Duquesne Law Review

Volume 25 | Number 4 Article 5

1987

Union Obligations to Disclose Information Under the Duty of Fair Representation: A Survey

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I. INTRODUCTION

The protection of individual rights has always been an important focus in American law, and is reflected in the field of labor regulation as well as other areas. In the early part of the Twentieth century, recognizing the power of large corporate employers to effectively overwhelm the interests of individual employees, Congress passed legislation which legitimatized and encouraged collective bargaining power between employers and their workers.[1] While it appears that the collective bargaining system has to some degree served this purpose, though, it also created a new threat to individual rights: specifically, the potential for their abuse by powerful labor organizations.

As the statutes which fostered the development of "big labor" initially provideed few protections for individual employees from the labor organizations which represented them,[2] one of the earliest responses to this undesirable situation came from the United States Supreme Court. In 1944, faced with several cases involving blatant racial discrimination by unions against employees that they were charged with representing, the Court created a duty upon unions to fairly represent employees.[3] Since 1944, the federal courts and the National Labor Relations Board have expanded the

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1. The principal legislation referred to here is the Railway Labor Act, 44 Stat. 577 (1926)(Codified at 45 U.S.C. Section 151 et. seq. (1982)), which extended collective bargaining rights to employees of railroads and similar common carriers; and the National Labor Relations Act, 49 Stat. 449 (1935) (codified at 29 U.S.C. Section 151 et. seq. (1982)), which extended similar rights to most private sector employees and U. S. Postal Service workers. In 1936, the Railway Labor Act was amended so as to expand its coverage to airline employees. *See* 44 U.S.C. Section 181 (1982).

2. In fact, the 1935 National labor Relations Act generally defined conduct by employers that would constitute unfair labor practices, but union unfair labor practices were not created until the passage by Congress of the Labor-Management Relations Act of 1947 (commonly known as the Taft-Hartley Act), 61 Stat. 136 (1947).

3. *See,* Steele v. Louisville & Nashville Railroad Co., et al., 323 U.S. 192 (1944), discussed *infra* at note 6; and accompanying text; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen et al., 323 U.S. 210 (1944), discussed *infra* at note 14 and accompanying text; and Wallace Corporation v. National Labor Relations Board, 323 U.S. 248 (1944), discussed *infra* at note 15 and accompanying text.

scope of this duty beyond situations involving racial discrimination, and it has been held that the duty applies to union actions or omissions connected with both the negotiation and administration of collective bargaining agreements.[4] However, the precise parameters of the duty have not been definitively established.[5]

In this comment, the duty of fair representation will be examined as the federal courts and the Board have applied it to require unions to disclose information to bargaining unit employees whom they represent. Following a short discussion of the development of the duty of fair representation in general, information disclosure cases will be presented according to the type of information involved. Finally, the implications of the cases will be examined and conclusions drawn as to the current state of the duty of fair representation with respect to information disclosure by unions; and what, if any, changes might be appropriate for the future.

II. Background

The duty of fair representation was first articulated by the United States Supreme Court in *Steele v. Louisville & Nashville Railroad Co.*[6] In *Steele*, a black locomotive fireman sued his union in the Alabama state courts for entering into an agreement with the railroad which ultimately would have had the effect of eliminating blacks from the fireman craft. Under the Railway Labor Act,[7] the union was the exclusive bargaining representative of all firemen employed by the railroad, although the union prohibited blacks from membership in it.[8] The Supreme Court of Alabama held that the plaintiff failed to state a cause of action, arguing that the Railway Labor Act gave the union authority to bargain on behalf of the craft as a whole "without any legal obligation or duty to protect the rights of minorities from discriminaton or unfair teatment, however gross."[9] The United States Supreme Court rejected this reasoning, analogizing the duty of a labor organization to the persons whom it had the statutory authority to represent to the duty that a legislature has "to give equal protection to the interest

4. *See*, e.g., International Brotherhood of Electrical Workers et al. v. Foust, 442 US 42, 47 (1979).

5. For a survey of current issues in fair representation law, See T. Boyce & R. Turner, *Fair Representation, the N.L.R.B., and the Courts* (2d ed. 1984).

6. 323 U.S. 192 (1944).

7. Ch 347, 44 Stat. 577 (1962)(codified as amended at 45 U.S.C. Section 151 (1982)).

8. 323 U.S. at 196.

9. *Id.* at 198.

of those for whom it legislates."[10] The source of the union's duty was the statute authorizing it to exclusively represent a bargaining unit of employees, in this case the Railway Labor Act.[11] On the facts of the case, the Court held that the Act imposed on the union a duty to act for the benefit of all unit members and "without hostile discrimination against them."[12] While not precluding a bargaining representative from entering into any labor agreement which had adverse effects on some unit members, the Court concluded that the union's racial discrimination against the plaintiff and other blacks was "irrelevant and invidious," and therefore a violation of the union's duty to "exercise fairly the power conferred upon it" by the statute.[13]

In cases decided on the same day as *Steele-Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*[14] and *Wallace Corp. v. N.L.R.B.*[15] the Supreme Court, respectively, held that the federal courts had jurisdiction to entertain nondiversity actions under the Railway Labor Act against bargaining representatives for failing to represent employees due to their race; and that the National Labor Relations Act,[16] like the RLA, imposed upon certified bargaining agents a duty to represent all employees "fairly and impartially."[17] Eight year later, in *Ford Motor Co v. Huffman*,[18] the Court elaborated on *Wallace* in stating that the source of a union's duty to fairly represent all employees in an appropriate bargaining unit derived from Section 9(a) of the NLRA which gives unions selected

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10. *Id.* at 202.

11. *Id.* at 204. The Court stated that ". . .the right asserted, which is derived from the duty imposed by the statute on a bargaining representative, is a federal right implied from the statute and the policy which it has adopted." *Id.*

12. *Id.* at 203.

13. *Id.*

14. 323 U.S. 210 (1944).

15. 323 U.S. 248 (1944).

16. Ch. 372, 49 Stat. 449 (1935)(codified as amended at 29 U.S.C. Sections 151-168 (1982)).

17. In *Wallace*, the Court found that a company violated Section 8(a)(3) of the Act, which prohibits discrimination against employees due to their union activities, where it acquiesced to union demands for a closed shop agreement desired by the union to rid the company of supporters of a rival union. While the Court cited no specific section of the Act as giving rise to a fair representation duty, the Court stated that "the duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Id.* at 255.

18. 345 U.S. 330 (1952)(union's acceptance of a seniority preference provision for veterans not unlawful).

under Board proceedings the authority to exclusively represent all employees in a bargaining unit.[19] The Court noted, though, as it did in *Steele*, that provisions in a labor agreement that affected some employees less favorably than others would not be found to *per se* demonstrate unlawful actions by a union. A union was to be accorded "a wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[20]

The Supreme Court expanded the duty of fair representation to apply in situations beyond the negotiation of collective bargaining agreements in *Conley v. Gibson.*[21] In *Conley*, a group of black employees claimed that their union refused to invoke provisions in an established labor agreement which would have protected them from racially motivated discharges by their employer. The Court rejected the union's contention that the employees failed to state a claim upon which relief could be granted, noting that collective bargaining, to which the duty of fair representation applied, was a continuing process which did not end with the successful negotiation of a labor agreement.[22] Thus, a union's failure to properly represent employees in the handling of grievances was held to constitute a violation of the duty of fair representation.[23]

It was not until 1962, 18 years after the *Wallace* Court held that the duty of fair representation was grounded in the NLRA, that the National Labor Relations Board held in *Miranda Fuel Company, Inc.*[24] that a violation of the duty of fair representation constituted an unfair labor practice. After examining the *Steel, Wallace* and *Tunstall* decisions, the Board concluded that Section 7 of the NLRA[25] gave employees "the right to be free from unfair or

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19. *Id.* at 337. Section 9(a) of the Act reads as follows:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be 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. . . .
Ch. 372, Stat. 449 (1935)(codified as amended at 29 U.S.C. Section 159(a)(1982).

