Application of Mansion House: Denial of Certification and N.L.R.B. Dilemma

Judi Fishman

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol24/iss3/5
APPLICATION OF MANSION HOUSE: DENIAL OF CERTIFICATION AND N.L.R.B. DILEMMA*

The National Labor Relations Act was originally designed to facilitate the free flow of commerce by promoting peaceful resolution of differences through the collective bargaining process. The function of the National Labor Relations Board is to administer the Act insuring labor and management protection of the rights guaranteed therein. By its recent decision in NLRB v. Mansion House Center Management Corp., the Eighth Circuit United States Court of Appeals has expanded the obligations of the NLRB to include thorough consideration of evidence relating to a union's alleged racially discriminatory practices when challenged prior to certification. A positive finding of the charge would preclude the NLRB from granting certification to the union as a collective bargaining agent.

THE Mansion House DECISION

The decision in Mansion House resulted from the NLRB's attempt to seek judicial enforcement of a reinstatement and bargaining order after the employer had refused to submit to the Board's determination. A union representative of Local 115 of the Brotherhood of Painters and Allied Trades secured signed authorization cards from five out of the eight painters employed by Mansion House. The union requested recognition as bargaining agent for the eight employees on the basis of the cards, but the company's president refused to bargain and eventually discharged the eight painters. The union and employees petitioned the NLRB for relief charging that the employer violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA. The trial examiner found the allegations to be sup-

* The author gratefully acknowledges the aid of Professor E. Goldstein, DePaul College of Law, in developing this article.
2. See id. § 153.
3. 473 F.2d 471 (8th Cir. 1973).
4. Id.
5. The employer was Mansion House Management Corporation, an operator of a residential and office building complex in St. Louis, Missouri.
ported by the evidence and the Board affirmed his findings ordering Mansion House to reinstate the discharged employees with back pay and to bargain collectively. The Board rejected both the company's contention that its refusal to bargain was justified on the grounds that the union discriminated in its membership policy and the statistical proof offered to support that allegation.  

When the Board sought enforcement of the order, the Eighth Circuit would only sustain the decision relating to the 8(a)(3) violation ordering reinstatement, and remanded the 8(a)(5) bargaining issue to the Board for consideration of the statistical evidence which was rejected at the initial hearing.  

The court held that "the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination" on the basis of the fourteenth and fifth amendments.  

EXISTING REMEDIES

In the past, several channels of remedial relief have been available to control discriminatory practices by unions. Clearly, a union guilty of ra-

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

(5) to refuse to bargain collectively with the representatives of his employees.


9. 473 F.2d at 477. There were actually two distinct decisions by the court of appeals. In the first decision, 466 F.2d 1283 (8th Cir. 1972), the Board's findings of discriminatory discharges based on violations of 8(a)(1) and (3) of the NLRA were sustained. The court withheld ruling on the 8(a)(5) bargaining order and requested supplemental briefs on whether the employer's contention that the union's alleged discriminatory membership policies constituted grounds for a refusal to bargain. Id. at 1286. In its second opinion, the court denied enforcement of the bargaining order, and remanded the case back to the Board for further consideration of the alleged discrimination. 473 F.2d at 477.

10. 473 F.2d at 477.


In regard to the type of proof necessary to show racial discrimination, the court imposed Title VII standards, which include the use of statistical data. 473 F.2d at 475-77.

cial discrimination violates Title VII of the Civil Rights Act of 1964, which is enforceable by the Equal Employment Opportunity Commission. A finding by the Commission of a persistent pattern or practice of discrimination may lead to the granting of an injunction or other appropriate relief.

In addition, the NLRB has the authority to alleviate certain union discriminatory practices after union certification. Under section 9(a) of the NLRA, a union has an implied statutory duty to fairly represent the members of its bargaining unit. For example, it is an unfair labor practice for a union to discriminate in the processing of grievances, or in its job referral procedures. Violations of the duty of fair representation are

15. Id. § 2000e-6(a).

16. 29 U.S.C. § 159(a) (1970). Section 9(a) provides that a majority of employees in a bargaining unit may choose the exclusive bargaining representative for that unit.


The Supreme Court first established the duty of fair representation by its construction of the Railway Labor Act, 45 U.S.C. §§ 151-58 (1970), in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). Section 2, 45 U.S.C. § 152(4) (1970) contains a provision for majority representation similar to 9(a) of the National Labor Relations Act. See note 16 supra. The duty to fairly represent the members of the bargaining unit emanates from the exclusive grant of bargaining power conferred on the majority representatives. There is a duty to represent non-union and minority members “without hostile discrimination, fairly, impartially, and in good faith,” 323 U.S. at 204. The Steele doctrine of fair representation was adopted by the court in Syres and applied to the NLRA.

18. Independent Metal Workers Local 1, 147 N.L.R.B. 1573 (1964). Although the traditional remedy of rescission was applied because of the racially exclusionary membership policies of two jointly certified locals, the Board also found that the union had committed an unfair labor practice by failing to process the grievances of black employees. Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967) (discriminatory refusal of union to process through arbitration a black member's grievance concerning back pay).

