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INTRODUCTION

I welcome this opportunity to comment on John True’s review essay¹ on my book, The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace² (Blue Eagle), and to note other features of members-only collective bargaining under the National Labor Relations Act³ (NLRA or Act)—which the book advances—that may benefit from further elucidation. I shall first address Judge True’s essay, after which I shall discuss a series of cases that provide, in my view, dispositive answers to questions that some skeptics have raised concerning the roles of sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A), and/or 8(b)(2)⁴ in relation to the book’s minority-union bargaining thesis.

That thesis revives and reaffirms the legality of a long-forgotten industrial relations practice: workers organizing into minority labor unions and exercising the right to bargain with their employers on a members-only basis in workplaces where there is not yet a designated majority representative. This concept challenges and overrides the conventional wisdom—or, more accurately the habit—that has long supported the erroneous belief that the Act requires bargaining only with a union that represents a majority of the employees in an appropriate bargaining unit.

I. THE TRUE REVIEW

It naturally pleases me that Judge True agrees with the Blue Eagle’s basic premise. He concludes early in his essay that “[n]othing in the actual language of the NLRA, in its legislative history, in NLRB or court cases, in

the constitution, in international law, or indeed in common sense or sound policy suggests that unions could not still use this ‘members only’ bargaining approach.”

And he reads the language of section 7 as “all inclusive,” explaining that

It does not by its terms limit in any way the rights it confers, including “activities for the purpose of collective bargaining,” to those who have designated a union as their exclusive representative. The clear language of the statute confers this right on all employees. So as a matter of simple logic, a minority group of employees is entitled to engage in “activities for the purpose of collective bargaining” including, presumably, the right to make their employer respond to its bargaining demands.

Notwithstanding that insightful recognition of the broad scope of the bargaining requirement, his emphasis on the independent role of section 8(a)(1) fails to appreciate that the integrated structure of the Act determines that an employer’s duty to bargain with a minority union on a members-only basis stands on two separate legs: One is section 8(a)(1), which Judge True correctly describes, and the other—of equal if not greater importance—is section 8(a)(5), which he virtually ignores or seems to suggest is applicable only to majority unions. The language of that section, however, contains no such limitation, and its legislative history shows conclusively that this belatedly added unfair-labor-practice—which was not contained in Senator Wagner’s original bill—was intended to enhance rather than diminish the bargaining requirements of section 8(a)(1). This was explicitly spelled out in the Senate and House committee reports. The provision was deliberately worded to avoid limiting an employer’s bargaining duty to majority unions only. The “smoking gun” that revealed such deliberation, which Judge True fails to mention, was the Senate’s rejection of an alternative version of section 8(5) that would have confined the bargaining requirement to employee representatives “chosen as

5. True, supra note 1, at 184.
6. True, supra note 1, at 184. Section 7, codified at 29 U.S.C. §157, provides in pertinent part: 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

7. Id. at 190.
8. 29 U.S.C. §158(a)(1), which provides that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7[.]”
9. 29 U.S.C. §158(a)(5), which provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)[.]”
10. Judge True acknowledges the “relatively late” addition of section 8(5) and Senator Wagner’s view that it “was unnecessary or superfluous.” True, supra note 1, at 193.
provided in section 9(a)—in other words, only to majority representatives within appropriate bargaining units. Instead, Congress adopted the present generic language, which is not so limited.

Judge True also gives four NLRB General Counsels more credit than they intended, for they did not propose my thesis as he asserts. Rather, they proposed only that an employer was duty bound to deal with an ad hoc group of employees regarding group grievances,13 which would be a discretionary14—though highly desirable—reading of the second-track requirement of section 7, i.e., protected concerted activity for “mutual aid or protection.” However, although the latter clause is closely related, it is not the statutory basis for the duty to bargain collectively with a minority union, which relies primarily on the express grant of collective-bargaining rights for all employees contained in the first part of section 7 and is based on a mandatory reading of clear and specific language.15 Furthermore, contrary to Judge True’s assertion,16 I do not contend that the Act requires that an employer must deal with ad hoc group grievances, although such a discretionary interpretation by the Board would certainly be consistent with the policy of the Act and enforceable under the Chevron17 doctrine.

12. See id. at 62-63, 73-74, & 105-106. The pertinent part of §9(a) (29 U.S.C. §159(a)) reads as follows:
   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 . . . .

13. See True, supra note 1, at 193; BLUE EAGLE, supra note 2, at 164-65.

14. See Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) (holding that when a court reviews an administrative agency’s construction of a statute which it administers, if the intent of Congress is clear, both the agency and the court must give effect to the unambiguously expressed intent of Congress, but if the court determines that Congress has not addressed the precise question at issue and the statute is silent or ambiguous with respect to the specific issue, the only question for the court is whether the agency’s interpretation is based on a permissible construction of the statute). See also Holly Farms Corp. v. NLRB, 517 U.S. 392, 398-99 (1996) (“When the legislative prescription is not free from ambiguity, the administrator must choose between conflicting reasonable interpretations. Courts, in turn, must respect the judgment of the agency empowered to apply the law ‘to varying fact patterns’ . . . .”); NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987) (finding that the courts “have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute”); see generally BLUE EAGLE, supra note 2, at 131-38.

15. Members-only minority-union bargaining and majority-exclusivity bargaining are both protected by the explicit language of section 7 that guarantees that “[e]mployees shall have the right to . . . bargain collectively through representatives of their own choosing,” hence are mandatory requirements in the Act, whereas the process of employees dealing with their employer on a group basis regarding grievances is concerted activity for “other mutual aid and protection,” which is subject to the Board’s exercise of discretion, provided the determination is rational and consistent with the statute. See supra note 14.

16. His allegation is that I “argue” that the employer’s refusal to deal with an ad hoc group “is violating the letter and spirit of the law.” True, supra note 1, at 196.

17. See supra notes 14-15.
In his commendable search for any sign of contraindications regarding minority bargaining in the vast NLRB forest of decisional trees, Judge True pauses to examine some odd leaves of dicta that I had uncovered in a few obscure cases. These cases had obliquely mentioned a majority-bargaining requirement but were actually irrelevant to the minority-union bargaining question here in issue. He thus devotes several pages of his review to a chapter of the book whose only purpose was to demonstrate the total absence of either court or Board cases addressing the basic issue. He dwells particularly on dictum in one case, In the Matter of Moorsville Cotton Mills,18 from which he draws an observation that is unsupported by the facts of the case.19 That decision was but one of eight cases that I have characterized as “false majority” cases,20 i.e., cases where the union was claiming or acting as the exclusive—hence the putative majority—representative for all the employees in the unit, not just for its members. In each of those cases the Board properly refused to recognize bargaining rights for minority unions that were erroneously claiming majority status.

To avoid any misconception concerning the Moorsville case, I shall here correct the record as to its facts and its meaning. On September 21, 1935, which was only a few months after passage of the Wagner Act,21 a union delegation attempted to discuss company-wide grievances with the employer. These were broadly-based grievances. The union was obviously not seeking to represent its members only, for it had reason to believe, as the facts demonstrated, that it represented a substantial majority of employees in the bargaining unit. The Board’s Regional Director likewise assumed the existence of majority status because, as the Board’s opinion stated, “[t]he complaint alleges . . . that respondent refused to discuss certain grievances with the duly designated representatives of the employees,”22 and a violation of section 8(5) was charged accordingly.

