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RACIAL AND RELIGIOUS DISCRIMINATION IN EMPLOYMENT AND THE ROLE OF THE NLRB

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I. INTRODUCTION

The concern currently expressed by several large and powerful national organizations about racial and religious discrimination in employment, and the attention given to the problem by both major political parties at their 1960 conventions,[1] portend renewed efforts to enact federal legislation providing legal remedies to persons suffering such job discrimination. Proposals to enact federal fair employment legislation date back many years.[2] However, the problem of discrimination in employment, particularly among Negroes, has been aggravated by the swiftness of industrial automation in displacing unskilled workers, and the telling effect of recessions, such as the one which took place in 1958. The reason that Negroes and other minority groups feel the pinch of unemployment with such dispro-

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[1] The Democratic platform adopted on July 21, 1960 at Los Angeles, provided:

> "The right to a job requires action to break down artificial and arbitrary barriers to employment based on age, race, sex, religion or national origin.
>
> Unemployment strikes hardest at workers over 40, minority groups, young people, and women. We will not achieve full employment until prejudice against these workers is wiped out. . .
>
> The new Democratic Administration will support Federal legislation establishing a Fair Employment Practices Commission to secure effectively for everyone the right to equal opportunity to employment."

The Republican platform adopted on July 27, 1960 at Chicago provided:

> "We pledge:
>
> Continued support for legislation to establish a Commission on Equal Job Opportunity to make permanent and to expand with legislative backing the excellent work being performed by the President's Committee on Government Contracts;
>
> Appropriate legislation to end the discriminatory membership practices of some labor union locals, unless such practices are eradicated promptly by the labor unions themselves;
>
> Use of the full-scale review of existing state laws, and of prior proposals for federal legislation, to eliminate discrimination in employment now being conducted by the Civil Rights Commission, for guidance in our objective of developing a Federal-State program in the employment area;
>
> Special consideration of training programs aimed at developing the skills of those now working in marginal agricultural employment so that they can obtain employment in industry, notably in the new industries moving into the South."

[2] See, for example, the report of President Truman's Civil Rights Committee. "To Secure These Rights" (1948).

portionate severity is that they are employed largely in unskilled and semi-skilled positions in manufacturing, where cyclical unemployment is greatest, and where they lack sufficient seniority to be protected during mass layoffs.[3] "Last to be hired and first to be fired" has been a long-standing complaint that has assumed graver implications. This concentration of Negroes and other minority groups in mass production industries has, in turn, been accentuated by the difficulties which Negroes have encountered in joining various railroad brotherhoods and in entering apprenticeship programs leading to full membership in the higher-paid building trades unions.[4] In 1955, at the time of the merger of the AFL and the CIO, the CIO influenced the newly-formed federation to adopt a civil rights clause[5] in its constitution.[6] When, on January 20, 1960, the Brotherhood of Railroad Trainmen, at its convention in Cleveland, Ohio, voted to abolish a "whites only" clause in its constitution, the Brotherhood of Locomotive Firemen and Enginemen was left as the only AFL-CIO affiliate to maintain a formal "lily-white" policy respecting membership. However, the National Association for the Advancement of Colored People, in pressing the AFL-CIO for enforcement of its constitutional declaration, has felt that labor practices, at least in some locals, have failed to conform to principles enunciated at the international level.[7] The widely publicized refusal of Local 26, International Brotherhood of Electrical Workers, in Washington, D.C., to refer Negroes for employment in the construction of a new office building for the House of Representatives, and the action of AFL-CIO President George Meany to circumvent this refusal, serve to underscore the merit in the complaint as well as the determination of labor leadership to put policy into practice.

As pressure again begins to mount for federal legislative action to end job discrimination, it is well to review the present status of federal law respecting racial discriminatees, particularly with reference to the agency charged with the responsibility of supervising wide areas of labor-man-

[3] During the 1958 recession, the rate of unemployment among Negro workers was more than twice the unemployment rate among white workers. In November 1958, 4.8% of white males were unemployed, while 11.4% of Negro males were without jobs. Fortune, March 1959, 191.