19. Longshoremen's Local 1367, 148 N.L.R.B. 897 (1964), aff'd, 368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967) (breach of duty of fair representation and violation of sections 8(b)(1)(A), 8(b)(2), 8(b)(3) of Act for participa-
subject to cease and desist orders as well as civil remedies for money damages, back pay, and injunctive relief. Furthermore, the NLRB has adopted the policy of rescinding certification of a union as a collective bargaining agent when the union fails to comply with its statutory duty to represent all employees fairly.

**POTENTIAL EFFECT OF DENYING CERTIFICATION**

Many commentators contend that the existing remedies are neither comprehensive nor efficient. Denying certification to a union because of racial discrimination is viewed as a potentially effective means of discouraging the illegal activity. For example, while a powerful and well-established union has the alternative of foregoing certification procedures, when organizing a new shop, in favor of imposing its economic power to force an employer to bargain, some unions may choose to abandon their discriminatory policies rather than risk the chaos and possibility of injury which often result from recognition strikes. In the case of a weaker union,
employees might be discouraged from supporting a union unable to force an employer to bargain.  

The negative ramifications in the latter case, or in a situation where the union continues in its discriminatory policies, may be that no union will be recognized in a particular shop. This would leave all employees in the appropriate unit, both black and white, unprotected and without the benefits of a collective bargaining agent. The result of denying certification to the union would then become inconsistent with the primary purpose of the NLRA, which is to encourage peaceful resolutions of differences between employers and employees, and to equalize the power relationships through the collective bargaining process.  

Furthermore, if the charge of racial discrimination by a union is a proper defense to an 8(a)(5) bargaining order, it is possible that unscrupulous employers would abuse the defense. It could be used as an effective tool to prevent the organization of their employees or to delay collective bargaining, with the possible result of dissipating the majority, and thus further hindering the Board in performance of its functions.

The NLRA was enacted to regulate labor interactions affecting interstate commerce and not to eradicate racially discriminatory membership policies. While the NLRB has adjudicated discrimination problems arising...
ing after certification in the process of administering the Act, these remedies do not interfere with the Act's primary purpose. However, denying certification may preclude the NLRB from performing its designated regulatory duties. This change in emphasis can only be justified if one assumes that the NLRB has acquired a function it has historically avoided—to affirmatively fight racial discrimination in union membership policies. Two questions which surface in this connection are: first, whether the Board is constitutionally required by the fifth and fourteenth amendments to make such inquiries into internal union policy, and second, whether the case-by-case method, announced in the Bekins Moving & Storage Co. case, is the most effective means of resolving the discrimination issue when compared to the relative clarity ascertainable under the Board's rulemaking procedures.

THE CONSTITUTIONAL ISSUE

The court in Mansion House concluded that the NLRB's certification of unions which racially discriminate constituted sufficient federal participation in the activity to violate the Constitution. "Any recognition or enforcement of illegal racial policies by a federal agency is proscribed by effecting the discharge of, or other job discrimination against... an employee. . . . S. REP. NO. 105, 80th Cong., 1st Sess. 21 (1947) as cited in Note, supra note 23, at 773 n.15. See NLRB v. Mansion House Center Mgmt. Corp., 473 F.2d 471, 474 n.6 (1973)."

28. See notes 16-21 and accompanying text supra.

29. As one author has noted in conjunction with the problem:

The mentality, the administrative apparatus and the staff limitations of the NLRB, and the broad discretionary powers of its general counsel, make it a poor substitute for an FEPC [Fair Employment Practices Commission]. Though it may become an adequate gadfly with respect to dramatizing the nature and extent of employment discrimination, too great a reliance on administrative inventiveness can be harmful, . . . in terms of dissipating Board resources needed in other areas. . . .

Albert, supra note 12, at 593.

30. In the past, the Board has rejected allegations of past discriminatory representation or membership denials to show the possibility of future inability to fairly represent. NLRB v. Pacific Am. Shipowners Ass'n, 218 F.2d 913, 917 (9th Cir.) (concurring opinion), cert. denied, 349 U.S. 930 (1955); Pacific Maritime Ass'n, 112 N.L.R.B. 1280 (1955); Coleman Co., 101 N.L.R.B. 120 (1952); Veneer Prod., Inc., 81 N.L.R.B. 492 (1949); Texas & Pac. Motor Transp. Co., 77 N.L.R.B. 87 (1948). However, in no case did the Board preclude the possibility of rescinding certification if it did appear that the union could not fairly represent the employees. See note 21 supra.


32. See notes 104-05 and accompanying text infra.
the Due Process Clause of the Fifth Amendment."33 However, an analysis of "state-action" cases indicates that the Supreme Court may not be able to find the requisite government involvement in the discriminatory practices in order to invoke the constitutional prohibitions of the fifth amendment. In recent decisions the Burger Court has tended to restrict the scope of constitutional restraints on private activity even though a connection between the government and the private activity exists.34 A crucial distinction has been made between mere governmental regulation of a private entity engaging in the challenged activity versus regulation which effectively supports that activity. In the latter situation, where there exists a close relationship between the government and the particular private acts in question, the Court has found "state-action."

