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RECENT CASES

Labor Law—Authorization Cards—Court Suggests Board Requirement That Employer Petition for Election to Demonstrate Good Faith Upon Rejection of Authorization Cards

Plaintiff unions[1] sought a National Labor Relations Board (NLRB) bargaining order[2] alleging a violation of section 8(a)(5) of the National Labor Relations Act (NLRA)[3] based on defendant-employers' refusal to recognize the unions when presented with authorization cards signed by a majority of the employees.[4] Plaintiffs

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1. Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, petitioned the court to set aside a Board decision refusing to order Linden Lumber Division, Summer & Co., 190 N.L.R.B. No. 116 (June 7, 1971), to bargain with the union.

Textile Workers Union of America petitioned the court to review the Board's Second Supplemental Decision and Order, 198 N.L.R.B. No. 123 (Aug. 21, 1972), refusing to issue a bargaining order directed against Wilder Manufacturing Co.

2. The court in Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944), expressly declared a bargaining order to be permissible under § 10(c) of the Act, which authorizes the Board to fashion appropriate remedies.

Section 10(c) reads in pertinent part:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and . . . take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter."

29 U.S.C. § 160(c) (1970).

3. Section 8(a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)." Section 9(a) provides that 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.

4. An authorization card can take many forms; it may be a regular union membership card, an explicit designation of the union as the signer's exclusive bargaining representative, an application for union membership, or an authorization for the checkoff of union dues. Generally, it is a printed form with appropriate blanks for the employee's name and/or signature, employer's name and date. As used in this comment, authorization card means a card giving the union authority to represent the employees in collective bargaining. Once a union has obtained the signatures of a majority of the employees, it may present the cards to the employer or to a neutral third party for a check against payroll records. If the employer then refuses to recognize the union, the latter may bring refusal-to-recognize charges according to § 8(a)(5) before the NLRB. *See generally* Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966).

contended that the language and history of sections 8(a)(5) and 9(a)[5] of the NLRA and interpretative court decisions establish an employer's duty to bargain whenever the union representative presents "convincing evidence of majority support."[6] Plaintiffs argued that such convincing evidence was supplied in the instant cases by submission of the authorization cards coupled with recognitional strikes involving a majority of the employees.[7] Plaintiffs further contended that an NLRB refusal to issue a bargaining order would virtually eliminate the value of authorization cards as a means of gaining employer recognition of unions. Defendant-employers stated that they had no duty to recognize the unions when there had been no prior voluntary agreement to determine majority status through means other than an election and when the potential for a fair election had not been seriously impeded by employer misconduct following the card presentation. After a series of Board opinions and court relitigation,[8] the Board supported the employer's "voluntarist" view of the duty to bargain by refusing to issue a card-based bargaining order absent employer misconduct or a prior agreement. On appeal to the United States Court of Appeals for the District of Columbia, *held,* reversed and remanded. The NLRB's refusal to issue a card-based bargaining order absent employer misconduct or a prior agreement is inconsistent with the policy of the NLRA supporting alternative methods to an NLRB election; the Board must adopt an option to test employer good faith such as an

5. *See* note 3 *supra.*

6. Since § 9(a) refers to the representative as the one designated or selected by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."

7. There were a number of indices in hoth of the instant cases that could have laid the predicate for "convincing evidence of majority status;" in *Wilder* there was a strike in support of the cards and an admission of respondent that the union had "10 or 11" of his employees: in *Linden Lumber,* there was a recognitional strike and a renege on the employer's agreement to abide by an election outcome after a "fresh" showing of a 30% support. The union argues that these facts necessarily lay the foundation for a bargaining order.

8. In the *Wilder* case, the Board's initial decision on Oct. 21, 1968, found that the company had not committed unfair labor practices and dismissed the complaint. Subsequent to the filing of the union's petition for review in the court of appeals, the Supreme Court decided the related case of NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), and the court decided that the Board was the appropriate forum to consider initially the effect of the *Gissel* opinion upon its prior decision. On Aug. 27, 1970, the Board issued a Supplemental Decision and Order, 185 N.L.R.B. No. 175, finding that *Wilder's* course of conduct did violate § 8(a)(5). The Board filed an application for enforcement of this order, hut following jurisdictional consideration and the recent decision in *Linden Lumber,* the Board moved to have the case remanded to it, leading to the Second Supplemental Decision being appealed in the instant court, 198 N.L.R.B. No. 123, (Aug. 21, 1972).

employer petition for election under section 9(c)(1)(B) of the Act. Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973).