Judge True asserts, however, that “[t]he facts suggest pretty clearly . . . that the union knew it was not a majority representative of the employees.”23 On the contrary, the facts suggest the opposite. The union had been active at the plant for a number of years, and the union delegation had no reason to doubt that they represented a considerable majority of the employees on September 21 when they presented several grievances to the employer regarding matters affecting all the employees, not just union members.
members. The grievances complained (1) that the overseers were engaging in practices that tended to promote discontent among the employees, (2) that a fair rule for the hiring and discharging of workers should be adopted, and (3) that the overseers should discontinue discrimination against union members and reinstate two discharged union officers—this is the only grievance that might appear at first glance to have been for union members only, though it would have protected all employees in their right to become and remain union members and also nonunion employees who were afraid to formally join the union. The union’s certainty that it represented a large majority of the employees seemed vindicated 48 hours later when approximately 1,000 of the 1,400 employees joined in its strike protesting the employer’s failure to bargain. Rather than being viewed as “not helpful,” as Judge True alleges, the high strike participation bears directly on the precise question the Board was addressing. However, the Board used the Moorsville case to clarify—apparently for the first time—that a union’s majority must exist, i.e., be provable, as of the exact date when the request to bargain was made. Although the union and the Regional Director may have assumed that a majority existed at the time of the request, and the evidence suggests that it did, there was no means to prove it with objective evidence, for the strike authorization had occurred prior to the September 21 meeting and the strike followed promptly after that meeting. At the time of the meeting, the union delegation probably had no accurate idea as to how many employees they represented, nor did they have reason to doubt—if they thought about it at all—that the overwhelming majority who went on strike would not be sufficient proof of majority representation. Regardless, there is no basis to conclude, as did Judge True, that “nowhere in the Board’s factual discussion of the dispute does it appear that the union claimed to be acting as anything other than an NMU [i.e., non-majority union],” for the Board’s factual discussion never even suggests that the union was claiming to be acting as anything other than the exclusive representative of all the employees.” The Board in Moorsville Cotton neither held nor implied that an employer has no obligation to bargain with a minority-union for its members only. That was not the issue in the case.

Judge True also refers to the Board’s dicta in a trilogy of “group-dealing” cases that repeated the conventional wisdom that majority status is required for bargaining. However, he inaccurately treats one dictum as a

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24. Id.
25. The decision declared: “It is not an unfair labor practice . . . for an employer to refuse to discuss grievances with employee representatives when such representatives do not represent a majority of his employees. That the union on September 21, 1935 [the day of the refusal] represented only a minority of respondent’s employees is clear from the record.” 2 N.L.R.B. at 955 (emphasis added).
26. True, supra note 1, at 195.
holding, although he accurately recognizes that "these obscure and now somewhat dated cases . . . do little to put to rest the question of whether ad hoc groups seeking to exercise their right to take collective action 'for other mutual aid or protection' are entitled to get a substantive response from their employer."27 Indeed, he makes a strong case for concluding that an employer confronted by a group grievance has a duty to provide employees with a "good faith dialogue . . . not the mere chance to beg an audience."28 Although that is an interesting and admirable conclusion, it misses the thrust of the Blue Eagle's thesis, which is that the Act unequivocally requires collective bargaining—not just dealing—with a minority union that represents employees only. By concentrating on the question of group dealing rather than collective bargaining, Judge True misreads the Blue Eagle's message, for he asserts that "sheer muscle is decidedly not a part of Professor Morris' portrait of the hypothetical NMU [non-majority union], a truism best illustrated by the fate of Hi-Tech Honeycomb whose struggle led to this book."29 Creative and successful collective bargaining requires more than sheer muscle, but there is nothing in the minority-union bargaining process that rules out a union's use of every legal bargaining weapon at its disposal. It was not my purpose, however, to provide prognostication as to what the working world will look like post-members-only bargaining. I leave that task to others, particularly to the unions who will be using this newly-found bargaining tool.

Another intriguing tangent is Judge True's assertion that "a considerable amount of space in the Blue Eagle is devoted to Weingarten,"30 the landmark case that recognized the right of an employee to have a union representative present during a disciplinary interview. The book does cover Weingarten, but not as support for the right to bargain as he implies; rather, it is cited as an example of an organizational tool that a minority union might use during the early stages of its development. Considering his accurate assessment of the Bush Board's extensive record of rolling back many worker protections—such as in IBM Corporation,31 which removed Weingarten rights from the nonunion workplace—I can well understand his pessimistic appraisal of the prospects for the Blue Eagle's thesis "if and when it is ever presented"32 to the Board. I am therefore pleased to report that as of this writing two unfair labor practice charges that squarely raise the members-only bargaining issue are now

27. Id. at 198.
28. Id. at 199.
29. Id. at 204.
32. True, supra note 1, at 199.
pending before the Board’s General Counsel, and hope springs eternal. And as to Judge True’s skepticism regarding the propriety of using recognitional picketing to obtain a ruling on members-only bargaining (for which he provides no authority), I call the reader’s attention first to the language of section 8(b)(7), which clearly confines the Act’s regulation of recognitional picketing to picketing for exclusive recognition, and also to its legislative history, and second to a recent publication by a leading management labor-law firm, Littler Mendelson, that acknowledges that there is ‘‘no specific provision in the law that prohibits minority union picketing for recognition.’’ It remains to be seen whether section 8(b)(7) will need to be activated.

Without suggesting any legal basis for rejection of minority bargaining, Judge True speculates as to what will happen if members-only bargaining is not approved by the Board or the courts. He asks: ‘‘What employer in its right mind is ever going to even respond to a bargaining request by an NMU, much less actually engage in a constructive dialogue with it?’’ Again, he frames the wrong question, for I readily concede in the Blue Eagle that ‘‘[m]ost employers will undoubtedly resist these efforts to obtain members-only recognition and bargaining; and refusals to bargain, plus other antiunion conduct, will undoubtedly continue to some extent even after a final judicial decision is issued confirming the legitimacy of this rediscovered bargaining duty.’’ Once the legal process has validated the members-only bargaining duty, unions will still need to achieve their collective-bargaining goals, which will ordinarily come not from the employer’s generosity but from the union’s ability to exercise, if necessary, concerted economic persuasion to the extent permitted by law. The Blue Eagle emphasizes, however, that while members-only organizing and bargaining should not be viewed as a panacea, employees will have a more realistic opportunity to join unions and to participate democratically in workplace decision making.

I close my commentary on Judge True’s essay by expressing my gratitude to him for his thoughtful evaluation of the Blue Eagle, and I am flattered by his observation that the ‘‘essential genius of [my] thesis is that unions . . . can and should act as organic, vibrant forces at the workplace,’

33. The cases are In the Matter of Dick’s Sporting Goods and United Steelworkers of America, NLRB Case No. 6-CA-24821 and In the Matter of Cooper Tire & Rubber Co. and United Steelworkers of America, NLRB Case No. 10-CA-35948.
34. 29 U.S.C. §158(b)(7).
35. See BLUE EAGLE, supra note 2, at 179-80.
37. True, supra note 1, at 201-02.
38. BLUE EAGLE, supra note 2, at 174.
interacting with other similarly situated workers and confronting their employers in ways that have the potential to give new potency to the idea of collective action.”

It is my hope that the Blue Eagle can help make that happen.

II.
A Response To The Doubters

I shall now turn to a few questions that some legal doubting-Thomasases have raised as to whether the product of members-only collective bargaining, to wit, members-only collective bargaining contracts, might represent a per se violation of one or more of the following provisions of the Act: Sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A), and/or 8(b)(2). Although the basic law and supporting authority concerning these questions are addressed in the Blue Eagle, the discussion that follows provides a more detailed examination of the relevant—and even some spuriously relevant—case law on this and closely related subjects.