In Burton v. Wilmington Parking Authority,35 the plaintiff sought to enjoin a restaurant's refusal to serve a black patron contending that the restaurant's location in a building owned and operated by the defendant state agency made it a state actor for purposes of invoking the equal protection clause. The Supreme Court held that,

the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.36

While the Court acknowledged the absence of a "precise formula" for ascertaining significant government involvement,37 the results of other decisions suggest that the involvement must be supportive of the particular activity in question.

Public Utilities Commission v. Pollak38 involved complaints by some passengers in streetcars and buses operated by a street railway company in Washington D.C. alleging that the broadcasting of radio programs in the vehicles violated their constitutional rights. In finding the requisite

33. 473 F.2d at 473.
36. Id. at 724.
37. Id. at 722.
38. 343 U.S. 451 (1952).
federal involvement to consider the constitutional issue, the Court expressly disclaimed reliance on the company's exclusive franchise from Congress.\textsuperscript{39} Instead, the Court emphasized the fact that the Public Utilities Commission, which regulates the transit service, had ordered an investigation because of the protests, held formal hearings, and made a decision to dismiss the complaints.\textsuperscript{40} Thus federal involvement was found on the basis of the governmental agency's specific approval of the challenged conduct.

However, where the connection between the governmental regulatory activity and the alleged discrimination is more tenuous, the Supreme Court seems reluctant to find the involvement necessary to constitutionally interfere with private conduct. In \textit{Moose Lodge No. 107 v. Irvis},\textsuperscript{41} a private club, whose liquor facilities were licensed and regulated by the state, refused to serve a guest because he was black. Suit was brought under the equal protection clause of the fourteenth amendment to seek an injunction requiring the state liquor board to revoke the club's license until its discriminatory policies ceased. The Supreme Court rejected the contention that the pervasiveness of the state regulatory scheme was sufficient involvement to constitute "state-action." "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination."\textsuperscript{42} The Court noted that an otherwise private entity does not become subject to the equal protection clause simply because it "receives any sort of benefit or service" from the state, or is regulated by the state "in any degree whatever."\textsuperscript{43} Where the "impetus for the discrimination is private," there must be significant state involvement with the discrimination.\textsuperscript{44} Whereas in \textit{Pollak},

the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of the Moose Lodge.\textsuperscript{45}

\textsuperscript{39} \textit{Id.} at 462.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} 407 U.S. 163 (1972).
\textsuperscript{42} \textit{Id.} at 176-77.
\textsuperscript{43} \textit{Id.} at 173.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 175-76.

The distinction between mere regulation and supportive regulation was again acknowledged in Chief Justice Burger's opinion in \textit{Columbia Broad. System, Inc. v. Democratic Nat'l Comm.}, 412 U.S. 94 (1973). However, it should be noted that there was no majority opinion on the "state-action" issue. The case involved the question of whether a broadcaster is under a first amendment duty to accept editorial advertisements because of government involvement in the form of FCC licensing.
The Supreme Court has remained consistent in rejecting the state regulation argument where there has been no specific governmental imprimatur placed on the challenged conduct. In *Jackson v. Metropolitan Edison Company*, the petitioner sought damages and injunctive relief for termination of her electric service before she had been afforded notice, a hearing, and an opportunity to pay the amounts due. Justice Rehnquist, writing for a 6-3 majority, refused petitioner's claim that state regulation of the private utility provided a sufficient state connection with the specific termination procedures for purposes of invoking the due process clause of the fourteenth amendment. The Court stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." No such "nexus" was found between the state's involvement and the utility's termination procedures.

Assuming substantial government involvement in the specific discriminatory activity is required, the relevant question is whether the NLRB's

---

Failing to find the requisite federal action sufficient to trigger first amendment protection, Chief Justice Burger stated:

> The First Amendment does not reach the acts of private parties in every instance where Congress or the Commission has merely permitted or failed to prohibit such acts.

412 U.S. at 119.

Chief Justice Burger, writing for the majority, was joined by Justices Stewart and Rehnquist on the "state-action" issue. Justice Marshall joined Justice Brennan in finding sufficient "state-action." In a separate opinion, Justice White stated that there was arguably sufficient "state-action" to require a review of the Commission's order under the first amendment. Justices Powell and Blackmun did not decide the issue because it did not affect the outcome in their view. Justice Douglas gave no opinion on the issue of government action.


47. 95 S. Ct. 449 (1974).


49. 95 S. Ct. at 453.

50. *Id.* at 456-57. The Court refused to find sufficient "state-action" because of the state's regulation of the utility or its grant of a certificate permitting Metropolitan to engage in the utility business, *Id.* at 453. It also rejected petitioner's argument
certification procedures constitute significant entanglement with a union's discriminatory membership policies to invoke the fifth amendment. The answer is not as obvious as it is purported to be by the decision in Mansion House. Section 9(c) of the NLRA requires the NLRB to direct an election where a question of representation exists, and states that it "shall certify the results thereof." It can be argued that the process of certification itself is simply an impartial administration of the Act.