20. *Id.* at 338.

21. 355 U.S. 41 (1957).

22. *Id.* at 46.

23. *Id.*

24. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir 1963).

25. Section 7 of the N.L.R.A., 29 U.S.C. Section 157 (1982) reads as follows:
Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own chosing, 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

irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[26] Unions which afforded employees such treatment were held to be acting in violation of Sections 8(b)(1)(A) and 8(b)(2) and the Act.[27] The Second Circuit Court of Appeals refused to enforce *Miranda*, finding no support in the legislative history of the Act for a duty of fair representation connected with a union's obligation to bargain with the employer, and arguing that violation of such a duty was to be enforced by the courts rather than the Board.[28] Although the Supreme Court has never passed on the validity of the *Miranda* doctrine, a number of the circuit courts now adhere to the position that a violation of the duty of fair representation constitutes an unfair labor practice under the NLRA.[29]

There is little doubt that the most influential case governing the duty of fair representation was the Supreme Court's 1967 decision in Vaca v. Sipes.[30] *Vaca* involved a suit by an employee, Owens, in the Missouri State courts in which he argued that he had been discharged by his employer in violation of a collective bargaining agreement, and that his union violated the duty of fair representation by refusing to arbitrate the employee's grievance protesting his discharge. After the Missouri Supreme Court upheld a jury ver-

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such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

26. 140 N.L.R.B. at 185.

27. *Id.* Sections 8(b)(1)(A) and 8(b)(2), 29 U.S.C. Sections 158(b)(1)(A) and 158(b)(2) (1982) read, in pertinent parts, as follows:

It shall be an unfair labor practice for a labor organization or its agents —

to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. . . .

to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

28. 326 F.2d 172, 177-178 (1963).

29. Cases upholding the *Miranda* doctrine include Kesner v. N.L.R.B., 532 F.2d 1169 (7th Cir.1976), *cert. denied*, 429 US. 983 and 429 U.S. 1022 (1976); Kling v. N.L.R.B., 503 F.2d 1044 (9th Cir. 1975); Bell & Howell Co. v. N.L.R.B., 598 F.2d 136 (D.C. Cir. 1979), *cert. denied*, 442 U.S. 942 (1979); Local Union No. 12, United Rubber Workers v. N.L.R.B., 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967). Indeed, the Second Circuit itself now adheres to *Miranda*, *see* N.L.R.B. v. Local 282, International Brotherhood of Teamsters, 740 F.2d 141 (2d Cir. 1984). To date, though, the Supreme Court has declined to accept or reject the doctrine. *See* DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 170 (1983).

30. 386 U.S. 171 (1967).

dict in favor of the employee, the union appealed the decision, arguing that its conduct, if improper, was an unfair labor practice under *Miranda,* and therefore under the exclusive jurisdiciton of the N.L.R.B.[31] The United States Supreme Court rejected the union's claim, noting that the duty of fair representatnion had developed in the courts, and even assuming that breach of the duty was an unfair labor practice,[32] federal and state courts should retain concurrent jurisdiction over cases involving the duty.[33] However, under the facts of the case, the Court found that the union had not violated its duty in refusing to arbitrate Owen's grievance.[34] The Court stated that a breach of the duty occureed only when a union's conduct toward a bargaining unit employee was "arbitrary, discriminatory or in bad faith," and rejected the principle that every employee should have the right to have his grievances arbitrated.[35] The Court finally rejected as inappropriate the notion that a court or jury could find a violation of the duty of fair representation based merely on its own opinion that a grievance which a union failed to arbitrate was meritorious. Rather, the Court held that the proper standard was limited to whether or not the union made its decisions regarding the grievance honestly, nonarbitrarily, and in good faith.[36] As Owens failed to establish that the union had hostility toward him, or had acted "other than in good faith" toward him, the Court determined that the Union had not breached its duty.[37]

Apart form its procedural implications,[38] *Vaca* articulated sev-

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31. *Id.* at 176.
32. *Id.* at 186.
33. *Id.* at 187-188.
34. *Id.* at 195.
35. *Id.* at 190-193.
36. *Id.* at 193-195.
37. *Id.* at 194-195. The Court noted that the union had processsed Owens' grievance through the first four steps of the grievance procedure, and refused to arbitrate it only after further medical evidence sought by the union to refute the employer's claim that Owens was not healthy enough to work turned out to be unfavorable. *Id.* at 194.
38. Besides rejecting pre-emption of fair representation cases and recognizing concurrent jurisdiction over suits involving the duty in the courts as well as the N.L.R.B., the *Vaca* Court established the right of employees to file hybrid suits against employers and unions for breach of collective bargaining agreements-violation of the duty of fair representation under section 301 of the N.L.R.A. *Id.* at 186-188. This subject, including post-Vaca developments, is discussed in detail in Note, *Evolving Standards For Duty of Fair Representation Cases Under Section 301,* 62 Denver University L.R. 627-652 (1985). The *Vaca* Court also concluded that where a union was found to have breached its duty but the breach was occasioned by the employer's violation of the labor contract, liability should be apportioned between the employer and the union "according to the damage caused by the fault of each,"

eral important principles which underlie the duty of fair representation. The *Vaca* court observed that the duty arose from the deprival by an exclusive bargaining representative of the individual employee's rights to bargain with his employer under a federal law scheme which promoted collective bargaining as being in the national interest.[39] The Court concluded that the exclusive representative could not base decisions on employee grievances on such factors as racial discrimination or personal hostility, nor could a union "perfunctorily" process or "arbitrarily ignore" a meritorious grievance.[40] On the other hand, the Court recognized that voluntary adjustment of contractual disputes by the parties to a labor agreement was essential to the efficient functioning of the collective bargaining system envisioned by Congress, and voluntary settlement of grievances and other problems could be frustrated if a union was obligated to arbitrate all grievances at the behest of individual grievants.[41] The most obvious means utilized by the Court to encourage free use of dispute resolution channels by unions was its pronouncement in *Vaca* that a union did not violate the duty of fair representation by settling a grievance short of arbitration.[42] Union discretion was also encouraged, though, by the *Vaca* Court's removal from courts and juries of any right to "second-guess" a union's evaluation of the merits of a grievance in deciding a fair representation case.[43]

Since *Vaca*, it has been held by the Supreme Court that the duty of fair representation applies not only to particular situations involving racially discriminatory contracts or improper handling of grievances, but generally to union actions or omissions connected with the negotiation and administration of collective bargaining agreement.[44] It has been suggested by one circuit court, and the N.L.R.B., that the scope of the duty encompasses all union dealings which "affect employment" of bargaining unit members.[45]

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386 U.S. at 197. While initially this resulted in employees bearing most of the cost of backpay liability, union liability increased following the Supreme Court's decision in Bowen v. United States Postal Service, 459 U.S. 212 (1983). *See* T. Boyce & R. Turner, *Fair Representation, The NLRB, and the Courts* 10-13 (2d ed. 1984).

39. 386 U.S. at 182.

40. *Id.* at 190-191.

41. *Id.* at 191-192.

42. *Id.* at 192.

43. *Id.* at 192-193.

44. *See IBEW v. Foust, supra* at note 4.

