Company participated in surface bargaining because although they suggested some version of pay increase percentages, the Company refused to discuss uniforms entirely and would not settle with the union unless agreeing to promote Italians over Hispanics, which is in violation of affirmative action.

In the case *NLRB v. Johnson Mfg. Co. of Lubbock*, 458 F.2d 453 (5th Cir. 1972) the Johnson Company was found to be bargaining, but only to cover its bad faith. The Johnson Company insisted that the union give up its right to bargain about, or arbitrate in exchange for existing company practices, in which employees would have without the existence of any collective bargaining agreement. This is what the Fancy Hotel did in the case at hand. They were bargaining but only on the surface and concessions would not be made without the adaptation of a clause which would violate federal affirmative action laws. As stated in *N.L.R.B. v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir.1943) "an open mind and a sincere desire to reach an agreement" and "a sincere effort must be made to reach a common ground" on the side of the employer. The company made no such attempt to reach a common ground and made a final decision that if Italians could not be promoted over Hispanics that an agreement would not be made. However, even if a clause that denies the rights of affirmative action was written into the collective bargaining agreement, because it is against federal law, SIFT would not have to follow its guidelines. Failure to bargain in good faith or § 8 (a) (5) would also be a violation of § 8 (a) (1) for interference with employees right to exercise their § 7 rights.

The company, however, can argue that because of the nature of SIFT union members' concerted activities they loose the rights allotted to them in § 7 of the NLRA, as was the case in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956). Therefore,