An analogy can be made to the courts' treatment of cases involving challenges to the granting of tax exempt status to private institutions and clubs which engage in discriminatory activities. Some courts have recognized that assistance in the form of tax exemptions or deductions is sufficiently supportive of the challenged activity to constitute meaningful government involvement. Other courts have held to the contrary, upholding the tax exempt status on the grounds that the conferral of such benefits is not sufficiently connected to the alleged discriminatory policies. The

that the private utility was performing a public function, thus refusing to expand the doctrine espoused in Marsh v. Alabama, 326 U.S. 501 (1946) (company town found to take on attributes of municipal government and become a public entity for purposes of invoking the first amendment). Id.

Furthermore, the Court found that the acceptance of a provision of a general tariff filed with the Public Utilities Commission, which gave Metropolitan the right to terminate service for non-payment, was not a specific approval of that provision. The provision became effective automatically sixty days after being filed if the Commission did not disapprove it. Since no consideration of the newly filed provision was ever made by the Commission, the Court distinguished the situation from that in Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) and found no state authorization of the termination procedures:

Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state-action."

Id. at 456-57. See text accompanying notes 38-40 supra.


latter decisions view the grants as the government's "impartial administration of the tax laws,"\textsuperscript{54} which do not perpetuate or encourage the discriminatory policies of the exempt organization.\textsuperscript{55} The contradicting analyses illustrate that the courts have not yet developed a satisfactory standard to gauge the degree of involvement necessary to implicate government in a private entity's discriminatory activities.\textsuperscript{56}

While the financial aspect of government involvement in the form of granting tax exemptions is distinguishable from government recognition of unions, the theoretical approach to finding federal support of the discriminatory activity in each instance is sufficiently related to suggest that judicial inconsistency in one area indicates unpredictability in the other. It therefore remains unclear whether, as the court in \textit{Mansion House} states, "[f]ederal complicity through recognition of a discriminating union serves . . . to condone the discrimination, [and] in effect legitimizes and perpetuates such invidious practices."\textsuperscript{57} Active federal involvement in a union's policies is not as evident in the initial certification of the union as in the subsequent NLRB and court regulation of the collective bargaining process. For example, it is not until after certification that the Board makes judgments in fair representation cases and exercises its other functions. Board approval of discriminatory policies at this point would constitute federal complicity. Since the Board has already imposed sanctions inhibiting union discrimination after certification, it is not necessarily "legitimizing or perpetuating invidious practices" by granting certification.

In light of the recent reluctance by the Supreme Court to impose constitutional restraints on private activity it is difficult to predict with certainty the outcome of a case involving the certification issue. It is unclear

\begin{flushright} 
its membership policies. The Court, after attempting to distinguish the \textit{Green} and \textit{McGlotten} cases, cited at note 52 \textit{supra}, in order to support its holding permitting the exemptions, noted the following: The Court is also aware . . . of an opposite line of authority which holds that tax exemptions to private institutions do not sufficiently implicate the government whereby it becomes a joint venturer in the challenged activity. See \textit{Browns v. Mitchell}, 409 F.2d 593 (10th Cir. 1969); \textit{Bright v. Isenbar-ger}, 314 F. Supp. 1382 (N.D. Ind. 1970), aff'd, 445 F.2d 412 (7th Cir. 1971); \textit{Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.}, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971)
\end{flushright}
whether Board certification constitutes sufficient participation in a union's discriminatory membership policies to compel a Supreme Court determination that the federal agency is encouraging and supporting the discriminatory activity. While there is a strong public policy against discrimination, there exists a countervailing consideration—the desire to shield the private realm of decision-making from constitutional restraints.58

**A Public Policy Decision**

In the absence of a Supreme Court determination as to whether the Board is constitutionally compelled to deny certification to unions which have racially discriminatory membership policies, it could be argued that the NLRB has the option of adopting such a procedure as a policy decision, thus avoiding the constitutional question.59 The situation can be analogized to a decision involving another federal agency, the Internal

---

58. See Note, supra note 34, at 863.

If the Supreme Court does find a constitutional requirement to disqualify unions which discriminate, other problems surface such as the kind of discrimination to be considered. Will the Board have to investigate all kinds of discrimination or only those recognized as suspect classifications? See notes 67-68 infra. Also, if it is constitutionally prohibited to allow discriminatory unions to use the machinery of the NLRB, it is unclear how far the concept extends. Would the Board be required to raise the issue itself before it could certify a union if the employer failed to make objections? Would the same requirement apply in an unfair labor practice charge? The Board is confined to issues raised by the parties and does not have the power to initiate its own objections. 29 U.S.C. § 159(c)(1), 160(b) (1970). But it seems contradictory to permit some unions to persist in their discriminatory practices and use the Board's facilities because the employer acquiesces in the discriminatory behavior and does not file objections. Perhaps an individual employee will be allowed to challenge the union's discriminatory policies. This would alleviate the inequities somewhat. See Note, supra note 23, at 781.

