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APPLICATION OF A CONSTITUTIONALLY-BASED DUTY OF FAIR REPRESENTATION TO UNION HIRING HALLS

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INTRODUCTION

The union hiring hall has been one of the major developments in twentieth century labor relations. It has provided many industries with a means for efficiently matching unemployed workers with job vacancies and has replaced a system of haphazard, unjust, and corrupt employment practices. Yet it has also developed substantial problems of its own. A hiring hall is fraught with potential for abuse, and, indeed, that potential is all too frequently realized. The largely unreviewable discretion of union business agents and inadequate protection for workers can combine to make hiring halls a mixture of whim, nepotism, prejudice, and irrationality.

Hiring halls satisfy important and legitimate needs in the "casual" employment industries, where jobs are usually short term and employers and employees have little opportunity to sustain a meaningful working relationship. The union halls routinely provide qualified workers and save the employers from conducting endless numbers of personnel searches. Simultaneously, the halls offer workers a convenient source for jobs; unemployed workers need only report to the appropriate hiring hall officials and then wait for referrals.[1] The lengths of the waits would ideally be determined by methods that are rational and fair for all employees.

Unfortunately, the referral systems are not always rational and fair.[2] Too often, there is no "system" at all and unions typically vest undue discretion in the hiring hall officials. Even in good economic times, such men can have undue power over individuals' opportunities to earn a living. The potential for abuse grows particularly acute, however, when jobs are scarce, as they are now in many sectors of the construction and maritime industries.

As will be shown, there are some limits on hiring hall discretion — primarily through after-the-fact review by government reg-

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[1] The methods of hiring hall operations are more fully explained below in Part II.

[2] Illustrations of hiring hall abuses are sketched in Part II-B, *infra*.

ulatory agencies, notably the National Labor Relations Board (NLRB)[3] and the Equal Employment Opportunities Commission (EEOC).[4] Yet these agencies depend for the most part on complaints from individual employees to bring the abuse of discretion to their attention, and have thus far concentrated only on certain kinds of discrimination.[5] The employee may be unaware of the hiring hall's arbitrariness, and even if he does know of misconduct, he may be afraid to report it for fear of retaliation. After all, the hiring hall agents control the only means for the union member to get a job. Not every worker is willing to risk months or years of unemployment on the hope that someday he may receive backpay.

To date, the responsible agencies and their reviewing courts have not developed a coherent and effective approach to the inherent dangers of hiring halls; the overseers' efforts have been largely stopgap.[6] (This retarded progress can perhaps be explained by the unfortunate implications of a 1961 Supreme Court decision.)[7] Commentators, surprisingly, have virtually ignored the problem.[8] (Possible explanation: unions want to maintain the current system; employers do not care; nobody speaks for the individual employees.) Thus there exists a severe need for an approach to hiring halls that is uniform and workable, and that adequately accounts for the competing demands of employers, unions and workers.

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[3] *See* National Labor Relations Act [hereinafter NLRA], §§ 3-11, 29 U.S.C. §§ 153-161 (1976); Part I-B, *infra.*

[4] *See* Civil Rights Act of 1964, §§ 704-710, 42 U.S.C. §§ 2000e-3 to -9 (1976).

[5] As discussed below in Parts II-B & III, the NLRB has focused on discrimination relating to union membership or nonmembership. *See* NLRA, § 8(b)(2), 29 U.S.C. § 158(b)(2). The EEOC is, of course, limited to dealing with discrimination based on race, sex, national origin or religion. Civil Rights Act of 1964, § 704, 42 U.S.C. § 2000e-3 (1976).

[6] *See* Part III, *infra.*

[7] Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).

[8] A pair of 1973 articles in the Texas Law Review has at least recognized the difficult issues inherent in hiring hall operations. Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights,* 51 TEX. L. REV., 1037, 1081-82; Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV., 1119, 1136-37, 1149-54. On hiring halls generally, *see* Bailey, *Construction Union Hiring Halls: Service Under a Collective Bargaining Agreement as a Prerequisite to High Priority Referral,* 19 WM. & MARY L. REV. 203 (1977); Craig, *Hiring Hall Arrangements and Practices,* 9 LAB. L.J. 939 (1958); Fenton, *Union Hiring Halls Under the Taft-Hartley Act,* 9 LAB. L.J. 505 (1958); Rains, *Construction Trades Hiring Halls,* 10 LAB. L.J. 363 (1959); Wilhoit & Gibson, *Can a State Right to Work Law Prohibit the Union Operated Hiring Hall,* 26 LAB. L.J. 301 (1975).

This article attempts to satisfy that need[9] by relying on a basic premise of the union's duty of fair representation (DFR) — that unions have responsibilities similar to those the Constitution places on legislative bodies.

Part I of the discussion will provide a brief background of the DFR before Parts II and III specifically address hiring halls. Part II describes the history and operating methods of hiring halls and the law that presently governs their administration. Part III applies the DFR to hiring halls, explaining first why the DFR applies, and then suggesting a return to the DFR's analytical sources. After making that return, the text emphasizes the sources' analogy of unions to legislative bodies, draws upon instructive principles of constitutional and administrative law, and builds onto recent DFR developments. Through these efforts, the article constructs for the NLRB and courts a workable and coherent means for protecting employees who must gain employment through hiring halls. In no way will these means suggest an end to the halls, or impinge upon their efficient operation, or unduly restrict the unions' flexibility in formulating rational priorities for the distribution of scarce jobs. Rather, the means will help insure rational and nondiscriminatory job distribution — the *raison d'etre* of every hiring hall.

I. THE UNION'S DUTY OF FAIR REPRESENTATION

Capable commentators have recently devoted much attention to describing the DFR's development[10] and have preempted the

[9] There is no acceptable formula for completely resolving the problems of hiring halls. The equitable operation of any jobs-referral system will always depend upon the good faith of its personnel and the alertness and integrity of participating employees and reviewing agencies. This article urges, however, that doctrines already conceived in other contexts can be used to at least contain the business agents' discretion and minimize the abuse potential.

[10] *E.g.*, T. BOYCE, FAIR REPRESENTATION, THE NLRB, AND THE COURTS (1978); PAPERS FROM THE NATIONAL CONFERENCE ON THE DUTY OF FAIR REPRESENTATION (J. MCKELVEY ED. 1977); Clark, *supra* note 8; Fanning, *The Duty of Fair Representation,* 19 B.C.L. REV. 813 (1978); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee,* 8 SUFFOLK U.L. REV. 1096 (1974); Summers, *Individual Employees' Rights Under the Collective Bargaining Agreement: What Constitutes Fair Representation,* 126 U. PA. L. REV. 251 (1977); Tobias, *Individual Employee's Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation,* 5 TOLEDO L. REV. 514 (1974); Walther, *Duty of Fair Representation,* 30 N.Y.U. CONF. LAB. 201 (1977); Note, *Union's Duty of Fair Representation — Fact or Fiction,* 60 MARQ. L. REV. 1116 (1977); Note, *NLRB & The Duty of Fair Repre-*

need for any elaborate discussion here of the duty's maturation. A brief background will suffice.

A. The Judicial DFR

The Supreme Court conceived the DFR in 1944 in a pair of cases under the Railway Labor Act. The primary decision, *Steele v. Louisville & Nashville Railroad,*[11] found that the statutory authorization for a union to act as the exclusive collective bargaining representative for all the unit's employees imposed upon the union a corresponding duty to represent *all* its members, minority as well as majority.[12] The union must therefore refrain from "hostile" or "irrelevant and invidious discrimination" among the membership.[13] In *Steele,* the union's racial discrimination against black members, manifested through ceilings on the number of black workers and other job-entry restrictions, was "obviously irrelevant and invidious."[14]

On reasoning similar to *Steele,* the Court in the 1953 case of *Ford Motor Co. v. Huffman*[15] extended its DFR rationale to unions governed by the National Labor Relations Act (NLRA). As section 9(a)[16] of the Act confers upon unions the power to bargain as the

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sentation: The Case of the Reluctant Guardian, 29 U. FLA. L. REV. 437 (1977); Note, *Fair Representation and Breach of Contract in § 301 Employee-Union Suits: Who's Watching the Back Door?,* 122 U. PA. L. REV. 714 (1974); Note, *Post-Vaca Standards of the Union's Duty of Fair Representation,* 19 VILL. L. REV. 885 (1974). *See also* T. KHEEL, LABOR LAW §§ 28.01-.04 (1978); R. GORMAN, BASIC TEXT ON LABOR LAW 695-728 (1976).

[11] 323 U.S. 192 (1944). The companion case was Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944). *See also* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944).

[12] As will be explained and emphasized below, notes 172-77 & accompanying text, the union's duty is analogous to the responsibilities of equal protection and due process that the Constitution has placed upon the legislature. 323 U.S. at 198, 202-03.

[13] *Id.* at 203-04.

[14] *Id.* at 203.

[15] 345 U.S. 330 (1953). The Court's first decision to find a DFR violation under the NLRA was Syres v. Oil Workers Local 23, 350 U.S. 892 (1955).

[16] 29 U.S.C. § 159(a) (1976). The relevant portion of that section reads:

> (a) 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 [exceptions omitted].

. . .

exclusive representative of the unit's employees, the union must fairly represent all its members, that is, "make an honest effort to serve the interests of [the bargaining unit's] members, without hostility to any."[17] Furthermore, "[t]he bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents."[18] That did not mean, however, that the union could not draw distinctions or compromise one factions' interests with another. The Court "recognized that negotiating agreements require compromises and adjustments of varied interests and groups."[19] Thus in *Huffman*, the union did not violate its statutory duty when it negotiated a contract which gave seniority credit for military service *prior to*, as well as following, employment with the company.[20] "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[21]

The Court expressed similar notions about union discretion in its next significant encounter with the DFR. *Humphrey v. Moore*[22] sustained the union's dovetailing of seniority lists following the combination of two trucking units into one. (The union called it an "absorption" of one operation by another.) The union had a dilemma — no matter how seniority was to be resolved between the drivers of the two companies, "one group or the other was going to suffer . . . . Inevitably the absorption would hurt someone."[23] The union therefore needed substantial flexibility in reaching the most equitable solution, and the Court was unwilling to find a DFR violation either "in taking a good faith position contrary to that of some individuals whom [the union] represents [or] in supporting

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[17] 345 U.S. at 337.

[18] *Id.* at 338.

[19] Summers, *supra* note 10, at 254.

[20] *See* 345 U.S. at 334-36 nn.6 & 7 for quotation of the contract agreement and how it affected the plaintiff.

[21] 345 U.S. at 338. The Court also stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.

Id.

[22] 375 U.S. 335 (1964).

[23] *Id.* at 350.

the position of one group of employees against that of another."[24] The *Humphrey* plaintiffs failed to prove a union violation of that standard.

In the DFR cases through *Humphrey,* the Court was concerned with the union's performance in negotiating and interpreting the collective bargaining agreement. Those obligations required substantial discretion to accommodate the myriad of competing considerations. The appropriate DFR standard reflected an accord between protecting the individual employees and giving the union an adequate amount of discretion.[25] The standard tightened, however, when the Court confronted the scope of the union's DFR in representing members in the grievance process.[26] *Vaca v. Sipe*[27] held that even though a union member does not have "an absolute right to have his grievance taken to arbitration," the union's conduct of a grievance cannot be "arbitrary, discriminatory, or in bad faith."[28]The *Vaca* standard indicated, and was so construed by a number of lower courts, that the DFR meant more than just avoiding race discrimination or bad faith. Unions, it appeared, had an affirmative duty to deal with employee grievances in a rational and fair manner. The boundaries of the duties, however, were difficult to determine because the *Vaca* Court found that the union had adequate justification for not taking the employee's grievance to arbitration.[29]

The Court provided some needed definition for the DFR in *Hines v. Anchor Motor Freight,*[30] when it held that mere perfunc-

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[24] *Id.* at 349. The complaining members also had an opportunity to present their views at a hearing, presided over by union officials, prior to the final decision to dovetail the seniority rosters. *Id.* at 350-55.

[25] *See, e.g.,* Note, MARQ. L. REV., *supra* note 10, at 1120.

[26] *See* Summers, *supra* note 10, at 254-58.

[27] 386 U.S. 171 (1967).

[28] *Id.* at 190-91. *See also* Czosek v. O'Mara, 397 U.S. 25 (1970).

[29] 386 U.S. at 193-95. The *Vaca* Court also held that federal and state courts were not preempted by the NLRA from deciding DFR suits, even assuming that a violation of the DFR is an unfair labor practice and thus within the NLRB's jurisdiction. Because (among other things) the DFR was a judicially developed doctrine and was closely connected with congressional policies expressed in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), the Court concluded that it would be inappropriate to preempt DFR law suits. 386 U.S. at 177-88. *See generally* San Diego Bldg. & Trades Council v. Garmon, 359 U.S. 236 (1959). *See also* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971); Bryson, *supra* note 8.

[30] 424 U.S. 554 (1976). Prior to *Hines,* the Court had taken a short detour from

tory handling of a grievance can violate the duty. The union had failed to investigate the possibility of exculpatory evidence; even though it did not necessarily act in bad faith, its arbitrary conduct was enough to justify finding a DFR breach. *Hines* thus finally settled the dispute over whether bad faith was a prerequisite or merely an alternative ground for proving a DFR claim for relief.

Lower courts have reached some agreement in elaborating on the DFR. Certainly, the duty precludes union conduct based on considerations of race, sex, alienage, intra-union politics, nepotism, geographic provincialism, or some other "invidious" criterion.[31] The "bad faith" element has been construed to protect individual employees from unexplained actions motivated by a hostile or personal animosity of union officials.[32] After *Hines,* of course, the circuits now have agreed that "arbitrary" union conduct, standing alone, can violate the DFR.[33] Defining arbitrariness has, however, generated substantial difficulties.

For one, the courts have varied their scope of review according to the nature of the union business at issue. The DFR's standard is not as exacting when the union must choose between or compromise among different groups or members of the collective bargain-

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its steady course toward an arbitrariness standard for the DFR. *Amalgamated Ass'n of Street Employees v. Lockridge,* 403 U.S. 274 (1971), held that NLRB jurisdiction preempted an employee's suit against a union for having him fired. In reaching that result, the Court noted that DFR and unfair labor practice proceedings would seldom conflict because different tests were applied. The DFR standard, the Court said, prohibits only "invidious" or "deliberate and severely hostile and irrational treatment" of the employee by the union. *Id.* at 301. In light of *Hines, Lockridge's* formula apparently was an aberration.

[31] *E.g.,* Gainey v. Brotherhood of Ry. Clerks, 313 F.2d 318, 324 (3d Cir. 1963) (recognizing racial discrimination, political discrimination and personal animosity as grounds for DFR suit); Ferro v. Ry. Express Agency, 296 F.2d 847 (2d Cir. 1961) (intraunion politics); Byrd v. Local 24, IBEW, 375 F. Supp. 545 (D. Md. 1974) (race); De Malherbe v. Elevator Constructors, 438 F. Supp. 1121 (N.D. Cal. 1977), *motion to dismiss denied,* 449 F. Supp. 1335 (N.D. Cal. 1978) (alienage). *See also* T.I.M.E. - DC, Inc. v. NLRB, 504 F.2d 294 (5th Cir. 1974) (parochialism); NLRB v. Longshoremen's Ass'n Local 1581, 489 F.2d 635 (5th Cir. 1974), *cert. denied,* 419 U.S. 1040 (1974) (alienage). *See generally* BOYCE, *supra* note 10, at 29-54; Clark, *supra* note 8; Flynn & Higgins, *supra* note 10.