[4] See America, Feb. 6, 1960, 544.

[5] The clause commits the AFL-CIO "to encourage all workers without regard to race, creed, color, or national origin to share in the full benefits of union organization."

[6] See Business Week, January 10, 1959, 78.

[7] See Business Week, May 17, 1958, 139.

agement relations in most large-scale industries. Such a review of NLRB and related cases will not only serve to set forth the status of the law in the absence of Congressional action dealing specifically with racial discrimination in employment, but may also suggest remedies which can be best adopted in conformity with experience under established procedures.

II. Federal Court Litigation on Job Discrimination

A. *Court Litigation under the Railway Labor Act*

Despite the Equal Protection Clause of the Fourteenth Amendment, and the willingness of the Supreme Court to find its similar import in the Fifth Amendment,[8] there are no federal constitutional restrictions as such on racial or religious discrimination in private employment. The historic and consistent view of the Supreme Court has been that these constitutional provisions serve as limitations only upon governmental instrumentalities, not upon individual citizens acting in a private capacity.[9] Accordingly, since unions do not fall into the category of governmental instrumentalities, their actions are not directly inhibited by the Fifth or Fourteenth Amendments. Hence, whenever federal courts or the NLRB have intervened to grant relief from racial discrimination, such relief has not been premised upon constitutional grounds, but upon the basis of statutory provisions and a general judicial disapproval of the distinctions between employees as "irrelevant and invidious."[10]

While the principal thrust of state FEPC legislation is aimed at bias by employers, the vast majority of federal cases on the subject are directed at discriminatory situa-

[8] See Bolling v. Sharpe, 347 U.S. 497 (1954), the District of Columbia school desegregation case. Because the case arose in a territory under the exclusive jurisdiction of the federal government, the plaintiffs could not cite the Equal Protection Clause of the Fourteenth Amendment to obtain relief, since that provision restricts only the several states. However, the Supreme Court relied upon the Due Process Clause of the Fifth Amendment to afford relief similar to that given to plaintiffs who brought desegregation suits against state instrumentalities.

[9] The Civil Rights Cases, 109 U.S. 3 (1883).

[10] Steele v. L. & N. R. Co., 323 U.S. 192, 203 (1944). An excellent example of Justice Murphy's philosophy can be found in his vigorous concurring opinion in the Steele case. Rather than relying upon the statutory basis of the majority opinion, he stated that the action of the Brotherhood of Locomotive Firemen and Enginemen in discriminating against Negroes infringed upon a constitutional right. It was his belief that the Constitution of the United States forbids economic discrimination applied under the authority of law against anyone on the basis of race or color, and he preferred that his brethren of the Court base their position upon the fundamental law. *Id.*, 208.

tions caused principally by unions. It should also be noted that federal litigation attacking racial discrimination in employment did not originate in the vast area of interstate commerce subject to the jurisdiction of the NLRB, but rather in the railroad industry under the provisions of the Railway Labor Act.[11] The *Steele* case,[12] brought by a group of Negro firemen against a railroad carrier and the Brotherhood of Locomotive Firemen and Enginemen, was the first significant decision by the Supreme Court dealing affirmatively with the question of racial discrimination in employment and provided the basic rationale for many future decisions, by both court and board.

In *Steele*, the plaintiffs alleged that the carrier and the union had entered into an agreement setting up a seniority system which eventually would spell the complete exclusion of Negroes from situations as firemen. The Supreme Court, in granting injunctive relief, laid great emphasis on the fact that the union in question was selected in accordance with the provisions of the Railway Labor Act, and was thereby accorded a special statutory privilege to serve as the exclusive bargaining representative for an entire class or craft. Having attained the exclusive right to bargain for all firemen, the union also assumed the responsibility of advancing the interests of all firemen, both white and Negro. Hence, it was not free to enhance the economic positions of some of its bargaining constituents at the expense of others whom it was obligated to represent. To use a term familiar to the common law, the union, unlike any private, voluntary association, became, in effect, a trustee for all firemen, and the Court would see to it that it fulfilled its fiduciary duty to all intended beneficiaries.