Another area of consideration would be the courts' reaction to contract enforcement cases. The situation could arise where a union which is denied certification because of its discriminatory policies subsequently uses economic pressure to force its employer to bargain with it and to sign a collective bargaining agreement. Assuming the contents of the contract are in no way arbitrarily discriminatory, the courts could not rely on Shelley v. Kraemer, 334 U.S. 1 (1947), to deny enforcement if there were a breach. It would not be the contents of the contract which are unenforceable as in Shelley but the undesirability of the party seeking enforcement. The court cannot deny a party enforcement of a private contract simply because it disagrees with the party's private conduct. However, if the contract is enforceable, the courts are in essence mitigating the effectiveness of the Board's denial of certification. Perhaps the judiciary can find the bargaining agreement void in order to avoid such a contradiction.

Revenue Service. In *Green v. Connally*, it was held that under the Internal Revenue Code and declared public policy, racially discriminatory private schools are not eligible for federal tax exemptions, and any donors to such institutions are not entitled to the corresponding charitable deduction. The Court reasoned that “[t]he code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private.”

It intentionally avoided the constitutional issue of governmental involvement.

If the NLRB does not adopt the policy of denying unions certification on the basis of racial discrimination, its purpose must be to induce the union to conform to the acceptable public standards, rather than to punish the union for not conforming. The latter position has only a punitive effect, while the former rationale is consistent with the desire to promote behavioral change on the part of non-conforming unions and thus contemplates their future certification.

The effectiveness of the Board's use of denial of certification to obtain the desired policy change of unions which discriminate is largely dependent on the publication of clear standards defining forbidden practices. A review of the results from recent NLRB decisions on the issue illustrates the need for an improved manner of defining these standards. Particular confusion arises as to the kind of discrimination which would preclude certification, and the nature and quantum of proof necessary to sustain an objection to certification.

**DEVELOPING THE Mansion House STANDARDS**

**Disagreement Among Board Members**

In *Bekins Moving & Storage Co.*, the NLRB announced a procedural decision to consider objections to the issuance of certification on the basis of the union's alleged discriminatory practices only after a representation election has been held and the union has received a majority of the valid votes cast. It also declared its intention to develop standards as to the nature and quantum of proof necessary to sustain a certification objection on a case-by-case basis.

---

61. *Id.* at 1163.
62. *Id.* at 1164-65.
64. *Id.* at 1328. Objections to elections must be filed with the Regional Director within five days of the issuance of the tally of ballots for any election. *Id.*
65. *Id.* at 1326.
Subsequent cases have failed to clarify the standards because of the conflicting views of the five Board members. Members Kennedy and Jenkins concurred with Chairman Miller in *Bekins*, finding a constitutional duty to consider the discrimination issue in representation cases.\(^6\) However, Member Kennedy would confine the denial of certification to unions which discriminate on the basis of race, alienage, or national origin,\(^6\) but not on the basis of sex.\(^6\) Therefore, when three cases arose involving alleged sex discrimination, Member Kennedy joined Members Fanning and Penello in rejecting arguments from *Grants Furniture Plaza*\(^6\) and *Bell & Howell*\(^7\) that the two local unions of the Teamsters and Operating Engineers should not be certified as bargaining agents. Board Members Fanning and Penello reiterated their dissent in *Bekins*\(^7\) that the withholding of certification is neither required by the Constitution nor permitted by statute. The Board has thus been denied the opportunity to formulate guidelines in determining the standard of proof.

The dicta in these cases provide some insight into what type of evidence the Board will accept when it decides to consider the issue. Unfortunately, a close analysis illustrates the NLRB's lack of success in articulating standards with predictive value, especially when viewed in light of the earlier decisions.

**A Case-by-Case Analysis**

*Mansion House* advocated a broad standard of proof, suggesting that the Board should apply Title VII standards,\(^7\) and should consider past as well as present discrimination.\(^7\) At the hearing the trial examiner had

---

66. *Id.* at 1329.

67. *Id.* (Member Kennedy's concurring opinion).

68. *Bell & Howell Co.*, 213 N.L.R.B. No. 79 (Sept. 20, 1974). In his concurring opinion, Member Kennedy stated that he would restrict the precertification investigations into alleged discrimination on the basis of race, alienage, or national origin, and would prefer to consider sex discrimination in the context of a fair representation hearing after certification. His reasoning was based on the following:

> Each of these classifications has been determined by the Supreme Court to be inherently suspect, thus requiring strict judicial scrutiny . . . . [T]he majority of the Supreme Court refused to find legislative classification based on sex inherently suspect.

*Id.*


70. *Bell & Howell Co.*, 213 N.L.R.B. No. 79 (Sept. 20, 1974).

71. 86 L.R.R.M. at 1331.

72. 473 F.2d at 475-77. *See Comment, supra* note 12, at 725-37 (discussion of the application of Title VII standards to union discrimination).

