Santa Clara University
School of Law

Santa Clara Law Review

Volume 14 | Number 2 Article 7

1-1-1974

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MINORITY RIGHTS AND THE EXCLUSIVITY PRINCIPLE: CONFLICT UNDER THE NLRA

In the past few decades the National Labor Relations Act[1] has made it possible for employees, once powerless in relation to their employers, to band together in unions and protect their interest by standing united behind a single representative. An essential element in developing this unified force has been the so-called exclusivity principle, the National Labor Relations Board enforced policy that once a union is elected to represent a bargaining unit, then it alone has the right to represent employee interests and employees may no longer separately bargain for their rights with their employer.

The operation of this doctrine raises a critical problem when minority workers, whether individually or as a group, seek to bypass union channels to protest an employer's alleged acts of racial discrimination. A conflict is thus created between rights of minority employees and the admittedly crucial principle of exclusive representation. The questions raised by the conflict are difficult ones. May minority workers take their protest outside of the procedures established by their bargaining representative and their employer and still retain the protection of the Act? Are they prevented from acting in concert,[2] other than through the union, by the NLRA provisions giving exclusive bargaining rights to the union representative?[3] Are minority rights greater where an issue of racial discrimination is raised? Any attempt to resolve these issues must start with an understanding of the interaction of the exclusivity principle and the duty of fair representation.

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1. 29 U.S.C. §§ 151-168 (1970) [hereinafter cited as N.L.R.A. or the Act].
2. N.L.R.A. § 7, 29 U.S.C. § 157 (1970) reads in part:

   Employees shall have the right . . . 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 . . . .
3. N.L.R.A. § 9(a), 29 U.S.C. § 159(a) (1970) reads:

   Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

THE EXCLUSIVITY PRINCIPLE

In administering the Act, the National Labor Relations Board has established various policies which have been subjected to judicial scrutiny. This scrutiny has often resulted in court opinions that become the foundation for future Board policy. It is by this process that a number of crucial principles of labor-management relations have evolved, including the principle of exclusivity.

In *NLRB v. Draper Corporation*,[4] union members were fired for conducting an unauthorized strike in an attempt to pressure their employer to continue negotiations on a collective bargaining agreement. The workers sought reinstatement on the ground that they were merely exercising their right to act in concert under section 7 of the Act.[5] The court, in refusing to order reinstatement, gave judicial birth to the concept of exclusivity. The court reasoned that if workers were to bargain with their employer on a unified basis, individual actions by splinter groups of workers could not be tolerated. The multiple demands which would result would unfairly burden employers. The court held that a minority of employees had "no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority."[6]

This ruling, no doubt, was greeted favorably by both employers and union organizations. Employers were guaranteed that they would have to deal with only one group of negotiators. Union officials saw this decision as reinforcing and legitimatizing the unions' position as negotiators for working people.

The only serious aberration from the exclusivity principle enunciated in *Draper* occurred in the case of *NLRB v. R.C. Can Co.*[7] In that decision, the Fifth Circuit Court of Appeals suggested that the purpose of the exclusivity principle was to avoid a situation in which an employer would be faced with conflicting demands from different segments of a single employee group. If a minority group of workers confined their protest to subjects in which they had no disagreement with the union position, the employer would not be faced with competitive demands from different interest groups.[8] This approach may be contrasted with

4. 145 F.2d 199 (4th Cir. 1944).

5. 29 U.S.C. § 157 (1970). The Board decision upheld the claims of the discharged workers. Draper Corp., 55 N.L.R.B. 1477, 13 L.R.R.M. 88 (1943).

6. 145 F.2d at 203.

7. 328 F.2d 974 (5th Cir. 1964). The facts in this case were similar to those of *Draper*. There was a "quickie strike" over stalled negotiations. Eight workers out of approximately fifty conducted a strike from 10:00 a.m. until 3:30 p.m. of the same day, at which time they requested to return to work.

