.*

We think the court's observations are peculiarly pertinent to the instant case. If, as the Union contends, section 8 of the contract applied to drivers who left their jobs before April 15, even with the consent of the employer, it certainly was charged with an obligation of fair dealing so to have informed the employer and Lopuch, for it was common knowledge that Lopuch intended to take leave during the slack season for personal reasons unrelated to the objectives of the contract. Furthermore, even if the Union's insistence on this interpretation can somehow be construed as a demand for a modification of the agreement, as the minority seems to imply—a modification to which the employer was subsequently forced to agree—it seems to us that the Union again hardly met its obligation of fair dealing by insisting on the retroactive application of the modified section 8, in circumstances which made it clear that Lopuch had no reason to anticipate any change in his rights under the contract or to believe that, if the contract changed, it would be applied retroactively to deprive him of his seniority standing. The sacrifice of Lopuch to placate the other drivers does not, in our opinion, comport with the requirements for fair dealing.

Accordingly, because the Union caused Miranda to discriminate against Lopuch, and the discrimination had a foreseeable effect of encouraging union membership within the meaning of the Supreme Court's *Radio Officers* decision; and because such discrimination was in violation of the outstanding contract and was otherwise arbitrary and without legitimate purpose, we find that the Union thereby violated Section 8(b)(1)(A) and (2) of the Act and that Miranda thereby violated Section 8(a)(1) and (3).[22]

THE REMEDY

As our findings herein are essentially consistent with our findings in our original Decision and Order, except for our present finding that the Respondent Company and the Respondent Union did not violate Section 8(a)(3) and Section 8(b)(2), respectively, merely by the delegation to Respondent Union of exclusive control over the

[22] In a motion asking the Board to take cognizance of an alleged rejection by Lopuch of an offer of arbitration of the instant dispute, the Respondent Union urges that, as it was willing to resolve by arbitration the issue whether the contract required a reduction in Lopuch's seniority, it cannot be said that it was motivated by any purpose or intent to encourage union membership We perhaps might find some pertinence in the argument if the Union had offered to arbitrate the issue before causing Lopuch's reduction in seniority or before charges were filed herein. But faced with the selection of the Board as the forum for the resolution of the dispute over the validity of its conduct, we fail to see how the Respondent's subsequent willingness under the circumstances to proceed to arbitration can have any bearing on the question of its motivation. As we see the situation, Respondent's offer to arbitrate amounts to no more than an expression of a preference of forums and has no relevancy on the question of its motivation. In view thereof, we deny the Respondent Union's motion to make part of the record the letter of May 19, 1958, from the Board's Second Regional Office addressed to the Respondent Union's attorney.

seniority status of Respondent Company's employees, we adhere to the remedial recommendations of the Trial Examiner as modified by the section entitled "The Remedy" of our original Decision and Order herein.

AMENDED ORDER

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby amends its Order previously entered in this proceeding by deleting therefrom paragraphs A 1 (a) and B 1 (a) and modifying the notices therein provided, marked "Appendix A" and "Appendix B," by deleting therefrom the paragraphs comparable to the above paragraphs of the Order, and, as so amended, constitutes it the present Order of the Board.

CHAIRMAN MCCULLOCH and MEMBER FANNING, dissenting:

A. *Background*

As appears from the majority's decision, this case has had a checkered career. In 1959 the Board held (Member Fanning not participating) that by "surrendering to the Union the right to determine" Lopuch's seniority, the Company and the Union violated, respectively, Section 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the Act. 125 NLRB 454. The Board relied for that holding upon *Pacific Intermountain Express Company*, 107 NLRB 837, enforced with modifications not relevant here, 225 F. 2d 343 (C.A. 8).[23] In 1960 the Board's Order in the instant case was enforced by the Court of Appeals for the Second Circuit, but on the limited ground that the action taken against Lopuch was not warranted by the collective-bargaining agreement, and that "the action taken in conflict with the agreement constituted a delegation of power over seniority rights which improperly encouraged union membership and discriminated against the employee Lopuch." *N.L.R.B.* v. *Miranda Fuel Co.*, 284 F. 2d 861. Rehearing was denied and a petition for certiorari was pending before the Supreme Court in 1961 when that Court issued *Local 357, International Brotherhood of Teamsters, etc.* (*Los Angeles-Seattle Motor Express*) v. *N.L.R.B.*, 365 U.S. 667, and companion cases.[24]