At the same time, the Supreme Court affirmed, albeit not in a racial context, the duty of an NLRB-certified union to represent with equal solicitude all employees for whom it was certified. In *Wallace Corp. v. Labor Board*,[13] an employer was found guilty of violating former Section 8(3) of the National Labor Relations Act. He had entered into a closed shop contract with a certified union, which contained a provision requiring him to discharge all employees who had been members of a rival union that lost a representation election. At that time, the processes of the Board could not reach the activities of labor organizations, so the Supreme Court had to strike at union practices in an in-

[11] 44 STAT. 577 (1926), as amended, 45 U.S.C.A. § 151 *et seq.*
[12] *Supra*, n. 10.
[13] 323 U.S. 248 (1944).

direct way. The Supreme Court clearly stated that the union was under a duty to represent all employees for whom it was certified. Accordingly, it could not enter into a collective bargaining agreement which would require the discharge of regular employees because they had been members of a rival organization. Therefore, when an employer gave effect to such an agreement, he was guilty of an unfair labor practice. This decision has been frequently cited, in cases involving industries subject to NLRB jurisdiction, for the same proposition contained in the *Steele* decision, namely, that racial discrimination by a labor organization in making a collective bargaining agreement violates the union's duty to render equal service to all employees it is supposed to represent.

Subsequent litigation has served to reinforce the obligation of unions to bargain for all their constituents on a non-discriminatory basis. Interestingly enough, this obligation has largely been developed by federal courts, exercising their general equity jurisdiction, and not by federal administrative agencies in the course of their normal administration of federal labor laws, despite the fact that the Court decisions have been premised upon statutes falling within the administrative responsibility of these agencies.

While the *Steele* case forbade racially discriminatory contracts within a single class or craft of railroad employees, the *Howard*[14] case, coming a few years later, extended the same rationale to prevent a racially segregated union from pre-empting jobs from Negroes who were members of another historically recognized craft of railroad employees. In *Howard*, the Brotherhood of Railroad Trainmen, by threatening a strike, forced the Frisco Railroad to enter into an agreement reserving exclusively to trainmen certain tasks which had formerly been done, in part, by Negro train porters. This racial jurisdictional dispute was resolved by the Supreme Court by granting an injunction forbidding the enforcement of the agreement on the ground that it had been unfairly concluded.

Conley v. Gibson[15] further extended the protection of the *Steele* doctrine to cover situations in which racial discrimination was practiced by a union against its own members. In *Conley*, the Brotherhood of Railway and Steamship Clerks organized its members into segregated locals. The

[14] Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

[15] 355 U.S. 41 (1957).

negotiating committee was made up exclusively of white men. The committee, acting on behalf of both locals, concluded an agreement with the railroad carrier that would have required the replacement of forty-five Negro clerks in the Houston freight house with white clerks. The plaintiffs also complained that the committee failed to do its duty to adjust individual grievances filed by Negro employees. The Supreme Court had no difficulty in finding that the negotiating committee failed to fulfill its statutory duty to represent fairly all employees in the bargaining unit by engaging in the conduct alleged. The Court also stated that the duty of the bargaining agent to represent all employees equally extends not only to the formation of a collective agreement but also governs the subsequent administration of the agreement as well.

B. *Recent Court cases in "NLRB Industries"*

Within the much broader jurisdictional scope of the National Labor Relations Act, racial discrimination has been more difficult to attack. Both the courts and the NLRB have been mindful of the Supreme Court teaching in regard to discrimination under Section (a)(3)[16] of the National Labor Relations Act. Lest the broad terms of the statute be further expanded by administrative or judicial fiat, the High Court issued the reminder — "Nor does this section (8(a)(3)) outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."[17] Much of the support for NLRB action in the field of racial discrimination has come, by analogy, from the *Wallace* case, *supra,* which was not decided in the context of racial conflict. Because of the fact that Section 8(a)(3) is not designed to eliminate racial or religious discrimination, legal assaults on such practices within the framework of the Taft-Hartley Act have been predicated upon Section 9(a). This section provides that "representatives designated or selected for the purpose of collective bargaining by the

[16] Section 8(a)(3), now codified in 29 U.S.C.A. (Supp. 1960) § 158(a)(3), is the principal provision of the Labor Management Relations Act dealing generally with discrimination in employment. It provides:

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

Section 8(b)(2) now codified in 29 U.S.C.A. (1956) § 158(b)(2), forbids a labor organization from causing or attempting to cause an employer to engage in such discriminatory conduct.