8. *Id.* at 979.

the *Draper* rationale, which would not allow any concerted activities by a minority group of workers whether or not their demands were in opposition to those of the bargaining representative.[9]

The conflict between these approaches came to a head in *NLRB v. Tanner Motor Livery, Ltd.*[10] In that case, two employees had been discharged for picketing in support of a non-discriminatory hiring policy. Their discharge was found to be in violation of the Act and an order for reinstatement was issued by the Board.[11] On appeal the court remanded to the Board the question: were the discharges, otherwise illegal under section 7 of the Act, legitimatized due to the existence of an exclusive bargaining agent which precluded certain activities by individual workers? An earlier decision in the *Tanner* case[12] had suggested that the question of non-discriminatory hiring could not be a basis for an individual grievance as it was a condition of employment affecting the entire bargaining unit and thus subject to the union's exclusive right of representation. Therefore, the chief question presented in the most recent *Tanner* decision was to what extent this vesting of rights in the bargaining representative cut off minority employees' rights to engage in protected concerted activity under section 7 of the Act.

Despite the peaceful nature of the protest undertaken by the minority employees in this case, the court chose to apply the rule of *Draper*, rather than that of the *R.C. Can* case. A crucial factor in this decision was the failure on the part of the protesting workers to first seek redress of their grievances through existing union channels. In refusing to order reinstatement of the discharged workers, the court reaffirmed the doctrine of exclusivity.

Failure to use prescribed union procedures has the effect of challenging the stability of the union's political system. The courts, although cognizant of the political dynamics of union organization and the problems they may pose for minority employees, have placed a higher priority on the institutional equality of labor and management in the collective bargaining forum. A stable labor-management bargaining relationship is deemed more important than the right of minority employees to assert their special interests. The imposition of the exclusivity prin-

9. The decision in *R.C. Can* was quickly undermined by the same Fifth Circuit Court in NLRB v. Cactus Petroleum, Inc., 355 F.2d 755 (5th Cir. 1966), which held that although a minority strike is not necessarily unlawful, participants in such a strike may be discharged.

10. 419 F.2d 216 (9th Cir. 1969).

11. Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402, 57 L.R.R.M. 1170 (1964).

12. NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1 (9th Cir. 1965).

ciple is an attempt to discourage minority action in order to preserve the operating effectiveness of unions versus management.

This legal protection has benefitted the union movement.[13] Judging from the acceptance of unions in our society, there can be no question as to their success. Labor gains were achieved through the efforts of a representative who could bargain with the knowledge that he would not be undermined by the workers he represented. "United we stand, divided we fall" rings true in this context. On matters that are of concern to the entire unit of workers, the necessity for a single exclusive representative cannot be questioned.

When the exclusivity principle does not work in behalf of the entire group, however, its application may be deleterious. The court in *Tanner* strongly hints that there are situations in which the *Tanner* decision might be distinguishable. The court recognizes "the problem of what action is proper when the intra-union processes produce a majority decision which is outside legally acceptable bounds."[14] In other words, the court acknowledges that there may be situations where a decision emanating from union procedures may be so unjust as to warrant independent action by the aggrieved party. It is possible therefore, to interpret *Tanner* to mean that allegations of racial discrimination will not *automatically* be precluded by the exclusivity principle merely because they were raised by a minority of workers rather than the union.

THE DUTY OF FAIR REPRESENTATION

Although the elimination of racial discrimination has not been the primary concern of the Board, the problem has not been totally ignored. Through application of a relatively recent policy[15] the Board has sought to eliminate discrimination when it occurs within intra-union procedures. This duty of fair representation on the part of unions assures members of some protection in processing any grievance through union channels.

From an intra-union political standpoint, the temptation to discriminate against minority members of a union always exists. This is especially true in the case of racial minorities. Union of-

13. Union membership has increased from less than nine million in 1940 to nearly twenty million members in 1970. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 249 (94th ed. 1971).

14. 419 F.2d at 221.

15. *See* Vaca v. Sipes, 386 U.S. 177 (1967); Miranda Fuel Co., 140 N.L.R.B. 181, 47 L.R.R.M. 2178 (1962), *enforcement denied*, 326 F.2d (2d Cir. 1963). These decisions have stood for the proposition that a union acting as exclusive bargaining agent for its members had a statutory duty to fairly represent all employees. A failure of this duty can result in an unfair labor practice.

ficials are elected from within their own ranks. They are usually long-standing members whose success is measured by their ability to best represent the needs of their fellow members. If they fail to do so they will lose the next election; this is the essence of a democratic system. The majority of a union that elects its officials and representatives is justified in believing that these officials will keep the majority's interest in mind when dealing with union matters. If a minority group is pursuing a goal of more jobs for minorities, the interests of the majority are involved. More jobs for minorities invariably mean fewer jobs for the majority.