Local 357 squarely presented the issue as to the right of a union to maintain a nondiscriminatory policy of job referral. The Supreme

[23] In *Pacific Intermountain Express*, the Board concluded that the mere delegation by an employer to a union of control over seniority is, without more, violative of the Act. The Board in that regard specifically overruled its own prior holding to the contrary. *Firestone Tire and Rubber Company*, 93 NLRB 981.

[24] *Local 60, United Brotherhood of Carpenters and Joiners of America* (*Mechanical Handling Systems*) v. *N.L.R.B.*, 365 U.S. 651; *N.L.R.B.* v *News Syndicate Co., Inc.*, 365 U.S. 695; *International Typographical Union* (*Haverhill Gazette*) v. *N.L.R.B.*, 365 U.S. 705.

Court held that the mere grant of exclusive authority to a union to refer applicants for employment is not unlawful, and that when an employer and a union enforce this grant of authority to the detriment of a union member "we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed." 365 U.S. at 675.[25] In response to the generalized assertion that any such discrimination had a natural and foreseeable consequence of encouraging union membership, the Court replied: "The truth is that the union is a service agency that probably encourages union membership whenever it does its job well." *Id.* at 675–676.

Thus, the Supreme Court in *Local 357* expressly rejected the theory[26] that an unlawful discriminatory motivation under Section 8(b)(2) and 8(a)(3) of the Act, and a corresponding violation under Section 8(b)(1)(A) and 8(a)(1), is automatically ascribed to a union and an employer in any case where an employee's employment status is changed to his detriment simply because this action was effectively requested by a labor organization.

As the majority opinion herein correctly notes, the Board, shortly after the issuance of *Local 357*, acquiesced in the petition for certiorari in the instant case. The Supreme Court thereupon granted the petition, vacated the judgment of the court of appeals, and remanded the case for reconsideration in the light of *Local 357*.

B. *The Board's Supplemental Decision*

In its Supplemental Decision, the majority states that in view of *Local 357*, "the mere delegation to the Union of authority to determine seniority is [not] itself sufficient predicate for a finding of discrimination." Nevertheless, the majority reaffirms the Board's original conclusion that the reduction of Lopuch's seniority at the request of the Union was unlawful.

The new rationale urged in support of this conclusion has in large part not heretofore been urged or passed upon in this much-litigated case. In sum, it begins with the premise—a premise with which we are wholly in accord—that under Section 9 of the Act a statutory bargaining representative is charged with the duty to represent the interests of all the employees in the bargaining unit fairly and impartially. But the majority goes further. The Section 9 duty, it is argued, must be read into the rights guaranteed employees by Section 7 of the Act so that any default in the Section 9 duty is correspondingly an infringement upon a Section 7 right. It then follows, the

[25] In the *News Syndicate* case, *supra*, the Supreme Court reached a like result in holding that there was no *per se* illegality in an arrangement whereby the employer permitted the union to establish competency tests and to establish employment priorities based thereon. 365 U.S 695.

[26] Sometimes referred to as the "arrogation" theory

majority concludes, that any such infringement by a union is a violation of Section 8(b) (1) (A), and, to the extent an employer acquiesces in the infringement, a violation of Section 8(a) (1), because the latter-named sections must be read as proscribing all intrusions upon Section 7 rights.

We defer, for the moment, consideration of the question whether the majority's observations in this regard are material to the instant case. Rather, we address ourselves to the remainder of the majority's thesis, namely, that the action of the Union and the Company in the instant case was likewise violative of Section 8(b) (2) and 8(a) (3) of the Act.