Regarding the underlying question—i.e., the validity of a members-only contract—it has been long established by both Supreme Court and NLRB authority that voluntary members-only bargaining and its resulting contracts are legal under the Act. The only noteworthy questions still open regarding this subject are: (1) whether an employer has a duty to engage in members-only non-majority bargaining where there is no section 9(a) majority representative and (2) to what extent, if any, benefits contained in member-only collective agreements may be granted exclusively to union members covered by such contracts—as to which there is a subsidiary question, to wit, whether the law requires the contracting employer to grant any or all of the same benefits to similarly-situated nonunion employees. The first open question is fully covered in the Blue Eagle. The second question, however, is touched on only lightly in that book, for that question is subsidiary to the duty-to-bargain issue and could have many answers, none of which, however, are critical to the focus of the book, which covers the first question. There is no open question under existing law, however, as to the legality of voluntary members-only minority-union bargaining where there is no section 9(a) representative; nor is there any reason to question the inherent validity of contracts resulting from such bargaining, though of course the parties could poison both the process and its contracts by engaging in otherwise unlawful conduct violative of sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A), and/or 8(b)(2). Indeed, there have been a number of such cases involving various

39. True, supra note 1, at 189.
40. See infra cases cited at notes 50-68.
41. See BLUE EAGLE, supra note 2, primarily at 1-80 & 91-109
infractions of that nature, but their holdings should not be confused with the issue of untainted members-only bargaining.

A. The Legality of Members-Only Collective Bargaining Contracts: A Settled Issue

Despite the clarity of existing and settled law, there are doubters who assert that these contracts must be deemed illegal because they represent a form of discrimination against nonunion employees—from which, they contend, it must logically follow that even voluntary members-only bargaining violates the Act, for such bargaining cannot be legal if its product is illegal. For the benefit of those doubters, I shall now review the pertinent case law.

The obvious place to begin this process is with the skeptical conclusions of Julius Getman, for Professor Getman seems to be the only law professor who has publicly espoused the latter negative position, a position that is contrary to the publicly stated opinions of at least eight other legal scholars and of course my own. Here are Getman’s positions and reasons quoted in full from his 2003 article, The National Labor Relations Act: What Went Wrong; Can We Fix It?:

We know that the concept of exclusivity together with §8(a)(2) forbids an employer from bargaining with a minority union on behalf of a unit in which the union does not represent a majority. In other respects, questions abound. Does a union that seeks minority representation violate the NLRA? Is its activity protected? May a union seek to bargain for its members alone? At least two major legal scholars, Clyde Summers and Charles Morris, believe that minority unions may bargain for their own members. . . . Despite the support of such distinguished scholars, this position is, in my view, wrong.

42. See infra discussion of Radio Officers’ Union v. NLRB, 347 U.S. 17 (1954), at notes 72-83 and cases cited infra in Part B.

43. See E.G. Latham, Legislative Purpose and Administrative Policy Under the National Labor Relations Act, 4 Geo. Wash. L. Rev. 433, 453, 456, n.65 (1936); Clyde Summers, The Kenneth M. Piper Lecture: Unions Without Majority - A Black Hole?, 66 Chi-Kent. L. Rev. 531 (1990); Alan Hyde, After Smyrna: Rights and Powers of Unions that Represent Less than a Majority, 45 Rutgers L. Rev. 637, 639 n.8 (1993); Matthew W. Finkin, The Road Not Taken: Some Thoughts on Nonmajority Employee Representation, 69 Chi.-Kent L. Rev. 195, 198 n.18 (1993); Joel Rogers (with Richard B. Freeman, economist), Open Source Unionism: Beyond Exclusive Collective Bargaining, 8 WorkingUSA 8, 40 nn.11-13 (Spring 2002); Theodore J. St. Antoine, Foreword to BLUE EAGLE, supra note 2, at xi; Lance Compa, cover-jacket comment to BLUE EAGLE, id.; Charles B. Craver, cover-jacket comment to BLUE EAGLE, id.

44. Julius Getman, The National Labor Relations Act: What Went Wrong; Can We Fix It?, 45 B.C. L. Rev. 125, 136-37 (2003). In the interest of presenting Getman’s argument in full-form, I have included his original footnotes unaltered. As indicated, footnotes 45-49 below correspond to footnotes 29, 31-34 of Getman’s article.

My basic reasons for disagreeing are first, that any agreement which applies to union members only would violate § 8(a)(3).46 This proposition was established in 1952 when the U.S. Court of Appeals for the Second Circuit held in NLRB v. Gaynor News Co. that granting benefits to union members that were denied to nonunion members violated §8(a)(3) because it was "inherently conducive to increased union membership."47 The Supreme Court affirmed in 1954, stating, "[i]n holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience."48 Second, any agreement that either overtly or tacitly applies more generally to the work force violates the concept of exclusivity and therefore violates §8(a)(2).49

I cannot explain why Professor Getman arrived at his conclusions. I can only explain what the law actually is according to long-established Supreme Court and NLRB precedent. The foundation case is Consolidated Edison Co. v. NLRB,50 which Getman fails to cite or explain. In that case, the Supreme Court unequivocally held that members-only collective bargaining agreements, "in the absence of [a section 9(a) majority-based] exclusive agency,"51 were valid under the Act even if the covered employees "were a minority."52 Not only has that decision never been overruled, the Court reaffirmed its holding on two subsequent occasions, in International Ladies Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.)53 and Retail Clerks International Association v. Lion Dry Goods, Inc.,54 and implicitly reaffirmed it in the principal case that Getman cites, or rather miscites, Radio Officers’ Union of Commercial Telegraphers Union v. NLRB.55 However, before discussing Radio Officers, I shall review the other relevant decisions, including the NLRB cases directly on point.

46. Thus both the Board and the courts automatically find a violation when an employer treats union members differently from non-union members." Julius G. Getman, Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. Chi. L. Rev. 735, 736 n. 6 (1965). (Footnote 31 in original.)
47. 197 F.2d 719, 722, 755 (2d Cir. 1952), aff'd sub nom. Radio Officers' Union of the Commercial Tel. Union v. NLRB, 347 U.S. 17 (1954). (Footnote 32 in original.)
48. Radio Officers' Union, 347 U.S. at 46. (Footnote 33 in original.)
49. See Int’l Ladies’ Garment Workers’ Union v. NLRB, 366 U.S. 731, 737-39 (1961) (holding that granting a minority union the right to bargain for the entire unit violated §8(a)(2) without regard to employer motivation). "There could be no clearer abridgment of §7 of the Act." Id. at 737. (Footnote 34 in original.)
50. 305 U.S. 197 (1938).
51. Id. at 237.
52. Id.
54. 369 U.S. 17 (1962).
Regarding the latter, it should first be noted that in its original Consolidated Edison decision the Board expressly held that the involved companies "have not engaged in unfair labor practices within the meaning of section 8(2) of the Act."56 The Supreme Court's decision in that case thus addressed only the section 8(1) and 8(3) issues. Soon after, in Solvay Process Co.,57 the Board reaffirmed its dismissal of the section 8(2) charge in Consolidated Edison by expressly holding that an employer's recognition of a minority union "as the sole bargaining agency for its members only"58 was not a violation of section 8(2). And in Consolidated Builders, Inc.,59 the Board again held that recognition of, and a collective agreement with, a members-only minority union does not violate section 8(a)(2). It also held that such conduct is not violative of sections 8(a)(1), explaining that

As it is not a violation of the Act for an employer to enter into an agreement with a union at a time when there is no representative complement in its employ unless the employer extends exclusive recognition to that union, it follows that the Respondent did not independently violate Section 8(a)(1) of the Act by entering into the ... agreement with [the union].60

In fact, the validity of members-only bargaining had become so well recognized that the Board in an earlier case61 indicated that an employer faced with rival recognition demands from two unions "may, without violating the Midwest Piping doctrine, grant recognition to each of the claimants on a members-only basis."62