45. *See* Al Mumford v. James M. Glover, 503 F.2d 878, 885, fn. 8 (5th Cir. 1974); Local No. 324, Operating Engineers, 226 N.L.R.B. 587, 597 (1976); and notes *73* and *81, infra*, and accompanying text. *But cf.* N.L.R.B. v. International Brotherhood of Teamsters Local 299,

It has also been held, since *Vaca*, by the Board and a majority of the circuit courts, that a union cannot violate the duty unless its conduct has been shown to constitute "more than mere negligence."[46] In Ruzicka v. General Motors Corp., the Sixth Circuit held in 1975 that merely negligent handling of a grievance breached the duty,[47] but on remand[48] (and in subsequent cases) the court reversed its field and returned to the standard doctrine that something more than mere negligence was required. Finally, one circuit, the Seventh, adheres to the position that even gross negligence will not violate the duty, requiring some form of intentional misconduct by a union toward unfair representation claimants.[49] Whether the proper standard should be "something more than mere negligence," negligence, or intentional misconduct has been sharply disputed by legal commentators, and remains a field open for argument in the absence of a ruling by the Supreme Court of the question.[50]

II. Union Obligations to Notify or Disclose Information to Bargaining Unit Employees

Cases decided by the federal courts and the Board with respect to union duties to provide information to employees have arisen under a variety of factual settings. For purposes of simplification, the following discussion has been broken down into six topic areas:

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782 F.2d 46 (6th Cir. 1985), where it was held that the duty does not arise where a union's actions or omissions affect all employees in a unit evenly.

46. *See*, e.g., Truck Drivers Local 692, 209 N.L.R.B. 446 (1974); Condon v. Local 2944, United Steelworkers of America, 683 F.2d 590 (1st Cir. 1982); Bazarte v. United Transportation Union, 429 F.2d 868 (3rd Cir. 1970); Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, (7th Cir. 1983); Harris v. Schwerman Trucking Co., 668 F.2d 1204 (11th Cir. 1982).

47. 523 F.2d 306 (6th Cir. 1975).

48. 649 F.2d 1207 (6th Cir. 1981).

49. *See*, e.g., Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir 1981). The Seventh Circuit has based its standard on a belief that union discretion in making decisions concerning the processing of grievances should be maximized, and judicial interference with such decisions minimized. *See* Baker v. Amsted Industries, Inc. 656 F.2d 1245, (7th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

50. Most commentators believe that the standard for a breach of the duty of fair representation should be less that intentional misconduct, but are in sharp dispute as to what degree of negligence should be required to make union conduct actionable. For arguments supporting a simple negligence standard, more stringent than the prevailing standard utilized by the Board and the courts, *see* Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence*, 65 Cornell L. Rev. 634 (1980); and Note, *Can Negligent Representation Be Fair Representation? An Alternative Approach to Gross Negligence Analysis*, 30 Case W. Res. L. Rev. 537 (1980). Arguments supporting a gross negligence standard may be found in Gregory, *A Call for Supreme Court Clarification of the Union Duty of Fair Representation*, 29 St. Louis U. L. J. 45 (1984).

information related to union security requirements; hiring hall and job referral information; information connected with grievance processing; information related to collective bargaining agreements and contract modifications; and finally, information concerning internal union matters. Following a presentation of cases in each topic area, an attempt will be made to summarize the thinking of the Board and courts in each area, as well as briefly discuss unitary or divergent trends. Conclusions concerning the duty to provide information under the duty of fair representation as whole will be presented in the final section of this survey.

A. *Information Connected with Union Security Requirements*

An area in which the courts and the N.L.R.B. have consistently found a union duty to provide bargaining unit members with information is that concerning information about employee obligations under union shop agreements.[51] Under a union shop agreement in a labor contract, a bargaining unit employee is required to maintain at least "financial" membership in the union which represents the bargaining unit as a condition necessary for his continued employment by the employer. If the employee fails to pay union initiation fees and dues, the union may lawfully request that the employer discharge the employee, and the employer is contractually bound to honor the union's request.[52]

Even prior to its first discussion of the duty of fair representation in *Miranda*,[53] the Board held in *Philadelphia Sheraton Corporation*[54] that a union violated Sections 8(b)(1)(A) and (2) of the

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51. *See*, e.g., N.L.R.B. v. International Woodworkers of America, 264 F.2d 649 (9th Cir. 1959); International Union of Electrical, Radio & Machine Workers v. N.L.R.B., 307 F.2d 679 (D.C. Cir. 1962) *cert. denied* 371 U.S. 936 (1962); Sheet Metal Workers, Local No. 355 v. N.L.R.B., 716 F.2d 1249 (9th Cir. 1983); Rocket & Guided Missile Lodge 946, IAM, 186 N.L.R.B. 561 (1970); Teamsters Local Union No. 13, 268 N.L.R.B. 930 (1984); Helmsley-Spear, Inc., 275 N.L.R.B. No. 43 (1985).

52. Section 8(a)(3) of the Act made union shops lawful. However, a union cannot require actual membership by an employee as a condition of continued employment, but only that the employee tender to the union the normal initiation fees and dues. An employee who satisfies these financial conditions of union membership cannot be discharged under the union shop clause, even if he is not actually a *member* of the union. *See* 2 The Developing Labor Law 1365-81 (C. Morris ed. 2d ed. 1983). Examples of cases upholding a union's right to request that an employee be terminated for failure to pay union initiation fees or dues, and the employer's right to terminate the employee based on that request include Big Rivers Electric Corporation, 260 N.L.R.B. 329 (1982), and N.L.R.B. v. Brotherhood of Teamsters, 458 F.2d 222 (9th Cir. 1972).

53. *See, supra* note 24.

54. 136 N.L.R.B. 888 (1962).

Act by unlawfully causing an employer to discharge two employees for failing to obtain union membership and pay dues as required by a union security agreement in the parties' contract.[55] While not disputing that they had not tendered union dues to the union prior to the union requesting that they be discharged, the employees argued that they had attempted to become members and pay dues, but had been frustrated in their efforts by the union.[56] In finding a violation of the Act by the union the Board noted that:

> [T]he parties herein had . . . a lawful union-security agreement, and pursuant thereto could lawfully require Vasquez and McIlwain to tender the periodic dues and fees uniformly imposed as a condition of acquiring or retaining membership, but for one fatal deficiency—*at no time was either man told the amount of his dues or when such payments were to be made.*[57]

The Board went on to state that a union was obligated to notify employees as to what their membership obligations were, as nondisclosure of these would be "grossly inequitable and contrary to the spirit of the Act."[58]

In a later case, International Union of Electrical, Radio & Machine Workers v. N.L.R.B., the District of Columbia Circuit elaborated on the source of the union's duty to notify employees of their obligations under union security agreements.[59] The court opined that the Act imposed a standard of "fair dealing" upon unions in transactions with employees that they represented, and that the duty of fair dealing was akin to a fiduciary requirement arising out of two factors: "the degree of dependence of the individual employee on the union," and "the comprehensive power vested in the union with respect to an individual."[60] Turning to the facts of the case, the court observed that the individual employees were, in essence, completely dependent upon the union to advise them of how to protect their rights under the union security provision, and that the union had the power to require their discharges upon failure to meet their obligations.[61] Noting finally that a union was the "agent" of employees that it represented, and under general agency law should therefore be

> subject to a duty to use reasonable efforts to give [its] principal information

55. *Id.* at 896.
56. *Id.* at 893-895.
57. *Id.* at 896.
58. *Id.*
59. 307 F.2d 679 (1962).
60. *Id.* at 683.
61. *Id.*

> which is relevant to affairs entrusted to [it] and which, as the agent has notice, the principal would desire to have . . .,[62]

the court concluded that that union had arbitrarily violated its duty uner the Act by summarily rejecting offers of dues by employees without explaining what the employees were required to do to fulfill their membership requirements.[63] While not specifically describing the union's "fiduciary duty of fair dealing" to be an aspect of a union's duty of fair representation, the circuit court cited a United States Supreme Court case, Ford Motor Co. v. Huffman,[64] which arose under the duty of fair representation, for the proposition that a union "is responsible to, and owes complete loyalty to, the interests of all whom it represents."[65]