C. *The alleged violations of Section 8(b) (2) and 8(a) (3)*

That thesis begins with the broad-gauged postulate that "a union and employer . . . respectively violate Section 8(b) (2) and 8(a) (3) when, for arbitrary or irrelevant reasons, or upon the basis of an unfair classification, a union attempts to cause and does cause an employer to derogate the employment status of an employee." The majority, perforce, cites no authority for this postulate. On the contrary, it recognizes that both the literal language of the cited provisions and controlling Supreme Court cases require something more than disparate treatment based upon "arbitrary," "irrelevant," or "unfair" criteria. The "something more" is that the discrimination must be "to encourage or discourage membership in any labor organization." [27] Inasmuch as the record in the instant case is devoid of any objective evidence that the action of the Union or the Company was motivated by a desire to encourage or discourage union membership, the majority concludes that such a desire can be inferred, i.e., was a "foreseeable" result of the Union's conduct. This inference, in turn, is apparently bottomed upon the assumption that because no obvious nondiscriminatory basis for the Union's action is apparent, the action must be for the purpose of enhancing the Union's stature, and a foreseeable result, within the meaning of *Radio Officers* and *Local 357*, is to encourage union membership. It follows, in the majority view, that the Union violated Section 8(b) (2), and that the employer by delegating to the Union the authority to take this unlawful action violated Section 8(a) (3). An unarticulated premise here is that any "arbitrary" action taken by a union which affects an employee's employment status is, by definition, to encourage union membership and hence violative of Section 8(b) (2). A corollary is that employer acquiescence in the union's action, without more, violates Section 8(a) (3).

[27] Section 8(a) (3) of the Act. Section 8(b) (2), so far as here relevant, makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a) (3)," thus incorporating the requirement of encouraging or discouraging membership in a labor organization.

1. The impact of *Radio Officers*, *Local 357*, and *News Syndicate*

We believe the majority errs—in its construction of the statute, in its reading of *Radio Officers* and *Local 357*, and in its conclusion that the Union and the Company here violated Section 8(b)(2) and 8(a)(3) of the Act.

Preliminarily, we note that the Second Circuit in reviewing the Board's original decision herein did not subscribe to the view there expressed that any arrangement or understanding delegating to the Union exclusive control over seniority is unlawful. The court placed its reliance rather on the fact that the action taken here was "against and not under the agreement." The Supplemental Decision herein appears to embrace this distinction.[28]

Particularly in view of the supervening decision in *Local 357* we respectfully differ with the Second Circuit's holding and with our colleagues' apparent adoption of that holding. Nothing in *Local 357*, as we read it, or in the companion cases, requires or suggests that there is a distinction between action taken by an employer upon a union request pursuant to a written agreement, or like action taken in the absence of a formal agreement, in determining whether or not an employee is a victim of unlawful discrimination. As we read the Supreme Court's opinions, there must be evidence in the record in either case upon which the Board can reasonably conclude that the real purpose for the reduction in Lopuch's seniority was to encourage his or other employees' union membership.

Phrased in other terms, if the mere *contractual* delegation to a union of exclusive control over seniority is not conclusive proof of unlawful motivation, as the majority concedes, then by a parity of reasoning, the mere fact of a union's request and an employer's acquiescence in reducing an employee's seniority, *in the absence of a contract*, is not decisive in assessing the nature and legal effect of the action complained of. Unlawful action cannot be inferred from either, except under a naked arrogation doctrine which we believe the Supreme Court repudiated in *Local 357* and *News Syndicate*.[29]

[28] The majority says: "Thus, as there was nothing in the contract which compelled a loss of seniority for an early departure, the Union's insistence can be taken, in the circumstances, as nothing more than an arbitrary imposition of an *ex post facto* rule of its own making, and its alleged breach by Lopuch resulted in a discriminatory reduction of his seniority status not sanctioned by Section 8(a)(3) of the Act" The implication here seems to be that if the contract had contained a provision compelling a loss of seniority for an early departure, the application of that provision would not have been a discrimination violative of the Act, but because the contract did not contain such a provision, the identical action which, so far as appears, was motivated by precisely the same considerations, suddenly becomes unlawful discrimination. We fail to perceive a legally tenable distinction