[32] *E.g.,* Cunningham v. Erie R.R., 266 F.2d 411 (2d Cir. 1959); Brady v. TWA, Inc., 174 F. Supp. 360 (D. Del. 1959). *See* BOYCE, *supra* note 10, at 53; Clark, *supra* note 8, at 1132.

[33] *E.g.,* Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978); Ruzicka v. General Motors Corp., 523 F.2d 306 (1974), *reh. den.,* 528 F.2d 912 (6th Cir. 1975).

ing unit.[34] That situation can arise, for example, in the give and take of contract negotiation,[35] in the process of contract interpretation,[36] or in the particularly sensitive occasions of layoffs, mergers, transfers, and business absorptions.[37] In such matters, courts have been unwilling to bind too tightly the union's discretion, and have insisted only that the union avoid invidious discrimination, that the union's procedures be fair and rational, and that any accommodation of competing interests have some rational basis.

Although still according unions some deference, courts reviewing complaints of improper contract administration have been more willing to scrutinize the substance of union decisions than in contract negotiation cases.[38] Unions do need latitude in choosing what grievances should be taken to arbitration; if the union officials are not given adequate discretion on such matters, and are afraid to settle or compromise grievances, then the arbitration process will become (even more) overburdened and all members of the collective bargaining unit will suffer.[39] There exists at all times, however, a union duty to keep the employee fully informed of the progress of his case[40] and to adequately advocate his cause.[41] The union cannot, without violating the DFR, perfunctorily process a grievance,[42] ignore evidence helpful to the unit member,[43]

[34] Masullo v. General Motors Corp., 393 F. Supp. 188, 194 (D.N.J. 1975); BOYCE, *supra* note 10, at 10-16; Summers, *supra* note 10, at 254-58.

[35] *E.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1952); Waiters Local 781 v. Hotel Ass'n, 498 F.2d 998 (D.C. Cir. 1974); Jackson v. TWA, Inc., 457 F.2d 202 (2d Cir. 1972); BOYCE, *supra* note 10, at 14-28.

[36] *E.g.*, Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976).

[37] *E.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Laturner v. Burlington Northern, 501 F.2d 593 (9th Cir. 1974); Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975).

[38] *Compare, e.g.*, Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), *and* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1974), *reh. den.*, 528 F.2d 912 (6th Cir. 1975), *with* Humphrey v. Moore, 375 U.S. 335 (1964). *See* BOYCE, *supra* note 10, at 52-54; Summers, *supra* note 10, at 254-58.

[39] Vaca v. Sipes, 386 U.S. 171, 191-93 (1967).

[40] *E.g.*, Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978); Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972); notes 232-42 & accompanying text, *infra*.

[41] *E.g.*, Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1974), *reh. den.*, 528 F.2d 912 (6th Cir. 1975); Summers, *supra* note 10 at 276-79.

[42] *E.g.*, De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir. 1970), *cert. den.*, 400 U.S. 877 (1970); St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128, 130 (6th Cir. 1969); authorities cited in note 41, *supra*.

[43] Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

"sacrifice" one legitimate grievance to win another (assuming no matter of contract interpretation is at issue, but merely a factual dispute),[44] or conduct the representation in a "grossly negligent" or "egregiously unfair" manner.[45]

The courts' development, then, of the DFR has delicately balanced the employees' need for protection from hostile and arbitrary treatment by their collective bargaining agent with the unions' need for discretion and flexibility in accommodating the multiple and often conflicting interests within a collective bargaining unit.

Courts and commentators have also become increasingly concerned about the *procedures* of decisionmaking and conflict resolution within the union.[46] Courts are particularly well-suited to review the fairness of decisional mechanisms, and they can do so (and impose fairness, if necessary) without unduly restricting the unions' discretion. Moreover, one of the major doctrinal supports of the DFR has special application in reviewing *how* a union reaches results. That is, through their statutorily granted authority to function as the exclusive employee representative, the unions' responsibilities and limitations should be considered analogous to that of a legislature.[47] As with legislatures, unions must implement administrative procedures that are fair, rational, and open.

B. The NLRB's DFR

Concurrently with the federal judicial development of a DFR, the NLRB has considered the DFR in the context of union unfair labor practices under section 8(b) of the NLRA. In its 1962 decision in *Miranda Fuel Co.*,[48] the Board found that a duty imposed by section 8(b)(1)(A) forbade a statutory representative "from taking

[44] Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. den.*, 425 U.S. 958 (1976); Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), *cert. den.*, 404 U.S. 1016 (1971); Summers, *supra* note 10, at 270-72.

[45] Robesky v. Quantas Empire Airways Ltd., 573 F.2d 1082, 1089-91 (9th Cir. 1978); Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1974), *reh. den.*, 528 F.2d 912 (6th Cir. 1975).

[46] *E.g.*, NLRB v. General Truck Drivers Local 315, 545 F.2d 1173 (9th Cir. 1976), *enf'g*, 217 N.L.R.B. 616 (1975); Clark, *supra* note 8; notes 212-14, 217-19 & accompanying text, *infra*.

[47] Steele v. Louisville & N.R.R., 323 U.S. 192, 198, 202-03 (1944). *See* notes 172-77 & accompanying text, *infra*.

[48] 140 N.L.R.B. 181 (1962) *(en banc)*.

action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[49]

The DFR is nowhere specifically referred to in the NLRA or its legislative history (even though section 8(b) was not passed by Congress until several years after *Steele* was decided). The Board nevertheless found the duty using a three-step rationale.[50] First, the Board noted the settled principle that section 9(a) of the NLRA[51] charges the collective bargaining representative with the duty to fairly represent the employees in the bargaining unit. That alone, of course, is not enough to establish a right enforceable through an unfair labor practice proceeding. Thus, the Board's second step was to find that the employees' right created by the union's section 9 DFR should be "read into" the employees' section 4 rights[52] "to bargain collectively through representatives of their own choosing." Then, third, like all section 7 rights, this newly incorporated DFR right is protected through the unfair labor practice enforcement mechanism in section 8(b)(1)(A).[53] So, the Board concluded, union classifications or decisions that concern unit members and that are "irrelevant, invidious, or unfair" violate the union's DFR and thereby constitute an unfair labor practice.[54]

The union officials in *Miranda Fuel* had effected an employee's demotion on the seniority ladder, a very serious matter under the applicable collective bargaining agreement because work as-

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[49] *Id.* at 185.

[50] *Id.* at 184-85. The dissent summarized the majority's rationale at 192-93 (Chairman McCulloch and Member Fanning). *See also* Fanning, *supra* note 10, at 831.

[51] 29 U.S.C. § 159(a) (1976), *quoted* at note 16, *supra.*

[52] 29 U.S.C. § 157 (1976):

> 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, and shall also have the right to refrain from any or all of 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 158(a)(3) of this title.

[53] 29 U.S.C. § 158(b)(1)(A) (1976):

> (b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title [exceptions omitted];
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> . . . .

[54] 140 N.L.R.B. at 185.

signments were based on seniority. There was no proof of an illicit union motive, except, perhaps, that by demoting the complainant, the union necessarily enhanced the status of other workers. Still, the union's unnecessarily rigid construction of the prevailing contract and its insistence on the complainant's demotion provoked the Board to find the union's actions arbitrary and unfair, and therefore a DFR violation and an unfair labor practice.

On appeal, however, a splintered Second Circuit reversed.[55] Judge Medina's opinion for the court said there must be some anti- or pro-union animus behind the discrimination before it can be a section 8(b) violation.[56] Concurring, Judge Lumbard assumed that the Board's DFR standard was appropriate but did not find the union's actions to have breached the arbitrariness standard.[57] In dissent, Judge Friendly contended that the union's action was arbitrary and, as such, tended to encourage union membership or to persuade union members to be complicit and submissive to the leadership.[58]

The Second Circuit's split reflects the basic dilemma that has nagged the Board in its development of a DFR. The only discrimination that the Act explicitly prohibits is that which encourages or discourages union membership. Section 8(a)(3)[59] bans employers from making such distinctions, and section 8(b)(2)[60] restricts

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[55] 326 F.2d 172 (2d Cir. 1963).

[56] Judge Medina's position was based on the language of § 8(b)(2) — the NLRA's only explicit anti-discrimination provision for unions — and the Supreme Court's construction of it. This is discussed further in the text's ensuing paragraph and its accompanying notes.

[57] 326 F.2d at 180.

[58] *Id.* at 180-86.

[59] 29 U.S.C. § 158(a)(3) (1976):

> (a) It shall be an unfair labor practice for an employer —
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> . . .
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> (3) by discrimination in regard to hire or tenure of employment or by any other condition of employment to encourage or discourage membership in any labor organization . . . [exceptions omitted];
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> . . . .

[60] 29 U.S.C. § 158(b)(2) (1976):

> (b) It shall be an unfair labor practice for a labor organization or its agents —
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> . . .
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> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other

unions from causing the employer to so discriminate. The Supreme Court has applied the latter provision to union activity that has the foreseeable effect of affecting workers' notions about union membership.[61] The Court has also recognized, however, that anytime the union does its job well, it will naturally and forseeably tend to encourage membership.[62] The test, as stated by the Supreme Court shortly before the Board's *Miranda Fuel* decision was whether the union's or the employer's "true purpose" was to illicitly affect union membership.[63] This backdrop can perhaps explain the Second Circuit's reluctance in *Miranda Fuel* to venture away from a motive test and toward some objective standard of "arbitrariness" or "unfairness."[64]

Two years after *Miranda Fuel*, the Board once again had the opportunity to apply the DFR. In *Local 12, United Rubber Workers,*[65] an Alabama union had consistently refused to process legitimate and substantial grievances made by black members of the collective bargaining unit. The Board reaffirmed its DFR ap-

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than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

. . . .

[61] Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

[62] Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675-76 (1961).

[63] *Id.;* Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954). Since *Local 357* and *Miranda Fuel* were decided, the Court has altered its test for 8(a)(3)-8(b)(2) discrimination. Essentially, the test now "presumes" illicit motive from "inherently destructive" discriminatory actions, unless there are substantial business justifications independent of anti- or pro-union sentiments. If the adverse effect of the discriminatory conduct is "comparatively slight," then an anti- or pro-union motive must be shown in fact. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). *See generally* R. GORMAN, *supra* note 10, at 326-38.

[64] The Board had originally decided for the employee in *Miranda Fuel* on traditional 8(a)(3)-8(b)(2) grounds, and the Second Circuit had granted enforcement. 284 F.2d 861 (1960). After the union appealed and upon the Board's request, the Supreme Court remanded the case to the Board for reconsideration in light of the intervening decision in *Local 357.* Local 553, Int'l Bhd. of Teamsters v. NLRB, 366 U.S. 763 (1961). On remand, the Board again ruled for the employee, but this time used the DFR to reach its result. Miranda Fuel, 140 N.L.R.B. 181 (1962) *(en banc).* The Second Circuit, obviously, did not agree that the DFR was an independent ground for an unfair labor practice and again analyzed it in 8(b)(2) terms. 326 F.2d 172 (2d Cir. 1963). In the opinion for the court, Judge Medina found that *Local 357* required a different result from the case's earlier visit to the Second Circuit. Even Judge Lumbard, concurring, and Judge Friendly, dissenting, used traditional 8(b)(2) analysis to reach their conclusions.

[65] 150 N.L.R.B. 312 (1964), *enf'd* 368 F.2d 12 (5th Cir. 1966), *cert. den.,* 389 U.S. 837 (1967).

proach and this time the appellate court, here the Fifth Circuit, ordered enforcement.[66] Relying upon *Steele's* language, the court's affirmance broadly defined the applicable DFR standard. The union must represent its members " 'without hostile discrimination, fairly, impartially, and in good faith.' "[67] Proof of the 8(b)(2) intent concerning encouragement or discouragement of union membership was not required.

Since *Miranda Fuel* and *Rubber Workers,* however, the Board has saddled its DFR with a rather confusing existence.[68] The principal uncertainty has related to whether proof of a particular animus is necessary to show a DFR violation, or whether mere arbitrary union conduct will suffice. Most of the Board's decisions finding DFR violations have either involved some "invidious" discrimination, such as that based on race, sex, or alienage, or have presented traditional 8(b) grounds.[69] In fact, in 1973 one commentator contended that the Board's only "pure" DFR case (that is, one not involving invidious or 8(b) discrimination) was *Miranda Fuel.*[70] Today, at least one Board member apparently believes the DFR should be confined to instances involving some illicit motive or to traditional section 7 and section 8 violations.[71]

On the other hand, some recent NLRB decisions reflect a DFR much like the duty that courts have imposed. In particular, *General Truck Drivers Local 315*[72] found that the union breached its duty, even absent any apparent hostile motive, when it sub-

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[66] 368 F.2d 12 (5th Cir. 1966), *cert. den.,* 389 U.S. 837 (1967).

[67] 368 F.2d at 19 (*quoting* Steele v. Nashville & N.R.R., 323 U.S. 192, 204 (1944)).

[68] Until very recently, the Board, although repeating its broad *Miranda Fuel* language, construed the case very narrowly. *See* Mumford v. Glover, 503 F.2d 878, 885 (5th Cir. 1974); Bryson, *supra* note 8, at 1074-84. *See also* Fanning, *supra* note 10, at 834-35. Administrative Law Judges continue to frequently note the DFR's imprecise role in unfair labor practice cases. *E.g.,* Truck Drivers Local 355, 229 N.L.R.B. 1319, 1326 (1977); American Postal Workers Local 4193, 226 N.L.R.B. 1000 (1976).

[69] Bryson, *supra* note 8, at 1074-84; Fanning, *supra* note 10, at 834 n. 180. *See* Handy Andy, 228 N.L.R.B. 447, 457 n.72 (1977).

[70] Bryson, *supra* note 8, at 1084. Mr. Bryson adds that "there is good reason to believe that the current [1973] Board would decide [*Miranda Fuel*] the other way." *Id.*

[71] Handy Andy, 228 N.L.R.B. 447, 457 n.72 (1977) (Chairman Fanning); *id.* at 4 n.77 (same); Fanning, *supra* note 8.