73. *Id.* at 477.
rejected the statistical evidence offered and based his decision on the absence of express racial restrictions in the local's bylaws and constitution, the fact that one of the employees who signed an authorization card was black, and on the lack of evidence showing that the union had actually rejected any membership applications on racial grounds since segregated locals were abolished in 1968.74

The Eighth Circuit substituted those considerations for the following:
statistical evidence may well corroborate and establish that a union has been guilty of racial practices in the past. In face of such proof, passive attitudes of good faith are not sufficient to erase the continuing stigma which may pervade a union's segregated membership policies. The fact that no minority applicant has been rejected by the union is not the sole test. When evidence suggests discrimination of racial imbalance the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices.75

Unfortunately, the charges in the Mansion House case were dropped after this decision and the Board never had the opportunity to translate this theory into workable criteria.

One year later the majority decision in Bekins appears to support this broad categorization of the type of discrimination subject to Board sanctioning. While the Board cautiously refused to commit itself to the nature and quantum of proof necessary, it characterized the burden of proof as a sufficient showing of the union's propensity for unfair representation.76

This seems to encompass Mansion House's suggestion of sanctioning unremedied past discrimination. Again the Board was unable to qualify these vague standards since the objections were made prematurely.77

The majority in Bell & Howell did not discuss the evidence offered since it rejected a precertification inquiry into the union's discriminatory practices. However, it is worth noting that in their dissent, Chairman Miller and Member Jenkins, remaining consistent with their view in Bekins,

---

74. 190 N.L.R.B. 437, 441-42. The statistical evidence offered by the employer included the following allegations:
1) that the union's jurisdictional territory includes most of the St. Louis Metropolitan area which has a population of approximately 50% non-whites;
2) out of approximately 375 active members in the union, only 3 were black, and they became members when they were transferred from the previous black local in 1968;
3) no non-white person had become a member since the 3 black transferes.

75. 473 F.2d at 477 (emphasis added).

76. 86 L.R.R.M. at 1326.

77. Id. at 1328. The objection was raised before a representation election was held.
determined that the employer's charges were serious enough to require consideration of the case on the merits. The offer of proof consisted of statistical evidence of discrimination and references to the bylaws and group insurance plan conferring benefits applicable to male employees only.

In Grants Furniture Plaza, Chairman Miller and Member Jenkins applied the theory they had espoused in Bekins on a practical level. However, they rejected the sufficiency of the statistical evidence to warrant a hearing in this case because evidence was not proffered to show that the union exercised any control over the racial, sexual, or ethnic composition of union members. They refused to pass on the appropriate weight to be given to statistical information which indicates discriminatory policies when there is no accompanying evidence to show that the union controls or substantially influences access to employment. The Board also rejected a Justice Department complaint offered into evidence, which alleged that the union had engaged in certain discriminatory practices against Blacks and Spanish-surnamed individuals: "The unproved allegations of the Justice Department did not establish an apparent case of discrimination, since they were not competent evidence admissible at a hearing."

The result was a 5-0 decision against denying certification—Jenkins and Miller considered the issue and found the evidence insufficient to dis-

79. Id. The statistical evidence offered consisted of the following allegations:
   1) the union exercised substantial control over the stationary engineering trade in the Chicago area;
   2) that membership in the union was the sine qua non for obtaining employment in the trade in the Chicago area;
   3) that the absence of female stationary engineers is the natural effect of union's discriminatory policies;
   4) approximately 34% of the civilian labor force in the Chicago area are women, as compared with 0% women among the union members who are stationary engineers.
80. In particular, the bylaws provided for a death benefit payable to the surviving spouse of male members but not the surviving spouse of female members. In reference to the group insurance plan, maternity benefits were provided for the dependent wives of the male employees, but no maternity benefits were provided for female employees. Id.
81. 213 N.L.R.B. No. 80 (Sept. 20, 1974). There were two Grants Furniture Plaza cases, see cases cited at note 69 supra. Both cases involved the same union, Teamsters Local 390, and therefore the issue of union discrimination was dismissed on the same grounds.
82. There was no evidence to show union control of those who entered the work force, and thereby became union members through a hiring hall or other means.
83. 213 N.L.R.B. No. 80 (Sept. 20, 1974).
84. Id.
qualify the union; Kennedy reasserted his position against extending precertification remedies to sex discrimination; Fanning and Penello reiterated their position in *Bekins* leaving questions concerned with a union's capacity to fairly represent its members to be resolved with other proceedings under the Act.

Thus it seems that the "new" method for fighting racial discrimination in unions as espoused by the Eighth Circuit in *Mansion House* and by Miller and Jenkins in the *Bekins* case is less effective in practice than in theory. It is evident that the Board's inability to formulate workable standards for applying the theory that are consistent and have some predictive value is hopelessly hindered by the conflicting positions of the Members. The situation is further complicated by Chairman Miller's recent resignation and replacement by Betty Southard Murphy. Her opinion will be detrimental to the Board's future determinations because of the tenuous alliances created in the past resulting in majorities without a consensus on the issues.