The courts have been sensitive to this problem. In *Steele v. Louisville-Nashville R.R. Co.*,[16] black workers sought to enjoin the enforcement of an agreement that was designed to abridge their employment within the railroad industry. The agreement had been suggested by the union which was the authorized bargaining representative for the black workers, despite their exclusion from its membership. The Supreme Court stated that,

> [u]nless the labor union representing a craft owes some duty to represent non-union members of the craft . . . the minority would be left with no means of protecting their interest, or indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.[17]

Avoiding this duty would leave minority members of the union, regardless of their race, at the mercy of union officials. Such potential for tyranny is contrary to the principles of our society.

The union's duty of fair representation goes beyond the mere negotiation of a collective bargaining agreement. The Supreme Court has indicated that,

> collective bargaining is a continuous process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by the existing agreement, and the protection of employees' rights already secured by contract. . . . The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.[18]

In a case in which the union refused to process grievances on behalf of black workers, the Fifth Circuit Court of Appeals held that under section 7 of the Act, workers had a right to be represented without invidious discrimination. A breach of this right was held to be unfair labor practice.[19]

16. 323 U.S. 192 (1944).
17. *Id.* at 194.
18. Conley v. Gibson, 355 U.S. 41, 45 (1957).
19. Local Union 12, United Rubber, Cork, Linoleum, & Plastic Workers of

The effect of the joint operation of the exclusivity doctrine and the duty of fair representation is to protect workers from racial discrimination when they take action through union processes and those processes are shown to be discriminatory. Where workers have attempted to operate outside of union channels, the courts have been unwilling to reach the merits of their complaints since the action was considered to be in derogation of labor policy.

THE WESTERN ADDITION CASE

Western Addition Community Organization v. NLRB[20] represents the most recent court decision on the matter of concerted activities by minority workers outside of union channels.

Two employees of a San Francisco department store contended that their employer discriminated on racial grounds in promoting employees. Both employees, who were black, had worked in the store for more than a year and were members of the Department Store Employees' Union, the elected bargaining representative for employees of the store.[21] At the time of the alleged discrimination and resultant picketing there was a contract between the union and the store that contained both an anti-discrimination clause and a clause calling for arbitration of employees' complaints.[22]

Union officials were informed of the complaints by members and commenced their own investigation. A report by the union was presented to company officials in April, 1968. At that time the company indicated a willingness to "look into" the matter,[23] and the union informed its members that it would seek an arbitration of the issue. The matter remained unresolved for several months,[24] while the union repeatedly assured the employees who had originally voiced the complaint that it would take action.

The union and company then attempted to deal with the matter on an individual basis. The two employees, along with others, rejected this procedure and took independent action which included peaceful picketing and the holding of a press conference. After a formal warning by the store management, the two em-

America, AFL-CIO v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

20. 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3457 (U.S. Oct. 27, 1973) (No. 73-696).

21. 485 F.2d at 920.

22. *Id.*

23. *Id.*

24. The reason for this delay was apparently the impending summer vacation of one of the participants in the matter. *Id.*

ployees were dismissed for engaging in a second day of peaceful picketing. A charge was filed with the Board alleging that firing the employees was illegal since they were engaged in protected, concerted activity. The charge was dismissed and the dismissal affirmed by a divided Board.[25]

The Board's rationale for its dismissal was that although employees have a right to seek improvement of their working conditions, the issue in this case was relevant to the working conditions of all the store's employees and therefore subject to the *Tanner* exclusivity rule. The Court of Appeals for the District of Columbia reversed the Board and remanded the case. The court recognized that any interference with the established relationship between the union and the employer was limited and that this interference was not, by itself, "sufficient to remove these concerted activities from the protection of the Act."[26]

It is not clear whether the court views this matter within the criteria set forth in *Tanner*. The crucial question under the *Tanner* dictum is whether pursuance of the intra-union process would have resulted in a decision not within legally acceptable bounds. In *Western Addition* there was an attempt to utilize intra-union processes that had been established by the majority representative. The end result of the intra-union process would have been an arbitration decision on the question of discriminatory promotion policies. Arbitration was not utilized in *Western Addition*, therefore no judgment can be made as to what would have occurred had the process been completed.