[29] See *N.L.R.B. v. News Syndicate Co., Inc.*, 365 U.S. 695, at 699, " . . . we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress"

2. The lack of an evidentiary basis for a finding of unlawful purpose

In determining the lawfulness of the conduct of the Union and the Company in the instant case, therefore, it is essential that we analyze carefully the true purpose of that conduct and its foreseeable effect.

At the outset we note the significant fact that nowhere in its opinion does the majority cite any affirmative objective evidence to show that the Union or the Company had a proscribed motivation to encourage or discourage membership in a labor organization. Such a showing is, of course, in the normal case an indispensable precondition for a finding of a Section 8(a)(3) or 8(b)(2) violation. In the principal opinion in *Local 357*, Mr. Justice Douglas reiterated the lesson of *Radio Officers* (365 U.S., at 674–675):

> The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

It follows, as Mr. Justice Douglas added: "It is the 'true purpose' or 'real motive' . . . that constitutes the test." Mr. Justice Harlan agreed: "In general, this Court has assumed that a finding of a violation of § 8(a)(3) or § 8(b)(2) requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity" (365 U.S. at 680).

Both Mr. Justice Douglas and Mr. Justice Harlan recognized the exceptional case where conduct by its very nature contains the implications of the required intent. In such cases "the natural foreseeable consequences of certain action may warrant the inference" (at p. 675). But the cautious reach of this exception is exemplified not only by the examples cited in the respective opinions here cited, but also by the fact that such an inference was held unwarranted both in *Local 357* and in the *News Syndicate* case. Our colleagues of the majority, however, would draw such an inference in the instant case.

We find the situations legally indistinguishable. It was not enough in *Local 357* for the Board to assume unlawful motivation in the arrangement whereby the employer vested control of the hiring hall in the union. Nor could the Board read unlawful motivation into *News Syndicate* because of the union's exclusive control over apprenticeship and competency requirements. So here, in the absence of objective evidence, the majority may not find unlawful motivation merely by attributing to the union a purpose to "sacrifice" Lopuch

in order to "placate" the "unjustified pressures" of other employees in the unit, all of whom were union members.

The short of the matter is that the majority here is making the identical presumption which was made in *Mountain Pacific*, 119 NLRB 883, and in its decision in *Local 357*, made on the authority of *Mountain Pacific*. In *Mountain Pacific*, too, the Board made reference to "the Union's power and control over the employment status," to "unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it," and to the "inescapable" inference of encouragement of union membership. 119 NLRB at 896; quoted in *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Los Angeles-Seattle Motor Express)* 365 U.S. 667, 671.

Both the majority and the concurring opinions of the Supreme Court in *Local 357* rejected this analysis. The Board did not find in *Local 357* that the arrangement there was without substantial justification in terms of legitimate employer or union purposes. But, in any event, as Mr. Justice Harlan specifically noted (365 U.S. at 684):

> Whether or not such a finding would have been supported by the record is not for us now to decide. *The Board has not, in my view, made the type of showing of an actual motive of encouraging union membership that is required by* Universal Camera *v.* Labor Board, *supra.* [Emphasis supplied.]

Such a showing of "actual motive" has not been made in the instant case. And the inference which the majority would substitute for such a showing, based as it is on unsubstantiated allegations of arbitrariness and lack of "aboveboard explanations" is no more "inescapable" in the instant case than it was in *Mountain Pacific* and *Local 357*.