**The Issues Left Unresolved**

In summary, there is no Board agreement as to whether discrimination requires a precertification inquiry, and if it does, further disagreement exists as to the type of discrimination to be investigated. Even if it is assumed that the new chairman will agree with Chairman Miller, thus creating a 3-2 majority in favor of considering denial of certification where racial discrimination is present, one can still only speculate as to the substantive aspects of the nature and quantum of proof necessary for disqualification. There is some indication that the union must be shown to control or have substantial influence over its membership and job access. The weight given to statistical evidence or provisions in the bylaws which imply discrimination are as unclear as is the amount and kind of additional evidence necessary to sustain an objection. The Board has failed to define what constitutes an incapacity to represent fairly in terms of past discrimination. Another question arises as to the proper use and weight of evidence showing that the union discriminates in its jurisdictional territory in order to prove that the particular local seeking certification will unfairly represent its members. The court in *Mansion House* readily accepted such evidence, while the Board in *Washington Sheraton Corp.* rejected an employer's offer of evidence that some other locals discriminate in or-

85. *Id.*
86. *See id.*
87. 473 F.2d at 476-77.
88. 199 N.L.R.B. 728 (1972).
DENIAL OF CERTIFICATION

order to prove that the local seeking recognition was likely to engage in similar practices. Finally, while Mansion House makes it incumbent on a union with a past history of discrimination to affirmatively correct those practices, the Board has failed to indicate what procedures would be sufficient to overcome this stigma.

RULEMAKING AS AN ALTERNATIVE TO ADJUDICATION

The previous section illustrated how the case-by-case method announced in Bekins has failed to provide the public with the clear standards necessary to make refusal to grant certification an effective tool against union discrimination. If unions remain uninformed as to what is expected from them, they are denied the opportunity even to attempt to conform. When the Board may finally encounter a situation where they find the evidence offered sufficient, the union may be denied certification with the effect of punishing the employees because of the NLRB's inability to articulate clear standards.

There exists an alternative method, and perhaps more preferable procedure to the adjudicative determination of standards. Section 6 of the NLRA provides as follows:

The Board shall have the authority . . . to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions [of the Act].

Historically the Board has chosen the adjudicative method for discharging its functions. However, on rare occasions press releases have announced new administrative policy, or agency members have made speeches

89. The employer introduced evidence that two locals of the union seeking certification engaged in discriminatory practices. In rejecting the employer's contention, the court stated:

In our opinion the evidence adduced at the hearing fails to support the employer's claim that the Intervenor engages in unlawful sex discrimination. While the record focused on certain alleged practices of two locals, it does not disclose any evidence whatsoever that the Intervenor, itself, has engaged in discrimination or is likely to engage in discrimination with respect to the employees in the unit sought.

Id.

90. See note 75 and accompanying text supra.


The NLRB has been accused of circumventing the procedural requirements of the Administrative Procedure Act, cited at note 98 infra, by failing to formally utilize its substantive rulemaking powers, while making rules by other means. See id. at 262-65; K. DAVIS, ADMINISTRATIVE LAW, 133-34 (2d ed. 1965); Peck, The Atrophied
which are indicative of policy although not binding. Commentators and numerous court opinions have criticized the Board for its refusal to utilize its substantive rulemaking powers where the appropriate subject matter is involved. Nevertheless, in the absence of a blatant abuse of discretion, it is ultimately the agency's decision whether to proceed by adjudication or rulemaking in reference to any particular issue.

In *Bekins*, the Board specifically rejected the rulemaking approach to the certification issue.

We have considered whether we ought to attempt to define through rulemaking both the procedural and substantive parameters of our future consideration of issues such as those sought to be raised in this proceeding. After much deliberation, we have concluded that we are not yet sufficiently experienced in this newly developing area of the law to enable us to codify, at this time, our approach to such issues. We also believe that the parties are entitled to judicial review of our determinations as to the proper scope of our duty and authority to conform our own law and procedures to the requirements of both the Constitution and legislation against invidious discrimination in employment.

Contrary to the conclusion of the Board, the reasons stated in rejecting the use of rulemaking appear to logically support rulemaking as an appropriate means of handling this area.


Judge Friendly has in many cases commented about the NLRB's failure to make substantive rules in certain situations. See, e.g., NLRB v. Pen Cork and Closures, Inc., 376 F.2d 52, 57 (2d Cir. 1967); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860-62 (2d Cir. 1966); NLRB v. Lorben Corp., 345 F.2d 346, 349 (2d Cir. 1965) (dissenting opinion). See also NLRB v. Wyman-Gordon, 394 U.S. 759 (1969). The majority opinion seemed to imply that in some situations an agency possessing both rulemaking and adjudicative authority must use the rulemaking power. However, the decision does not reveal how to identify what those situations are. *But cf.* id. at 769 (Black's concurring opinion).