[17] Radio Officers v. Labor Board, 347 U.S. 17, 43 (1954).

majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of *all* the employees in such unit for the purposes of collective bargaining. . . ." (Emphasis supplied.) Necessarily, the litigation in this area has primarily dealt with instances of union-generated racial discrimination in violation of a statutory bargaining duty, rather than with racial or religious practices by employers in the absence of union causation. The Supreme Court has spoken on this point in only the most desultory and cryptic fashion.

Two principal court cases in "NLRB industries" involve racial hiring bias. In *Williams v. Yellow Cab. Co. of Pittsburgh, Pa.*,[18] a group of Negro cab drivers in Pittsburgh brought suit in District Court against the Teamsters and the Yellow Cab Company for an unlawful conspiracy. They charged that the defendants had entered into a collective bargaining agreement which would relegate Negro cab drivers employed by the Yellow Cab Company to less desirable and lower paying assignments than those given to white cab drivers. The union here involved had been recognized by the company on the basis of a showing of majority representation, rather than by Board election and certification. The plaintiffs charged that the union was failing to fulfill its statutory bargaining duty, under Section 9, to represent "all employees." In dismissing the complaint, the United States Court of Appeals for the Third Circuit, while following the basic concept of the *Civil Rights Cases*,[19] drew sharp distinction between the obligations of certified and uncertified bargaining agents. In so deciding, the Court ignored the language in Section 9(a) relating to bargaining representatives that are "designated or selected." Since the union herein had achieved its position as bargaining representative by majority designation rather than by Board election and certification, the Court felt it was powerless to interfere with any contract it might conclude. It distinguished the union's status from the position of the union in the *Steele* case on the basis that the Teamsters herein had achieved their right to serve as bargaining representative through the privately-made choice of the employees, not through the issuance of a certificate by a governmental agency. It is interesting to speculate what the Third Circuit would have done, had the same Negro plaintiffs first filed a timely representation

[18] 200 F. 2d 302 (3rd Cir. 1952).

[19] *Supra*, n. 9.

petition, awaited a Board election and certification of the union, and then brought their suit in District Court against a defendant who enjoyed a current certification as well as a majority designation.

Syres v. Oil Workers International Union, Local No. 23,[20] is the second prominent court case in this area. In *Syres*, two union locals, one restricted to white members and the other restricted to Negroes, were jointly certified as the bargaining representatives for all employees at an oil refinery. However, the negotiating committee which concluded the collective bargaining agreement was composed exclusively of white men. It concluded an agreement with the company which effectively froze Negro members into an unpromotable status. Several Negro employees filed an action in the United States District Court to nullify the agreement. On appeal in the Court of Appeals for the Fifth Circuit, the case was dismissed without the drawing of any nice distinction between certified and uncertified unions. Instead, the Court used procedural grounds to dispose of the case. It held that inasmuch as no federal statute specifically authorized the suit, a federal court did not, in the absence of diversity of citizenship between the parties, have jurisdiction to grant relief. The Supreme Court of the United States promptly reversed the Fifth Circuit, in a *per curiam* decision without opinion, citing, *inter alia*, its previous decisions in the *Steele* and *Howard* cases. However, it did not give any further explanation of its views on the merits of the case, and thus leaves the impact of its decision open to much speculation.