Moreover, we feel the majority opinion here is vulnerable even on its own stated grounds. Analytically, its conclusion that a proscribed motivation exists rests on two premises. The first is that the natural and foreseeable consequence of the reduction in Lopuch's seniority at the Union's request was to encourage membership in the Union. In this respect, and for reasons already set forth herein, we believe the majority is reasserting the precise doctrine it had—and for valid reason—just rejected, namely, that the delegation to a union of exclusive control over seniority was in and of itself a violation of the Act. As already noted, we are persuaded that *Local 357* and *Radio Officers* itself, both of which cases the majority cites, demonstrate the limitations of the doctrine of "foreseeability" as a substitute for the actual proof of unlawful discriminatory motivation which in our view is wanting here.

The second premise which the majority articulates is that the Union's conduct differs "little if at all from a union's enforcement of its own rules." [30] Characterizing the Union's action as "nothing more than an arbitrary imposition of an *ex post facto* rule of its own making," the majority concludes that the imposition of this rule against Lopuch resulted in a discrimination not sanctioned by Section 8(a)(3) of the Act.[31] Subsumed in this pronouncement, it seems fair to say, is the proposition that any union action or request is the adoption of a union rule, and that a union's enforcement of its own rules necessarily encourages membership in a union. We need not explore the ramifications of this doctrine extensively for we find the premise wholly inapposite in the instant case.

Moreover, we have dealt with this issue in some detail in our dissent in *Animated Displays Company*, 137 NLRB 999. Although we might be tempted to condemn, under the rubric of Section 8(b)(2) or 8(a)(3), union action which may appear unwarranted upon the predicate that it is pursuant to a "union rule or policy," that is not the measuring stick which Congress gave to the Board. As we said in *Animated Displays*, and as we have documented here, the discrimination which Section 8(b)(2) and 8(a)(3) outlaws is that related to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations." Where disparity of treatment has this as its foundation, that disparity of treatment is vulnerable, whether based on a rule or not.[32]

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[30] To the extent that this contention is based on a mere absence of a contract with the employer, covering the matter, we have already indicated our reasons for holding this insufficient to establish unlawful motivation, *supra*.

[31] The fact that the action complained about was not sanctioned by Section 8(a)(3) is, of course, not decisive, since it cannot correctly be contended that the failure to pay dues and initiation fees there specified is the only ground upon which a union can lawfully cause an employer to affect an employee's employment status. See *Studebaker Corporation*, 110 NLRB 1307, 1323, 1325–1327; *Ford Motor Company* v. *Huffman*, 345 U.S. 330; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521; *Plaza Builders, Incorporated*, 134 NLRB 652; *Yonkers Contracting Co., Inc*, 135 NLRB 865.

[32] Our colleagues suggest that this is true in the instant case, but they have not explained in what respect the parties' actions were related to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations." Moreover, the cases which they cite in support of their position are plainly distinguishable. In *Brunswick Corporation*, the employer complied with a union steward's demand for the discharge of an employee who, in violation of instructions from the steward, had quit his work early. In finding a violation of Section 8(b)(2) the Board said specifically that the discharge was in reprisal for the refusal to comply "with a union rule, which the union members under his [steward's] jurisdiction were obligated to follow." In *Valetta*, the union's contention that the employee's reduction in preference for driving assignments was to preserve jobs for unemployed drivers, was found to be a pretext, and the Board held that the discrimination was either because the affected employee was considered a "troublemaker" by his fellow employees, all union members, or because the union wished to substitute its own method of job assignments for that which the employer preferred. Similarly, in the *Local 12* case, the discharge was under "a threat of a work stoppage and imposition of *AGC hiring procedures* by threat and duress." [Emphasis supplied.]

Further, we do not believe that the recent court of appeals decision in the *General Motors, Frigidaire Division* case justifies the majority's holding. In that case, the union secured the discharge of an employee who had made a belated tender of dues. The court held that because the employee had not been informed of his obligation with respect to

Here, on the other hand, the disparity of treatment, as a result of which Lopuch was prejudiced, flowed from his absence from the job. Lopuch was a member of the Union. The beneficiaries of the action against Lopuch were the remaining employees who rose in the seniority ladder without regard to their union membership or lack of it. There is no basis in the record for assuming that the action which the Union took was predicated on supposed shortcomings in Lopuch's performance of any union obligation, or was designed to benefit fellow employees who were union members as opposed to fellow employees who were not union members. Moreover, the record does not suggest—nor do our colleagues—precisely what union rule or policy Lopuch is presumed to have transgressed.