In cases decided since *IUE*, it has been established that a union's duty to employees concerning their union security obligations requires the labor organization to inform delinquent employees of the precise amount of dues that they are in arrears for, the method by which the dues obligation was calculated, and the consequences of loss of membership, i.e., loss of employment.[66] In H.C. Macauley Foundry Co. v. N.L.R.B.,[67] a union was found to have violated its duty in this regard by sending an employee a letter explaining that the union would demand his discharge if he did not pay his back dues, where the letter failed to clearly specify the deadline for receipt of the dues.[68] It has also been established that a union's breach of its responsibility for notifying employees of their union security obligations need not rest on a finding that the union had hostility or bad faith toward an employee.[69]

In examining cases involving an exclusive bargaining representative's duty to inform employees of their union security obligations, it might be argued that this obligation arises independently of the union's general duty to fairly represent employees. Indeed, it has already been noted here that the first Board cases finding union breaches of the duty to inform with respect to union shop obligations were decided prior to the Board's recognition of the duty of fair representation. Moreover, cases decided by the Board and the

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62. *Id.* citing Restatement (Second), Agency, Section 381 (1958).
63. 307 F.2d at 684.
64. 345 U.S. 330 (1953).
65. *Id.* at 338.
66. *See*, e.g., Teamsters Local Union No. 13, 268 N.L.R.B. at 931 (1984).
67. 553 F.2d 1198 (9th Cir. 1977).
68. *Id.* at 1201.
69. *See*, e.g., Rocket and Guided Missile Lodge 946, IAM, 186 N.L.R.B. at 562 (1970); Granite Steel Company, 169 N.L.R.B. 1009 (1968).

courts in the former area, even to the present day, tend in general not to cite "duty of fair representation" cases as precedent.[70] However, no cases appear to suggest that the two duties are not branches of the same tree, and it seems clear that both duties stem form a desire by the courts and the Board to impose a type of fiduciary obligation upon unions in order to protect employees who have surrendeed their individual rights to bargain on employment matters with their employers.[71] If there is any difference in the duties, it would appear to be one of degree rather than of kind, as discharge under union security provisions presents the somewhat unique situation of a union, rather than the employer, taking steps to initiate an employee's discharge.

B. *Hiring Hall and Job Referral Information*

A second area in which it has generally been held that employees are entitled to information from their exclusive bargaining representative as part of the duty of fair representation arises where a union operates an exclusive hiring hall. Under an exclusive hiring hall system, a union essentially undertakes a normal task of an employer, the procurement of workers to perform jobs on an as-needed basis for various employers. As the name of the arrangement indicates, the union is given the exclusive power under the collective bargaining agreement to provide employees for any employer covered by the agreement, and while employers are not obligated to hire unsuitable employees referred to them by the union, they generally must give the union a chance to refer suitable employees prior to hiring employees from outisde the hiring hall system. Similarly, under en exclusive hiring hall system, an employee must attempt to procure work with an employer covered by the system through the union, and is not free to solicit his own work with a covered employer whether or not he is a member of the union operating the hiring hall. Hiring halls operate primarily in the construciton and maritime industries, as in those businesses employment of individuals with particular employers is often lim-

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70. *See* cases cited at note 51, *supra*. *But compare* Communications Workers of America and its Local 6402, (N.L.R.B. Advice Memorandum), 120 L.R.R.M. 1350 (1985), in which the Division of Advice of the N.L.R.B. General Counsel's office characterized the "fiduciary duty to inform an employee that union security provisions have not been properly complied with" as part of a union's "general duty of fair representation. *Id.* at 1352.

71. *Compare*, e.g., the explanation of the source of the duty of fair representation in Ford Motor Company v. Huffman, *supra*, with the origins of the union security notification duty described in IUE Local 801 v. N.L.R.B., *supra*.

ited to short-term jobs.[72]

The Board has consistently held that a union violates the duty of fair representation if it operates an exclusive hiring hall to favor job applicants who are union members over non-members.[73] At least one circuit court of appeals, the Eighth Circuit, also recognizes discriminatory referral of employees by a union as a violation of the duty.[74] Furthermore, it has been held by the Board that if a union refers applicants without employing objective standards, or if it fails to refer according to the exact provisions of a contractually established system, the union has breached the duty of fair representation.[75]

With respect to a union's duty to provide information to employees or job applicants in connection with the operation of an exclusive hiring hall, the seminal case is Local No. 324, Operating Engineers.[76] In *Operating Engineers,* Carlson, a member of the union but a critic and political opponent of the union administration, requested that a union official tell him how many people were ahead of him and behind him on a job referral list. He also asked for the names, addresses and phone numbers of the persons on the referral list. Carlson's reason for requesting this information was his suspicion that the union was discriminating against him in making job referrals, and that verbal information given to him by the union might not be accurate. The union refused to provide the requested information, justifying its refusal on a claim that job applicants did not want their phone numbers or other information concerning them to be given out. In an opinion affirmed by a Board majority,[77] the Administrative Law Judge held that the union's failure to provide referral information was arbitrary conduct prohibited under the duty of fair representation.[78] The ALJ traced the development of the duty through *Steele, Miranda* and *Vaca,* and concluded first that to satisfy the duty of fair represen-

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72. The foregoing information concerning exclusive hiring halls was derived from 2 The Developing Labor Law 1396-1403 (C. Morris ed. 2d ed. 1983).

73. *See, e.g.,* International Brotherhood of Boilermakers, Local Union No. 154, 253 N.L.R.B. 747, 760 (1980); Local No. 324, Operating Engineers, 226 N.L.R.B. 587 (1977).

74. Emmanuel v. Omaha Carpenters District Council, 535 F.2d 420 (8th Cir. 1976), *on remand,* 422 F.Supp. 204 (D. Neb. 1976), *on further appeal,* 560 F.2d 382 (8th Cir. 1977).

75. See Boilermakers, *supra,* at 760; Pacific Maritime Associations, 209 N.L.R.B. 519 (1974).

76. 226 N.L.R.B. 587 (1976).

77. Member Fanning dissented, arguing that the union's refusal to provide the requested information was, at most "mere negligence or lack of responsiveness" not proscribed under the duty of fair representation. *Id.* at 588-589.

78. *Id.* at 598.

tation it was not sufficient for a union to treat an individual or group of employees the same as any other employees in the unit.[79] Rather, beyond providing "equal protection" to employees, a union was also required to "provide substantive and procedural due process in taking action or refraining therefrom."[80] The ALJ then observed that while the refusal to provide information itself did not directly impact upon Carlson's employment, Carlson's efforts to ensure that his rights to referral under the contract were not being violated was a matter which affected his employment, and thus convered under the duty of fair representaiton.[81] The ALJ finally rejected as illegitimate the union's claim that it had refused to provide the information due to privacy concerns of job applicants, and concluded that the union had proffered "no arguably reasonable basis" for refusing to supply the information.[82] Under those circumstances, the ALJ considered the union's failure to provide the information to be arbitrary, and therefore in breach of the duty of fair representation.[83]

In cases decided since *Operating Engineers*, the Board has continued to hold that a union violates the duty of fair representation by not acceding to the requests of job applicants for information concerning referral rules and procedures and their own positions on job referral lists.[84] The information obligation has not been

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79. The ALJ noted that as the union apparently would deny the requested information to *any* job applicant, there was no question of "differences in treatment" or "discrimination." *Id.* at 596.

80. *Id.* at 597. The ALJ cited Al Mumford v. James M. Glover, 503 F.2d 878, 885, fn. 8 (5th Cir. 1974)(union's renegotiation of pension plan contrary to the desires of majority of represented employees could violate duty of fair representation) as standing for the proposition that discrimination against a minority or individual was not an essential element of the duty. The ALJ went on to assert that claims could arise under the duty in such hypothetical situations as that of a union ceasing to process any grievances from a bargaining unit, or where a union negotiated an unsatisfactory contract in return for money paid by a company to union officers. 226 N.L.R.B. at 597.