The next relevant decision was the Supreme Court's 1954 Radio Officers63 case, which I shall treat separately below with reference to Professor Getman's comments. Six year later, in Bernhard Altmann, the Court revisited the issue. That case concerned an employer's signing of a collective bargaining agreement with a minority union, thus recognizing it as the exclusive bargaining agent of all unit employees. This was the most significant of the "false majority" cases previously noted.64 Such conduct was deemed a section 8(a)(2) violation by the employer and a section 8(b)(1)(A) violation by the union. Although Justice Douglas' partial dissent has been cited for its clarity in depicting the nature of and rationale for members-only contracts and for its reminder of the long history validating

57. 5 N.L.R.B. 330 (1938).
58. Id. at 338.
59. 99 N.L.R.B. 972, 975, n. 6 (1952).
60. Id. at 975 (emphasis added).
62. 90 N.L.R.B. at 1618. The Midwest Piping doctrine holds that it is an unfair labor practice under §8(2) for an employer to recognize one of two competing unions after a representation petition had been filed with the Board. In re Midwest Piping and Supply Co., 63 NLRB 1060 (1945).
64. See supra note 53; see also supra reference at notes 18-20.
such contracts, the majority opinion also favorably acknowledged the validity of those contracts. Not only did it not question the accuracy of Justice Douglas’ observations—disagreeing only as to the appropriate remedy—it expressly explained that the section 8(a)(2) violation which the Board found was the grant by the employer of exclusive representation status to a minority union, as distinguished from an employer’s bargaining with a minority union for its members only. Therefore the exclusive representation provision is the vice in the agreement . . . .

Although Professor Getman cites Bernhard Altmann, he fails to note, or else overlooks, the foregoing express caveat. The Supreme Court thus reiterated, without qualification, that a members-only agreement with a minority union would not be deemed a violation of sections 8(a)(2) or 8(b)(1)(A). And a year later, in Lion Dry Goods, the Court again reconfirmed the validity of such a minority-union contract, reminding us that “members-only contracts have long been recognized.”

Now to Professor Getman’s specific contentions. Notwithstanding the foregoing strong precedents that long ago established the validity of voluntary members-only bargaining and resulting contracts, including specific findings that they do not violate sections 8(a)(1), 8(a)(2), 8(a)(3), or 8(b)(1)(A)—and by implication that a union party to the contract would not be in violation of section 8(b)(2) by virtue of such bargaining and contracts—Getman, with one exception, never even mentions or seeks to account for these decisions. The exception, as noted, is the Bernhard Altmann case, on which he oddly relies to support his second reason, which is that “any agreement that either overtly or tacitly applies more generally to the work force violates the concept of exclusivity . . . .” That assertion is of course a non sequitur, for the concept of exclusivity applies only to section 9(a) representation, not to members-only representation. More important, however, as pointed out above, the Bernhard Altmann Court recognized and distinguished the difference between members-only and exclusivity representation.

For his primary reason, Getman simply asserts that minority unions cannot bargain for their members only because “any agreement which applies to union members only would violate §8(a)(3).” He bases that

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65. See, e.g., BLUE EAGLE, supra note 2, at 95.
67. 369 U.S. 17 (1962); see supra note 54.
68. Id. at 29
69. Getman, supra note 44, at 137 (emphasis added); see also supra at note 49, where Gettman’s quote is reproduced.
70. See supra at notes 64-66.
71. Getman, supra note 44, at 137; see also supra at note 46, where Gettman’s quote is reproduced.
over-broad conclusion on a single case, *Gaynor News Co.*, which was reviewed by the Supreme Court in *Radio Officers.* The fact situation there, however, was not one that involved representation of union-members only; rather, it was a case where a majority union purported to represent an entire bargaining unit, signed a contract containing an exclusive recognition clause to that effect, then proceeded to represent only its union members. Complying with the union’s demands, the employer retroactively paid wage increases and vacation benefits to union members only. To support his view that “any agreement which applies to union members only would violate §8(a)(3),” Getman takes a phrase from the Second Circuit’s opinion wholly out of context, for the court was specifically referring only to a *majority* union that had been recognized as the representative of the entire bargaining unit, not just of its own members. This would have been readily evident to the reader had Getman quoted the court’s full sentence, which, with the omitted part italicized, reads as follows: “*Discriminatory conduct, such as that practiced here* is inherently conducive to increased union membership.” Accordingly, in no way is that case an indictment of members-only bargaining contracts where there is not a recognized section 9(a) exclusive bargaining agent. Compounding that erroneous reading, Professor Getman next implies that in *Radio Officers,* “[t]he Supreme Court affirmed” his view, when in fact the Court was clearly and specifically referring only to discrimination against nonunion employees where the union had been recognized as the exclusive bargaining agent. The Court made this clear in at least four different ways.

In the first way, later in the paragraph that Getman quotes, the Court cites explicit legislative history from the House Report on section 8(3) of the Wagner Act that shows that it was discrimination by the *majority* representative that was in issue, for the Report stated that “agreements more favorable to the *majority* than the *minority* are impossible.” Such a citation makes sense only with reference to a majority union.

In the second way, the Court in *Radio Officers* viewed the union’s conduct in *Gaynor* to be violative of the duty of fair representation (DFR), though that was not how the issue arose, nor was it the posture of the issue

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72. 197 F.2d 719 (2d Cir. 1952).
73. 347 U.S. 17 (1954). See *supra* notes 42 & 47.
74. See Gettman, *supra* note 44, at 137; see also *supra* at note 46, where Gettman’s quote is reproduced.
75. *Gaynor,* 197 F.2d at 722 (“The union here represented the majority of employees and was the exclusive bargaining agent for the plant.”).
76. *Id.*; Cf. Gettman, *supra* note 44, at 137; see also *supra* at note 46, where Gettman’s quote is reproduced.
77. See Gettman, *supra* note 44, at 137; see also *supra* at note 48, where Gettman’s quote is reproduced.
78. *Radio Officers,* 347 U.S. at 44 (emphasis added).
before the Court. The Court quoted Senator Wagner’s statement that “exclusive bargaining agents are powerless ‘to make agreements more favorable to the majority than to the minority,’” citing Steele v. Louisville & Nashville R. Co.80 and other DFR-related cases81 to drive home the point that a majority union is not permitted to discriminate against nonunion employees.

In the third way, the Court noted the Second Circuit’s own limitations expressed in its Gaynor opinion:

According to the reasoning of the Second Circuit . . . disparate payments based on contract are illegal only when the union, as bargaining agent for both union and nonunion employees, betrays its trust and obtains special benefits for the union members. That court considered such action unfair because such employees are not in a position to protect their own interest. Thus, it reasoned, if a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give, special benefits to the members of the union for if nonmembers are aggrieved they are free to bargain for similar benefits for themselves.82

In the fourth way, with reference to the foregoing statement by the Second Circuit, the Court pointedly explained that its decision had nothing to do with disparate treatment of union and nonunion employees under members-only contracts, that it concerned only disparate treatment where the union was recognized as the section 9(a) exclusive representative, for it explicitly limited its ruling as follows:

We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent since that case is not before us. We do hold that in the circumstances of this case, the union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating §8(a)(3), discriminate in wages solely

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79. Id. at 47.
80. 323 U.S. 192, 202-203 (1944) (holding that an exclusive union representative has a duty to represent all employees in the class or craft (Railway Labor Act terminology for appropriate bargaining unit) “fairly [and] without hostile discrimination . . . ”).
82. Radio Officers, 347 U.S. at 47 (emphasis added). The Court also quoted from the Second Circuit’s opinion distinguishing the Third Circuit’s decision in NLRB v. Reliable Newspaper Delivery, Inc., 187 F.2d 547 (3rd Cir. 1951):

. . . . there discrimination resulted from what the court considered entirely legal action of the minority union in asking special benefits for its members only. The union made no pretense of representing the majority of the employees or of being the exclusive bargaining agent in the plant. The other non-union employees, reasoned the Court, were quite able to elect their own representative and ask for similar benefits. Not so here. The union here represented the majority of employees . . . .