[72] 217 N.L.R.B. 616 (1975), *enf'd,* 545 F.2d 1173 (9th Cir. 1976). The circuit court's handling of the case is discussed below, note 217 & accompanying text.

jected seniority and job rights of a small minority to a majority vote. While recognizing that the duty's outlines are imprecise, the opinion of two of the three member panel stated that the DRF's "fiduciary nature connotes some degree of affirmative responsibility."[73] Moreover, "[a]t least as to rights under an existing agreement, the duty of fair representation is more than an absence of bad faith or hostile motivation."[74] Significantly, the panel majority cited not only *Miranda Fuel*, but also decisions of the circuit courts that liberally defined the duty.[75] *Vaca* was used as support for "authoritatively" describing the DFR as "the avoidance of arbitrary conduct."[76]

Local 315 has been followed in a series of cases in which the Board has affirmed, without substantial elaboration, the findings and conclusions (or at least relevant portions thereof) of the Administative Law Judge (ALJ). These cases have typically cited the *Miranda Fuel* and *Vaca* language banning "arbitrary, irrelevant, or invidious" distinctions, then acknowledged that mere negligence, poor judgment, or ineptitude are not remediable, but finally concluded that there does come a point when a union's action or failure to act is so unreasonable as to be arbitrary and thus contrary to its fiduciary obligations.[77] The opinions are particularly noteworthy for their reliance upon liberal judicial-DFR decisions[78] and for their application of the doctrine to nontraditional fact situations.[79]

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[73] *Id.* at 617.

[74] *Id.*

[75] *Id.* at 617 n.5. The authorities cited were Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1023 (9th Cir. 1972), and Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

[76] 217 N.L.R.B. at 617.

[77] *E.g.*, Denver Stereotypers Local 13, 231 N.L.R.B. 678, 685 (1977); Massachusetts Laborers' Dist. Council, 230 N.L.R.B. 640, 642-43 (1977); Service Employees Local 579, 229 N.L.R.B. 692, 695 (1977); Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 597-98 (1976). *See also* P.P.G. Industries, Inc., 229 N.L.R.B. 713 (1977) (opinion by 3-member panel), *enf't denied*, 579 F.2d 1057 (7th Cir. 1978)); Handy Andy, 228 N.L.R.B. 447, 455 (1977) (*en banc*).

[78] Those cases most frequently relied upon have been Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), and Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). Naturally, *Vaca v. Sipes* and *Miranda Fuel* have also been cited repeatedly.

[79] *E.g.*, Massachusetts Laborers' Dist. Council, 230 N.L.R.B. 640 (1977) (Union had higher duty to arbitrate grievance after union had been responsible for employee's termination); P.P.G. Industries, Inc., 229 N.L.R.B. 713 (1977), *enf't denied*, 579 F.2d 1057 (7th Cir. 1978). (Fact that employer had exacted a waiver from employee at time of hire did not relieve union of duty to represent employee

Such cases obviously indicate that the Board's DFR is expanding to fill the same shape as that developed for the judicial DFR. Yet recent musings from Chairman Fanning,[80] the Board's failure thus far to deal with the duty comprehensively and *en banc*, some inconsistencies in the Board's opinions and results,[81] and the Supreme Court's deft avoidance of the issue,[82] all combine to cast some doubt on the precise status of the Board's DFR.

II. Hiring Halls

A. *History and Background*

Hiring halls are the prevailing means of job distribution in those industries in which employment is short term and workers move from one employer to another as needed. The maritime (longshoremen and seamen), construction and, to a lesser extent, trucking constitute those industries that most commonly use hiring halls.

Prior to the advent of unionism, employment in these industries was accomplished non-methodically, mostly at the whim of the employers and their personnel agents. Abuses were rampant. While testifying before a Congressional subcommittee, a longshoreman recalled the days when workers were selected by the person hiring them:

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in nullifying the waiver); Service Employees Local 579, 229 N.L.R.B. 692 (1977)(Two DFR violations: (1) Business Agent told employee "this union don't file grievances," causing legitimate grievance to be dropped; (2) Union refused to process grievance because of employee's alleged past derelictions when the grounds for her discharge were unrelated to that past conduct); Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587 (1976) (DFR violated by Union's failure to provide employee a copy, or to permit him to make a copy, of the names, addresses, and phone numbers of other employees' names on the hiring hall's out-of-work list).

[80] Handy Andy, 228 N.L.R.B. 447, 457 n.72 (1977); Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587 (1976) (dissenting opinion); Fanning, *supra* note 8.

[81] *E.g., compare* Truck Drivers Local 355, 229 N.L.R.B. 1319 (1977) (No DFR violation for union's failure to pursue for worker certain procedural rights granted by the collective bargaining agreement), *with* Service Employees Local 579, 229 N.L.R.B. 692 (1977) (DFR violated by union's failures to process grievances to arbitration).

[82] Each time that the Supreme Court has had an occasion to determine whether a violation of the DFR is an unfair labor practice, the Court has assumed that it is. *E.g.,* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971); Vaca v. Sipes, 386 U.S. 171, 186 (1967); Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690, 696 n.7 (1963).

> [W]hat develops in this kind of situation is that a man who has an 'in' gets selected. That can mean many things. It can mean a man who buys a drink for someone in a saloon. It can mean, for example, among some of the Italian longshoremen in Brooklyn, that if they buy a certain number of cases of grapes from someone to make wine, that helps to get a job at certain piers. There are many angles to picking up work on the waterfront . . . . [E]very man knew that behind him, anxiously waiting for his job, were hungry men ready to step in. It was not wise to be a complainer.
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> Graft, favoritism, company unions, blacklisting — these were all among the indignities suffered by the longshoremen during the era 1922 to 1934.[83]

The subcommittee that heard that testimony also heard from a series of other union officials and employers in industries using hiring halls. The participating Congressmen concluded that job distribution in pre-hiring hall days was inefficient, unstable, and corrupt, with "men at the mercy of petty racketeers who demanded kickbacks and other favors in return for permitting them to work."[84] This situation resulted in burdens on community welfare resources to provide for the underemployed men, fostered major and petty crime, and brought about bad housing and health conditions.[85]

Obviously, if operated in a rational manner, hiring halls are a fairer and more efficient means for distributing jobs. Rather than having some workers employed constantly, while others are persistently unemployed, hiring halls spread the jobs out, giving everyone *some* opportunity for work. This is especially important when jobs are scarce and unemployment high.

Employers also stand to gain from hiring halls. Rather than having to recruit new employees for each ship it sends out or unloads, or for each plumbing installation or building to be wired, the

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[83] *Hearings on Hiring Halls in the Maritime Industry, Subcommittee on Labor-Management Relations of Senate Committee on Labor & Public Welfare,* 81st Cong., 2d Sess. 100-01 (1950) [hereinafter cited as *Hearings*] (testimony of W. Glazier, Washington Representative, ILWU), *reprinted in* C. SUMMERS & H. WELLINGTON, CASES AND MATERIALS ON LABOR LAW 932-33 (1968). *See also Hearings* 57-63 (testimony of A. MacDonald, General Chairman, Radio Officers' Union) in SUMMERS & WELLINGTON, *supra,* at 929.

[84] S. REP. No. 1827, 81st Cong., 2d Sess. (1950) [hereinafter S. REP. 1827], *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 938.

[85] *Id.*

employer can simply call the union hiring hall and have a qualified worker dispatched.[86] At the very least, the employer will know that referred employees are minimally qualified and accurately classified.[87] In many industries, he may also have a greater likelihood of getting quality workmanship, although that is a difficult statement to prove and is disputed.[88] Finally, the hiring halls' recruitment and classification of workers nets substantial savings for employers.[89]

The construction industry presents several unique problems that hiring halls solve especially well.[90] Construction jobs require

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[86] S. REP. 1827, *supra* note 84, at 4-8; *Hearings, supra* note 83, at 57-63 (testimony of A. MacDonald, General Chairman of Radio Officers' Union), *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 929; A. GOLDBERG, THE MARITIME STORY 277-82 (1958). *See also* Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 LAB. L.J. 505, 506 (1958).

[87] Rains, *Construction Trades Hiring Halls*, 10 LAB. L.J. 363, 367-68 (1959).

[88] *Hearings, supra* note 83, at 57-63 (testimony of A. MacDonald, General Chairman, Radio Officers' Union), 83 (testimony of W. Van Buren, Secretary-Treasurer, National Organizations of Master Mates & Pilots), and 213-15 (testimony of L. Jonassen, President, Cleveland Tankers, Inc.), *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 929, 932, 935-36; Rains, *supra* note 87, at 368, 370.

[89] *Hearings, supra* note 83, at 36-37 (testimony of J. Curran, President, NMU), *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 931; Rains, *supra* note 87, at 368-69; note 92, *infra*.

[90] In 1949, construction employer representatives on the Joint Board for the Settlement of Jurisdictional Disputes made a statement to the NLRB outlining 11 distinctive features of the construction trade. Rains, *supra* note 87, at 368; Sherman, *Legal Status of the Building and Construction Trades Unions in the Airing Process*, 47 GEO. L. REV. 203, 204-05 (1958). Those 11 points are:

1. Each employer constructs on numerous and separate jobs in each year.
2. Until a project is started, he has no manual 'employees'.
3. On each project there are usually several 'employers' frequently using different crafts of workmen.
4. On each project there is a constant shifting of crews on and off the job as the work progresses.
5. In each crew there are frequent changes in the men when the crew returns to the job.
6. There is not a time on the job when all men and all crews eventually employed will be so employed at the same time.
7. The workmen are drawn from an 'area pool' of available workmen who will work for many or all employers in the area, or may drift from one area pool to another area pool.
8. When a workman's function on a job is temporarily or permanently finished they [sic] are laid off and returned to the pool for use on other jobs or by other construction employers.

the use of workers in separate crafts according to the stage and sequence of construction. The construction craft hiring halls can supply either a steady or a sporadic flow of workers — whatever the contractors need.[91] Moreover, the construction industry is particularly afflicted with decentralization of job opportunities. That is, jobs are scattered all over a given geographic region, and the burden on workers to seek out the jobs for which they are qualified would be grossly unfair. The system would be inefficient. The hiring hall works well to solve all these special problems of the construction industry.[92]

Hiring halls can vary greatly in their operating methods from trade to trade and from region to region. The methods can be written, oral, or tacit understandings, or any combination thereof.[93] Most halls use a "rotary" system, in which jobs are as-

9. A vast number of projects in the industry are of but a few days' or hours' duration for a given craft.

10. This quick need and rapid shifting of men in and out of the pool to various projects requires a previously established and uniform understanding of employment terms for all jobs and for all contractors in order to avoid delays in hiring and misunderstandings as to the terms of employment.

11. Each employer's policy as to wages and working conditions must be comparable to that of other employers of the men in the pool.

[91] Rains, *supra* note 87, at 367.

[92] *Id.* at 368-69:

> Experience has shown that the union hiring hall can meet the needs of the industry as it presently exists. It dispatches qualified men swiftly in response to employer demands. The administrators of the hiring shall become familiar with the men they dispatch and be able to match workmen to employers with reasonable accuracy. The hiring hall provides a central location where information about employment can be transmitted in an orderly manner to job seekers, who save the time and effort of hunting down their highly mobile prospective employers. Where jobs frequently last for a few days or for even shorter periods, it is of vital importance to enable an employee to line up new jobs without extensive periods of seeking and of unemployment. Long periods of unemployment between jobs would prove a drain on state unemployment insurance funds and drive up the employer's contributions — in turn, this would raise the cost of construction. An even greater increase in construction costs could result if workmen, plagued by longer periods of joblessness than those to which they are already subject, would add this factor into their wage demands.

[93] Rothman, *The Development and the Current Status of the Law Pertaining to Hiring Hall Arrangements*, 48 VA. L. REV. 871, 871 (1962). *See also* authorities cited in notes 94-97, *infra*.

signed in the order of registration after completion of the last job.[94] That is, when a worker finishes a job he signs up at the hiring hall; he is put at the bottom of the waiting list and waits as jobs are assigned to those in front of him and their names are crossed off. Eventually the worker's name reaches the top of the list and he is given a new referral.

The unions vary in how they handle short term work — some halls do not cross employees off the list until they have worked a minimum number of days; some halls keep separate lists; some simply "call out" short term jobs and let the first taker have the work.[95] Other halls, especially where the majority of jobs are of very short duration, may not make any distinctions.

Hiring halls differ in their emphasis on seniority. Some ignore it; others, especially in the trucking industry, may make it the determinative factor, with the most senior available employee always getting the first opportunity to take a job.[96] Still another approach is to have separate lists according to term of service. For example, a hall might have an "A" list for employees with over twenty years experience, a "B" list for those with ten to twenty, and a "C" list for those with less than ten. "B" list employees would not be called until the "A" list is exhausted, and correspondingly, "C" list people would not be called until all the "A" and "B" people were either employed or called.[97]

Other variables could affect referrals, such as place of residence, job classification schemes, testing scores, prior employment with a particular employer and employer requests.[98] Some long-

[94] *E.g.*, S. REP. 1827, *supra* note 84, *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 938.

[95] *See, e.g.*, Operating Eng'rs Local 406, 189 N.L.R.B. 255, 258 (1971) (1-3 day jobs distributed by a "free-for-all" method).

[96] *E.g.*, T.I.M.E.-DC, Inc. v. NLRB, 504 F.2d 294 (5th Cir. 1974); NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963); Local 138, Int'l Union of Operating Eng'rs v. NLRB, 321 F.2d 130, 134-35 (2d Cir. 1963); Denver Stereotypers Local 13, 231 N.L.R.B. 678 (1977).

[97] *See* ILWU Local 13, 183 N.L.R.B. 221 (1968), *enf'd*, 549 F.2d 1347 (9th Cir. 1977).

[98] *See, e.g.*, Emmanuel v. Omaha Carpenters Dist. Council, 535 F.2d 420 (8th Cir. 1976), *on remand*, 422 F. Supp. 204 (D. Neb. 1976), *aff'd*, 560 F.2d 382 (1977) (employer requests); Operating Eng'rs Local 98, 155 N.L.R.B. 850 (1966) (residence); Lathers Local 383, 176 N.L.R.B. 410 (1969) (same). *See generally* Rains, *supra* note 83, at 374-75 (residence, seniority, testing, and experience with union contractors). The Board has imposed some restrictions on such hiring hall regula-

shoremen's jobs on the west coast are divided between two lists, one for "gangs" of men and one for individuals called "plug-board men." The gangs are assigned by teams; the plug-board men are assigned individually.[99]

Although the halls were a major advance in labor-management relations, their legality was placed in substantial doubt by the 1947 Taft-Hartley Amendments to the NLRA, especially by the section 8(b)(2) ban on discrimination tending to encourage or discourage union membership. The hiring halls were operated by unions, and the unions routinely gave preference to their members.[100] The halls were closely identified with the closed shops at which the Taft-Hartley Act had taken direct aim. Thus, speculation about the halls' continued validity persisted until the NLRB addressed the question.[101]

When the Board finally responded, it found that section 8(b)(2) was not intended to ban hiring halls. The Board did, however, establish criteria that the halls had to satisfy to remain lawful. These *Mountain Pacific* standards[102] required a hiring hall to show three basic features:

> (1) that its referrals were made on a nondiscriminatory basis and were wholly unaffected by union membership, policies or practices; (2) that an employer could reject any referral; and (3) that notices of any provisions governing the hiring hall be posted for scrutiny by workers. If the hiring hall did not have these safeguards built in, then the arrangement was *per se* violative of 8(b)(2) and (1)(A).[103]

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tions. *E.g.*, Hagerty, Inc., 153 N.L.R.B. 1375 (1965) (charging service fees for use of hiring hall); Operating Eng'rs Local 542, 151 N.L.R.B. 497 (1965) (geographical restrictions). *See also* notes 178-84 & accompanying texts, *infra*.