Under the National Labor Relations Act, two methods have developed by which a union can obtain recognition as the exclusive bargaining representative of a previously unorganized group of employees. The first, based on section 9(c) of the Act,[9] provides for an election procedure by secret ballot on the petition of any interested party—employee, union or management.[10] This secret ballot election is controlled by strict regulations[11] designed to prevent management and union coercion of the voting employees. While the election procedure maintains a "preferred status"[12] as a means of establishing union representation, the Board has interpreted sections 8(a)(5) and 9(a) of the Act so as to allow unions, in some instances, to circumvent regulated secret ballot elections. Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain with the representative of a majority of his employees; section 9(a) defines representative as one "designated or selected" by a majority of the employees, without specifying precisely how the representative is to be chosen. Authorization cards, signed by a majority of the employees and presented to the employer for examination, have become a popular method of informing the employer of majority union status.[13] If the employer refuses to recognize the union following the card presentation, the union may, instead of

9. 29 U.S.C. § 159(c)(1)(B) (1970).

10. Section 9(c)(1)(B) gives employers the right to file their own representation petitions. It allows for a petition "by an employer, alleging that one or more individuals or lahor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) . . . ."

11. *See generally* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Note, 72 YALE L.J. 1243 (1963).

12. The Court in *Gissel* noted that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U.S. at 602.

13. Employer knowledge of majority status may be secured in a number of ways. A majority of the employees may inform the employer directly in groups, or individually, of their own accord, or indirectly as a result of polling by the employer of employees. *See generally* Shuman, *Requiring a Union to Demonstrate Its Majority Status by Means of an Election Becomes Riskier*, 16 LAB. L.J. 426 (1965).

filing a petition for an election, bring charges of refusal to bargain—an unfair labor practice according to section 8(a)(5)—against the employer. If the union is successful in this proceeding, the Board will issue a bargaining order to the employer.[14] Compared to the 9(c) election process, however, the card check method for gaining employer recognition has produced the following significant defects: greater opportunity exists for coercion of employees by union organizers;[15] employees may misunderstand the impact of signing an authorization card, because of misreading, failure to read, or union misrepresentation;[16] and, the employer may lose the opportunity to speak to his employees concerning their decision to have union representation.[17] For these reasons, the Board has emphasized that authorization cards are not the functional equivalent of a certification election[18] and traditionally has limited the issuance of card-based bargaining orders by certain judicial tests. In 1950, the landmark case of *Joy Silk Mills Inc. v. NLRB*[19] established the good faith test; the Court of Appeals for the District of Columbia held that if an employer has a "good faith" doubt that the union lacks status as a majority representative, the employer will not be charged with an 8(a)(5) violation upon refusal to recognize.[20] Under this *Joy Silk* test, adopted in all other circuits, the union could disprove good faith of the employer in either of two ways: by a showing that at the time the union presented its authorization cards the employer could have no good faith doubt about the union's majority status; or by a showing of employer misconduct, subsequent to the initial refusal of recognition, which tended to dissipate the union's strength. Criticism directed at the difficulty of translating the undisclosed state

14. *See* note 2 *supra.*

15. *See* Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice,* 33 U. CHI. L. REV. 387, 390 (1966).

16. *See* Note, *Union Authorization Cards,* 75 YALE L.J. 805, 823 (1965); *cf.* Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 MICH. L. REV. 851 (1967).

17. Courts have protected the employer's right to influence the vote of his employees through non-coercive speech. *See* Thomas v. Collins, 323 U.S. 516, 537-38 (1945); Surprenant Mfg. Co. v. NLRB, 341 F.2d 756 (6th Cir. 1965).

18. *See* Cudahy Packing Co., 13 N.L.R.B. 526 (1939). *See generally* Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard,* 39 U. CHI. L. REV. 314, 318 (1972).

19. 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951).