Radio Officers, 347 U.S. at 37 (quoting NLRB v. Gaynor News Co., 197 F.2d 719, 722 (2d Cir. 1952)).
on the basis of such membership even though it had executed a contract with the union prescribing such action.\textsuperscript{83}

That statement clearly, though implicitly, recognized the validity of members-only contracts, which is not surprising in view of the Court’s earlier ruling in \textit{Consolidated Edison} and its reaffirmations of that concept in subsequent cases. \textit{Consolidated Edison}—notwithstanding Professor Getman’s failure to mention it, much less distinguish it—remains the law of the land.

\section*{B. Unlawful or Irrelevant Majority-Union Bargaining for Union Members Only}

\subsection*{1. Majority-Union Discrimination}

\textit{Gaynor/Radio Officers} was but one of several cases where the Board used rhetoric describing representation or bargaining for union members to portray scenarios where the recognized majority union and the employer were discriminating against nonunion employees. None of those cases concerned the issue of non-majority and non-exclusive unions bargaining on behalf of their members only. The vice in the parties’ conduct in each of these cases was the employer’s recognition of a union as the \textit{majority and exclusive representative of all the employees in the unit}, when in fact the union was representing only its own members and the willing employer was intentionally not granting collectively-bargained benefits to the nonunion employees. These cases, regardless of the posture in which they arose—for example, some even arose primarily as section 8(a)(5) cases—were basically combinations of breach of the duty of fair representation (DFR) by the union,\textsuperscript{84} unlawful section 8(a)(2) favoring of the union by the employer, and discrimination against nonunion employees by both the union and the employer.

\textit{Max Factor & Co.}\textsuperscript{85} was the earliest such case. The Board there expressly noted that it was not passing “upon the legality, in isolation, of a members-only contract”\textsuperscript{,86} rather, it was holding that the employer’s recognition of a minority union as the exclusive bargaining agent for the unit and executing and maintaining a union-security agreement violated sections 8(a)(1), 8(a)(2), and 8(a)(3), and that the union’s reciprocal conduct violated section 8(b)(1)(A).

\begin{footnotesize}
\begin{footnote}{83. \textit{Radio Officers}, 347 U.S. at 47.}
\end{footnote}
\begin{footnote}{84. Most arose prior to \textit{Miranda Fuel Co.}, 140 N.L.R.B. 181 (1962), \textit{enforcement denied}, 326 F.2d 172 (2d Cir. 1963), which initiated the Board’s assertion of DFR jurisdiction.}
\end{footnote}
\begin{footnote}{85. 118 N.L.R.B. 808 (1957).}
\end{footnote}
\begin{footnote}{86. \textit{Id.} at 813, repeated at 815. \textit{But see infra} text at notes 91-98.}
\end{footnote}
\end{footnotesize}
In *Alco-Gravure, Division of Publications Corp.*, the next such case, the employer had recognized the union as exclusive representative of all employees in the unit before it had any employees—thereby foisting the union on later-hired employees—and subsequently amended the contract to allegedly cover “members only,” the Board found the employer in violation of sections 8(a)(1) and 8(a)(2). This case was thus only a garden-variety 8(a)(2) decision, despite the employer’s effort to conceal its true nature by inaccurately labeling the contract “members only,” which the Board nevertheless found to be an exclusive-recognition agreement.

The next case, *Don Mendenhall, Inc.*, invites our special attention because of the careless language the Board used to describe representation or bargaining for union members only where the recognized majority union and employer were overtly discriminating against nonunion employees. There was nothing remarkable, however, about either the facts or the holding in *Don Mendenhall*. The employer had granted the union exclusive recognition, but with the understanding that it would represent only its members and that nonunion employees would not receive the benefits of the union contract. Subsequently, when the employer proceeded to subcontract substantial parts of its work without first bargaining with the union, the union charged the employer with refusal to bargain under section 8(a)(5). The Board—not surprisingly—refused to find the employer in violation, for the union was seeking to bargain as the majority and exclusive representative of all unit employees when in fact it did not represent a majority; it represented only four employees who were its members. Having considered this “alleged refusal to bargain against this background of discriminatory members-only dealing between the parties,” the Board declared that,

> in the context of events, the Respondent’s actions cannot be held violative of Section 8(a)(5). That section, by reference to Section 9(a), requires as a predicate for any finding of violation that the employee representative has been designated or selected as the exclusive representative of the employees.

In that context, this was a correct assessment of what section 8(a)(5) required, for the Union was claiming exclusivity status, hence the provision of section 9(a) requiring majority designation as a pre-condition to such bargaining was indeed applicable.

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88. 194 N.L.R.B. 1109 (1972).
89. “[F]or all work performed by ‘tile layers, marble masons and terrazzo workers, whether for interior or exterior purposes, in any public or private buildings’ within the Union’s Jurisdiction.” *Id.* at 1109.
90. *Id.* at 1110.
91. *Id.*
The opinion, however, added another sentence and a short paragraph that invite further comment. That sentence, without citation of authority, was that: "It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms." Obviously this meant, consistent with the facts in the case, that when a union represents its members only, granting exclusive recognition to that union does not satisfy statutory norms. Despite the sentence's awkward syntax, that is the only meaning that makes sense, for that conclusion, and no other related conclusion, had been "settled since the early days of the Act." Indeed, eight cases so holding are cited in The Blue Eagle under the heading of "The False Majority Cases," including five from the first decade of the Act, to wit, Segall-Maigen, Inc., Mooresville Cotton Mills, Wallace Manufacturing Co., Brashear Freight Lines, Inc. National Linen Service Corp. Because that conclusion was so well "settled," it is understandable that the Board felt no need to cite specific authority.

For the short paragraph, however, the Board did cite two authorities. Although the first reference was both irrelevant and inaccurate, the second provides real (but hidden) meaning regarding the relation of Don Mendenhall to the legality of members-only bargaining. The paragraph reads as follows:

Although the Board has never ruled squarely on the legality per se of a members-only contract, [citing Max Factor] the insufficiency under the Act of such recognition has been well established [citing Golden Turkey Mining Co.]. For that reason we dismiss the complaint insofar as it alleges violations of Section 8(a)(5).

As to the first reference, notwithstanding the erroneous assertion in Max Factor (which was here repeated in Don Mendenhall), both the Board and the Supreme Court had ruled affirmatively in several cases on the per se legality of a members-only contract, as was noted above. It remained for an administrative law judge (ALJ) in Greyhound Lines, Inc., four years later, to set the record straight and remind the Board that it "has long held that an employer and a union may lawfully enter into a members-only

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92. Id.
93. See Blue Eagle, supra note 2, at 159-62; see also supra at note 20.
94. 1 N.L.R.B. 749 (1936).
95. 2 N.L.R.B. 952 (1937), enforced as modified, 94 F.2d 61 (4th Cir. 1938) (modification unrelated to issue). See discussion supra at notes 18-26.
96. 2 N.L.R.B. 1081 (1937).
97. 13 N.L.R.B. 191 (1939), enforced, 119 F.2d 359 (8th Cir. 1941).
98. 48 N.L.R.B. 171 (1943).
99. 194 N.L.R.B. 1109 (1972) (citing Max Factor & Co., 118 N.L.R.B. 108 (1957), and In re Golden Turkey Mining Co., 34 N.L.R.B. 760 (1941)).
100. See supra discussion at notes 50-68.
contract," citing the Board’s decisions in Consolidated Builders and The Hoover Co.