[99] *Hearings*, *supra* note 83, at 100-10 (testimony of W. Glazier, Washington Representative, ILWU), *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 934-35.

[100] HABER & LEVINSON, LABOR RELATIONS AND PRODUCTIVITY IN THE BUILDING TRADES 62-65, 71 (1956); SUMMERS & WELLINGTON, *supra* note 83, at 927; Sherman, *supra* note 90, at 206-07. *See, e.g.*, United Ass'n of Journeymen Local 231 (Brown-Olds), 115 N.L.R.B. 594 (1956).

[101] National Maritime Union, 78 N.L.R.B. 971 (1948), *enf'd*, National Maritime Union v. NLRB, 175 F.2d 686 (2d Cir. 1949); SUMMERS & WELLINGTON, *supra* note 83, at 927-28; Sherman, *supra* note 90, at 208.

[102] Mountain Pacific Chapter of the Associated General Contractors, 119 N.L.R.B. 883 (1958), *enf't denied*, 270 F.2d 425 (9th Cir. 1959).

[103] 119 N.L.R.B. at 897. *See* Fenton, *supra* note 86; Rothman, *supra* note 93.

The *Mountain Pacific* standards prevailed until 1961, when the Supreme Court decided *Local 357, International Brotherhood of Teamsters v. NLRB.*[104] The Court, as had the NLRB, recognized the utility of hiring halls, that they work "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers."[105] Noting that Senator Taft had admitted in his committee's report to the Senate that hiring halls are useful, that the "union is frequently the best employment agency",[106] the Court went on to find that the Act did not forbid hiring halls, except to the extent that they were operated as a closed shop. The majority would not infer unlawful motives or means when the agreement specifically provided that there be no discrimination against employees because of the presence or absence of union membership.[107] "[T]he union is a service agency that probably encourages membership whenever it does its job well. But, . . . the only discouragement or encouragement of union membership banned by the Act is that which is 'accomplished by discrimination.' "[108] The Court thus concluded that Congress had sanctioned hiring halls generally, and had proscribed only certain forms of discrimination; a hiring hall with a nondiscrimination provision could not be invalidated without proof of actual discrimination. The Board's *per se Mountain Pacific* rules were overturned.

Local 357 signalled another era for workers in the "casual" employment trades. Initially subjected to oppressive hiring practices by employers with unlimited and unreviewable discretion, such workers improved their lot through unionization and the union-operated hiring halls. Those halls, however, began to breed their own problems, not only by discriminating against non-union workers, but also by engaging in other forms of arbitrariness. The NLRB sought to address some of those forms in *Mountain Pacific*, but the Supreme Court halted the effort. Left with no restrictions other than section 8(b)(2), a most uncertain *Miranda Fuel* doctrine, and, eventually, anti-race and anti-sex discrimination measures, the hiring halls have resurrected many of the evils of pre-

Unlawful hiring halls can also leave the employer in violation of § 8(a)(3), 29 U.S.C. § 158 (a)(3). *See, e.g.*, Fruin-Colnon Corp. v. NLRB, 571 F.2d 1017 (8th Cir. 1978).

[104] 365 U.S. 667 (1961).

[105] *Id.* at 672, *quoting Mountain Pacific*, 119 N.L.R.B. 883, 896 n.8 (1958).

[106] *Id.* at 673, *quoting* S. REP. 1827, *supra* note 84, at 13.

[107] *Id.* at 673, 675.

[108] *Id.* at 675-76, *citing* Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954).

union days. Power corrupts, and whether it is a union or an employer that is given unchecked power to dole out jobs, arbitrariness is bound to result with unsatisfactory frequency.[109] The Board's and the courts' repeated encounters with hiring hall capriciousness prove the point.

B. *NLRB and Judicial Responses to Hiring Hall Arbitrariness*

The instances and forms of hiring hall arbitrariness are manifold, and illustrative cases are numerous. Some forms of their discrimination, such as that motivated by a desire to encourage or discourage union membership or that based on racial prejudice, are clearly unlawful. Other forms are also arbitrary but more difficult to fit into a statutory mold. As in any case of discrimination, proof is difficult and the methods for discriminating have at times been subtle. Since *Local 357,* both the Board and the courts have been reluctant to impose affirmative duties on hiring halls to reduce the potential for abuse.

Obviously, hiring halls cannot discriminate to encourage union membership or to coerce "obedience" in union members. Yet, as might be expected, such cases have been the most common, for union officials who run the halls have too often used the job referral process to reward union members and union political allies.[110] Moreover, antagonism towards non-union "freeloaders" has always been characteristic of American labor unions.[111] Within the year following the *Local 357* decision, for example, the Board decided at least five hiring hall cases based on such alleged discrimination, finding 8(b)(2) violations in three of them.[112] A synthesis

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[109] *See, e.g., Hearings, supra* note 83, at 213-15 (testimony of L. Jonassen, President, Cleveland Tankers, Inc.), *reprinted in* SUMMERS & WELLINGTON, *supra* note 83, at 936-37.

[110] *E.g.,* Operating Eng'rs Local 18, 205 N.L.R.B. 901 (1973), *enf'd,* 500 F.2d 48 (6th Cir. 1974); Operating Eng'rs Local 406, 189 N.L.R.B. 255 (1971)(discussed below, notes 140-41 & accompanying text); Carpenters Local 1281, 152 N.L.R.B. 629 (1965), *enf'd,* 369 F.2d 684 (9th Cir. 1966). *See also* Ferro v. Ry. Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961); Hargrove v. Brotherhood of Locomotive Eng'rs, 116 F. Supp. 3 (D.D.C. 1953); notes 114-21 & accompanying text, *infra.*

[111] *See, e.g.,* NLRB v. Local 2, United Ass'n of Journeymen 360 F.2d 428 (2d Cir. 1966).

[112] Petersen Construction Corp., 134 N.L.R.B. 1768 (1961), *enf'd,* 336 F.2d 459 (9th Cir. 1964); Local 694, United Bhd. of Carpenters, 133 N.L.R.B. 52 (1961); Local 106, United Bhd. of Carpenters, 132 N.L.R.B. 1444 (1961); Pan Atlantic S.S. Co., 132 N.L.R.B. 868 (1961); Mason Contractors Exchange, 132 N.L.R.B. 839 (1961).

of the five cases shows a Board looking only for discrimination motivated by a desire to affect union membership and refusing to place any affirmative duties on the hiring halls to insure an equitable distribution of job openings.[113]

Hiring hall arbitrariness frequently arises from inter-union and intra-union political struggles. For example, in *Southern Stevedoring & Contracting Co.*,[114] a referral system operated by the International Longshoremen's Association (ILA) discriminated against members of the competing International Brotherhood of Longshoremen (IBL). The ILA had referred more than two hundred men for a job, yet despite the appearance of forty to fifty job-seeking IBL members at the "shape-up," only two or three of the referrals were from the IBL. The remainder of the two hundred were ILA members. The Board found the ILA's insistence on referring only ILA members to be an 8(b)(2) violation. In a similar vein, *United Brewery Workers*[115] found unlawful discrimination in a hiring hall's failure to refer workers because of their activities in and support of a rival union.[116]

Intra-union disputes generated illicit motivation and an 8(b)(2) violation in *Operating Engineers Local 406*.[117] Hiring hall officials there had persistently refused to refer for long-term jobs union dissidents who were critical of incumbent office holders and of the manner in which the hiring hall was operated. So, too, in *Operating Engineers Local 18*,[118] the Board found an unfair labor practice when union hiring hall officials removed an employee's name from its proper position on the referral roster and placed it at the bottom of the list. The discrimination was a retaliation for the employee's work on behalf of opposition candidates in the union election. The ALJ, whose opinion the Board adopted, cited as "settled law" the proposition that hiring halls are " 'obligated

See also Local 367, Int'l Bhd. of Elec. Workers, 134 N.L.R.B. 132 (1961). *See generally* Rothman, *supra* note 93, at 875-80.

[113] Rothman, *supra* note 93, at 881-82.

[114] 135 N.L.R.B. 544 (1962), *enf'd*, 332 F.2d 1017 (5th Cir. 1964). The text discusses just one of several instances of discrimination by the ILA against IBL members.

[115] 166 N.L.R.B. 915 (1967).

[116] *See also* General Truck Drivers Local 315, 217 N.L.R.B. 616 (1975) (discussed above, notes 72-76 & accompanying text), *enf'd*, 545 F.2d 1173 (9th Cir. 1976) (discussed below, note 217 & accompanying text).

[117] 189 N.L.R.B. 255 (1971).

[118] 205 N.L.R.B. 901 (1973), *enf'd*, 500 F.2d 48 (6th Cir. 1974).

to refer its applicants without regard to their union . . . loyalty or lack of it . . . .' "[119]

Reviewing courts have had little difficulty sustaining the Board in such cases. In *Fruin-Colnon v. NLRB*,[120] for example, union job referral officials had manipulated the termination of two workers who had formed a club to organize opposition to the union hierarchy and had campaigned against and criticized the union incumbents. The dissidents' terminations, said the Board and the Eighth Circuit, constituted an unfair labor practice. The D.C. Circuit has also found section 8(a) and 8(b) violations in the refusal of union officials to refer certain employees for work because the employees had been critical of the union leaders.[121]

The Board has dealt with these matters under traditional section 8(b) rationales — that discrimination on the basis of union politics has a natural tendency to encourage complicity among members and that, the Supreme Court has said, is proscribed by sections 8(b)(1)(A) and 8(b)(2).[122]

In addition to these "traditional" section 8(b)(2) violations, the Board and the courts have found certain kinds of "invidious" discrimination in hiring halls to be inconsistent with the NLRA. Race discrimination cases are the most obvious and the most frequent examples.[123] The Board has used its *Miranda Fuel*-DFR rationale, and has applied it consistently, in trying to cope with racial problems in union referral systems.

Nevertheless, hiring hall racial prejudice continues to plague the Board. Some halls remain intent on discriminating to preserve the jobs and priorities of long standing union members, who are overwhelmingly white males. The federal and state civil rights laws have not been effective in dealing with hiring hall race discrimination because of the unions' recalcitrance and the ease with which the discrimination can be camouflaged.[124] The job referral

[119] *Id.* at 910 *(quoting* Operating Eng'rs Local 406, 189 N.L.R.B. 255 (1971)).

[120] 571 F.2d 1017 (8th Cir. 1978).

[121] Lummus Co. v. NLRB, 339 F.2d 728 (D.C. Cir. 1964). *See also* authorities cited in note 110, *supra.*

[122] *E.g.*, Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954). *See* note 63, *supra.*

[123] *E.g.*, NLRB v. Houston Maritime, 426 F.2d 584 (5th Cir. 1970); Byrd v. Local 24, IBEW, 375 F. Supp. 545 (D. Md. 1974).

[124] *See* U.S. v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 592, 595 (1976);

systems are often elaborate and the discrimination subtle.

A 1976 report by the U.S. Civil Rights Commission on "Discriminatory Practices in Referral Unions," made the following conclusion about race and sex discrimination within those trades using hiring halls:

> Among referral unions generally, the greater the advantages of working in a particular occupation, the smaller are the proportion of women and minority men in the corresponding membership category. Conversely, the fewer the advantages, the greater are the proportions of women and minority men.[125]

The Commission cited practices of several unions designed to keep minority and women percentages low. For example, the Teamsters, though having less control over hiring than the maritime and building trades unions, have negotiated for seniority and transfer provisions that inhibit entry of minorities and women into the desirable jobs and thus perpetuate white male control.[126] Moreover, white teamsters have refused to ride with minority drivers, and the union has refused to ensure equal opportunity in referrals to road-driving positions.[127] Many building trades unions have also continued to overtly and deliberately discriminate in their job referral systems against minorities. Referral eligibility and membership rules, limitations on membership size, interviews, and apprenticeship requirements have all been used to keep minority and women workers at a minimum.[128]

In addition to racial prejudice, the Board and the courts have also applied the *Miranda Fuel* proscription to discrimination based on gender,[129] ethnic origin, or alienage. In *NLRB v. ILA Local*

Local 181, Int'l Union of Operating Eng'rs, 148 N.L.R.B. 750, 753 (1964). *See also* authorities cited in note 127, *infra*.

[125] U.S. CIVIL RIGHTS COMMISSION, REPORT ON DISCRIMINATORY PRACTICES BY REFERRAL UNIONS (1976) [hereinafter U.S.C.R.C. REPORT], *reprinted in* A. SMITH, EMPLOYMENT DISCRIMINATION LAW 844 (1978).

[126] U.S.C.R.C. REPORT, *supra* note 125, in SMITH, *supra* note 125, at 846.

[127] *Id.* For examples of how minorities have been discriminated against in Teamster hiring practices, *see* Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[128] U.S.C.R.C. REPORT, *supra* note 125, in SMITH, *supra* note 125, at 846. Such tactics proved to be quite successful. "In 1900, black union members constituted somewhere between zero and 1.6 percent of building trades unions' total membership. By 1972, the percentage was approximately 3.6 percent." U.S.C.R.C. REPORT, *supra* note 125, in SMITH, *supra* note 125, at 845.

[129] *See* Olympic S.S. Co., 233 N.L.R.B. 169, 97 L.R.R.M. 1276 (1977). *See also*

1581,[130] the Fifth Circuit granted enforcement of a Board decision that a job referral system based on citizenship and residence of prospective employees' families violated both the *Radio Officers* section 8(b)(2) standard and the *Miranda Fuel*-DFR standard. Under the referral system, "highest priority went to United States citizens; second priority went to Mexican nationals with families in the United States; and lowest priority went to Mexican nationals whose families remained in Mexico."[131] The Court analogized to equal protection cases finding discrimination against aliens so arbitrary as to require some form of strict judicial scrutiny.[132] The court concluded, when a union discriminates on such invidious grounds, it impermissibly encourages union membership or union activity.[133]

In reflection, then, section 8(b)(2) clearly bans hiring halls from discriminating on the basis of union membership or union political views. The *Miranda Fuel*-DFR voids discrimination based on race, sex, alienage, or ethnic origin. (This latter doctrine could be subject to expansion to include protection for any insular or traditionally disadvantaged and prejudice-scarred group.) Other forms of hiring hall discrimination have been more problematic; they clearly have troubled the Board and the judges, but there has still not been developed a sound and adequately inclusive approach. The Board and reviewing courts have usually managed to find some 8(b) rationale for remedying hiring hall arbitrariness. To do so however, they have often either strained section 8(b)(2)'s language, or latched onto a clear but relatively minor 8(b)(2) viola-

Local 106, Glass Bottle Blowers Ass'n, 210 N.L.R.B. 943 (1974), *enf'd*, 520 F.2d 693 (6th Cir. 1975).

[130] 489 F.2d 635 (1974).

[131] *Id.* at 636.