20. The court stated: "[A]n employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status. When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act." 185 F.2d at 741.

of mind of an employer into a legal finding of "good" or "bad" faith[21] led to the "independent knowledge" test, which utilized more objective criteria for determining the employer's knowledge of majority status. This new doctrine developed in *Snow & Sons*[22] where the employer had reneged on an agreement to have the cards authenticated by an impartial party and to be bound by such authentication. The test required that an employer who refused a union request for recognition based on an authorization card majority was subject to a mandatory bargaining order if he had knowledge, independent of the cards, that the union possessed the support of a majority of the members of a unit. The independent knowledge doctrine assumed added significance when the good faith test was expressly abandoned[23] seven years later by the Supreme Court in *NLRB v. Gissel Packing Co.*[24] The *Gissel* decision held that the NLRB has the authority to order an employer to bargain collectively if he has committed unfair labor practices that interfere with the potential for a fair election. Since under the *Gissel* standard, the key to a bargaining order is the effect of employer misconduct on the election process, the standard of good faith doubt is largely irrelevant. The *Gissel* decision, however, expressly left open the question "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes."[25] Since a union's right to rely on cards as a freely interchangeable substitute for elections where there had been no election interference was not put in issue in *Gissel,* employer misconduct along with independent knowledge remained the sole criteria for the issuance of a bargaining order. Following the *Gissel* case, two Board decisions expanded the independent knowledge test beyond the facts of *Snow & Sons* to situations where the employer and employees made no prior agree-

21. *See generally* Pogrebin, *NLRB Bargaining Orders Since Gissel: Wandering from a Landmark,* 46 ST. JOHNS L. REV. 193 (1971).

22. 134 N.L.R.B. 709 (1961), *enforced,* 308 F.2d 687 (9th Cir. 1962).

23. The Board in *NLRB v. Gissel Packing Co.* announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether. The Court also summarized the Board's position on the independent knowledge test at that time:

> Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct. . . . The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew* . . . that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

395 U.S. at 594.

24. 395 U.S. 575 (1969).

25. *Id.* at 595. *See generally* Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA,* 37 U. CHI. L. REV. 411 (1970).

ment.[26] In both decisions, the Board relied on evidence in addition to authorization cards to draw the inference that the employer must have known of the union's majority status. This evidence included employer acknowledgement of card authenticity, his conversation with employees, and a strike by the majority of the employees. More recently, however, the Board has retreated from this expanding independent knowledge concept to the narrower holding of *Snow & Sons*. In the 1970 case of *Redmond Plastics*,[27] the Board identified the "prior agreement" element as the critical factor; it found that the employer's initial acknowledgement to union officers that they appeared to have a union majority, together with a tentative agreement to talk with the union, justified the issuance of a bargaining order. The instant Board decisions follow this restriction of the independent knowledge test; the employer has no duty to bargain absent an agreement to determine majority status through means other than an election. This recent position coupled with the Court's earlier rejection of the good faith test in *Gissel* has seriously limited the effectiveness of authorization cards as a means of gaining union recognition.

The instant court first briefly examined the statutory material involved and noted that although elections enjoy a "preferred status" as a means of determining representation, they are not the only predicate for a union claim to majority status. The court then described the development of the "independent knowledge" doctrine and emphasized that the instant Board opinions represented a restriction of this standard; the only valid basis for an employer duty to bargain was a prior agreement to let its "knowledge" be established through a means other than a Board election. The court reasoned that by restricting the independent knowledge test to the prior-agreement situation, an employer's duty to recognize a union can be triggered only by his own permission and therefore the effectiveness of authorization cards is seriously limited.[28] The court stated that the Board's "voluntarist" position was inconsistent with the policies of the NLRA and argued that some alternative must be devised to prevent an employer's deliberate disregard of union cards without rhyme or reason. For cases involving neither a prior agree-

26. Wilder Mfg. Co., 185 N.L.R.B. 175 (1970); Pacific Abrasive Supply Co., 182 N.L.R.B. 329 (1970).

27. 187 N.L.R.B. 487 (1970).

28. The court empbasized that the facts of *Snow & Sons* laid the predicate for a finding of independent knowledge, not that a finding of independent knowledge was restricted to such facts.

ment nor employer misconduct, the court proposed a new test for issuing a bargaining order, which it felt was related to independent knowledge and its good faith predecessor: the failure of the company to evidence its own "good faith doubt" by itself petitioning for an election indicates recognition of majority status and a bargaining order may ensue. The court reviewed the legislative history of section 9(c)(1)(B) of the 1947 amendment, which provides the employer with the right to petition for an election, and noted that it was designed to allow the employer to test its doubts as to a union's majority.[29] Relying on this legislative history and a desire for a compromise standard, the court proposed that since authorization cards create a sufficient probability of majority support, an employer should resolve any doubt of majority status through a section 9(c)(1)(B) petition for election if it is to avoid a bargaining order.