The second reference, the phrase, “the insufficiency under the Act of such recognition has been well established”—despite its blurry syntax—leads affirmatively to the legal reality of members-only bargaining, for its only cited authority was Golden Turkey Mining Co. In that case, the union represented a substantial majority of the unit employees, which the employer conceded; nevertheless, he insisted on granting the union recognition “for its members only” rather than for all employees in the unit as required by section 9(a). The Board, relying on its McQuay-Norris case, which the Seventh Circuit had recently enforced, found the employer in violation of its duty to bargain under section 8(a)(5). That reliance on McQuay-Norris brings us back to historical reality, for it was cited in the Blue Eagle for its judicial recognition of the stepping-stone role of minority-union members-only bargaining that usually leads to mature section 9(a) majority/exclusivity bargaining. What began at the McQuay-Norris Company as a minority UAW union that bargained for its members only, had now grown into a majority union, hence it was entitled to be recognized as such. During the first decade of the Act, this stepping-stone process was a common phenomenon in the establishment of union bargaining, and when the process led to majority status—which ordinarily occurred—the employer had a duty to grant the union section 9(a) exclusive recognition, which is what the Board and the Court of Appeals held in McQuay-Norris. So from McQuay-Norris to Golden Turkey we see the progression of authority cited in Don Mendenhall. Rather than casting any doubt on the legitimacy of the members-only bargaining process, those cases actually reaffirm the natural role of that process in the contemplated scheme of the National Labor Relations Act.

In another majority-union discrimination case, Schorr Stern Food Corp., the beneficial terms and conditions of employment provided in the collective agreement were applied only to employees within the relevant job classifications who were union members, and nonunion employees in the same or related work classifications were excluded from such benefits.

102. Id. at 1105.
103. 99 N.L.R.B. 972 (1952); see supra note 59.
104. 90 N.L.R.B. 1614 (1950); see supra note 61.
105. 34 N.L.R.B. 760 (1941); supra note 99.
106. Id. at 765.
108. See BLUE EAGLE, supra note 2, at 85.
109. Id. at 81-86.
Accordingly, and not surprisingly, the Board held the employer in violation of sections 8(a)(1), 8(a)(2), and 8(a)(3).

Similarly, in *Reebie Storage and Moving Co., Inc.*\(^\text{111}\) the Board held that an employer did not violate section 8(a)(5) when it refused to furnish the union with certain requested information, because the union and the employer had been applying the exclusive-recognition bargaining contract on a ""members only"" basis by limiting its application to only those employees who were union members."\(^\text{112}\)

Despite the occasional oblique and confusing references to alleged members-only representation in the foregoing cases, these cases obviously have no relation to voluntary recognition and bargaining with a union for its members only. In each of those cases the union had been recognized as the representative of all the employees in the unit—whether correctly or incorrectly initially—and in each case the nonunion employees were discriminated against by being denied the collectively-bargained benefits of exclusive representation. None of these cases touch upon the legality of bona fide members-only bargaining in workplaces where there is no section 9(a) majority representative.

2. Collective Bargaining for Union-Members Only Does Not Create a Binding Pattern for Subsequent Exclusive Bargaining-Unit Determination

Four additional cases that refer to members-only bargaining, but without in any way denigrating such bargaining, are *Kansas Power & Light Co.*,\(^\text{113}\) *Crucible Steel Castings Co.*,\(^\text{114}\) *Manufacturing Woodworkers Association of Greater New York*,\(^\text{115}\) and *Greyhound Lines, Inc.*\(^\text{116}\) These cases simply hold that a history of members-only bargaining is not controlling as to the make-up of an appropriate bargaining unit, which is a sensible conclusion inasmuch as members-only bargaining is not dependent on the appropriateness of a unit, notwithstanding that the "Board has sometimes accepted a members-only contract as indicative of the feasibility of the scope of the unit."\(^\text{117}\) However, one of these cases, *Greyhound Lines*,

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\(^\text{111}\) 313 N.L.R.B. 510 (1993), rev’d, 44 F.3d 605 (7th Cir. 1995). (The Seventh Circuit’s denial of enforcement was based on procedural grounds only.)

\(^\text{112}\) Id. at 510. A side-bar note in passing: The Board’s agreement with the ALJ that “the Board does not issue bargaining orders in ‘members only’ units,” *id.*, was of course an oxymoron, for members-only bargaining is for members only, not for all employees in a non-existent bargaining unit. However, having put “members only” in quotation marks, charitably construed, the oxymoron may have been avoided.

\(^\text{113}\) 64 N.L.R.B. 915 (1945).

\(^\text{114}\) 90 N.L.R.B. 1843 (1950).

\(^\text{115}\) 194 N.L.R.B. 1122 (1972).


\(^\text{117}\) Crucible Steel Castings Co., 90 N.L.R.B 1843, 1844 (citing Tennessee Coal, Iron & Railroad Co., 39 N.L.R.B. 617 (1942)).
is worthy of special note, for this was the case where the ALJ accurately reminded the Board of its long-held recognition of the legality of members-only contracts.\textsuperscript{118}

3. \textit{A Purported Members-Only Agreement Does Not Act as a Contract Bar}

In \textit{Cargo Packers,\textsuperscript{119}} Sumergrade and Sons,\textsuperscript{120} Grocers Wholesale, \textit{Inc.,\textsuperscript{121}} and \textit{Ron Wiscombe,\textsuperscript{122}} all representation cases, the Board held that agreements that provided for exclusive representation of all unit employees, but which had not been applied to nonunion employees—thus deemed to have been administered for union members only—cannot serve as an election bar. These cases, despite their “members-only” references, obviously have no bearing on the validity of legitimate members-only agreements. They would also be irrelevant as to the legality of bona fide members-only agreements if such agreements were ever deemed not a bar to an election.


Although there is no reasonable basis to question the \textit{per se} legality of the members-only bargaining process or its resulting collective agreements where there is not currently a majority/exclusive section 9(a) representative,\textsuperscript{123} a related area of the law still remains uncertain.\textsuperscript{124} As I noted earlier in this commentary,\textsuperscript{125} the following questions have not yet been definitively answered: To what extent, if any, can benefits contained in a member-only collective agreement be granted exclusively to union members covered by such a contract? And, as a subsidiary question, does the law require the employer to grant any or all of the same benefits to similarly-situated nonunion employees, or is that a matter that may be left to the discretion of the employer?

\begin{itemize}
\item \textsuperscript{118} See \textit{supra} reference at notes 101-02.
\item \textsuperscript{119} 109 N.L.R.B. 1184 (1954).
\item \textsuperscript{120} 121 N.L.R.B. 667 (1958).
\item \textsuperscript{121} 163 N.L.R.B. 937 (1967).
\item \textsuperscript{122} 194 N.L.R.B. 907 (1972).
\item \textsuperscript{123} See \textit{Blue Eagle}, \textit{supra} note 2, at 1-80 & 91-109, and discussion hereinabove.
\item \textsuperscript{124} The reader will recall that in \textit{Radio Officers} the Supreme Court stated: “We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent, since that case is not before us.” \textit{See supra} note 78.
\item \textsuperscript{125} \textit{See supra} text accompanying notes 40-42.
\end{itemize}
It should first be emphasized that the answers to these questions do not affect the Blue Eagle's basic thesis, that the NLRA protects the right of less-than-majority employees to bargain collectively through a union of their own choosing wherever there is not an existing section 9(a) exclusive representative. What can be affected by the answers, however, is the impact that such bargaining might ultimately have on employees who are not members of the union.

As I shall demonstrate, the statute and existing case law, coupled with simple logic and socially-desirable end results, point firmly in the direction of an affirmative answer to the first question, i.e., allowing collectively-bargained benefits under a members-only agreement to be granted exclusively to union employees without the employer being required to grant the same benefits to nonunion employees, who, by having refrained from joining the union, have chosen to bargain individually. Although that is the more appropriate answer, I shall first examine the contrary view—that benefits of a member-only agreement cannot be granted exclusively to union members—in order to demonstrate that regardless of how this issue is finally resolved, it will not affect the underlying legality of members-only bargaining and its resulting contracts.