III. NLRB LITIGATION IN THE AREA OF RACIAL DISCRIMINATION

From the earliest days of the National Labor Relations Act, the NLRB has been confronted with problems involving racial discrimination and racial segregation. These problems have, for the most part, arisen in three different legal postures: (1) determinations of appropriate collective

[20] 223 F. 2d 739 (5th Cir. 1955), rev'd 350 U.S. 892 (1955). The progress of this particular case illustrates what may occur as the practical result of seeking legal redress from racial discrimination. When this case was remanded, the plaintiffs confined their demand for relief to damages for past injuries, rather than pressing their demand for an injunction. The discriminatory contract drawn into question had expired, and had been replaced by a new agreement which was not attacked. Presumably, the parties eliminated the provisions which were the gravamen of the original complaint.

bargaining units; (2) enforcement of the duty of a certified bargaining representative to fulfill a duty implicit in certification to represent equally all members of the bargaining unit; and (3) appeals to racial bias to influence the outcome of representation elections. The Board has never attempted to eliminate racial or religious discrimination in hiring by the citation of either labor or management for the commission of an unfair labor practice. Nor has it attempted to eliminate racial segregation within labor unions.[21]

It has been the consistent policy of the Board to disregard racial considerations in determining the appropriateness of bargaining units. In so acting, the Board has materially reduced the likelihood of emotion-charged racial jurisdictional disputes which have characterized much of the above-mentioned litigation in the railroad industry. In *American Tobacco Company*,[22] the Board found that both Negro and white production and maintenance employees performed essentially the same functions and therefore should be included in the same bargaining unit. Not long thereafter, it reaffirmed this same policy in a granite monument factory,[23] a public utility,[24] and a steel processing plant.[25] However, the Board has permitted racially segregated locals to serve as the joint representative in an overall unit.[26]

After formulating this policy with respect to bargaining units, the Board began to look at the matter of racial discrimination in employment in a somewhat broader context. In *Bethlehem-Alameda Shipyards*,[27] the Board was confronted with a case involving potential discrimination against both Negroes and orientals. The problem was further complicated by a craft determination problem. In its opinion, the Board stated, by way of dicta, that it had "grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative of an appropriate unit composed in part of the excluded race."[28] The Board also hinted that it was considering whether or not racial discrimination violated the rights

[21] See Norfolk Southern Bus Company, 83 N.L.R.B. 115 (1949); Veneer Products, Inc., 81 N.L.R.B. 492 (1949).

[22] 9 N.L.R.B. 579 (1938).

[23] Interstate Granite Corporation, 11 N.L.R.B. 1046 (1939).

[24] Georgia Power Company, 32 N.L.R.B. 692 (1941).

[25] Aetna Iron and Steel Company, 35 N.L.R.B. 136 (1941).

[26] Atlanta Oak Flooring, 62 N.L.R.B. 973 (1945).

[27] 53 N.L.R.B. 999 (1943).

[28] *Id.*, 1016.

of employees conferred by Section 7 of the Act.[29] However, since the unions involved had indicated that they would cease any racially discriminatory conduct, the Board announced that it would not pass upon the merits of these issues.

Bethlehem-Alameda Shipyards contains some of the strongest language against racial discrimination that the Board has yet uttered. It soon resolved its stated doubt concerning the eligibility of unions practicing racial exclusion to serve as bargaining agents when it decided *Carter Manufacturing Company*.[30] Without any express reference to the *Steele* decision and doctrine therein announced by the Supreme Court for the railroad industry, the Board, in effect, adopted the same concept for industries subject to its own jurisdiction. It stated that a union was obligated to provide equal representation for all employees in the bargaining unit, regardless of race, color, creed, or national origin. The Board indicated, without so holding, that if a union fulfilled its obligation of equal representation, the Board would not inquire whether or not the union opened its membership rolls to all employees. It further said that if evidence were brought to its attention, after certification, that the union was not fulfilling its statutory obligation, the Board would consider rescinding the certification.

In *Larus and Brother Company*,[31] the Board followed the rationale announced in *Steele* and *Wallace* by holding that the certification given to a union should not be a vehicle for racial discrimination. It asserted its right and obligation to set aside a certification upon proof that the certified union was guilty of racial discrimination in failing to represent all employees as Section 9 requires. However, the Board further recognized that its power to remedy unfair labor practices did not extend to eliminating undemocratic practices within a labor organization. Later, in *Hughes Tool Company*,[32] the Board actually did revoke (on a provisional basis) the certification of a union which, while serving as an exclusive bargaining representative of both white and Negro workers, charged white and Negro

[29] Former Section 7 of the National Labor Relations Act, then in effect, provided:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection."