In accordance with the policy of the NLRA, the instant decision attempts to ensure the effectiveness of authorization cards as an alternative means of gaining employer recognition of union representation. The abandonment of the "good faith" test, the restriction of the "independent knowledge" test and the limitation of the *Gissel* holding to employer misconduct situations have combined to limit the scope of an employer's duty to bargain upon presentment of authorization cards. The court sets forth a proposed rule to prevent deliberate employer disregard of authorization cards in situations where there has been no *Snow & Sons* prior agreement or *Gissel* employer misconduct. In placing the burden of affirmative action—petitioning for an election—on the employer, the proposed rule aims to maintain the delicate balance between authorization cards and the election process; since cards do not become the functional equivalent of an election, the "preferred status" of elections is preserved while authorization cards retain their value at the same time. In addition, the proposed rule may cure several defects that exist in current Board procedures for handling authorization card situations.[30] For example, the proposed rule should result in a speedier election process because it would help obviate employer use of delaying tactics. The current independent knowledge standard cre-

29. The court cited the statements made in *Gissel* regarding § 9(c)(1)(B):

> That provision was not added, as the employers assert, to give them an absolute right to an election at any time; rather it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity.

395 U.S. at 599.

30. *See* Comment, *supra* note 18.

ates an incentive not to recognize the union, but rather to prolong a pre-election hearing[31] or to withhold recognition until the union is forced to initiate a lengthy 8(a)(5) proceeding. By requiring the employer to satisfy its doubts by an election petition, the rule would decrease the possibility that an employer would succeed in the section 8(a)(5) proceeding. The employer should be more likely to grant recognition immediately or petition for an election, thereby avoiding the lengthy proceedings that occurred in the instant case. Despite these potentially beneficial effects of the proposed rule, it is questionable that its practical application will actually reinforce the utility of authorization cards as a direct means to the end of union recognition. An initial question arises as to why an employer would not petition for an election every time it was presented with authorization cards in order to gain time and utilize the safeguards of the election procedures. If employer petition upon presentment of cards becomes a matter of course, how should the Board or a court determine when an employer has petitioned for an election to remove its good faith doubt and when it has so acted simply out of a desire to avoid union recognition? This question of good faith raises once again the criticisms of subjectivity which were directed at *Joy Silk,* in the face of the Board's warning in *Summer & Co.* that "it did not wish to reenter the good faith thicket of *Joy Silk.*" Nonetheless, if authorization cards are to be an independent means of obtaining union recognition, this subjective evaluation of employer state of mind becomes necessary. Since the potential for adequately policing employer petitions for election appears slim at best, the court should recognize that the independent effectiveness of authorization cards has not really been preserved; rather the election process merely has been expedited through the use of authorization cards. The courts should evaluate the cards' utility in attaining a smoother election procedure and determine whether the election procedure could operate just as efficiently without the use of the troublesome cards at all.

31. *Id.* at 326.

Labor Law—Protected Activity—Concerted Activity in Protest of Racial Discrimination and Without Union Authorization by Employees Dissatisfied with Union Efforts is Protected by § 7 of the NLRA

Petitioner instituted unfair labor practice proceedings against a California department store[1] on behalf of dissident union members who were discharged for picketing in protest of alleged racial discrimination by their employer.[2] The employees in question had set up pickets without union authorization[3] after becoming dissatisfied with investigations of discrimination charges conducted by the union and employer in accordance with the collective bargaining agreement.[4] Petitioner contended that the picketing employees were engaged in concerted activity protected from employer interference by section 7 of the National Labor Relations Act (NLRA).[5] The National Labor Relations Board (NLRB) ruled that the concerted activity was unprotected and the discharges lawful because the picketers' actions were in derogation of the union's status as exclu-

1. Respondent Emporium Capwell Co., through its bargaining agent, the Retailer's Council, was a signatory to a collective bargaining agreement with the Department Store Employees Union, exclusive bargaining representative of Emporium's stock and marking-area employees. The collective bargaining agreement contained an anti-discrimination clause, a no-strike clause, and provided for an adjustment board and binding arbitration for dealing with agreement disputes.