81. 226 N.L.R.B. at 597. The ALJ cited *Mumford, supra*, as defining the scope of the duty of fair representation as applying to all matters "affecting employment." He went on to note that in *Mumford, supra*, the Fifth Circuit had gone so far as to say that the duty of fair representation was applicable to "all union dealings" based on Congress' grant to unions under the NLRA of exclusive bargaining authority exercisable on behalf of all members of a bargaining unit. 226 NLRB at 597.

82. *Id.* at 598.

83. *Id.*

84. *See*, e.g., Local 282, Teamsters, 280 N.L.R.B. No. 86 (1986)(violation where union refused to allow employees to inspect job referral cards and referral list); Iron Workers, Local No. 433, 266 N.L.R.B. 154, 161-162 (1981) (refusal to allow employee to inspect dispatch book a violation); and International Brotherhood of Boilermakers, Local Union No. 154, *supra*, at 763 (violation where union refused to provide applicant with list of job refer-

found to be satisfied by a monthly posting by the union of a referral list, where referrals are made on a more frequent basis.[85] The Board has found, though, that access to referral records may legitimately be limited if the records contain confidential information or are unduly burdensome for the union to produce.[86]

In addition to providing requested information aboutr referral rules and the referral positions of job applicants, unions operating exclusive hiring halls appear to have an affirmative duty, as part of the duty of fair representation, to notify hiring hall registrants of any changes in hiring hall procedures which could impact upon their employment. In Operating Engineers Local 406 v. N.L.R.B.,[87] the Fifth Circuit found a union to have violated Section 8(b)(1)(A) of the Act by changing a rule eliminating registrants from the referral list if they accepted a job lasting more than five days, without giving prior notification to job applicants. By "covertly" changing the rule, the union allowed several employees to retain places on the referral list despite working six day jobs, which inhibited employment opportunities for other employees.[88] The court reasoned that the failure to notify *all* employees of the rule change was arbitrary, as the covert rule change represented the operation of the hiring hall without reference to objective criteria.[89] Like the Fifth Circuit, the Board has consistently held that the duty of fair representation requires unions operating exclusive hiring halls to give notice to job applicants prior to modifying referral system rules.[90]

It is finally important to note that a finding of a violation of the duty of fair representation with respect to a union refusing to provide information related to an exclusive hiring hall is not dependent upon there being evidence of an intent by the union to dis-

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rals made in specified time period, names of applicants referred and the employers referred to, and the basis for each referral).

85. *See* Local 282, Teamsters, *supra*, slip. op. at 5-6.

86. *See* Bartenders and Beverage Dispensers' Union, Local 165, 261 N.L.R.B. 420, 423 (1982).

87. 701 F.2d 504 (5th Cir. 1983).

88. *Id.* at 507.

89. *Id.* at 510. *See also* cases cited in note 75, *supra*, and accompanying text.

90. *See*, e.g. Teamsters Local Union No. 519, 276 N.L.R.B. No. 94, slip. op. at pp. 7-13 (1985); Millwright and Machinery Erectors, Local Union 270, 276 N.L.R.B. No. 10 (1985) (violation where union changed policy by initiating internal union charges against applicants who refused referrals while working for non-union companies without announcing change in advance to membership); Electrical Workers IBEW Local 11, 270 N.L.R.B. 424, 426 (1984) (Union violated duty of fair representation by failing to announce 4000 hours of work required to be referred in group I to jobs, in advance of implementing rule).

criminate against job applicants.[91]

In explaining the broad scope of the disclosure duty with respect to hiring hall information, and the affirmative nature of the duty to notify job registrants of rule changes, the most important factor is possibly the union's dual role in not only being responsible for representing employees vis-a-vis employers, but also having the sole power to initiate employment relationships of represented employees with employers. Consequently, arbitrary, hostile or bad faith conduct by a union in this area, as in the area of unions demanding discharge of employees for not meeting union security requirements, can directly impact the employment relationship without prior action by the employer against the employee. Moreover, as in the union security area, information vital to initiation or maintenance of the employment relationship rests solely in the hands of the union. It is not surprising, therefore, that the union's duty to disclose hiring hall information is viewed in more strict terms than it is in situations where the union does not have sole custody of information, or where that information is not as vital to the employment relationship.

C. *Information Connected With Grievance Processing*

The extent to which a union must disclose information concerning its processing of employee grievances is less clearly delineated than in the union security or job referral situations discussed above. However, the Board and the courts have found failure to disclose information concerning grievances to violate the duty of fair representation in a number of instances, as the following discussion will illustrate.[92]

In *Groves-Granite, A Joint Venture*, the Board held that a union's failure to tell an employee that it did not intend to process a grievance over his discharge violated the union's duty of fair representation. In this case, employee Baublitz was discharged for refusing to work in the rain, and promptly reported the situation to an official of the union which represented him. The union official told Baublitz that he could not be terminated for refusing to work in the rain, advised Baublitz to report to work the next day, and indicated that the union would look into the matter the very next day. After speaking with company officials, the union official decided that he no longer wished to pursue Baublitz's claim, but he

91. *See*, e.g., Bartenders and Beverage Dispensers' Union, Local 165, *supra*, at 423.
92. 229 N.L.R.B. 56 (1977).

declined to communicate this to Baublitz. Rather, he actually told Baublitz, after his decision, that he would "see what we could do."[93] The ALJ determined that by misleading Baublitz and thereby "perhaps irreparably harming [his] ability to obtain redress through alternate channels," the union violated its duty of fairly representing Baublitz.[94] The ALJ went on, though, to also determine that the union violated the duty of fair representation with respect to its decision to drop the grievance, inasmuch as the decision appeared to be based on the irrelevant considerations that Baublitz had previously filed internal union charges against the officer who decided to drop the grievance, and that the union considered Baublitz to be a troublemaker.[95]

The Board found a similar breach of the duty of fair representation in Local 417, UAW,[96] where union officials repeatedly told a grievant that they were processing her grievance and would arbitrate it if necessary as late as two months after the union had stopped discussing the grievance with the employer. The ALJ, affirmed by the Board, noted that the Union's action prevented the grievant, Houck, from presenting the grievance herself to company officials.[97] This was particularly significant because the company had invited the union to discuss the grievance, but the union declined to do so.[98] Based on this fact, and the possibility that union officials held animus toward Houck because a friend of hers had filed racial discrimination claims against the union, the ALJ found that the union failed to properly represent Houck both in its processing of her grievance and its willfully misinforming her about the status of the grievance.[99]

On the other hand, where there is not evidence of misrepresentation concerning the status of a grievance, or evidence that the union dropped a grievance based on bad faith or animus against the grievant, it is not clear that a union violates the duty of fair representation by failing to advise an employee concerning the status of her grievance. In Office Employees Local 2,[100] the Board held that a union official's failure to advise employee Eichelberger

93. *Id.* at 63.
94. *Id.*
95. *Id.* at 63-64.
96. 245 N.L.R.B. 527 (1980).
97. *Id.* at 535.
98. *Id.*
99. *Id.*
100. 268 N.L.R.B. 1353 (1984); *affirmed,* Eichelberger v. N.L.R.B. 765 F.2d 851 (9th Cir. 1985).

that the union had decided not to file a grievance concerning, in particular, a failure by the company to give her severance pay upon her resignation, did not constitute a breach of the duty. The Board distinguished the *Groves-Granite* and *UAW* cases as both involving willful deception and elements of union hostility toward the grievant, which were not present in *Office Workers*. According to the Board, such factors, or others not present in this case, were necessary to establish that the union's failure to inform Eichelberger of its decision was "more than mere negligence."[101] Determining that only negligence was involved in the present case, the Board dismissed Eichelberger's complaint.[102]

In the recent case of Local 3036, New York City Taxi Drivers Union, SEIU, AFL-CIO, though, the Board found a violation of the duty of fair representation despite a lack of evidence of union hostility or animus toward a grievant.[103] In this case, the union abandoned a grievance without notifying the grieving employee of its action, and in fact continued to advise the employee that his grievance was being handled. The Board viewed this misrepresentation of the status of the grievance in connection with a total failure by the union to attempt to explain why it dropped the grievance, as an arbitrary action proscribed by the duty of fair representation.[104] The Board distinguished *Office Workers* on the grounds that in that case, the union had at least considered the grievant's claims and determined that they lacked merit before dropping her grievance.[105]

In comparison with the Board, there are some indications that the federal courts take a more expansive view of a union's duty to disclose grievance information. In Robinson v. Marsh Plating Corp., a U.S. District Court denied a motion by a defendant union for summary judgment on an employee claim that the union had misinformed him by telling him that his grievance over his dis-

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101. 268 N.L.R.B. at 1356.