[132] *E.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). Since *Local 1581* was decided, however, the Supreme Court has retreated from its strictest scrutiny standard for alienage classifications. Foley v. Connelie, 435 U.S. 291 (1978) (Citizenship requirement for state troopers did not violate equal protection); Matthews v. Diaz, 426 U.S. 67 (1976) (Congress may condition an alien's eligibility for Medicare on five-year continuous United States residence and on admission for permanent residence).

[133] 489 F.2d at 638. *See also* DeMalherbe v. International Union of Elevator Constructors, 438 F. Supp. 1121 (S.D. Fla. 1977) (For purpose of determining preemption, deletion of plaintiff's name solely because he was an alien was "arguably," at least, a DFR violation and an unfair labor practice); *Cf.* T.I.M.E. — DC, Inc. v. NLRB, 504 F.2d 294 (5th Cir. 1974) (union's "parochialism" violated DFR).

tion in order to reach related conduct that is more offensive though not a certain unfair labor practice. With an increasing and encouraging frequency, the DFR has provided the decisional basis. In still other cases, no remedy or relief was allowed.[134]

ILWU Local 13[135] is one example of hiring hall arbitrariness that did not fit neatly into a clear-cut statutory mold. Local 13 had established a three-tiered referral system, List "A" priority referrals, List "B" secondary referrals, and a list for "casuals", who were referred last and rarely. The only means for a casual to become a B registrant was to know and be sponsored by an A listee. The trial examiner thought the sponsorship system had "more the ring of an archaic social club than of a labor organization."[136] Clearly, the system facilitated nepotism, racism, and other sorts of undersirable favoritism, yet it did not really relate to the union in a typical 8(b)(2) way. "There was no direct benefit conferred on union members as a class, and union membership was not a criterion of referral from the union's hiring hall."[137] The trial examiner had relied upon *Miranda Fuel* for his conclusion invalidating the system. A majority of the Board's three member panel tacitly approved that approach; Member Fanning wrote separately to say that 8(b)(2) controlled because the "unlawful conduct was related to union considerations."[138]

In *Heavy Construction Laborers' Local 663,*[139] operation of the union hiring hall was "carried out and controlled entirely" by the

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[134] *Local 357,* for example, presented some egregious facts. According to Justice Clark's dissent (the majority did not develop the facts of the NLRB complaint), the complainant Lester Slater alleged that the union hiring hall had refused to refer him. 365 U.S. 667, 685-87. The record reflected that the refusal could have been the result of some problems Slater had with a previous employer, some impressions about Slater's literacy, the way he dressed, and the manner in which he "fussed around and fussed around." *Id.* at 687. The union official in charge of the hiring hall was cryptic, condescending and arbitrary in dealing with Slater. In NLRB v. Local 294, Int'l. Bhd. of Teamsters, 317 F.2d 746 (1963), the Second Circuit could not find an illicit animus and therefore allowed union officials to ignore a worker's "priority" ranking for employment referral. The officials refused to refer him because they thought he was a "trouble maker" and "no good." To the same effect is ILWU v. Kunte, 334 F.2d 165 (9th Cir. 1964).

[135] 183 N.L.R.B. 221 (1970), *enf'd,* 549 F.2d 1346 (9th Cir. 1977).

[136] *Id.* at 228.

[137] Bryson, *supra* note 8, at 1081.

[138] 183 N.L.R.B. at 221.

[139] 205 N.L.R.B. 455 (1973).

assistant business agent.[140] The Board, adopting the ALJ's opinion and finding, found an unfair labor practice in the agent's failure to strictly abide by the employment contract's hiring hall provisions. What was most offensive about the referral operation, however, was the manner in which the hall was administered — "virtually out of the vest pocket of [the assistant business agent], maintaining no regular list or system on a visibly equitable basis, being frequently inaccessible and applying broad subjective judgments in selecting an applicant for referral."[141] Still, the Board grounded the unfair labor practice finding on the business agent's failure to give due consideration to the employers' wishes, as required by the collective bargaining agreement.

As noted above, *Operating Engineers Local 406* involved official hostility based on intra-union political disputes.[142] Yet the Board was also concerned with the general manner in which the hiring hall was conducted, particularly in regard to short term work. Those jobs (of 1-3 days duration) were assigned by the business agent who called out the openings in the hiring hall and then gave them to the first employee to respond. While the procedure "lent itself to abuse and arbitrariness,"[143] the Board refused to find the system to be a *per se* unfair labor practice because the complaint had not challenged the procedure, but had alleged only that the charging parties had received unequal treatment.[144]

Operating Engineers Local 513[145] illustrates an expansive 8(b)(2) reading. The Board there sustained a worker's section 8(b)(2) charge against a union business agent for refusing to refer the worker, and referring instead other people with less seniority and less time out of work. Members Jenkins and Kennedy concluded that "the evidence does not show any legitimate reason for the refusal to refer [the charging party] for employment, and does show *prima facie* bases, unexplained by [the union], for inferring discriminatory treatment."[146] Thus, held the two member majority, the union violated sections 8(b)(1)(A) and 8(b)(2). The only inferences of discrimination cited by the majority arose from an

[140] *Id.* at 456.
[141] *Id.* at 457.
[142] Notes 117-19 & accompanying text, *supra.*
[143] 189 N.L.R.B. 255, 265 (1971).
[144] *Id.* at 264.
[145] 199 N.L.R.B. 921 (1972), *enf'd per curiam,* 85 L.R.R.M. 2303 (8th Cir. 1973).
[146] 199 N.L.R.B. at 922.

incident in which the employee had insulted the union business agent at a meeting and had thereafter experienced difficulty in getting referrals.[147] Chairman Miller dissented, contending that the record was insufficient to establish the illegal motivation required to prove an 8(b)(2) violation.[148]

Taken together, these four precedents (*ILWU Local 13*; *Laborers Local 663*; *Operating Engineers Local 406*; *Operating Engineers Local 513*) provide a basis for greater judicial and administrative scrutiny of hiring halls. They also add support for a more enlightened use of the DFR in reviewing job referral procedures.

Some recent DFR-hiring hall developments do offer hope that the Board is now resolving its reservations about providing relief for hiring hall "arbitrariness" that does not involve invidious or union-related motives. In *Local 324, International Union of Operating Engineers,*[149] the majority of a four-member panel ordered a union's business agent to disclose to an employee the names and addresses of the fifty workers on either side of him in the hiring hall's out-of-work file. The Board characterized the union's action in withholding the listings as an "arbitrary refusal to comply with [the employee's] reasonable and manageable request for job referral information."[150] While there were some intra-union political overtones to the case, they were not essential to the majority's *ratio*

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[147] *Id.* at 921.

[148] *Id.* at 926. *IBEW Local 592,* 223 N.L.R.B. 899 (1976), may shed some light on *Local 513's* § 8(b)(2) holding. The Board-approved ALJ opinion in *Local 592* said that "discriminatory motivation is presumed where, through its control of employment opportunities, a labor organization demonstrates its power by impairing an employee's tenure of employment." 223 N.L.R.B. at 901, *citing* Operating Engineers Local 18, 204 N.L.R.B. 681 (1973) (notes 118-19 & accompanying text, *supra*) and Operating Engineers Local 513, 199 N.L.R.B. 921 (1972). That rationale is closely akin to Judge Friendly's *Miranda Fuel* dissent — that when a union arbitrarily wields its power against an employee, for whatever reason, it naturally tends to encourage employees to be union members and to behave according to the union officials' dictates. 326 F.2d at 183; notes 58, 64 & accompanying text, *supra. See also* notes 59,63, *supra.* In *Local 592,* however, the Board found no unfair labor practice because the union had rebutted the presumption of illicit motive by explaining that the employee had failed a test that all other referred workers were required to pass. 223 N.L.R.B. at 902.

[149] 226 N.L.R.B. 587 (1976).

[150] *Id.* at 587. Member Fanning dissented, contending that the DFR "protects employees from their representative's hostility, but not from mere negligence or lack of responsiveness," that the duty "was not developed for application to these housekeeping matters," and that "it is breached only when [the union] deals in bad faith." *Id.* at 588.

decidendi. The Board-approved ALJ opinion held that "the primary question" in a DFR suit "appears to be whether the [union] has engaged in 'arbitrary conduct.'"[151] The discussion clearly communicated that a union could act "arbitrarily" and thereby violate the DFR without practicing either invidious or "traditional" 8(b)(2) discrimination.[152] Similarly, the Board in *Denver Stereotypers*[153] found that a union breached the DFR when it arbitrarily, though not invidiously, deprived an employee of his rightful place on a hiring list.

Although not deciding the legitimacy of the hiring hall's manner of operation, the ALJ in *Local 324* expressed displeasure that the factors upon which the union relied in making referrals were "completely devoid of boundaries, parameters, guidelines or definitions."[154] The hiring hall was described as the business agent's personal "fiefdom."[155] After noting that the business agent would be able to justify, under his open-ended criteria, almost any shuffling of job assignments and employees that he pleased, the ALJ concluded that, "[s]uch near-absolute power vested in a union official is plainly a potentially dangerous thing."[156]

The varied reactions by the NLRB to hiring hall mistreatment of workers, particularly in those instances of "nontraditional" arbitrariness, reflect that the Board is groping. The members are clearly concerned about such abuses in job referral systems, but have felt constrained by the language of 8(b)(2) and by the *Local 357* decision. The recent applications of the DFR to the hiring hall context suggest a potentially reasonable approach. The Board has not yet, however, fully articulated clear standards that comprehensively and authoritatively address the breadth of hiring hall problems.

The courts' performances in hiring hall cases have not produced any real clarifications or improvements on the NLRB's basic

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[151] *Id.* at 597.

[152] *Id.* at 597-98. As noted in the text in Part I-B, *supra,* the Board is moving (or has moved) away from a motive-based DFR standard.

[153] 231 N.L.R.B. 678 (1977). The Board has recently used the DFR to decide several cases of job referral abuses. *E.g.,* Bricklayers & Stonemasons Local 8, 235 N.L.R.B. No. 152, 98 L.R.R.M. 1343 (1978) (DFR and 8(b)(2) alternative grounds); Laborers Local 252, 233 N.L.R.B. No. 195, 97 L.R.R.M. 1128 (1977).

[154] 226 N.L.R.B. at 595.

[155] *Id.*

[156] *Id.*

approaches. Courts reviewing NLRB hiring hall decisions have generally sustained the Board's efforts to remedy arbitrary conduct,[157] and several circuits have ruled that section 8(b)(2) is violated by hiring hall discrimination brought on by personal animosity against particular employees.[158] At least one court of appeals has had the opportunity to deal with hiring hall abuses in a section 301 law suit. In *Emmanuel v. Omaha Carpenters District Council,*[159] the Eighth Circuit found a DFR violation against a union for its officials' conduct in depriving the plaintiff of a job that he would have received had the union not pressured the employer otherwise. The union breached its DFR by interfering with the referral policy, established by the collective bargaining agreement, that the employer's expressed desires be given priority. In another instance, a district court has applied the judicially-developed DFR to an alleged hiring hall injury. In 1958, *Berman v. National Maritime Union*[160] considered the validity of a hiring hall provision that denied job referrals to any seaman who did not have Coast Guard clearance. The "clearance" program was in reality another Communist "witch hunt," so prevalent during the McCarthy period, and had already been declared unconstitutional. The district court held that a DFR claim for relief had been stated against the union, for the clearance prerequisite "bore no reasonable relationship to [the plaintiffs'] suitability for employment."[161]

The cases cited throughout this section illustrate the variety and seriousness of arbitrary conduct in hiring halls.[162] The abuses range from contemptuously blatant to complex and very subtle. As might be expected, the causes and motives behind the abuses are manifold. Nevertheless, whether the arbitrariness is brought on by

[157] *E.g.,* Pacific Maritime Ass'n v. NLRB, 452 F.2d 8 (9th Cir. 1971), *enf'g,* 184 N.L.R.B. 312 (1970); NLRB v. ILWU Local 13, 549 F.2d. 1346 (9th Cir. 1977), *enf'g,* 183 N.L.R.B. 221 (1970).

[158] *E.g.,* NLRB v. ILWU Local 27, 514 F.2d 481 (9th Cir. 1975); General Truckdrivers Local 5 v. NLRB, 389 F.2d 757 (5th Cir. 1968).

[159] 560 F.2d 382 (1977), *aff'g,* 422 F. Supp. 204 (D. Neb. 1976), *on remand from,* 535 F.2d 420 (8th Cir. 1976).

[160] 166 F. Supp. 327 (S.D.N.Y. 1958). *See also* Clark, *supra* note 8, at 1149-50.

[161] 166 F. Supp. at 331.

[162] The arbitrariness persists as cases continue to come up before the Board. For a recent and particularly outrageous example of hiring hall abuses, *see* Painters Local 1555, 241 N.L.R.B. No. 111, 100 L.R.R.M. 1578 (1979). For other recent examples of hiring hall arbitrariness, *see* Shopmen's Local 24, 99 L.R.R.M. 1065 (1978); Local 90, Operative Plasterers & Cement Masons, 236 N.L.R.B. No. 37, 77 LAB. L. REP. (CCH) 19,297 (1978); authorities cited in note 153, *supra.*

racial prejudice, union politics, personal animosity, or official ignorance, the nature of the injury to workers remains the same. In each case, the employees are victimized by unfairness and are deprived of work opportunities.

C. *Summary*

The foregoing discussion of hiring hall cases evidences that developments have come slowly and have not produced a coherent means for dealing with abuses in job referral systems. Some synthesis, however, is necessary and possible. These observations can safely be made:

1) Hiring halls can be operated consistently with the NLRA;
2) Application of section 8(b)(2) and the *Miranda Fuel*-DFR clearly prohibits hiring hall discrimination against workers —
   a) to encourage or discourage union membership,
   b) to coerce complicity to union officials,
   c) for intraunion or interunion political purposes,
   d) on any "invidious" grounds, such as race, sex, alienage, and ethnic origin are prohibited;
3) The law is less certain about arbitrary hiring hall actions other than those mentioned in paragraph (2). Some authorities, not overruled, hold that the Board's DFR requires a specific discriminatory animus. There are, however, a number of Board decisions and a clear trend toward finding DFR violations in arbitrary union actions, even though no invidious or union-related motive is present;
4) The Supreme Court has assiduously avoided a determination of the DFR's role under sections 7 and 8, and in the hiring hall context;
5) The courts have had very few opportunities to apply the DFR to hiring halls. Thus far those cases have not questioned the doctrine's applicability, and there is, indeed, no reason why it should not apply. No special DFR considerations for hiring halls have been developed. The cases have imposed only the general duty — to basically avoid arbitrary, discriminatory, or bad faith conduct — and have not fleshed out the duty for the hiring hall context. The relief available has strictly been *post hoc* recovery for discrimination that has already occurred.

[163] Mumford v. Glover, 503 F.2d 878, 882 (5th Cir. 1974); Local 324, Int'l Union of Operating Engineers, 226 N.L.R.B. 587, 597 (1976). *See generally* BOYCE, *supra* note 10; Clark, *supra* note 8.