2. Petitioner charged that by firing employees Hawkins and Hollins, the employer violated § 8(a)(1) of the NLRA, which provides: "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 . . . ." 29 U.S.C. § 158 (1970).

3. The union filed a protest with the Retailer's Council challenging the firings, but did not authorize the strike or initiate the instant action.

4. Five months after receiving employee complaints of employer racial discrimination in promotions, the union charged the employer with discrimination and demanded an adjustment board proceeding. After announcing that it would demand arbitration if necessary, the union rejected the suggestion of several employees that a strike be called and expressed the intent to utilize the grievance procedure of the collective bargaining agreement. At the adjustment board meeting, 4 employees, including Hawkins and Hollins, refused to participate in grievance adjustment on an individual case basis and demanded that discrimination be considered as it affected non-white employees of the company as a group. The employees also demanded a meeting with employer's president and staged a walkout. After the refusal of employer's president to negotiate directly, employees Hawkins and Hollins picketed employer's store and were fired.

5. Section 7 of the NLRA, 29 U.S.C. § 157 (1970) 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 . . . ."

sive bargaining representative.[6] On appeal to the United States Court of Appeals for the District of Columbia, *held,* order reversed and case remanded for further proceedings.[7] When employees engage in concerted activity without union authorization to protest racial discrimination, such concerted activity is protected by section 7 of the NLRA, if after initially utilizing union grievance procedure the employees have a reasonable belief that the union is not opposing discrimination to the maximum extent possible. *Western Addition Community Organization v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted,* 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-830).

The right of employees to engage in concerted activity[8] for the purpose of collective bargaining and the protection of that right from employer interference—as embodied in sections 7[9] and 8(a)[10] of the NLRA—are central components of national labor legislation.[11] Moreover, the courts early recognized that efforts to eliminate racial discrimination are within the scope of "labor disputes"[12] and may constitute protected concerted activities.[13] National labor policy has provided additionally, through section 9(a)[14] of the NLRA, that the elected union representative should be the exclusive agent

6. The NLRB adopted the Trial Examiner's decision in favor of the employer, Members Jenkins and Brown Dissenting. 485 F.2d at 924.

7. The court remanded on the issue of whether the language used hy the picketing employees constituted disloyalty sufficient to remove the activities from the protection of § 7. The court cautioned the NLRB, however, to closely examine the facts to ensure that the firings were not motivated by racial discrimination or employer adversity toward concerted activity. *See* NLRB v. IBEW Local 1229, 346 U.S. 464 (1953) (discharge of employees who publicly disparaged employer's television broadcasts not an unfair labor practice); Patterson-Sargent Co., 115 N.L.R.B. 1627 (1956) (discharge of strikers carrying disloyal signs not an unfair labor practice).

8. "Concerted activity" refers both to employees' actions and the legal status of those actions, and as a result the term "protected concerted activity" has been utilized to indicate such activity which is protected by law from employer interference. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-17 (1962); NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 221 (9th Cir. 1969); Note, *Concerted Activity Under Section 7 of the National Labor Relations Act,* 1955 U. ILL. L.F. 129.

9. *See* note 5 *supra.*

10. *See* note 2 *supra.*

11. *See* THE DEVELOPING LABOR LAW 22-24, 28 (C. Morris ed. 1971); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U. PA. L. REV. 1195 (1967).

12. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

13. NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1, 4 (1965), *on remand,* 166 N.L.R.B. 551 (1967), *vacated and remanded,* 419 F.2d 216 (9th Cir. 1969); Mason-Rust, 179 N.L.R.B. 434 (1969).

14. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1970) provides: "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 . . . ."

of the members of the collective bargaining unit.[15] This principle of exclusivity is designed to create a means by which the demands of the union majority may be translated into a single bargaining position. The representative communicates the bargaining position to the employer, thereby creating a more orderly system of collective bargaining[16] and also protecting the employer from conflicting demands of numerous groups of workers.[17] A series of "wildcat" strike cases, involving employees striking without union authorization,[18] has presented problems in reconciling section 7's protection of concerted activities with section 9(a)'s principle of exclusivity. The Fourth Circuit in *NLRB v. Draper*[19] approved the firing of a minority group of strikers on the basis of the exclusivity principle, reasoning that collective bargaining would lose its effectiveness if small groups of employees could ignore their exclusive agent.[20] The Fifth Circuit initially adopted a position more amenable to minority strikers in *NLRB v. R.C. Can Co.*,[21] holding that minority concerted activity in support of the union position is not in derogation of the exclusive status of the union and therefore does not lose the protection of section 7.[22] A later Fifth Circuit decision, however, narrowly limited *R.C. Can* to cases where the minority action is consistent