102. The Board has held in Teamsters Local 692 (Great Western), 209 N.L.R.B. 446 (1974), that negligence, standing alone, was not arbitrary conduct which constituted a violation of the duty of fair representation. In *Office Employees*, two additional factors seemed to mitigate against a finding of a violation: 1) that the union fully considered the facts underlying the grievance and reasonably determined that it lacked merit; and 2) that, under the contract, Eichelberger could have filed and processed a grievance *without* the necessity of proceeding through the union. Thus, the Board noted, Eichelberger's own inaction as well as the union's resulted in her losing right of recourse when the contractural time limits for filing a grievance expired. *Office Employees, supra*, at 1355-1356.

103. 280 N.L.R.B. No. 115 (1986).

104. *Id.*, slip. op. at p. 6.

105. *Id.*, slip. op. at p. 7.

charge was still pending when in fact it had been dropped by the union and was subsequently time-barred by the contract.[106] The grievant also alleged that the union misrepresented to him that the decision to drop the grievance was supported by all three members of a union committee, when in fact two of the members never heard about the facts of the grievance and allegedly would have supported processing it. Although the plaintiff failed to allege any hostility toward him on the part of the union, the court held that the duty of fair representation could be violated if the employee proved his complaint, as under those circumstances the union's conduct could be termed as arbitrary, discriminatory, or undertaken in bad faith.[107]

In Harrison v. United Transportation Union, the Fourth Circuit similarly held that a defendant union breached a duty to advise a grievant that it had dropped his grievance despite a lack of animus toward the grievant by the union.[108] *Harrison* involved a situation where the union and the employer apparently agreed not to pursue plaintiff Harrison's grievance over a suspension in return for the employer settling a grievance involving another employee. Harrison contended that the union thereafter intentionally decided not to advise him of the decision to drop his grievance until the time limits for advancing the grievance to the next step of the grievance procedure expired, while the union claimed that its failure to notify Harrison of the decision was an "accidental oversight."[109] The court determined that even if the union's decision not to advance the grievance was made in good faith, the decision not to notify Harrison, found by the District Court below to be a conscious one, was arbitrary, and therefore violative of the duty of fair representation.[110] The arbitrariness of the decision was based on the fact that the union's constitution and by-laws required the union to advise grievants like Harrison that it had decided not to advance their grievances.[111]

Perhaps the farthest extension to date by the courts of a union duty to advise employees when it intends to drop their grievances is found in the Ninth Circuit's decision in Robesky v. Quantas Em-

106. 443 F.Supp. 811 (E.D. Mich. 1978).
107. *Id.* at 815.
108. 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).
109. *Id.* at 560.
110. *Id.* at 561-562.
111. *Id.* at 560, 562.

pire Airways Ltd.[112] In *Robesky* the union processed a discharge grievance filed by employee Robesky through the pre-arbitration steps of the grievance procedure, but the grievance was not arbitrated due to either late submission of the grievance for arbitration under contractual time limits, or due to a union-employer decision to settle the grievance on a compromise basis offering Robesky reinstatement without lost pay. However, in offering Robesky the settlement the union failed to advise her that it could not proceed to arbitrate the grievance due to the expiration of time limits for submission to arbitration, and Robesky rejected the settlement. The employer subsequently withdrew the settlement offer and the union advised Robesky that it was dropping her grievance. The circuit court vacated a judgment by the trial court and remanded the case for consideration of two possible theories upon which union liability under the duty of fair representation could be based.[113] Under the first theory, a factual finding that the union *intentionally* withheld information about its inability to arbitrate the grievance could provide the basis for a finding that the withholding was arbitrary because it lacked any rational basis.[114] The court noted that the information was critical to Robesky, and that while concealing the inability to arbitrate from the *employer* might have been rational, there was little risk in not concealing it from Robesky herself.[115] The court went on to conclude, though, that even an *unintentional* withholding of the information could constitute arbitrary conduct, if found to exhibit three elements: reckless disregard of the grievant's interest, severe prejudice to her, and a failure to serve the policies underlying the duty of fair representantion.[116] The court freely suggested that the first two elements could be easily shown, as the union had ample opportunities to present the information to Robesky, and the consequences of its not doing so was "the industrial equivalent of capital punishment"—Robesky's discharge.[117] With respect to the policies underlying the duty of fair representation, the court argued that the principle policies favoring limits on liability—the needs of a union to be able to screen out nonmeritorious grievances and to efficiently allocate group resources—would not have been impaired by

112. 573 F.2d 1082 (9th Cir. 1978).
113. *Id.* at 1088.
114. *Id.* at 1089.
115. *Id.*
116. *Id.*at 1090.
117. *Id.* at 1090-1091.

the union disclosing the information to Robesky.[118]

In summary, it appears that both the Board and the federal courts would generally find a union to have violated the duty of fair representation where a union misrepresents or intentionally withholds information concerning the status of a grievance to a bargaining unit employee. The foregoing discussion indicates that this is particularly true where the union has dropped the grievance based on bad faith considerations rather than an honest assessment of its merits, and its failure or refusal to advise the employee of the dropping of the grievance results in his being time-barred from pursuing his own remedies with the employer. As a comparison between *Office Workers* and *New York City Taxi Drivers* indicates, though, the Board may not find violations without an intentional withholding or misrepresentation of information, and perhaps evidence that the grievance involved is meritorious. Simple failure to inform may be found, as in *Office Workers*, to constitute mere negligence, which is not sufficient in the Board's view to establish a breach of the duty of fair representation.

The *Harrison* and *Robesky* cases, on the other hand, indicate that the courts may view the duty more expansively. *Harrison* clearly states that a breach of the duty may be found even if the underlying grievance is dropped by the union for permissible good faith reasons. The Fourth Circuit still intimates, though, that the failure to inform was clearly more than negligence because it was intentional. *Robesky* goes even farther, and is probably one of the msot significant cases yet decided involving a union's duty to provide information. Under a *Robesky* analysis, neither bad faith, intentional nondisclosure, nor misrepresentation would be necessary elements of a violation of the duty of fair representation if the union's failure was in reckless disregard of the grievant's interest, severely impacted the employment relationship, and oculd not be justified in terms of the union's need to screen out nonmeritorious grievances or to efficiently allocate group resources.

D. *Information Relevant to Contract Negotiations*

A number of fair representation cases have arisen in recent years contending that unions have breached their duties to bargaining unit employees by failing to provide them with important information about contract negotiations with employers. Often, these cases involve misrepresentations or omissions by unions in explaining

118. *Id.* at 1091.

contract proposals prior to submitting them to the employees for ratification votes. Such cases also arise, though—and perhaps with more serious implications—where unions are accused of misrepresentations or omissions on negotiations matters which result in strikes or even permanent loss of employee jobs.