III. Application of the DFR to Hiring Halls

A. Whether the DFR Applies

The DFR applies to each facet of a union's representation of the bargaining unit's members.[163] Yet, as has also been discussed, the courts have rarely addressed whether the duty extends to the hiring hall context, and the Board, at least until recently,[164] has avoided relying solely on its DFR version in hiring hall cases. Whatever the reasons for the slow development, the DFR certainly should regulate hiring hall operations. No court has held otherwise, and no good reason has been advanced why it should not apply.[165] True, a union hall deserves maximum discretion in trying to allocate scarce jobs; there are more applicants than there are jobs, and that creates a very "troublesome" issue.[166] Yet that should not be cause for rejecting the DFR. Such considerations are important in defining the DFR's scope, but not in denying its relevance.[167]

There are compelling reasons why the DFR should apply to hiring halls and job referral systems. Union officials conducting such operations wield enormous power over employees and hold unduly inflated discretion. The halls provide the only source of employment for union members and, in many regions, for all workers within a given industry. That kind of power is so subject to

[164] *See* authorities cited in notes 149, 153. In Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587 (1976), the Board's brief opinion assumed that the DFR applied to hiring halls, though dissenting Member Fanning disagreed. *Id.* at 588. The majority-endorsed ALJ opinion at least discussed the issue. The ALJ noted that the DFR protects employees "*in matters affecting* their employment," *id.* at 597, *quoting* Miranda Fuel, 140 N.L.R.B. at 185 (emphasis supplied by ALJ), and in "the negotiation, *administration,* and enforcement of collective bargaining agreements," 226 N.L.R.B. at 597, *quoting* Bazarte v. United Transp. Union, 429 F.2d 868, 871 (3d Cir. 1970), (emphasis supplied by ALJ). Because operation of a hiring hall falls within these definitions, the ALJ concluded that the DFR should be engaged. 226 N.L.R.B. at 597. *See also* note 167, *infra.*

[165] *But see* Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 588 (1976) (Member Fanning, dissenting); Fanning, *supra* note 10, at 834-36.

[166] *See* Laturner v. Burlington Northern, Inc., 501 F.2d 593, 599 (9th Cir. 1974), *cert. den.,* 419 U.S. 1109 (1974); Red Ball Motor Freight, Inc., 157 N.L.R.B. 1237, 1245 (1966), *enf'd sub nom.,* Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

[167] If anything, the complexity of the problem weighs heavily towards an informed and thoughtful DFR application. Indeed, the Board's fountainhead DFR case, *Miranda Fuel,* offers a hiring hall illustration as an obvious example of when the DFR would naturally be applied. 140 N.L.R.B. at 184.

abuse, and the stakes are so high.[168] The issues go to the very core of all workers' primary concern — jobs. DFR protection in the grievance and collective bargaining processes is worth precious little to workers who cannot get employment because of union hiring hall abuses.

The Supreme Court in imposing the DFR has placed great emphasis on the exclusive nature of a union's right to act as the bargaining representative for the employee unit;[169] with such exclusivity goes certain responsibilities of fairness. Similarly, a hiring hall with the bargained-for power to be the exclusive source for job referrals should be subject to the same duty to treat fairly all employees who use the hiring hall.

When unchecked power exists, the leverage over workers possessed by union officials is enormous; the officials have the ability to exact unhealthy amounts of complicity and obedience, or worse, to easily (and illegally) extort gifts and favors. Oftentimes, if not usually, such unchecked power will "chill" the hiring hall enrollees from exercising protected rights for fear of aggravating hiring hall officials. Systems that operate with no guidelines or with vague standards that are difficult to understand necessarily create unhealthy and unduly bloated official discretion. In such circumstances, a chill factor will result even when not intended by the officials.

Application of the DFR to hiring halls could on several points advance predictability and certainty of the NLRA's impact. First, if the DFR structure suggested below is implemented, there will be a set of specific, per se requirements that every hiring hall and job referral system must satisfy in order to confine discretion. These obligations, themselves a clarification of the union's duty, when fulfilled would effect greater openness in and understanding of hiring hall operations. Second, the use of the DFR would end any remaining confusion about whether an 8(b)(2) union-related or invidious animus must be proved in order for an aggrieved hiring

[168] Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 595 (1976):

> [T]here inheres an enormous potential for abuse in a hiring hall which maintains no published priority lists, which operates with no written standards, for referral, and in which the livelihood of men has been confined to the unbridled discretion of a few union officials.

[169] *E.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1952); Steele v. Louisville & N.R.R., 323 U.S. 192, 200 (1944). *See also* Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 587 (1976).

hall applicant to recover for wrongdoing against him/her. Besides confusion, the only accomplishment of the 8(b)(2) limitation in a hiring hall setting has been to create artificial and unjust distinctions among workers who have been arbitrarily treated by hiring hall officials.

Thus, by insuring DFR protection in the job referral stages, especially if the requirements suggested below are implemented, workers will know what their rights are and will feel more secure in exercising them. Union officials, too, will know better what is expected of them. Because predictability will be enhanced, all parties can act in greater reliance on the law. Quite possibly, too, there may be fewer law suits — both because there should be fewer abuses and because there will be a greater understanding of what the law requires.

B. How the DFR Applies — Construction of a "Constitutionally-Based" DFR

Actually, the issue is not so much whether the DFR applies to hiring halls; the more important (and difficult) question is, *"How* should it apply?" The answer to that question occupies the remainder of this article.

1. Basic Premises

Under the "constitutionally-based" theory advanced in the ensuing discussion, the DFR imposes upon union-operated hiring halls an affirmative obligation to develop fair and rational rules, to have those rules written, posted and distributed, and to maintain accurate records of all job applications and referrals. Failure to meet these responsibilities would justify a DFR action and relief, whether pursued in a Section 301 court suit or an unfair labor practice charge.

Such an approach is a return to a sort of *Mountain Pacific* "per se" inquiry.[170] Actually, this suggested DFR standard would go much further than *Mountain Pacific* in imposing on hiring halls requirements of fairness and rationality. The requirements, however, are not unreasonable — any hiring hall that seeks to treat its workers equally and fairly would naturally adhere to this regimen without any administrative or judicial prodding. The standards

[170] *See* notes 102-03 & accompanying text, *supra.*

are warranted by the susceptibility to abuse (amply demonstrated in the cases discussed above)[171] that is inherent in any system of job distribution. They provide a more effective approach to the persistent offenses of hiring halls because they work to prevent injuries, not merely to provide a *post hoc* remedy. Broadly stated, the standards require exposure of all aspects of a job referral system and adherence to basic due process concepts of fairness and rationality. The doctrinal foundation for imposing such duties on a union can be found in existing DFR case law and commentary, supported by analogies to constitutional and administrative law.

The DFR is rooted in the union's statutorily granted powers as an exclusive bargaining representative. *Steele v. Louisville & Nashville Railroad,*[172] the Supreme Court's first recognition of the DFR, likened the union's power to "that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."[173] To much the same effect, the Court added, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, . . . , but it has also imposed on the representative body a corresponding duty."[174] That duty is the DFR. The Court continued during the DFR's early development to frame the union's duty in terms of the fourteenth amendment's constraints on legislatures.[175]

The *Steele* analogy between the DFR and a legislature's constitutional duty is crucially important in the present context.[176]

[171] All of the cases cited in Part II-B provide apt illustrations. In particular, *see* authorities in notes 135, 139, 142, 147, 153, and 162. In addition, *see* Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977); Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963); Gray v. International Ass'n of Heat & Frost Insulators Local 51, 416 F.2d 313, *aff'd after remand,* 447 F.2d 1118 (1969).

[172] 323 U.S. 192 (1944).

[173] *Id.* at 198.

[174] *Id.* at 202.

[175] *E.g.,* Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 773-74 (1952); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 214 (1944). *See also* Miranda Fuel, Inc., 140 N.L.R.B. 181, 185 (1962); Summers, *supra* note 10, at 253.

[176] This return to the DFR's roots is particularly appropriate because the duty's development thus far has not produced an effective means for dealing with hiring hall mistreatment of employees.

The analogy points to the relevance and instructive value of constitutional law and its individual rights limitations on legislative/administrative authority.[177] Faithful adherence to *Steele* requires consideration of those limitations, just as if the union was a governmental body. When the union's hiring hall DFR is so structured, as it is in the ensuing discussion, a coherent and equitable approach can emerge. Court and NLRB decisions have produced results supporting this constitutionally-based DFR, but synthesis and elaboration are needed.

2. Equal Protection Model

The constitutional considerations for a governmental hiring hall are manifold.[178] Certainly, the criteria upon which referrals are made must satisfy equal protection. The criteria cannot discriminate on any "invidious" grounds.[179] As seen above,[180] the courts and

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[177] Professor Summers has provided an insight that is instructive for the constitutionally-based DFR:

> Returning to the roots of the duty, when a union negotiates a contract it is acting like a legislature establishing rules, and like a legislature it is allowed a wide range of reasonableness; but when a union administers a contract it is acting more as an administrative agency enforcing and applying legislation, and it must act within the boundaries of established rules.

Summers, *supra* note 10, at 257. More specifically, when a union negotiates for a hiring hall, it is acting in a legislative capacity, and when it operates the hiring hall, it acts much like an administrative agency.

[178] Government's role as an employer should not be confused with what its role would be as operator of a job referral system. As an employer, the government would have interests and concerns in hiring personnel that are quite different from those it would maintain in a referral system, just as a union has different concerns in hiring its own employees than it does in fulfilling its fiduciary duty to its members through the hiring hall. Thus, constitutional cases regulating the civil service are not dispositive in determining hiring hall duties. Of course, civil service statutes and regulations incorporate many of the same principles put forth here as regulating hiring halls. Nevertheless, those principles have not yet been held to be constitutionally required. *Cf.* Elrod v. Burns, 427 U.S. 347 (1976). A more appropriate analogy to hiring halls is the state unemployment offices, although they are not operated as exclusive sources for jobs, as union hiring halls are for members of the collective bargaining unit.

[179] *E.g.*, Craig v. Boren, 429 U.S. 190 (1976) (sex); Sugarman v. Dougall, 413 U.S. 634 (1973) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race). When one of these "suspect" classifications is created, the state must have an important countervailing interest in order to avoid equal protection invalidation. This "strict scrutiny" is also applied when a classification affects a "fundamental interest," *i.e.*, a right explicitly or implicitly granted by the Constitution. San Antonio Indepen-

the Board have carefully applied this restriction to hiring halls, forbidding distinctions based on race, sex, alienage, and national origin. Equal protection law also requires that any legislative classification be justified by some rational basis, that there be some substantial relationship between the means adopted and the ends sought to be achieved.[181] The standard is not a restrictive one, yet it does require the legislature to articulate some rationale for its distinctions.

Certainly, hiring halls should identify some rational basis for their job referral priorities, and indeed, substantial authority already exists to impose that DFR obligation on unions.[182] Courts have held that union negotiated contracts and plans for accomplishing layoffs and mergers must be rational and nondiscriminatory,[183] and the Board's *Miranda Fuel* proscription against "irrelevant and invidious" classifications is essentially equivalent to the prevailing equal protection tests. The intensity of judicial scrutiny of hiring hall referral policies should correspond to that which has been applied in reviewing both legislation under the equal protection clause and the terms of a collective bargaining agreement under the DFR.[184]

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dent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (free speech); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to travel & right to vote in a public election); Skinner v. Oklahoma, 316 U.S. 535 (1942) (privacy). This "fundamental" interest line of cases can be analogized in DFR instances in which hiring hall discrimination has been based on union politics. Notes 114-21 & accompanying text, *supra. See also* Berman v. National Maritime Union, 166 F. Supp. 327 (S.D.N.Y. 1958), discussed in notes 160-62 & accompanying text, *supra.*

[180] Notes 123-33 & accompanying text, *supra.*

[181] *E.g.*, U.S.D.A. v. Moreno, 413 U.S. 528 (1973); Reed v. Reed, 404 U.S. 71 (1971); F.S. Royster Guaro Co. v. Virginia, 253 U.S. 412 (1920).

[182] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1000, 1082-99, 1116-36 (1978); Gunther, *The Supreme Court, 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065 (1969).

[183] *E.g.*, Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974); General Truck Drivers Local 568 v. N.L.R.B., 379 F.2d 137 (D.C. Cir. 1967).

[184] *See* BOYCE, *supra* note 10, at 14-28; Summers, *supra* note 10, at 254-58; notes 34-37, 177 & accompanying text, *supra.*

3. Due Process Model

a. General principles

The more significant impact of an application of constitutional principles to hiring halls would come through imposition of *procedural* restrictions. Procedures are the hallmark for insuring fairness in Anglo-American law;[185] procedural due process bares decision-making, bridles discretion, and assures fair treatment without unduly infringing on substantive policies.

A job-referral system has many procedural analogies in governmental functions.[186] Speaking most broadly, however, the process of assigning jobs is much like the process in distributing most any governmental benefit, particularly those that are of limited supply, be it welfare payments, licenses, housing, etc. In assigning jobs, a union must determine who among its enrollees should receive priority on a job opening. Governmental benefits programs face the same process. Most likely, a hiring hall, like a government program, is assigning a scarce resource — there are not enough jobs, or welfare dollars, or public houses, or other such benefits, to go around to all those who need them. In both the hiring hall and government cases, the problem is to confer a benefit that cannot be shared evenly or cannot be distributed to each person who needs one.

The procedural obligations on government in conferring a benefit are not great. They certainly do not require hearings or a formalized right of confrontation of an adversarial nature. Instead, procedural due process concentrates in this context on a system of application and dispensation that is efficient (for *both* applicant and administrative agency), rational in the means by which it reaches its decisions, open, and, of course, fair.[187]

Two leading cases are particularly instructive. *Hornsby v. Allen*[188] was a due process challenge to a denial of plaintiff's appli-

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[185] *See generally* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-74 (1951) (Frankfurter, J., concurring).

[186] Government as an employer is not, however, analogous. *See* note 178, *supra. But cf.* Elrod v. Burns, 427 U.S. 347 (1976).

[187] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 46-47, 155, 187 (3d ed. 1972) [hereinafter cited as DAVIS TEXT]; K. DAVIS, ADMINISTRATIVE LAW TREATISE 26-29, 223-30 (1976 Supp.) and 58-62 (1920 Supp.) [hereinafter cited as DAVIS TREATISE]; TRIBE, *supra* note 182, at 1146.

[188] 326 F.2d 605 (1964), *reh. den.*, 330 F.2d 55 (5th Cir. 1964).

cation for a liquor license by Atlanta's mayor and alderman. The only real criterion for getting a license was to secure the approval of the alderman from the ward in which the business was located. The Fifth Circuit found due process to be offended by the Board's rigid adherence to the ward "veto" power and the city's failure to develop ascertainable rules for licensing decisions. "The public has the right," held the court, "to expect its officers to observe prescribed standards and to make adjudications on the basis of merit."[189] The due process standards were essential because "absolute and uncontrolled discretion invites abuse."[190] "If there are too many qualified applicants," then, the court informed the aldermen, their solution is "to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified."[191]

In the second case, *Holmes v. New York City Housing Authority*,[192] the Second Circuit found a claim for relief in a complaint charging that the housing authority had failed to process 90,000 annual applications for 10,000 public housing slots "chronologically, or in accordance with ascertainable standards, or in any other reasonable and systematic manner."[193] The absence of any meaningful procedural constraints "increase[d] the likelihood of favoritism, partiality and arbitariness," and constituted an "intolerable invitation for abuse."[194] Thus, "due process requires that selections among applicants be made in accordance with 'ascertainable standards,' [*Hornsby*], and in cases where many candidates are equally qualified under these standards, that further selections be made in some reasonable manner such as 'by lot or on the basis of the chronological order of application.'"[195]

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[189] 326 F.2d at 610.