15. The § 9(a) principle of exclusivity is enforced by § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970), which makes it an unfair labor practice for the employer to refuse to bargain with the elected union representatives or to bargain with splinter groups. *See, e.g.*, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

16. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 685 (1944); NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 220 (9th Cir. 1969); Plasti-Line, Inc. v. NLRB, 278 F.2d 482, 486 (6th Cir. 1960). *See also* National Labor Relations Act § 1, 29 U.S.C. § 151 (1970).

17. NLRB v. Draper Corp., 145 F.2d 199, 203 (4th Cir. 1944); *see* NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 221 (9th Cir. 1969). Another benefit of this structure is the more effective use of the economic strength of the workers. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); NLRB v. Draper Corp., 145 F.2d 199, 203 (4th Cir. 1944). An additional result is the avoidance of unequal treatment of groups within the bargaining unit. II LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3070 (NLRB 1949).

18. A "wildcat" strike is defined as "a work stoppage, generally spontaneous in character, by a group of union employees without union authorization or approval." H. ROBERTS, DICTIONARY OF INDUSTRIAL RELATIONS 461 (1966).

19. 145 F.2d 199 (4th Cir. 1944).

20. 145 F.2d at 203. A number of other circuits have followed the *Draper* decision. *See, e.g.*, Lee A. Consaul Co. v. NLRB, 469 F.2d 84 (9th Cir. 1972) (per curiam); NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963); Plasti-Line, Inc. v. NLRB, 278 F.2d 482 (6th Cir. 1960).

21. 328 F.2d 974 (5th Cir. 1964).

22. The Fifth Circuit, in addition, held that if the minority group criticizes or opposes union positions then the group's activity is divisive and unprotected. 328 F.2d at 979; *see* Western Contracting Corp. v. NLRB, 322 F.2d 893 (10th Cir. 1963).

with *all* positions of the union.[23] Minority strikes involving the issue of employer racial discrimination present courts with an additional problem in light of the exclusivity principle; the situation may involve white union leaders who are unresponsive or even hostile to black members[24] thereby escalating the pressure for minority members to engage in concerted activity against the employer in order to get adequate representation.[25] In *NLRB v. Tanner Motor Livery, Ltd.*,[26] the Ninth Circuit considered the question of protection of the concerted activities of employees who were fired for picketing in protest of employer racial discrimination where the employees made no attempt to bargain through their union representative. The court, relying on *Draper* and on two recent Supreme Court decisions emphasizing the exclusivity principle,[27] held that the concerted activities were not protected. Although the Ninth Circuit concluded that section 9(a) requires that the employees assert their demands through their union,[28] the court did not specifically pass on the question of section 7 protection where the employees initially utilize union machinery and then resort to concerted activities out of dissatisfaction with union efforts to end discrimination. Thus, while the section 7 right of employees to engage in concerted activity against employer racial discrimination has been limited to some extent by the exclusivity principle of section 9(a), no definitive approach to this problem has yet been exhibited by the courts.

Considering the right of an employee to non-discriminatory treatment, the instant court held that this right differs from other conditions of employment because of its independent statutory base

23. NLRB v. Shop Rite Foods, Inc., 430 F.2d 786, 791 (5th Cir. 1970).

24. *See* Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969); Kovarsky, *Current Remedies for the Discriminatory Effects of Seniority Agreements*, 24 VAND. L. REV. 683, 686-87 (1971).

25. Although the union is under a duty of "fair representation" to its black members, the general legislative dissatisfaction with the effectiveness of this doctrine resulted in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), which guarantees the right of employees to be free of racially discriminatory employment practices. *See* Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Steele v Louisville & N.R.R., 323 U.S. 192 (1944); Blumrosen, *Strangers in Paradise: Griggs v Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59. 87 (1972); Kovarsky, *supra* note 24, at 686-87.

26. 419 F.2d 216 (9th Cir. 1969).