A lead case in the area of a union's duty to provide contact ratification information to employees is Anderson v. Paperworkers Union.[119] In *Anderson*, the Eighth Circuit concluded that misrepresentations made by a union to employees during contract negotiations were a subject cognizable under the fair representation doctrine, rejecting a contention by the defendant union that the duty applied only where the union was directly dealing with the employer.[120] Turning to the facts of the case, though, the court held that the employees' injury—loss of severance pay due to the employer's bankruptcy—was completely unrelated to union misrepresentations before a ratification vote that the employer had agreed to establish a special security fund to guarantee severance pay in the event of bankruptcy.[121] Without such a link, the court concluded, judgment for the union must result.[122]

A similar result was obtained by the Ninth Circuit in the recent case of Acri v. Machinists Lodge 115,[123] where the defendant union was accused of falsely telling employees that the employer had agreed to remove limits on their severance pay, resulting in employees ratifying a contract to end a strike. Summary judgment was granted for the union when the plaintiff conceded that it could not prove that the employer would have agreed to remove the limits had the contract not been ratified and the union continued to strike to advance the severance pay demand.[124]

When alleged misrepresentations by union officials lead not to ratification of a contract but to strikes, the courts do not appear to

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119. 641 F.2d 574 (8th Cir. 1981).

120. *Id.* at 576. The union argued that its discussions with employees about what the proposed contract contained were strictly an internal union matter. The court, citing Retana v. Apartment, Hotel & Elevator Operators Union, Local 14, 453 F.2d 1018 (9th Cir. 1972), observed that so-called internal union matters often impacted on the relationships of bargaining unit members with the employer. 641 F.2d at 576.

121. *Id.* at 580. The court posited that as the employer had consistently resisted the idea of a special fund for severance pay, it was "mere conjecture" that the employees would have been able to procure employer agreement to the fund - and thus avoid their later injury - by refusing to ratify the contract and striking to obtain the fund. *Id.*

122. *Id.*

123. 781 F.2d 919 (9th Cir. 1986).

124. *Id.* at 332.

have reached a consensus. In Swatts v. Steelworkers,[125] the plaintiff claimed that the union had induced employees to strike by misleading them to believe that they could not be permanently replaced by the employer, and that they would receive more assistance from the union's strike fund than they actually acquired. In deciding the case in favor of the union, the U.S. District Court for the Southern District of Illinois observed that it was not clear that the union misrepresented facts so much as neglected to fully advise the employees.[126] Nevertheless, the court also noted that the subject of whether or not an employer could permanently replace employees was a matter of law, and observed that *general* knowledge of the law by citizens—and, of course, the employees involved in the strike—could be presumed.[127] The above result is contrasted with the holding of the Eighth Circuit in Chavez v. Food and Commercial Workers,[128] where a verdict against the union was upheld with respect to plaintiff employees who had voted to strike, relying on union misrepresentation that they could not be permanently replaced if they went on strike.[129] While observing that a union representative could not be held to the standard of an attorney in making statements concerning legal matters, the court noted that his representations on such matters could still be actionable on a less stringent standard.[130]

Where a union has not misrepresented facts related to ratification or the risks of a strike, the Board and the courts are more reluctant to hold that there is a duty to inform. In western Conference of Teamsters,[131] the Board held that "failure to adequately and fully explain the ramifications of . . . proposals" did not rise to the level of intentionally misleading employees, and therefore did not violate the union's duty of fair representation.[132] In a later

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125. 585 F.Supp. 326 (S.D. Ill. 1984).

126. *Id.* at 332.

127. *Id.* at 333. In general, case law developed by the Board and the courts allows employers to permanently replace economic strikers, but gives no right to permanently replace employees who strike to protest employer unfair labor practices. See Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enf'd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

128. 779 F.2d 1353 (8th Cir. 1985).

129. *Id.* at 1358-1359. It is important to note that the court denied recovery to employees who heard the misrepresentations but did not prove that they relied on them in deciding to strike against the employer. *Id.*

130. *Id.* at 1358.

131. 251 N.L.R.B. 331 (1980).

132. *Id.* at 339. The ALJ cited Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, Local 17, 241 N.L.R.B. 22, in which the Board implied that such

case, Teamster, Local 912,[133] the Board found no violation where employees lost their jobs for violating a no-strike clause, and claimed that the union had violated its obligations to them by not advising them that they could lose their jobs for striking. The Board concluded that as there was no evidence that the union "encouraged, prompted or misled the employees to strike," nor evidence that it believed they were likely to strike, it could not be concluded that the union's failure to inform was arbitrary or in bad faith.[134] Finally, in considering a question similar to that before the Board in *Teamsters Local 912,* the Fourth Circuit held in Self v. Teamsters, Local 61[135] that a union did not violate the duty of fair representation by not advising employees that a new contract had been reached, where in the absence of such knowledge certain employees struck and lost their jobs due to contract provisions prohibiting unauthorized work stoppages. The court observed that the employees were aware that unauthorized strikes were prohibited, that the union had not authorized a strike, and that the union had done nothing to instigate the strike.[136] The court dismissed as conjecture a claim that if properly informed by the union of the status of negotiations, the employees would not have struck and lost their jobs.[137]

In contrast to the above cases, failures to inform unit employees without misrepresentation were found to violate the duty of fair representation in Teamsters Warehouse Union, Local 860[138] and Parker v. Teamsters Local 413.[139] In *Teamsters 860,* a group of clerical employees lost their jobs after their union, at their insistence, negotiated wage increases for them in a new contract. While the employees admittedly pressed for the increases, they were never informed by the union of the employer's negotiation position that if the union obtained the increases, the employer intended to close the entire clerical section. The Board found that the union's

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failures to fully explain, absent bad faith, would be mere negligence not proscribed by prior Board cases under the duty of fair representation. See 241 N.L.R.B. at 25.

133. 235 N.L.R.B. 200 (1978).

134. *Id.* at 202.

135. 620 F.2d 439 (4th Cir. 1980).

136. *Id.* at 443.

137. *Id.* The court essentially viewed the plaintiff's knowledge that unauthorized strikes were prohibited as placing a burden on *them* to contact the union before striking, rather than putting the onus on the union to advise employees that they should *not* strike. *Id.*

138. 236 N.L.R.B. 844 (1978).

139. 501 F.Supp. 440 (S.D. Ohio, 1980).

failure to advise the employees of the risk to their jobs, regardless of the motive for the failure, violated the union's "fiduciary duty" to the employees.[140] In *Parker*, employees contended that their union had violated the duty to faily represent them by not giving them adequate notice of a ratification vote on an employer proposal concerning flexible work hours. The U.S. District Court for the Southern District of Ohio held that the union's conduct had been arbitrary and therefore violated the duty.[141] Specifically, the District Court noted that the collective bargaining agreement clearly made the union responsible for setting up the ratification vote, that the issue was important to the employees, that the union had had ample time to advise the employees of the election, and that the union offered no explanation of its failure to notify some of the employees about the election.[142] As a remedy, the union was ordered to conduct a second election, this time making sure that all affected employees were adequately notified.[143]

With respect to the contract negotiations cases, as in other areas, it appears that the Board and the federal courts are more likely to find a violation of the duty of fair representation where a union gives misinformation than when it simply fails to provide any information at all. Even in the former situations, though, employees seem to face the formidable obstacle of proving direct damages resulting from the misrepresentations before they can recover. As a practical matter, this will be extremely difficult, as it must generally be shown that employees would *not* have struck or ratified absent the misrepresentations; and further, in ratification cases, that the employer would have granted an employee desired proposal later had employees held out for the proposal rather than ratifying a contract not including the proposal. Also, as the *Swatts* case indicates, union misrepresentations on matters of law may be presumed by some courts to be immaterial because it is a legal presumption that employees are aware of what the law is.

The *Western Conference of Teamsters, Teamsters Local 912,* and *Self* cases indicate that the Board and the courts are reluctant to find violations where unions simply fail to inform employees

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140. 236 N.L.R.B. at 851. The Union actually took the position that it did not communicate the information because it felt that the Employer's threats to close the section were merely a bluff. *Id.* at 846.

141. 501 F.Supp at 449.

142. *Id.* at 448.