[30] 59 N.L.R.B. 804 (1944).

[31] 62 N.L.R.B. 1075 (1945).

[32] 104 N.L.R.B. 318 (1953).

employees vastly different sums for processing their grievances.

In a few instances, the Board has been asked to find an employer guilty of conduct in violation of Section 8(a)(1) of the Act[33] by making appeals to racial prejudice during the course of a union organizing campaign. In these cases, racial appeals have generally been regarded as one facet of the employer's overall conduct and as evidence, to be considered along with facts and circumstances, in ascertaining whether or not the employer has engaged in a general pattern of coercive anti-union conduct. Appeals to racial prejudice, in and of themselves, do not amount to an unfair labor practice.[34]

In *The American Thread Company,*[35] the employer warned his employees that, if the union won an impending election, Negroes would work side by side with white employees in the same spinning alleys and would share the same toilet facilities. This statement, coupled with other activity, was found to be sufficiently coercive to constitute a violation of Section 8(a)(1).

In *Empire Manufacturing Corporation,*[36] a similar statement was regarded, in the setting of a southern community, as sufficiently coercive to warrant a finding of an unfair labor practice.

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[33] Section 8(a)(1) of the Labor Management Relations Act, as amended, 29 U.S.C.A. (1956) § 158(a)(1), provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"

Section 7 of the Labor Management Relations Act, as amended, 29 U.S.C.A. (1956) § 157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[34] Happ Brothers Co. Inc., 90 N.L.R.B. 1513 (1950). In Coca-Cola Bottling Company of Louisville Inc., 108 N.L.R.B. 490 (1954), the Board, in finding a violation of Section 8(a)(1), rejected an interesting argument advanced by an employer in defense of his conduct. The respondent drew an analogy from Section 9 requirements and argued that a union, such as the one therein concerned, which practices racial discrimination is not, under Board law, fulfilling its duty under Section 9 as a labor organization. He then reasoned that such a union, which would be subject to having its certification revoked, is not a "labor organization" within the meaning of Section 7. Therefore, it would follow that any interference respecting such a union would not violate Section 8(a)(1) since it was not entitled to protection under Section 7. In rejecting this defense, the Board preserved its policy of treating racial discrimination within unions under representation law, rather than in an unfair labor context.

[35] 84 N.L.R.B. 593 (1949).

[36] 120 N.L.R.B. 1300 (1958).

IV. POTENTIALITIES OF THE NLRB IN THE AREA OF RACIAL AND RELIGIOUS DISCRIMINATION

The NLRB has realized the inherent limitations of the National Labor Relations Act in affording an effective remedy for racial and religious discrimination in employment. Congress clearly did not have this problem in mind when it brought the Board and its Act into existence, nor when it expanded the powers of the Board in 1947.[37] As the law stands now, the NLRB simply is not and cannot be an FEPC. Whenever racial and religious problems have arisen in the course of Board litigation, they have come up incidentally in some peripheral context of the administration of the Act.

It has been ably argued that the Board could, in filling up the broad interstices of the Act, assume a more vigorous and comprehensive role in eliminating racial job bias.[38] It has been suggested that the duty of a union to bargain under Section 8(b)(3) of the Act encompasses a duty owed to its constituents as well as to its economic protagonist. Accordingly, racial discrimination in employment, or at least in collective bargaining, would be deemed as unfair labor practices. It is submitted that such an argument does not accord due deference to Congress.