Inasmuch as both the Supreme Court and the Labor Board have each unambiguously affirmed the legality of the non-majority bargaining process and its contracts, even if it were determined that denying the benefits of such contracts to similarly-situated nonunion employees would be unlawful, it would not follow that either the bargaining process or the resulting contracts would be illegal per se. Such a determination would simply mean that the bargaining employer would be obligated to grant the same benefits to affected nonmember employees. Such benefits, however, would likely be economic benefits only, for benefits such as access to union stewards and grievance and arbitration procedures are inseparable parts of the union-representational process. Absent a DFR requirement—which is dependent on the concept of exclusive representation, not here present—a nonmajority union would have no obligation to provide the latter-type benefits to nonmembers who pay no dues. In other words, even if the Board or the courts were to decide (erroneously in my view) that denial of collective benefits to nonunion employees would constitute discrimination under section 8(a)(3)—and conceivably also under section 8(b)(2)—the only effect of such a ruling would be to require employers henceforth to grant those benefits, which many if not most employers would likely grant anyway without legal compulsion. Accordingly, the following excerpt from

126. See cases discussed supra at notes 50-68.
127. See supra notes 79-81 and BLUE EAGLE, supra note 2, at 219.
the *Blue Eagle* concerning the impact of providing such collectively-bargained benefits to nonunion employees is here pertinent:

When a minority union succeeds in negotiating economic benefits for its members—as distinguished from noneconomic benefits, such as grievance procedures—it may be indirectly negotiating those same benefits on behalf of others, for the employer may choose to extend them to nonunion workers similarly situated. A non-majority union must be careful not to urge that such benefits be applicable to union members only, for it will want to avoid being charged with having caused the employer to discriminate against nonunion employees. On the other hand, if the employer on its own chooses not to extend the same benefits to nonunion employees, this would not violate the Act unless it can be shown that its purpose was to discriminate against those employees in order to encourage their joining the union, which normally would be unlikely. The employer’s purpose might simply be to save money, in which event, however, many nonunion workers would undoubtedly hasten to join the union to obtain the negotiated benefits. The more likely scenario is that the employer will extend those benefits to the other employees, but this will nevertheless represent a gain for the union in that it can now properly claim credit for the employer’s action while exhorting the recipients of the windfall not to be free-riders. Significantly, as previously noted, such extended benefits will not be part of the collective agreement, hence not enforceable thereunder, either by arbitration or court action.\(^\text{128}\)

Under such a worst-case scenario, inasmuch as the employer would simply be required to provide similar benefits to nonunion employees, no extended discussion of this strained—and in my view inappropriate—construction of the Act is necessary. Although this might not be the most ideal resolution for the policy of the Act or for the affected union—because it might encourage some employees to be selfishly satisfied with their free-rider status—it might nevertheless be a tolerable outcome because the union, with its recent bargaining success figuratively under its belt, could now proudly continue its organizational activity and concentrate on securing an employee-majority with accompanying exclusivity status.

The more appropriate resolution of the opening question, however, is that a disparity between benefits for union members and nonmembers does not violate the Act. This is not to say that the bargaining employer would necessarily want to withhold such benefits; but this should be the employer’s own business decision, not one dictated by law, especially law that purports to encourage collective bargaining.\(^\text{129}\) Nevertheless, as noted in the foregoing excerpt from the *Blue Eagle*, the union should carefully avoid requesting, or even suggesting, that any economic benefits be withheld from nonmember employees, for such conduct might be

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\(^{128}\) *Blue Eagle*, *supra* note 2, at 215 (endnotes omitted).

misconstrued as evidence of the union “causing[ing] or attempting to cause an employer to discriminate against an employee in violation of subsection 8(a)(3),” thereby violating section 8(b)(2). \[^{130}\]

The key element that determines this issue, however, is the employer’s purpose, for the critical language in section 8(a)(3) provides that it is an unfair labor practice for an employer “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.” \[^{131}\] The Supreme Court defined that provision in the following oft-quoted passage in the Radio Officers case:

The language of §8(a)(3) is not ambiguous. The unfair labor practice is for an employee to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. \[^{132}\]

According to the Court, “[t]hat Congress intended the employer’s purpose in discriminating to be controlling is clear.” \[^{133}\] Indeed, that concept of purpose is the reason why an employer’s grant of additional benefits to union employees in their collective bargaining agreement would not be a per se violation of section 8(a)(3). Its action may be “discriminatory in regard to [a] term or condition of employment,” but its purpose will likely not be “to encourage . . . membership in any labor organization,” \[^{134}\] for employers will generally not want to encourage such membership. The employer’s likely purpose—having presumably bargained in good faith—will be to fulfill its bargaining obligation, which the Act is designed to promote, and to spend as little money as possible. That this conduct may have the incidental effect of encouraging some nonunion employees to join the union does not brand the employer with an unlawful purpose.

What about NLRB v. Great Dane Trailers, Inc.? \[^{135}\] A careful reading of that case reinforces the conclusion that an employer who grants collectively-negotiated economic benefits to employees of a members-only union and chooses not to grant the same benefits to similarly situated nonunion employees does not violate section 8(a)(3). I am aware, however, that some observers have hastily—but groundlessly—assumed that Great

\[^{132}\] Radio Officers, 347 U.S. at 42-43.
\[^{133}\] Id. at 44 (emphasis added).
\[^{134}\] Id. at 21.
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Dane might discourage well-intentioned employers from negotiating such benefits. That assumption can only be based on an out-of-context—hence erroneous—reading of a single incomplete statement in the case where the Supreme Court was defining a procedural evidentiary rule, not a substantive requirement of the statutory provision. That statement was that

if it can reasonably be concluded that the employer’s discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.\textsuperscript{136}

That statement does not eliminate the need for proof of unlawful motive, for it implicitly incorporates the Court’s statement in the opinion’s preceding paragraph that confirmed—as the statutory language mandates—that to support a finding of an 8(a)(3) violation there must be proof of motive “to encourage or discourage membership in any labor organization.”\textsuperscript{137} That proof might be shown by the conduct itself, but not necessarily so. The Court had previously explained in NLRB v. Erie Resistor Corp.\textsuperscript{138} with reference to certain conduct deemed to be “inherently destructive” of employee rights, that such “conduct does speak for itself.”\textsuperscript{139} It thus invoked the age-old doctrine of \textit{res ipsa loquitur} to affirm the Board’s treatment of an employer’s grant of permanent super-seniority to striker replacements as “conduct which carries its own indicia of intent.”\textsuperscript{140} There must, however, be a showing of unlawful purpose. The Court in \textit{Great Dane}, in the referenced preceding paragraph, reaffirmed this requirement that it had spelled out earlier in \textit{Erie Resistor}, to wit: “If the conduct in question falls within this ‘inherently destructive’ category, the employer has the burden of explaining away, justifying or characterizing ‘his actions as something different than they appear on their face,’ and if he fails, ‘an unfair labor practice charge is made out.’”\textsuperscript{141} What the Court in \textit{Great Dane} was saying in the referenced statement—albeit awkwardly—was what it later said more simply, that “[s]ome conduct is so ‘inherently destructive of employee interests’ that it carries with it a \textit{strong inference} of impermissible motive.”\textsuperscript{142} That is how the Court reworded the \textit{Great Dane}

\begin{itemize}
\item \textsuperscript{136} \textit{Id. at 34.}
\item \textsuperscript{137} 29 U.S.C. §158(a)(3).
\item \textsuperscript{138} 373 U.S. 221 (1963). The Court in \textit{Great Dane} also relied on its prior decisions in \textit{American Ship Building Co. v. NLRB}, 380 U.S. 300 (1965), and \textit{NLRB v. Brown}, 380 U.S. 278 (1965).
\item \textsuperscript{139} 373 U.S. at 228.
\item \textsuperscript{140} \textit{Id. at 231}, repeated by the Court in \textit{Great Dane}, 388 U.S. at 33.
\item \textsuperscript{141} 388 U.S. at 33 (citing \textit{Erie Resistor}, 373 U.S. at 228) (emphasis added). The Court added that “even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.” \textit{Id. at 33-34.}
\item \textsuperscript{142} Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 701 (1983) (emphasis added).
\end{itemize}
prescription in 1983 in its Metropolitan Edison decision. That prescription, however, does not define the unfair labor practice, it only defines the procedure as to which party—the employer or the General Counsel—has the evidentiary burden when there is a showing of employer conduct that adversely affects employee rights. The prescription concludes that whether such conduct is inherently destructive or comparatively slight, "in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."143