97. 86 L.R.R.M. 1327. The reasoning in this quote seems to resemble the following passage from SEC v. Chenery:

...the agency may not have had sufficient experience with a particular
The Board has acknowledged its lack of experience in regard to employment discrimination, and is aware of the disagreement among its members as to the constitutional requirements. A decision to engage in rulemaking would entail a hearing whereby all those potentially affected by the rule could participate in the deliberative process. While the Board has on occasion invited or accepted supplemental briefs on important issues, it has been noted that

[rulemaking does more characteristically involve the promulgation of concrete proposals and the affording of opportunity for general comment than does adjudication, and such opportunity can be of considerable value to the agency and the public.]

In a recent Supreme Court case, it was also acknowledged that "rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course." The hearings should provide the Board with sufficient information and varied opinions to facilitate a determination on this issue.

Another reason for the Board's preference of adjudication over rulemaking in this area is its desire to insure the parties judicial review of its determinations. Certainly rulemaking does not inhibit this process. On the contrary, rulemaking would tend to facilitate supervision by the problem to warrant rigidifying its tentative judgment into a hard and fast rule. ... In [that situation], the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective. ...


The flexibility and experimentation which are the major virtues of the ad hoc approach appear to have been lost in the rigidity of standards announced in the supposedly ad hoc determinations. Indeed one wonders whether there would not be greater flexibility if the standards were announced in rules which through their generality, suggested the possibility of departures in compelling circumstances.

Id. at 758.


1) Publication of a general notice of the proposed rulemaking in the Federal Register, stating the time, place and nature of the rulemaking. See id. § 553(b).

2) An opportunity for interested persons to participate in the rulemaking through the submission of written data, views or arguments, with or without an oral presentation.

99. See DAVIS, ADMINISTRATIVE LAW, supra note 92, at 133; Shapiro, supra note 94, at 931.

100. Shapiro, supra note 94, at 932.


courts and Congress by clearly identifying the NLRB's position and policies.\textsuperscript{103}

The principal advantage of rulemaking on the subject would be clarification and articulation of the NLRB's policy and standards.\textsuperscript{104} Clearly enunciated and properly drawn rules can reduce litigation and encourage behavior change by authoritatively advising the unions.\textsuperscript{105}

Rules can specify the type of discrimination subject to a precertification inquiry in terms of race, alienage, sex, and national origin. The process should result in a determination on the issue of the nature of discrimination susceptible to precertification consideration—whether it be past discriminatory practices, present restrictions only, or the capacity to fairly represent. The rules can set a standard of proof in regard to such categories as statistical evidence, or evidence of discrimination of other locals of the same union. It should be decided if affirmative action is necessary to remedy past discrimination before certification will be granted, and if so, what actions will be sufficient to demonstrate the desired policy change. It may not be feasible nor desirable to do more than announce general criteria relating to the standard of proof and give some indication of their relative weight. Too much specificity can be just as debilitating as too little.\textsuperscript{106} The rules should be general enough to insure flexibility, but sufficiently specific to retain their predictive value.

CONCLUSION

There is nothing inherently detrimental in incorporating public policy into the administration of the NLRA. Government can successfully serve as an initiator of desirable social change by requiring a particular standard of behavior as a prerequisite for conferral of certain benefits. The question of denying certification on the basis of discrimination brings two equally important social interests into conflict—protection of the worker and the desire to eliminate the effects of discrimination. In formulating a remedy to the problem it is necessary to keep the individual significance

\textsuperscript{103} See Peck, \textit{supra} note 59, at 275; Shapiro, \textit{supra} note 94, at 941. "[T]he declaration of policy by means of regulations may make more available the process of judicial review." \textit{Id.}

\textsuperscript{104} According to Davis, \textit{supra} note 92, "[p]rivate parties generally gain from being able to know what the law is and generally lose from uncertainty and confusion." \textit{Id.} at 131.

\textsuperscript{105} See Bernstein, \textit{supra} note 93, at 590.

\textsuperscript{106} See Shapiro, \textit{supra} note 94, at 927-28 (contending that rules which are too speculative can subtract from the force of the general statute and serve as guideposts for evasion).
of the two competing interests in perspective so that one is not completely sacrificed for the other. An attempt should be made to extend the protection of the NLRA to reach those individuals who are being discriminated against without depriving those already enjoying the benefits of the Act’s coverage. It seems logical that a union member whose union affiliation is being threatened by the institution of some public policy will become hostile towards the cause.

This Comment suggests that the most effective way to inject public policy into the certification procedures, and at the same time protect the rights of those already certified, is to clearly identify the behavior required to attain certification by means of rulemaking. This would provide an opportunity for those unions which are discriminating to conform before they are disqualified. It would also provide the Board with a set of standards to implement the policies heretofore unattainable by their use of adjudication. While the Board may never be able to control certain activity, rules proscribing affirmative conduct may be more successful where the traditional case-by-case method has failed to produce notable improvements.107

Judi Fishman

107. But see Bernstein, supra note 93, at 593.

The settled habits of union and management advocates, the comparatively weak demand for rule-making, and most importantly, the almost undeviating rejection of rule-making by all members of the Board . . . make the potential effectiveness of a new approach subject to some doubt.

Id.