As is apparent from the contract provision here in issue and from the whole record, the Union and the Company were pursuing the admittedly legitimate objective of eliminating the fluctuations of seasonal employment. The utilization of absence at certain times as a means of achieving that objective, whether pursuant to a contract provision or not, is not in and of itself discriminatory in the statutory sense. Pursuit of this objective is, in the last analysis, in the interest of all the employees the Union represented. The detriment to Lopuch, a union member, and the resultant benefit to Lopuch's fellow employees irrespective of their union membership can hardly be said to have encouraged union membership as such. Rather, the foreseeable effect could only be to encourage timely return and continuous work until the annual layoff, the identical objective which prompted the contract provision.

One might quarrel with the equities of the disposition made by the Respondents in Lopuch's case.[33] But there is no showing that union considerations motivated the Company or the Union. Doubts or suspicions, even when based on healthy skepticism, may not be substituted for proof of unlawful discrimination. No other proof is cited. We

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the payment of dues, the union could not refuse a good-faith tender of such dues made within a reasonable time after the employee had learned or reasonably should have learned that he had to join the union in order to keep his job. In reaching this conclusion the court relied upon a union's "obligation of fair dealing," but in no sense can the decision be understood as extending the province of the Board's protective action to situations where the union's actions are unrelated to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations." The *General Motors* case itself involved a matter of union obligation, the payment of dues

[33] So, too, one might conceivably quarrel with the equities of the preference given to veterans in *Ford Motor Company* v. *Huffman*, 345 U.S 330, or the preference given union functionaries in *Aeronautical Industrial District Lodge 727* v *Campbell*, 337 U.S 521 Yet in both of these cases the Supreme Court found that the implementation of this preference was plainly within the statutory authority of a collective-bargaining representative. Indeed, in *Huffman*, the Supreme Court had this to say (345 U S at 332, footnote 4): "Our decision interprets the statutory authority of a bargaining representative to have such breadth that it removes all ground for a substantial charge that [the union] by exceeding its authority committed an unfair labor practice" It is interesting to note that the Supreme Court made this observation in connection with its discussion of a contention that the court below lacked jurisdiction in the premises because the action complained of, if cognizable at all, was cognizable only in an unfair labor practice proceeding subject to the Board's exclusive jurisdiction.

conclude, therefore, that the record will not support a finding of violation of Section 8(b)(2) or 8(a)(3) of the Act.

D. *The alleged violations of Sec. 8(b)(1)(A) and 8(a)(1)*

There remains for consideration only the proposition that the action of the Union and the Company here is, in any event, violative of Section 8(b)(1)(A) and 8(a)(1) of the Act. To recapitulate, it proceeds upon the premise that Section 9 imposes upon a bargaining representative the duty to represent all the employees in the bargaining unit fairly and impartially; that this duty must be read into the rights guaranteed by Section 7 of the Act so that any default in the performance of the Section 9 duty is an infringement upon a Section 7 right; and that any such infringement trenches upon the prohibitions of Section 8(b)(1)(A) and 8(a)(1) which insulate Section 7 rights against union or employer intrusion.

The majority does not suggest that this theory was advanced, argued, or litigated in the instant case. Moreover, quite apart from this frailty, the majority assumes—an assumption which we believe is not warranted by the facts of record—that the Union's action against Lopuch was an arbitrary and invidious discrimination and, hence, a default in its statutory obligation under Section 9. For reasons we have already set forth, and especially in the light of the language in *Huffman* (*supra*, footnote 32) concerning the breadth of a statutory representative's authority in this regard, we believe this assumption (upon which the majority's whole argument, even if otherwise valid, must rest) is unwarranted.