When an employer negotiates economic benefits with a minority union for its members only, such benefits are not "given" to those employees—rather, they are the natural product of the collective-bargaining process, hence the result of the employer's legitimate business activity. The union has no authority to bargain for non-members, and the employer is under no legal obligation to give the same benefits to other employees. Although this conduct should not be deemed inherently destructive of the rights of nonunion employees, even if it were so construed it would not be a violation of section 8(a)(3), for the employer can easily demonstrate that it is not motivated by a discriminatory intent to encourage nonunion employees to join the union, but rather by its legitimate duty to bargain and its intent to spend company money only where necessary. That some employees might join the union in order to obtain these benefits is not evidence of an employer's unlawful purpose.

The foregoing reading of Great Dane is consistent with the prevailing view of the Board and the courts, as demonstrated in the Supreme Court's decision in Metropolitan Edison, noted above, and by the D. C. Circuit Court of Appeals in its more recent decision in Contractors' Labor Pool v. NLRB,144 where that court concluded that based on "the Supreme Court's long-standing interpretation of section 8(a)(3),"145 "indispensable to a determination of a violation of §8(a)(3) . . . is a finding that an employer acted out of an anti- (or "pro-)

143. 388 U.S. at 34.
144. 323 F.3d 1051 (D.C. Cir. 2003).
145. Id. at 1059.
146. Id.
147. E.g., NLRB. v. Harrison Ready Mix Concrete, 770 F.2d 78 (6th Cir. 1985) (no evidence of discriminatory intent where employer reinstated economic strikers with less seniority than that assigned to replacements); Illinois Coil Spring Co., Milwaukee Spring Div., 268 N.L.R.B. 601 (1984), aff'd sub nom. Automobile Workers v. NLRB., 765 F.2d 175 (D.C. Cir. 1985) (transferring bargaining-unit work to unorganized plant during the term of a collective bargaining agreement and laying off affected
Accordingly, if successful union representation encourages employees to join the union, the union’s engaging in such statutorily approved activity should not be rendered meaningless by treating it as unlawful activity on the part of the employer. Furthermore, even if applicable statutory provisions, i.e., section 8(3) and the duty-to-bargain provisions of sections 7, 8(a)(1) and 8(a)(5), were here deemed to be in conflict with each other, such conflict should be resolved in accordance with the avowed pro-collective-bargaining policy of the Act.

The Supreme Court recognized such a potential conflict when it evaluated the allegedly discriminatory application of a hiring hall provision in a collective agreement in the 1961 case of *Local 357, International Brotherhood of Teamsters v. NLRB (Los Angeles-Seattle Motor Express)*. After repeating the above quoted language from *Radio Officers*, it emphasized that “[i]t is the ‘true purpose’ or ‘real motive’ in hiring or firing that constitutes the test” for a violation of 8(a)(3). By the same token, it is the “true purpose” or “real motive” in withholding union-bargained benefits that constitutes the test in a members-only bargaining situation. Observing that successful collective bargaining that encourages union membership should not be confused with discriminatory conduct motivated by an unlawful purpose, the Court in *Los Angeles-Seattle Motor Express* stated that

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well.

Furthermore, treating nonunion employees differently as a result of members-only collective bargaining—if that is the employer’s voluntary decision—does not interfere with the Taft-Hartley right of employees “to

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149. See supra note 132.
150. Id. at 675.
151. Id. at 675-76 (emphasis added).
refrain from any or all" union and collective bargaining activity.\textsuperscript{152} By not joining the union, nonunion employees are choosing instead to engage in \textit{individual bargaining}, which is exactly what the Right to Work Foundation and its affiliate, the National Institute for Labor Relations Research, advocate.\textsuperscript{153} In fact, the National Right to Work Newsletter recently acknowledged its agreement with the statutory thesis of \textit{Blue Eagle}, having endorsed the conclusion that "nothing in federal law prevents union officials and employers from negotiating 'members-only' contracts"\textsuperscript{154} and having recognized that such bargaining is required under the Act because "members-only bargaining remains permissible under the law if union officials choose that option."\textsuperscript{155}

I close this portion of my commentary by repeating\textsuperscript{156} what the Supreme Court observed in \textit{Radio Officers} with reference to the Third Circuit's decision in \textit{Reliable Newspaper Delivery} and the Second Circuit's decision in \textit{Gaynor} distinguishing \textit{Reliable}:

According to the reasoning of the Second Circuit . . . disparate payments based on contract are illegal only when the union, as bargaining agent for both union and nonunion employees, betrays its trust and obtains special benefits for the union members. [However], it reasoned, \textit{if a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give special benefits to the members of the union for if nonmembers are aggrieved they are free to bargain for similar benefits for themselves.}\textsuperscript{157}

That italicized statement is still the current, and in my opinion correct, description of the law on this issue.\textsuperscript{158} That is exactly what was intended

\textsuperscript{152} Added to section 7 (29 U.S.C. §157) by the Taft-Hartley Act, Act of June 23, 1947, ch. 120, §1ff, 61 Stat. 136: "and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title."

\textsuperscript{153} \textit{See, e.g., STAN GREER, NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH, UNION 'REPRESENTATION' IS FOISTED ON WORKERS-NOT VICE-VERSA (2004), available at http://www.nilrr.org/Members%20Only%20Update%20February%202004.pdf.}


\textsuperscript{155} \textit{Id. (emphasis added).}

\textsuperscript{156} \textit{See supra note 82.}

\textsuperscript{157} \textit{Radio Officers' Union v. NLRB, 347 U.S. 17, 47 (1954) (emphasis added).}

\textsuperscript{158} Parenthetically, the Court also noted that the issue before it, the validity of a strike settlement contract with a union that was not a traditional majority representative, "does not touch upon whether minority unions may demand that employers enter into particular kinds of contracts or the circumstances under which employers may accord recognition to unions as exclusive bargaining agents." 347 U.S. at 28-29 (emphasis added). The italicized phrase is consistent with my observation in the \textit{Blue Eagle} regarding the duty to bargain with a minority union for its members only, to wit: "From an adjudicatory standpoint, the issue is clearly an open question;[\ldots] when the Board and the courts finally write on this issue, they will be writing on a clean slate." \textit{Blue Eagle, supra note 2, at 170.}
with the passage of the Wagner Act, and its applicable provisions still prevail.

III.
CONCLUSION

An employer’s duty to bargain with a minority union for its members-only where no union has yet been designated as exclusive bargaining representative is based primarily on the broadly-written statutory language of section 7, which mandates, without qualification, that: “Employees shall have the right to . . . bargain collectively . . . .” Accordingly, a timely conclusion to this commentary can be found in the guidance to statutory construction that John Roberts, the new Chief Justice of the United States Supreme Court recently supplied. Faced with broadly-written, brief statutory language in each of two case for which he wrote opinions for the D. C. Court of Appeals, he applied the statutory language literally, emphasizing in both cases that “[t]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad sweeping application.” Applying that same canon of statutory construction to section 7 of the National Labor Relations Act means that all covered employees, including minority-union employees in workplaces where there is no majority union, have an enforceable statutory right to engage in collective bargaining.