[190] *Id.* *See* Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 595 (1976), *quoted in* note 168, *supra.*

[191] 326 F.2d at 610.

[192] 398 F.2d 262 (2d Cir. 1968).

[193] *Id.* at 264. *See* DAVIS TEXT, *supra* note 187, at 47.

[194] 398 F.2d at 264.

[195] *Id.* at 265. *See* Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (due process violated by state welfare agency's failure to inform eligible benefits recipients of their right to clothing as part of general assistance grant and failure to develop administrative guidelines governing eligibility determinations):

> In the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision-making

This concept, that governmental "privileges" or benefits can be administered only in accordance with preestablished, reasonable standards, has been widely accepted by a variety of both state and federal courts in a variety of circumstances.[196] For example, in *Tosto v. Nursing Home Loan Agency,*[197] the Pennsylvania Supreme Court sustained a legislative delegation to a state agency to administer a loan program for nursing homes. The enabling legislation satisfied constitutional scrutiny by requiring the agency "to establish criteria for use in determination of priority among applicants and eligibility for loan refinancing, and to develop a standard form for loan applications. The use of neutral, generally applicable criteria and forms is an important safeguard against the arbitrariness of ad hoc decision-making."[198] The concept has not been limited to governmental distribution schemes, but has been applied to any government program in which the administrators have received broad delegations of authority. Thus the Seventh Circuit has concluded that state university administrators cannot dismiss students on the basis of imperceptible rules that do not give students guidance or foreknowledge of what is to be expected of them.[199] A Philadelphia federal court has required that city's police department to develop a set of reasonable procedures for handling citizen complaints of police abuse.[200] Police in another case were ordered by the D.C. Circuit to devise a set of rules for handling and preserving audio tapes of statements, particularly confessions, made by criminal defendants and witnesses.[201] The Supreme Court has

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. . . . Typically this requirement is met through the adoption and implementation of ascertainable standards of eligibility.

See also notes 196-207 & accompanying text, *infra.*

[196] Generally, procedural due process protects individual interests regardless of whether those interests are characterized as "rights" or "privileges." DAVIS TEXT, *supra* note 187, at 175-86; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968). *But see* DAVIS, *supra,* at 186-89 (doctrine prevails in some areas); *cf.* Greenholtz v. Inmates of Neb. Penal & Corrections Complex, 99 S. Ct. 2100, 2104-05 (1979) (parole statute provides inmates "no more than a mere hope," which does not entitle them to formal hearings).

[197] 460 Pa. 1, 331 A.2d 198 (1975).

[198] *Id.* at 13, 331 A.2d at 203-04.

[199] Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). *See also* notes 222-30 & accompanying text, *infra.*

[200] C.O.P.P.A.R. v. Rizzo, 357 F. Supp. 1289, 1321 (E.D. Pa. 1973), *aff'd as to injunctive relief,* 506 F.2d 542 (3d. Cir. 1974), *rev'd on federalism grounds sub nom.,* Rizzo v. Goode, 423 U.S. 362 (1976).

[201] United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971). *See also, e.g.,*

recently used the fourth amendment's balancing approach to invalidate warrantless random stops of automobiles to check for operators' licenses and vehicle registrations.[202] "Standardless and unconstrained discretion is the evil the Court has discerned when . . . it has insisted that the discretion of the official in the field be circumscribed at least to some extent."[203] When the legislature fails to specify standards for the agency to operate under, then it is incumbent upon the agency to adopt and promulgate its own rules.[204] Judge David Bazelon has summarized the judicial and administrative duties:

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary.[205]

The goal towards which such cases and commentary are aimed

McGautha v. California, 402 U.S. 183, 273-74 (1971) (Brennan, J., dissenting); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758 (D.D.C. 1970). Several courts have required prison officials to formulate regulations for prison discipline. *E.g.*, Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), *vacated on other grounds*, 491 F.2d 417 (5th Cir. 1975), *cert. den.*, 416 U.S. 992 (1974); Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973), *aff'd on other grounds*, 416 U.S. 396 (1974); Landman v. Royster, 333 F. Supp. 621, 654-56 (E.D. Va. 1971). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969); DAVIS TREATISE, *supra* note 187, at 223-30 (1976 Supp.).

[202] Delaware v. Prouse, 99 S. Ct. 1391 (1979).

[203] *Id.* at 1400. *See also, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967). The balancing and the requirement for rational standards under the 4th amendment (the grounds for decision in the cases cited in this note) is substantially equivalent in approach to the doctrines developed under the 14th amendment's due process clause. *See* Camara, *supra*, 387 U.S. at 538-39; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[204] *E.g.*, Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Quad City Community News Service v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971); Sun Ray Drive-In Dairy v. Oregon Liquor Control Comm'n, 16 Ore. App. 63, 517 P.2d 289 (1973); Barry & Barry, Inc. v. State Dep't of Motor Vehicles, 81 Wash. 2d 155, 158, 500 P.2d 540, 542 (1972). *See also* Citizens' Ass'n of Georgetown v. Zoning Comm'n, 477 F.2d 402, 408 (D.C. Cir. 1973).

[205] Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

was succinctly and wisely stated by the Supreme Court almost one hundred years ago.

> [O]ur institutions of government, . . . do not mean to leave room for the play and action of purely personal and arbitrary power . . . . For, the very idea that one man may be compelled to hold his life, or the means of his living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . . .[206]

The overriding constitutional principle, then, is that government agency discretion must whenever and to whatever extent feasible be constrained by preestablished and ascertainable standards or rules. The principle has both unusual relevance and enormous potential for application to hiring halls. As noted above, the DFR ascribes to unions a responsibility tantamount to that which the Constitution places upon a legislature. A hiring hall, like an administrative agency, is then delegated the power to administer a program that allocates scarce benefits to a surplus of applicants.[207] The interests and processes involved are strikingly similar to governmental allocations of public housing and of licenses. With hiring halls, as with government agencies, the need for protection and the potential for abuse are great.

DFR cases have laid the groundwork for application of a due process standard in the operation of hiring halls. After all, due process, like the duty of fair representation, is primarily concerned with insuring fairness and preventing arbitrary conduct. Due process constrains government arbitrariness, while the DFR, of

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[206] Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886). *Yick Wo* reversed a conviction under an ordinance that prohibited the construction of wooden laundries without a license. The decisions whether to grant the license, however, were entirely discretionary, and resulted in a *de facto* exclusion of Chinese. (79 out of 80 non-Chinese received licenses; 200 out of 200 Chinese were denied). *See also,* Wright, *Beyond Discretionary Justice* (Book Review), 81 YALE L.J. 575, 589 (1972):

> [I]magine a system under which a man's right to pursue his chosen occupation depends upon his ability to get approval from a board which gives no hint of when it will give such approval and when it will withhold it. Is it really open to question that such schemes would be unconstitutional? Regulatory systems which operate without rules are inherently irrational and arbitrary.

[207] As with a legislative delegation to an administrative agency, the delegation to a hiring hall (whether by collective bargaining or otherwise) may be with or without standards. If without, then it is up to the hiring hall officials to come up with fair and rational rules. *See* notes 203-05 & accompanying text, *supra.*

course, confines the conduct of collective bargaining representatives.

The Supreme Court's opinion in *Vaca v. Sipes* recognized three aspects of the DFR. In addition to treating members in complete good faith and without hostility to any factions within the unit, the union must avoid arbitrary conduct.[208] For present purposes, that latter responsibility is the key; for it provides the due process element in the DFR, and has supported lower court applications indicating constraints on hiring hall discretion analogous to those on government agency discretion.

Thus, the Fourth Circuit in *Griffin v. UAW*[209] has described *Vaca's* "arbitrary conduct" element as permitting unions to act upon a "multitude" of legitimate purposes, but also as restraining unions from acting "without reason, merely at the whim of someone exercising union authority."[210] In *Griffin,* the union had opted for a grievance tactic that was wholly inappropriate for the employee's problem. The court insisted that the union must have some parameters on its discretion in matters so directly affecting important employee concerns.

Relying on a *Vaca-Griffin* rationale, cases and commentary have expressly imposed due process principles on unions through the DFR. In enforcing certain notice obligations on hiring halls, the NLRB-endorsed ALJ opinion in *Local 324, International Union of Operating Engineers* concluded that "the duty of fair representation . . . encompasses the obligation to provide substantive and procedural due process in taking action or refraining therefrom, without reference to whether the union's conduct effects a discrimination as such."[211] In addition, several courts have followed the lead of a commentator[212] and pinned a requirement on unions for "rational decision-making processes," that unions be allowed great

[208] 386 U.S. 171, 190-91, 193, 194 (1967). *See* Ruzicka v. General Motors Corp., 523 F.2d 306, 309-10 (6th Cir. 1974), *reh. den.*, 528 F.2d 912 (6th Cir. 1975); Clark, *supra* note 8, at 1134.

[209] 469 F.2d 181 (4th Cir. 1972).

[210] *Id.* at 183. *See also* De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 286 (2d Cir. 1970), *cert. den.*, 400 U.S. 877 (1971); Clark, *supra* note 8, at 1134-35.

[211] 226 N.L.R.B. 587, 597 (1976). *See also* Mumford v. Glover, 503 F.2d 878, 885 n.8 (5th Cir. 1974); *cf.* Knitweave Finishing Co., 183 N.L.R.B. 1148, 1166-67 (1970).

[212] Clark, *supra* note 8.

leeway in the substance of their choices, so long as they follow procedures that facilitate and reflect consideration of individual and minority interests as well as the majority's.[213] The cases have bifurcated their reviews of union activities into "substance" and "procedure," showing great latitude in the former while scrutinizing more closely the latter.[214]

Recent decisions addressing lay-offs, mergers, and bumping illustrate well the DFR's growing concern with procedure and indicate the proper scope and nature of judicial review of job referral systems. As with hiring halls, the essential problem in instances of lay-offs, mergers, etc., is deciding which employees shall work when there are not enough jobs to go around. Somebody is going to be left out. The mere fact that lay-offs or bumping must occur guarantees that some employees are going to be disappointed, and courts have readily recognized the intractability of the situation.[215] Because of the problem's difficulty, the courts have allowed great flexibility to unions in determining the order of jobs and lay-offs. The plans have varied, but include reliance on seniority in the industry or with a particular employer. Depending on the circumstances, priority for jobs in mergers can be determined by dovetailing, endtailing, or date of hire methods.[216] Despite the variety of permissible choices, courts have invalidated particular plans because of the means of their adoption. In *NLRB v. General Truck Drivers Local 315,*[217] for example, the Ninth Circuit sustained the Board in striking down a union policy on bumping rights because the policy had been reached by an unfair vote among unit members. The union had framed the issue on the ballot too broadly and unnecessarily subjected the question to the self-interests of the unit members as a whole. The vote could have and should have been limited specifically to the plaintiffs' situation. Other circuits have reacted similarly when confronted with seniority or lay-off schemes adopted in a procedurally deficient manner.[218] At the

[213] *E.g.,* NLRB v. General Truck Drivers Local 315, 545 F.2d 1173 (9th Cir. 1976); Mumford v. Glover, 503 F.2d 878 (5th Cir. 1974). *See also* Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1089-91 (9th Cir. 1978).

[214] *E.g.,* Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976); Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974); authorities cited in note 211, *supra.*

[215] *See* Humphrey v. Moore, 375 U.S. 335, 349 (1964); note 164, *supra.*

[216] *See* Laturner v. Burlington Northern, Inc., 501 F.2d 593, 597-603 (9th Cir. 1974), *cert. den.,* 419 U.S. 1109 (1975), for a discussion of some permissible methods and variables.

[217] 545 F.2d 1173 (9th Cir. 1976).

[218] *E.g.,* Goclowski v. Penn Central Transp. Co., 571 F.2d 747 (3d Cir. 1977);

same time, most of the seniority and lay-off cases have sustained the union's method, finding the union's methods to have been fair and rational. *Humphrey v. Moore* is an excellent example of fair procedures legitimizing the reformulation of seniority following a merger/acquisition. The employees had an opportunity for a hearing to present their views, were fully apprised of their rights and the facts, and were given a rational set of seniority rules, even if the rules were not satisfactory to each employee.[219]

At the heart of these authorities is a concern for fair procedures — the essence of due process. Union decisions on layoffs, seniority, and similar matters — like job referrals — can be made only after consideration of all relevant factors and factions and only after employees have been fully informed of their rights and alternatives. To avoid violating the DFR's arbitrary conduct standard, a hiring hall must also include safeguards to insure its fair and rational administration. The authorities cited in this section (and, to some extent, in section II, above) lead to the imposition of the specific procedural devices identified below. Those devices restrain hiring hall discretion and protect workers without damaging efficiency. As will be shown, there are DFR and constitutional decisions, in addition to those previously discussed, that directly support requiring the procedures.

b. Specific applications

The impact of constraining hiring hall discretion would be substantial. As noted in section II, above, many hiring halls operate, in whole or in part, without any rules or standardized procedures. Other unions may have some guides, but they are informal, unwritten, or, at least, not promulgated and posted. Still other sets of job referral rules may be vague or subject to easy manipulation.[220] The due process cases speak directly to such hiring halls.

To meet their responsibility under the constitutionally-based DFR, hiring halls must develop standards that are clear and precise, and that are distributed and posted. The hiring lists must also

Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974); Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

[219] 375 U.S. 335, 350 (1964).

[220] The authorities cited in Section II amply illustrate all of the deficiencies referred to in the text here. *See especially* Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587 (1976), and the authorities cited in notes 134-35, 139, 142, 147, 153, & 162, *supra*.

be posted, and adequate and accurate records maintained. Finally, the hiring halls must adhere to their standards, and cannot change them without following formal and rational decision-making processes.

(1) Written, clear standards

Obviously, hiring halls must have standards.[221] That is, they must have a set of eligibility and priority requirements that are fair and reasonable. "These rules," Judge (now Chief Judge) Skelly Wright tells us, "must be clearly formulated and publicly promulgated."[222] They must spell out how an employee will ascend to the top of a list and be referred for employment. There may be more than one list, based, for example, on relative seniority or some other neutral, discernible qualification or skill. The procedures should be stated in an unambiguous fashion understandable to all members of the bargaining unit.

The importance of achieving clarity in standards is reflected in a line of due process decisions finding statutes, ordinances, and regulations "void for vagueness."[223] Many of the vagueness cases have arisen in a first amendment context and those decisions have a strictness about them that is not generally applicable.[224] Yet there is also an "all purpose" due process vagueness doctrine that requires standards of conduct to be written with sufficient clarity to give notice to the individuals of what is expected of them, what is permissible and what is prohibited. Thus, for example, *Papachristou v. City of Jacksonville*[225] struck down a vagrancy ordinance that was written in archaic and imperceptible language and that was susceptible of application to a multitude of everyday activities.