The court, rather than applying the *Tanner* rationale, attempted to distinguish *Western Addition* from *Tanner*. The court cited the absence of cross-purposes between the union and employees, the attempt to use union machinery, and the fact that the dismissed workers were acting on behalf of all minority workers.[27]

Using this approach, the court attempts to avoid a direct confrontation with the exclusivity principle and the issue of whether the principle acts as a deterrent to the attainment of non-discriminatory working conditions. In so doing, the court offers little help in determining what standards should be applied in the future.

A New Approach

The unsatisfactory and inconclusive resolution of the *Western Addition* case indicates that a different approach is necessary.

25. The Emporium, 192 N.L.R.B. No. 19, 77 L.R.R.M. 1669 (1971).
26. 485 F.2d 917, 929 (D.C. Cir. 1973).
27. *Id.* at 929-30.

That approach must attempt to preserve the effectiveness of the exclusivity principle while at the same time insuring minority workers that legitimate questions of racial discrimination will be dealt with according to the standards prescribed by the federal government.

The *Western Addition* court recognized that the principle of exclusivity can be used as a political shield to protect the bargaining relationship from the legitimate demands of minority employees. Such a use might occur when a union and an employer have established a compatable relationship and neither has any desire to see this relationship jeopardized by a minority group within the union. Use of the principle as a shield is easily accomplished. Since exclusivity is already an established policy of the Board, employers and unions need only let dissident workers take independent action, have them discharged by the employers, have the union make the standard complaint about an unlawful discharge, and allow the Board and courts to apply the principle. The result would be an excision of dissident minority workers and a return to the status quo. The legitimacy of workers' complaints would never be determined.

Another factor to be considered is the type of racial discrimination in question. Such subjective activities as membership examinations,[28] requirements for journeyman status,[29] and tests devoid of objective controls[30] have been found by the courts to be racially discriminatory practices. Although in some cases the practices were not discriminatory per se, they were objectionable in that they prolonged the effects of past discriminatory actions.

Assuming that the enactment of Title VII of the Civil Rights Act[31] indicates that public policy favors eliminating employment discrimination, these subjective activities can be seen as the last residuaries of racial discrimination in the labor-management area. This is racial discrimination that occurs in such subtle forms that often the malfeasor is unaware of his misdeeds. It is the legacy of a generation whose lives span the period from the last gasps of a segregated society to the early years of an integrated society. Further compounding the difficulty of this task are present policies of neutral character that perpetuate past policies of discrimination.[32] Seemingly neutral policies, dis-

28. U.S. v. Sheet Metal Workers Int'l Ass'n, 416 F.2d 123 (8th Cir. 1969).

29. Local 53 of Int'l Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

30. Dobbins v. Local 12, Int'l Bhd. of Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968).

31. 42 U.S.C. § 2000(e) *et seq.* (1970).

32. Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 COLUM. L. REV. 563 (1962).

criminatory in effect, can no longer be tolerated.[33]

The best critics of such discriminatory tactics are the minority workers themselves. They are most able to determine when a bargaining representative is unable to present their best interests. By effectively short circuiting any concerted activity by the minority workers, the exclusivity principle destroys this potent and necessary force for change and employment equality.

Judge Wysanski, in his dissenting opinion in *Western Addition*, notes the implicit contradiction that exists when the exclusivity principle is applied in cases involving racial discrimination:

> When the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that their position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit. . . . Hence, it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial matters, whether or not this is in disparagement of the union representative.[34]

Wysanski's suggestion is to construe the Act to avoid such a result. He would allow a group of minority workers to bargain directly with the employer on "racial issues which affect that minority in a way different from the way they affect the majority."[35] This approach, while recognizing the need for an exclusive bargaining agent to deal with matters of general concern, would have the effect of opening channels between minority workers and their employers that previously might not have existed. Such a departure from accepted procedure, however, requires close examination with respect to both its legitimacy and effect. In addition, guidelines would have to be established to limit the approach to the use for which it is intended. The latter requirement is, no doubt, the easiest to fulfill and will be dispensed with first.

The most obvious criteria for inclusion within the new approach is that the issue involved be racial in nature and one that

33. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (a high school completion requirement and general intelligence test did not have a demonstrable relationship to successful job performance); NLRB v. Mansion House Center Mgt. Corp., 473 F.2d 471, 477 (8th Cir. 1973) (the court indicated that "passive good faith [is] not sufficient to erase the continuing stigma which may pervade a union's segregated membership policies"); Local 53 of Int'l Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (nepotism requirement by a previously segregated union was held unlawful since its application denied future membership to racial minorities).