27. The *Tanner* court found in the *Allis-Chalmers* and *Scofield* decisions a growing emphasis on ensuring the free expression of employee demands within the union, with the result that added weight should be given the majority position. *See* Scofield v. NLRB, 394 U.S. 423 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

28. 419 F.2d at 221.

in Title VII of the Civil Rights Act of 1964.[29] The court concluded that the exceptional character of concerted activities involving racial discrimination should have been recognized and considered by the NLRB in its decision.[30] The court next distinguished the instant situation from the *Tanner* case in which the strikers made no attempt to utilize the established grievance procedures and held that an initial resort to the union's established procedures is essential for section 7 protection of concerted activities. The court then turned to the efforts of the strikers' union representatives and concluded that while the union appeared to be representing the dissident employees in good faith, it may not have been proceeding "to the *fullest extent possible, by the most expedient and efficacious means.*"[31] The court ruled that the eradication of discrimination cannot be subjected to less than this high standard of representation, and thus the employees had reasonable grounds to believe that they were not being adequately represented by the union. The court next focused on the interference of this minority concerted activity with section 9(a). The court found that the basic premise of exclusivity—majority rule producing a single bargaining position—is not defeated by minority activities opposing racial discrimination because the union majority is itself compelled by Title VII to oppose discriminatory policies. The court, although conceding that the actions of the strikers were disruptive of the collective bargaining process, reasoned that the instant strike was not sufficiently disruptive to remove section 7 protection.[32] The court therefore concluded that due to the privileged position of racial disputes, concerted activities protesting racial discrimination should be protected by section 7 when the following conditions are met: initial utilization of established union grievance procedures and a reasonable employee belief that the union is not proceeding to the maximum extent in

29. *See* note 25 *supra.* In addition, the court noted that peaceful picketing in protest of employer discrimination is specifically protected from employer interference under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1970) which provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." *Cf.* Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972), *aff'd,* 411 U.S. 792 (1973).

30. *See* Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Market Case,* 1970 SUP. CT. REV. 215, 260-61.

31. 485 F.2d at 931.

32. The court also noted that the strikers pursued the established grievance procedure until the union declined to proceed on a group basis, and not until that point did disruption occur. 485 F.2d at 929-30.

opposing discrimination.[33]

The instant decision's significant departure from those prior "wildcat" strike cases relying on the *Draper* exclusivity rationale,[34] and the opposite results reached in the instant case and the Ninth Circuit's *Tanner* decision,[35] indicate an apparent split in the District of Columbia and Ninth Circuit's approaches to section 9 in racial discrimination cases.[36] By "immunizing" labor disputes involving racial discrimination from the exclusivity requirement,[37] the court has aided minority group employees in their struggle by creating an additional avenue by which discrimination in employment can be combatted and by reducing the obstacle of unresponsive union representation.[38] At the same time the court has attempted to preserve orderly collective bargaining by limiting section 7 protection to employees who have at least initially utilized union grievance procedures. The instant decision, however, does present three major problems. First, the right to act outside of union representation must be viewed in terms of the employee's reasonable belief that union representation has been inadequate,[39] and this "reasonable belief" criterion will create an uncomfortable dilemma for the employer who is faced with minority concerted activity. If the employer bargains directly with the dissident group, he may face unfair labor practice charges by the union under section 8(a)(5) of the NLRA which prohibits the employer from bargaining with union splinter

33. In his dissenting opinion, Judge Wyzanski found that the position of the strikers was in derogation of the union because any advances made by non-white workers must necessarily be at the expense of white employees. Judge Wyzanski, however, concluded that where racial discrimination is involved an exception to the exclusivity rule must be created. In addition to Title VII policies noted by the majority, Judge Wyzanski found a basis for this exception in the essential injustice of requiring that non-whites asserting their rights "**BE RELEGATED TO WHITE SPOKESMEN, MIMICKING BLACK MEN.**" The Judge concluded that "**THE DAY OF THE MINSTREL SHOW IS OVER.**" 485 F.2d at 940. Judge Wyzanski dissented from the majority's remand, and argued that the NLRB should he ordered to grant relief to petitioner. 485 F.2d at 941.

34. *See* 485 F.2d at 926-27, 938.

35. The *Tanner* court specifically rejected the Fifth Circuit's reasoning in *R.C. Can* that a minority strike in support of the union position does not derogate from the union's exclusivity and is therefore protected. 419 F.2d at 221; *see* note 22 *supra*. However, the instant court's reasoning—since the majority is compelled by law to oppose discrimination, minority strikes opposing discrimination do not derogate from the majority—sounds more akin to *R.C. Can* than to *Tanner*.