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[221] Notes 188-207 & accompanying text, *supra.*

[222] Wright, *supra* note 206, at 588. *See also* Hornsby v. Allen, 330 F.2d 55, 56 (5th Cir. 1964), *denying reh. of,* 326 F.2d 605 (5th Cir. 1964).

[223] *E.g.,* Connally v. General Construction Co., 269 U.S. 385, 391 (1926); *See generally* DAVIS TREATISE, *supra* note 187, at 22-29 (1976 Supp.); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

[224] *E.g.,* Smith v. Goguen, 415 U.S. 566, 573 (1974); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967). *But see* Parker v. Levy, 417 U.S. 733, 757-58 (1974) (First amendment vagueness doctrine is not to be applied strictly in construing military regulations because of the factors differentiating military society from civilian society).

[225] 405 U.S. 156 (1972).

The evil sought to be expunged in such holdings lies in the grant of unbridled authority to enforcement officials. Vagueness offends due process *"because,"* notes a leading commentator, *"it permits or encourages arbitrary and discriminatory enforcement of the law."*[226] While most of the vagueness decisions have arisen in the administration of criminal laws, the doctrine has not been limited to that field. Courts have required at least minimal clarity when a government standard affects important individual interests, and have struck down provisions regulating various employment matters. For example, the Pennsylvania Supreme Court in *Pennsylvania State Board of Pharmacy v. Cohen*[227] invalidated a pharmacist's license suspension that had been based on a catch-all prohibition against "grossly unprofessional conduct." The agency could not rely on such vague language unless it had promulgated explicative and relevant regulations. In another example, the California Supreme Court has expressed similar concerns in reviewing a teacher dismissal for "immoral conduct."[228]

By forcing agencies to clearly define and specify the governing standards, the courts force the agencies to cabin their discretion. So long as officials are permitted to administer under vague guidelines, they can interpret them in any willy-nilly, ad hoc fashion.[229] That creates arbitrariness and unfairness among similarly situated individuals. It also creates a devastating "chilling effect" on the desires of anyone to criticize or disagree with officials who have such unconstrained power.[230] An individual will not want to engage in any activity, even protected activity, if it will antagonize an official who can retaliate under rules that are malleable to any desired use or can arguably be applied to an untold number of situations.

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[226] DAVIS TREATISE, *supra* note 187, at 24 (1976 Supp.) (emphasis in original).

[227] 448 Pa. 189, 292 A.2d 277 (1972).

[228] Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 217-35, 82 Cal. Rptr. 175, 177-91, 461 P.2d 375, 377-91 (1969). After fully demonstrating the term's vagueness, the court gave the statute the narrow construction it needed to survive constitutional attack.

[229] *See, e.g.*, Local 324, Int'l Union of Operating Eng'rs, 226 N.L.R.B. 587, 595 (1976), *quoted in* note 168, *supra*.

[230] *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cramp v. Board of Public Instruction, 368 U.S. 278, 286-87 (1961); Wright, *supra* note 206, at 589. *See also* H. WELLINGTON, LABOR AND THE LEGAL PROCESSES 134-44 (1968).

(2) Notice

Notice is the *sine qua non* of procedural protections.[231] It is just as critical in disseminating and administering standards as it is in the context of hearings and trials. A chief architect of the theory of discretionary justice, Professor Kenneth Culp Davis, has emphasized (in the context of public housing) that "regulations should be published and readily available to all who are affected."[232] In denying rehearing in *Hornsby* v. *Allen,* the Fifth Circuit held that "every applicant should be appraised of the qualifications necessary to obtain a license . . . ."[233] Consistent with those sentiments, the Seventh Circuit has recently found a due process violation in a welfare agency's failure to establish reliable means for informing certain potentially eligible welfare recipients of the availability of clothing allowances.[234] Without such promulgation, the procedures or standards for distribution are worthless.

DFR cases have been emphatic in their recognition of the importance of information flow to workers. The D.C. Circuit has imposed a duty on unions administering a union security clause "to inform the employee of his rights and obligations so that the employee may take all necessary steps to protect his job."[235] That basic precept of union "fair dealing" provided a substantial precedent for the NLRB in deciding *Miranda Fuel Co.*[236]

The Ninth Circuit has also insisted on proper notice about employment rights. In *Retana v. Apartment Operators Local 14,*[237] that court held that a complaint stated a DFR claim by alleging the union failed to provide plaintiffs, unit members of Hispanic descent, with a Spanish-speaking liason, advice on the grievance and other union-operated systems, and copies in Spanish of the

[231] *E.g.,* Covey v. Town of Somers, 351 U.S. 141 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See also* Boddie v. Connecticut, 401 U.S. 371, 380 (1971). The vagueness doctrine, discussed in the preceding subsection, has roots in the due process requirement of notice, for standards and rules do not provide adequate notice if one cannot determine what they mean. *See e.g.,* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[232] DAVIS TEXT, *supra* note 187, at 155. *See* Thorpe v. Housing Auth., 386 U.S. 670, 672 (1967).

[233] 330 F.2d 55, 56 (5th Cir. 1964). *See also* Wright, *supra* note 206, at 588.

[234] Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978).

[235] Electrical Workers Local 801 v. NLRB, 307 F.2d 679, 683 (1962).

[236] 140 N.L.R.B. 181, 189 (1962).

[237] 453 F.2d 1018 (9th Cir. 1972); *cf.* H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941); 29 U.S.C. §§ 414-415 (1976).

collective bargaining agreement. In *Robesky v. Quantas Empire Airways Ltd.*,[238] the same circuit found a DFR violation in a union's failure to disclose to the plaintiff that it was not pursuing her grievance to arbitration. Had she known, she may have been willing to accept a proposed settlement.

These principles of notice have important application to hiring halls, and have recently provoked the NLRB to order a union to disclose to a member of the collective bargaining unit the names of fifty individuals immediately in front of and behind him in the out-of-work file. Relying heavily on *Miranda Fuel* and the "fair-dealing" requirement, the Board in *Local 324, International Union of Operating Engineers*[239] was explicit:

> We find that inherent in a union's duty of fair representation is an obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall.[240]

The Board has held to that position in a subsequent case presenting similar facts.[241]

The duty to inform should compel unions to posthiring hall operating procedures and all current lists or notices that govern who is referred for work and when. Moreover, the union should affirmatively act to see that each member is given a copy of the operating procedures. (Such information would be at least as important to the employee as his/her union contract).[242] Employees need such knowledge to exercise fully their rights and to insure that officials are properly and fairly operating the system.

(3) Adherence to Standards

In addition to establishing fair procedures and standards, the union must follow them. Moreover, the union and its officials cannot change the applicable rules without going through some rational process that gives full vent to competing elements and concerns within the bargaining unit.

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[238] 573 F.2d 1082 (9th Cir. 1978). *See also, e.g.*, Harrison v. United Transp. Union, 530 F.2d 558, 562 (4th Cir. 1975); Brady v. TWA, Inc., 401 F.2d 87, 99 (3d Cir. 1968); NLRB v. Hotel Employees Local 568, 320 F.2d 254, 258 (3d Cir. 1963).

[239] 226 N.L.R.B. 587 (1976).

[240] *Id.* at 587 (1976). *See also id.* at 597-98 (ALJ Opinion).

[241] Laborers Local 252, 233 N.L.R.B. No. 195, 97 L.R.R.M. 1128 (1977).

[242] *Cf.* Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1027 (9th Cir. 1972); 29 U.S.C. §§ 414-415.

These seemingly self-evident tenets are basic elements of a due process model for the DFR. The Supreme Court since its 1954 decision in *United States ex rel. Accardi v. Shaughnessy*[243] has ruled that even though an executive or administrator has complete discretion to change a rule or regulation, he must follow the preestablished rules until he has formally, by whatever applicable procedures, changed them.[244] Without such a duty, officials could reshape their standards on personal caprice each time a different set of facts and parties presented themselves. Such a system would generate discrimination and disrupt reliance and predictability. In short, it would be unfair.

DFR cases have also recognized the soundness of requiring compliance with applicable rules, whether their source be the collective bargaining agreement, union by-laws and constitutions, or otherwise. Thus, the Eighth Circuit has found a DFR violation in union officials' circumvention of job referral rules derived from the collective bargaining agreement.[245] The NLRB has also insisted that unions follow their own, self-conceived rules in operating hiring halls.[246] Naturally, if the union deviates from procedures or applies them in such a manner as to discriminate against a worker for any hostile reason — be it racial prejudices, sex or ethnic bias, political favoritism and retaliation, or personal animosity, — then the union has violated the DFR in its most traditional form. (A caveat is appropriate here: no matter how rational and fair rules may strive to be, they can reach that goal only when they are applied in an evenhanded fashion.)

C. Local 357 Remnants

To adhere to the foregoing principles of due process, the effect, though not necessarily the rationale, of *Local 357* would have to be overruled. *Local 357,* of course, struck down the Board's *Mountain Pacific* "facial" requirements for hiring halls to have three basic procedural safeguards — a nondiscrimination provision, an em-

[243] 347 U.S. 260 (1954).

[244] *Accord,* Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957). *See* United States v. Nixon, 418 U.S. 683, 693-96 (1974).

[245] Emmanuel v. Omaha Carpenters Dist. Council, 535 F.2d 420 (8th Cir. 1976), *on remand,* 422 F. Supp. 204 (D. Neb. 1976), *aff'd,* 560 F.2d 382 (8th Cir. 1977).

[246] *E.g.,* Heavy Construction Laborers Local 663, 205 N.L.R.B. 455 (1973); Operating Eng'rs Local 513, 199 N.L.R.B. 921 (1972), *enf'd per curiam,* 85 L.R.R.M. 2303 (8th Cir. 1973).

ployer right of rejection, and public posting of the hiring hall's operative provisions.[247] The DFR-due process approach advanced here would reinstate the latter requirement and would add several more to be applied to every hiring hall. Such an application of the DFR and the distinguishing, or virtual rejection, of *Local 357* are warranted on a number of grounds.

The most obvious feature distinguishing the *Local 357* opinion from the approach advocated here is that *Local 357* was decided under 8(b)(2) and did not consider any DFR arguments.[248] The distinction is significant because the DFR applies without reference to anti- or pro-union animus. Proving a specific motive is always difficult and in the case of hiring halls it would create artificial distinctions between employees similarly wronged.[249]

Moreover, the 8(b)(2) limitations, signifying a particular congressional intent, did make a difference to the *Local 357* Court.[250] An approach like the DFR that does not have such a restricted application may well have produced a different result. Certainly, if the case were reheard today on DFR grounds, there should be a contrary holding. By now, too, congressional approval of judicially rendered DFR developments can be inferred from the absence of any legislative efforts to change the doctrine.

Since *Local 357* was decided, the DFR has expanded considerably in its scope and utility. For sure, the current DFR version was not available to employees' counsel in *Local 357* and the Court did not address the issue. In other contexts, the Court has distinguished, or overturned, prior decisions due to the creation in intervening years of new doctrines.[251] Moreover, times change. Today we know that *Local 357* and its narrow 8(b)(2) reading have not provided an adequate check on hiring halls. The number of and the degree of abuses in hiring hall cases sadly force that conclusion. It is therefore appropriate, indeed necessary, to reconsider *Local 357's* refusal to impose per se restrictions on hiring halls.[252]

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[247] *See* notes 102-04 & accompanying text, *supra.*

[248] The NLRB relied upon that distinction in deciding *Miranda Fuel* and establishing the DFR as an unfair labor practice. 140 N.L.R.B. 181, 187-88 (1962) (*en banc*).

[249] *See id.* at 188.

[250] 365 U.S. 667, 673-77 (1961).

[251] *E.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 595 (1967), *distinguishing* Adler v. Board of Educ., 342 U.S. 485 (1952).

[252] The Board could accomplish that reconsideration by either adjudication or

Of course, there are compelling reasons why the DFR should apply to hiring halls. Those reasons, which have been fully articulated above,[253] include an overriding need to place some parameters around the enormous power and discretion held by hiring hall operatives, to provide some meaningful recourse for injured employees, to provide guidance and predictability for both unions (to know what is expected of them) and workers (to know what their rights are), and to prevent any "chill factor" on protected rights that often results, even unintentionally, from unchecked discretion. For these reasons and through use of the rationale offered here, the Board and the courts should no longer consider *Local 357's* refusal to impose per se restrictions on hiring halls to be controlling.

CONCLUSIONS

Union hiring halls and other union-run job referral systems provide an indispensable service in many industries. Such employment systems are a vast improvement over the employer-controlled hiring methods that prevailed in the "casual" employment markets prior to the advent of strong trade unions and adoption of the NLRA. Nevertheless, the hiring halls have generated their own abuses. Union officials have accumulated unchecked discretion. Many halls have failed, either in whole or in part, to draft written rules and procedures for determining the distribution of jobs. Even when they are written, the rules are not always circulated or posted. In any hiring hall, the susceptibility to abuse or discrimination is unduly great; union officials intent on conferring favors or retribution can too easily camouflage their efforts. The hiring hall cases reflect an unacceptable frequency and degree of arbitrary conduct by union officials. The Board's efforts to deal with the abuses have not been adequate. The Supreme Court's major treatment of hiring halls, the *Local 357* decision, has only served to impede development of a coherent approach to job referral problems.

The union's duty of fair representation offers a rationale that can place appropriate limits on hiring hall discretion. By returning to the doctrinal roots of the DFR, an analogy can be drawn to

use of its rule-making authority. *See,* Peck, *The Atrophied Rule-Making Powers of the NLRB,* 70 YALE L.J. 729 (1961).

[253] Section III-A.

constitutional limitations placed on legislative and governmental administrative bodies. Those limitations require hiring halls to avoid "invidious" discriminations — those based on race, sex, alienage, and ethnic origins — and to articulate a rational basis for all referral rules. Moreover, the constitutional analogy would place procedural duties on the hiring halls. Of particular significance, the unions should adhere to due process limitations on the exercise of discretion through development of clear and precise operating standards and through notice to workers of those standards. Such an approach would act as a preventive measure against hiring hall abuse, and would supplement the (haphazard) *post hoc* system of review that is presently the prevailing means for dealing with hiring halls. *Local 357* should be limited to its facts and its Section 8(b)(2) rationale, and should not be deemed as preemptive of this DFR approach.

Specifically, union hiring halls and job referral systems should adhere to the following:

1) The union must adopt, through fair and rational decision-making processes, a set of rules for operating the hiring hall and for determining priorities for all job referrals;
2) The rules cannot invidiously discriminate, but must be reasonable and fair;
3) The rules must be written, and must be clear and precise;
4) Copies of the rules must be distributed to each member of the collective bargaining unit;
5) Copies of the rules and of all lists affecting job referrals must be posted in a conspicuous and convenient place for all members of the collective bargaining unit to read and study;
6) The hiring hall officials must follow the rules and regulations and cannot change them without complying with formal and fair decision-making procedures;
7) The union must maintain clear, detailed, and accurate records of all employer requests, employee applications and qualifications, and job referrals in order to facilitate review by government agencies.