The cases upon which the majority relies to establish that an arbitrary and invidious discrimination occurred here are inapposite. It is important to note the circumstances in which this principle has been laid down and the precise legal consequences—and limits thereof—that have been held to flow from a violation of it in the decided cases.

In the first case cited by the majority, *The Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248, 255, the certified independent union refused to admit CIO men to membership, and the company fired them. The discrimination found to be a violation of Section 8(a)(3) and (1) was clearly based on past CIO membership. In *Hughes Tool Company* v. *N.L.R.B.*, 147 F. 2d 69, 74 (C.A. 5), it was a refusal to handle grievances for nonmembers of the certified union that was referred to by the court. The Board indicated that rescission of the union's certification would be an appropriate remedy, although it did not invoke the remedy in that case. And in *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U.S. 192, 202 (followed in *Tunstall*), the Court granted injunctive relief against the enforcement of agreements between the

employer and the certified union which discriminated against some employees on account of race.

The Board has itself interpreted the statute to give it authority to revoke certifications where the duty of fair representation is breached by such racial discriminations. *Larus & Brother Company, Inc.*, 62 NLRB 1075.

The reduction of Lopuch's seniority for his absence from work is a far cry from the arbitrary and invidious discriminations that were the subject of the cited cases.

The impact of the majority's opinion transcends the instant case, however, and impels us to observe that even if the record supported a finding of arbitrary action by the Union and acquiescence by the Company in such arbitrary action, and even if the issue in that regard were open for resolution in this case, the majority errs in its analysis.

We recognize, of course, that Section 9 of the Act imposes the obligation upon a statutory representative to represent all the employees in the bargaining unit fairly and impartially. The numerous cases cited by the majority, arising both under the Railway Labor Act and the National Labor Relations Act, attest the binding character of this obligation and attest also the fact that the courts have not been remiss in enforcing this obligation. Moreover, we recognize, as the Board has uniformly recognized, that in the exercise of the powers granted the Board in Section 9, i.e., to determine questions concerning representation involving questions of appropriate unit and designation of bargaining representatives, the statute empowers us also to insure compliance with that obligation, for example, by withholding or revoking certifications in situations where the duty of fair representation has been egregiously flouted.[34]

The question is whether in the instant case, a *Section 10 proceeding* which defines the Board's powers to remedy unfair labor practices listed in Section 8 of the Act, the Board has the power which the majority here asserts.

Even assuming *arguendo* that the Section 9 duty of fair representation can be read into Section 7, it does not follow that the prohibitory provisions of Section 8(a)(1) or 8(b)(1)(A), or even all the provisions of Section 8, provide a remedy for all incursions upon those rights, or make the Board the exclusive guardian of those rights.

In *N.L.R.B.* v. *Drivers, Chauffeurs and Helpers Local Union No. 639, International Brotherhood of Teamsters etc.* (*Curtis Brothers*), 362 U.S. 274, 284–290, the Supreme Court dealt at length with the limitations of the Board's powers in that regard with specific reference to Section 8(b)(1)(A) of the Act. There the question presented was whether peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the em-

[34] See *Larus & Brother Company, Inc, supra; Hughes Tool Company,* 104 NLRB 318.

ployees' exclusive bargaining agent, is conduct of the union "to restrain or coerce" the employees in the exercise of rights guaranteed by Section 7, and thus an unfair labor practice under Section 8(b)(1)(A). The Board held, *inter alia*, that because the object of the picketing was to make the picketing union the exclusive bargaining representative over employees, a majority of whom had not selected the union, the employees were, *pro tanto*, deprived of their Section 7 right to bargain collectively through a representative of their own choosing; it followed that Section 8(b)(1)(A) which protected Section 7 rights against union infringement was violated. The reasoning was as persuasive as that proffered in the instant case, if not more so. But the Supreme Court flatly rejected the argument and held that Section 8(b)(1)(A) had, not the broad sweep contended for, but only "limited application"; that the section was "only one of many interwoven sections in a complex Act." (362 U.S. at 290–292.)