As recent as August, 1959, when Congress was considering the "Labor-Management Reporting and Disclosure Act of 1959,"[39] it deliberately refused to legislate in the area of racial discrimination in employment. On August 12, 1959, when the House of Representatives was debating this measure, Representative Adam Clayton Powell introduced an amendment to the bill providing:

> ". . . that no labor organization shall discriminate unfairly in its representation of all employees in the negotiation and administration of collective bargaining agreements, or refuse membership, segregate, or expel any person on the ground of race, religion, color, sex, or national origin."[40]

After a brief discussion, the House rejected this amendment by a teller vote of 215 to 160.[41] In so doing, Congress

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[37] *Supra*, n. 17.
[38] Cox, *The Duty of Fair Representation*, 2 Villanova L. Rev. 151 (1957).
[39] Public Law 257, 86 Cong., 1st Session, 73 STAT. 519 (1959).
[40] 105 Cong. Rec. (Daily ed., Aug. 12, 1959), 14399.
[41] 105 Cong. Rec. (Daily ed., Aug. 12, 1959), 14391. It was suggested in the course of the debate on this amendment that it had been introduced as a

not only failed to outlaw racial and religious discrimination in employment or collective bargaining; it affirmatively rejected a proposal making such matters the subject of federal law. This action was but another manifestation of the present reluctance of Congress to enact fair employment practices legislation or anything remotely touching upon it.

However compelling the reasons may seem to be for federal action in the area of racial and religious job bias, it is submitted that it is of paramount importance to accede to the expressed wishes of the body which the Constitution has designated for the creation of new law and new policy. When Congress has failed to set such a policy, an administrative body would be ill-advised to attempt, by a flanking action, what elected representatives have declined to accomplish by frontal assaults.

Despite its past actions, there are clear prospects for yet another drive in Congress to enact legislation dealing with racial and religious discrimination in employment. It would not be out of keeping with a survey of past administrative and judicial experience in this area to suggest a possible avenue for future legislative approach. The spectre generally presented to the public by opponents of such action is that any law on the subject would mean "jail-sentence FEPC." This inflammatory image connotes a new, impersonal federal bureau, staffed with hordes of government agents who are assigned to go about the country as personnel policemen, forcing thousands of reluctant employers to hire Negroes or go to jail. This image has been quite effective in marshalling opposition to any congressional efforts to deal with the subject.

Hostility to federal job bias legislation cannot reasonably be expected to subside, even in the face of the most modest proposal. However, the degree and intensity of such opposition may become modified if the proposal advanced is clearly remedial in character and does not contain express criminal sanctions. This practical end may be accomplished by a proposal making racial and religious discrimination a new and distinct unfair labor practice

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strategem designed primarily to defeat the enactment of the principal measure. Hence some might argue that Congress was not really opposed to eliminating racial and religious discrimination from labor organizations and from collective bargaining; it merely opposed doing so in a manner which might have jeopardized the passage of the Landrum-Griffin Act. Suffice it to say that, whatever the motives Congress might have had, it clearly rejected the proposed amendment, and has not seen fit subsequently to enact the substance of Representative Powell's suggestion into law.

on the part of either labor organizations or employers, to be remedied under the established procedures of the NLRB.

It is true that the ultimate sanction for continuing unfair labor practices is criminal contempt of the enforcement decree of a federal Circuit Court of Appeals. However, this sanction is rarely invoked, and only against the most obdurate and contumacious respondents. Between the filing of an unfair labor practice charge and the institution of contempt proceedings, there exist many opportunities for compromise, settlement, and voluntary compliance. It is axiomatic that the NLRB may fashion, in cases which reach it in the course of litigation, only those orders which are remedial in character; it may not properly issue a punitive order. This approach may accommodate itself most fittingly to the end of making future congressional policy come alive as a valuable and functioning reality.

Furthermore, the processes of the NLRB have long been geared to the sophisticated task of assessing discriminatory motive and intent in an employment situation. When actual cases of racial and religious discrimination are litigated, the matters in issue will probably involve, in large measure, highly subjective factual questions, rather than candid practices and policies of discrimination. In short, the enforcement problems inherent in any legislation dealing with racial job bias are closely analogous to problems which the NLRB has been handling for over twenty-five years. When the wholly legitimate necessities of making a political record are brought into contact with the equally practical requirements of administrative viability, it may be more propitious for a legislative body to expand the functions of a tested administrative vehicle, whatever may be its limitations, rather than set in motion wholly new practices and procedures. The unfair labor practice approach to handling racial and religious discrimination in employment can well afford Congress the precedent and promise it needs in order to act in this delicate matter.