34. 485 F.2d 917, 938 (D.C. Cir. 1973).

35. *Id.* at 939.

affects *all* the members of a particular minority group.[36] Furthermore, it must be an issue which would normally be a proper subject of collective bargaining.[37] These two initial requirements would reduce the frequency of assertions of frivolous issues on the mere pretext that they involve matters of a racial nature. Although a formal collective bargaining agreement between the employer and the minority group would not be necessary, assurances of some nature should be made by the employer that any agreements reached would be incorporated into the employer's policy of operation. Although the established union representative would not be directly involved, since no extensive use of existing union procedures would be undertaken, the racial minority should be required to notify union officials of their impending action.

The irony of these guidelines is that situations in which they would most likely be adhered to by all the parties are the situations in which they are least needed. Except on the occasions that an unconscious form of racial discrimination arises, the majority of unions and their respective counterparts in management have attempted to eliminate employment discrimination. The real need for this new approach will occur where either the union, the employer, or both are less willing to take positive action to remove any lingering discriminatory practices. Unfortunately, where these recalcitrant parties are encountered, the legality of this approach will be tested to its fullest prior to any adherence to guidelines. The critical question therefore remains with the original issue: will the Board entertain a charge by a group of minority employees acting outside their union that they are subject to racially discriminatory practices or will the Board apply the exclusivity doctrine?

THE ROLE OF THE BOARD

Clearly Congress did not intend to cut off the rights of racial minorities in the area of labor relations. This is evidenced by the enactment of Title VII of the 1964 Civil Rights Act which is directed specifically towards the elimination of all racial discrimination by union organizations and employers. In administering the NLRA, the Board may not foster policies which contra-

36. Although this comment focuses upon the question of racial discrimination, the rationale could apply to all types of discrimination, including that of sex, age, religion, or nationality.

37. Under the NLRA, terms and conditions of employment are considered mandatory subjects for bargaining. A refusal to engage in bargaining on such matters can result in an unfair labor practice. N.L.R.A. § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

dict other federal labor legislation.[38]

Since enforcement procedures exist within the framework of Title VII,[39] why should those remedies be bypassed in favor of action through the Board? Despite the availability of these alternative remedies, the Board offers the greatest degree of expertise in the field of labor-management relations. The Board's investigation and enforcement procedures ensure that minority group complaints will get a fair hearing and that only unjustified and frivolous complaints will be dismissed. Minority workers probably can be assured that as an agency of the federal government, the Board's standards in making these determinations can be no less than those set forth by the government and that the Board can utilize the legal machinery that has dealt with labor-management problems for decades.

Furthermore, Board handling of minority complaints would lessen the threat of political instability within the union organizations. As mentioned earlier, union officials are presently required to perform a delicate balancing act. They must, on the one hand, be responsive to the majority by whom they were elected, while on the other, perform their duty to fairly represent the minority members of their union. When issues are raised by a minority group that could ultimately adversely affect the majority, the union officials are put in an irreconcilable position. By allowing minority groups to pursue racial issues on their own, union officials are exculpated from blame for any results adverse to the majority's interest. This serves to preserve the stability of the union which is crucial to the maintenance of a strong bargaining position when the interests of *all* the workers must be pursued.

CONCLUSION

The *Western Addition* case indicates the conflict between two goals in the field of labor-management relations. There is the need for a stable collective bargaining process, which has led to the development of the exclusivity principle. There is an equally pressing need for providing equal employment opportunities for all workers. The conflict arises when a group of minority workers seek to assert their right to employment equality outside of the process established by their exclusive bargaining representative.

38. Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-58 (1957).

39. If a violation is found, remedies may include reinstatement with back pay or any other equitable relief that the court deems appropriate. 42 U.S.C. § 2000(e)(5) *et seq.* (1972).

The proposed extension of the protection of the Act to minority action where it pertains to racial matters involving the entire minority group is an attempt to achieve the realization of both goals: to further the goal of equal employment opportunity with only minimal adverse effect upon the stability of the collective bargaining relationship.

To assuage the fears and mistrust that still linger among minority groups, the most impartial body available should be permitted to adjudicate any claims that arise. In labor-management relations, the National Labor Relations Board provides such a forum. The attractiveness of this approach is that it is a self-terminating concept. When true integration occurs, the need for the approach no longer exists. This fact, alone, should work as an incentive to remove the last vestiges of racial discrimination.

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