One year later, in *Local 357* itself, the Court, citing the *Drivers, Chauffeurs and Helpers Local Union No. 639* case, repeated this theme (365 U.S. at 676):

> [W]here Congress has adopted a selective system for dealing with evils, the Board is confined to that system. [Citation omitted.] Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

We find nothing in the exhaustive legislative history of the Act or in Board or court authority [35]—and the majority opinion furnishes no aid in that regard [36]—which suggests that Section 8(b)(1)(A) or Section 8(a)(1) has the sweep which the majority perceives.[37] We

[35] Excepting, of course, the Board decision reversed by the Supreme Court in the *Drivers, Chauffeurs and Helpers Local Union No. 639* case, *supra* However, as the Court noted, that Board decision was inconsistent with a decade of prior Board decisions dealing with the scope of Section 8(b)(1)(A).

[36] The language cited by the majority (footnote 18) from the H. Conf. Rept. 510, p. 41, as evidencing a congressional purpose to protect individual workers "against arbitrary action by the union" has specific reference to the concluding language of the union-security proviso to Section 8(a)(3) dealing with the availability of union membership "on the same terms as those generally applicable to other members" That language, in our view, may not be read as evincing a legislative purpose to outlaw "arbitrary action" in general.

[37] It is noteworthy that, according to the majority, a Section 8(a)(1) violation only enters this picture insofar as an employer "participates in [a] union's arbitrary action." The majority would not argue, of course, that an employer could not otherwise discharge an employee for "arbitrary" reasons. The asserted justification for imposing a more stringent limitation upon unions is predicated on their special status as statutory bargaining representatives. However worthy our colleagues' motivation, their assertion as to the scope and function of Section 8(b)(1)(A) does not reflect the intention of the drafters as interpreted by the Supreme Court. "In the Taft-Hartley Act Congress added § 8(b)(1)(A) to the Wagner Act, prohibiting, as the Court of Appeals held, 'unions from invading the rights of employees under § 8(a)(1).' 280 F. 2d at 620. It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed upon employers with respect to violations of employee rights." (Legislative references omitted.) *International Ladies' Garment Workers Union* v *N L R.B.*, 366 U.S. 731, 738.

may assume, *arguendo*, that the tactics used here, like the tactics used in *N.L.R.B.* v. *Insurance Agents' International Union* (*Prudential Ins. Co.*), 361 U.S. 477, 496, "deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it."

We join our colleagues in their condemnation of arbitrary and invidious action against employees, whether at the hands of their employers or at the hands of their bargaining representatives. We recognize also that their proposal represents a laudable effort to reach—in appropriate cases—union or employer conduct which falls outside the literal scope of the Act's prohibitory unfair labor practice provisions. But to say that a proposal is laudable and that it has a salutary objective does not endow it with legal validity.

In situations where employees have been the victims of truly arbitrary or invidious discrimination at the hands of their statutory bargaining representative, with or without the employer acquiescence, they are not without recourse.[38] This is true even where that arbitrary or invidious action is unrelated to legitimate union or other concerted activities protected by the Act. The courts have furnished, and do furnish, a remedy.[39] Congress has throughout the years indicated no dissatisfaction with this remedial scheme. The position here advocated by the majority represents, in our view, an unwarranted extension of Board authority.

[38] *Larus & Brother, Inc*, 62 NLRB 1075; *Hughes Tool Company*, 104 NLRB 318, and see cases cited in footnote 39 *infra*.

[39] *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen et al.*, 323 U.S. 210; *Syres* v. *Oil Workers*, 350 U.S. 892.

Bartlett-Collins Company *and* United Glass and Ceramic Workers of North America, AFL-CIO, and United Glass and Ceramic Workers of North America, Local 411. *Case No. 16-CA-1645. December 20, 1962*

DECISION AND ORDER

On September 21, 1962, Trial Examiner Joseph I. Nachman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report.