36. *See* 485 F.2d at 940.

37. *See* Gould, *supra* note 30, at 260-61.

38. *See also* Gould, *Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 MICH. L. REV. 237-38 (1969).

39. 485 F.2d at 931.

groups.[40] Moreover, if the employer fires the dissidents after incorrectly gauging as unreasonable their belief that union representation has been inadequate, he is in violation of section 8(a)(1) which prohibits employer interference with the exercise by employees of section 7 concerted activity.[41] If the employer does nothing, he faces economic losses from disruption caused by the strikers.[42] Secondly, objection may be raised to the court's standard of adequate union representation.[43] In the instant case, the union was admittedly proceeding in good faith in what it felt was the most efficient manner.[44] The court's determination that the union had not fulfilled the "high standard" of representation creates doubts that any union representational effort, short of calling a strike, can stand the test where objections from racial minorities arise.[45] If the standard is indeed that stringent, the court's requirement that members resort to union representation is rendered essentially meaningless.[46] A third, more basic objection to the decision is found in the court's use of the Title VII anti-discrimination policy to immunize the strikers from the exclusivity requirement.[47] Title VII not only makes discrimination in employment illegal, but also provides an orderly system by which discrimination complaints may be processed.[48] Title VII's policy of negotiation and conciliation, in conjunction with the recognized NLRA policy of orderly collective bargaining, weighs in favor of discouraging minority concerted activity, even within the context of

40. *See* note 15 *supra*. In situations similar to the instant case where the union position is closely linked to that of the strikers, the danger of § 8(a)(5) charges would appear to be remote. But where the union is in opposition to minority strikers, indicating a greater possibility of inadequate union representation, the employer's dilemma could become acute. *See* Getman, *supra* note 11, at 1246-47; Gould, *supra* note 24, at 67.

41. *See* note 2 *supra*.

42. The employer's dilemma should also be viewed in terms of the collective bargaining process. The employer often gives up significant concessions to the union, including the binding arbitration clause, in order to obtain a no-strike agreement. The employer's, and indeed the union's, reliance upon an orderly system of grievance adjustment for the purpose of insulating production from industrial strife may be defeated by the instant decision. *See* note 40 *supra*.

43. *See* note 31 *supra* and accompanying text.

44. "There is nothing in the record before us to indicate that the Union's decision to remedy the charges of discrimination by proceeding on an individual rather than a group or class basis was made in bad faith." 485 F.2d at 930.

45. *See* 485 F.2d at 931.

46. *See id.* at 929.

47. *See* notes 29-30 *supra* and accompanying text.

48. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-4, -5 (1970), Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 47 (1971) *See also* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 862-63 (1972).

a discrimination protest. Dissident union members have access to several major alternative remedies including Title VII protection,[49] state anti-discrimination laws,[50] suit for breach of the collective bargaining agreement,[51] and other federal statutory provisions.[52] The availability of these nondisruptive means of combatting racial discrimination—in particular the remedies under Title VII—should make concerted activity by dissidents not only unnecessary, but also undesirable.[53]

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49. *See* note 25 *supra*. The enforcement scheme of Title VII, as amended by the Equal Employment Opportunity Act of 1972, provides that the Equal Employment Opportunity Commission (EEOC) will investigate charges of discrimination and determine if there is reasonable cause to believe that the charges are true. Upon finding reasonable cause, the EEOC must make efforts to conciliate the case, and failing to obtain conciliation, the EEOC may bring a civil action in an appropriate federal district court. Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972), *amending* 42 U.S.C. § 2000e-5(f) (1970). *See generally* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 7TH ANNUAL REPORT (CCH LAB. L. REP., Aug. 23, 1973); Sape & Hart, *supra* note 48, at 862-64.

50. *See, e.g.*, Beaird, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469, 472-73 (1972); Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 449, 455-56 (1971); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

51. *See* Beaird, *supra* note 50, at 474-76; 1966 U. ILL. L.F. 230.

52. *See* Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 WASH. L. REV. 455, 489-91 (1971).

53. *See generally* Meltzer, *supra* note 48; Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions*, 24 LAB. L.J. 592, 608 (1973). *But see* Cox, *The Right To Engage in Concerted Activities*, 26 IND. L.J. 319, 332 (1951).