143. *Id.* at 451. The court observed that there was only a one-vote difference in the initial vote, and that at least five eligible employees did not vote in the election. *Id.* at 448.

about contract negotiation matters, as opposed to misrepresenting the facts of the matters. However, the Board's decision in *Teamsters 860* indicates a possible exception to this rule where the union is the sole source of information critical to the continued employment of bargaining unit employees. Finally, the *Parker* decision seems to represent the broadest conception of the disclosure duty in this area, through its implication that the duty exists where the union is solely responsible for arranging a vote on an employment matter of importance to employees and has ample opportunity to convey the information to the employees, absent some reasonable explanation of its failure to do so.

E. *Information Relating to Collective Bargaining Agreements and Contract Modifications*

While traditional fair representation cases arise under the main areas of contract negotiation and the handling of grievances, some cases concerning a union's obligation to disclose information have concerned subjects outside of these confines. One such issue dealt with in recent years by the Board and the courts concerns whether or not the duty of fair representation requires that employees be given copies of collective bargaining agreements, or otherwise advised of contract obligations and changes which may occur in them. Another is the question of whether or not a union must provide information which may assist employees in staying clear of company discipline or discharge.

In Law Enforcement & Security Officers, Local 40B,[144] the Board held that failure of a labor organizaiton to respond to a request by an employee for a copy of the collective bargaining agreement covering the employee constituted a breach of the duty of fair representation.[145] The Board noted the fiduciary nature of the duty of fair representation, and observed that failure of a union to provide copies of collective bargining agreements impinged strongly upon employees' abililties to ensure that they are receiving fair representation.[146] Under the facts of the case, the Board took cognizance of the charging party's inability to understand his rights concerning health and welfare claims he had made, due to the union's failure

144. 260 N.L.R.B. 419 (1982).

145. *Id.* The Board noted that such a failure also constitutes a violation of Sections 104 and 210 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 414 and 29 U.S.C. Section 440 (1982), but held that the remedy provided therein was not an exclusive one. 260 N.L.R.B. at 419-420.

146. *Id.* at 420.

to respond to his request for a copy of the health and welfare agreement.[147]

The Board seems to have limited the impact of this decision, though, in a later case, Rainey Security Agency.[148] In *Rainey*, employees attempting to deal with a union which had recently been recognized as their exclusive bargaining representative not only failed to receive copies of contracts after they had asked to see such documents, but in many cases were unable to even contact the union due to its failure to advise employees of its address, meeting times, or to return employee phone calls. Nevertheless, the Board maintained that the union's apparent "ineptitude or mismanagement" was not more than permissible negligence or poor judgment, in light of an absence of animus toward the employees or discriminatory treatment of them.[149] In distinguishing *Security Officers* on its facts, the Board claimed one employee who had agreed to act as an "information liaison" for the other Rainey employees had received a contract, and that the Rainey employees requested contracts only for general purposes rather than to obtain information about specific benefits.[150]

A case decided by the Ninth Circuit in 1972, Retana v. Elevator Operators Union,[151] offers a special situation in which employees appear to have been found to possess a right to receive copies of a contract without requesting them to resolve a particular problem. The *Retana* plaintiff alleged that her union violated the duty of fair representation by failing to provide employees with a copy of the collective bargaining agreement in Spanish (the language of many of the unit employees), as well as by failures to provide as bilingual liaison between the union and Spanish-speaking employees, and to explain employee rights and responsibilities as union members—including the right to have their union process grievances for them. Noting that the language barrier prevented Spanish-speaking employees from effectively participating in contract negotiations or understanding their rights, the Court opined that the union's failure to attempt to overcome that barrier might violate its duty "to make an honest effort to serve the interests" of all employees in its bargaining unit.[152] The court therefore denied the

147. *Id.*
148. 274 N.L.R.B. 269 (1985).
149 *Id.*
150. *Id.* at fn. 9.
151. 453 F.2d 1018 (9th Cir. 1972).
152. *Id.* at 1024, citing Ford Motor Co. v. Huffman, *supra.*

union's motion for summary judgment. Unlike the Board in its later *Rainey* decision, the circuit court did not view it as important that the *Retana* plaintiff did not raise her complaint with reference to rights or questions under any specific provisions of the collective bargaining agreement.[153]

Concerning the obligations of a union to advise employees of contract modifications, the Board held in Teamsters Local 282[154] that a union violated the duty of fair representation by failing to advise laid off employees about an arbitration decision which, contrary to collective bargaining agreement provisions, held that employees had to "shape up"[155] regularly to retain their seniority rights. In *Teamsters*, the Board noted that the duty of fair representation was not breached by mere negligence, and it failed to find that the union was motivated by animus toward laid off employees or a desire to discriminate against them.[156] Moreover, it was observed that the union did in fact announce the terms of the arbitration award through stewards at a "shape up" meeting, a procedure the union had normally utilized in the past to announce arbitration decisions. However, the Board held the union's efforts to be insufficient in view of repeated communications to the drivers by the union prior to the arbitration decision to the effect that they did not have to "shape up" to retain seniority rights, and knowledge by the union that laid off drivers would not be present (as they believed they were not required) at shape up meetings.[157] In finding a violation, the Board held that a union could not purposely keep employees uninformed as to matters affecting their employment, and cited earlier cases which held that unions breached the duty of fair representation by failing to inform employees of changes in job referral procedures.[158] In enforcing the Board's decision, the Second Circuit, like the Board, held that it was arbitrary for the union *not* to deviate form its "normal" announcing procedure, where it was aware that few if any laid off drivers would be present at meetings where the award was announced.[159] The court further concluded that though the union's

153. *Id.* at 1023-1024.

154. 267 N.L.R.B. 1130 (1983), *enforced* sub nom N.L.R.B. v. Teamsters, Local 282, 740 F.2d 141 (2d Cir. 1984).

155. That is, report to a designated place for possible hire.

156. 267 N.L.R.B. at 1130.

157. *Id.* at 1131.

158. *Id.* Specifically cited were Local 392 Plumbers, 252 N.L.R.B. 417 (1980) and Operating Engineers Local 406, *see supra* at note 87.

159. 740 F.2d at 147.

conduct was unintentional, it was so far below minimum standards of fairness and unjustified by legitimate union interests as to violate "the fiduciary duty which a union owes to its members and requires it to inform them of their obligations so that they may take whatever steps are necessary to protect their interests in their jobs."[160]

In two other recent cases, though, courts set limits to the doctrine that a union must advise employees of situations which could negatively affect their job rights. In Jenkins v. Great Lakes Plastics,[161] the U.S. District Court for the Easter District of Michigan held that a union did not violate the duty of fair representation in failing to advise an employee of the proper procedure for taking a medical leave of absence. After the plaintiff had filed documents that she had felt were sufficient to protect her job rights, her employer discharged her for failure to properly request a medical leave of absence while off work for more than three days. The plaintiff grieved her discharge, and the union arbitrated the grievance, but the arbitrator sustained the discharge. The district court refused to hold the union in violation of any duty to the plaintiff, concluding that the union's failure to advise her of the proper procedure for requesting a medical leave was mere negligence.[162] The result in this case is not necessarily inconsistent with that of *Teamsters Local 282*, though, as the medical leave procedure that the employer demanded be followed was the *same* as that set forth in the contract, which presumably the plaintiff had prior access to.[163]

In N.L.R.B. v. International Brotherhood of Teamsters Local 299,[164] the Sixth Circuit veiwed the information problem in an entirely different context. In this case, an employer announced that it intended to eliminate bid jobs for three employees. The union, upset at this, called a "meeting" on work time at the company's facility, despite the company advising the union that it considered such a "meeting" to be an illegal work stoppage prohibited under the collective bargaining agreement. The union never advised the employees of the company's contention or the possibility of discharge. Subsequently, though, the employer issued 30 day suspensions to

160. *Id.*

161. 119 L.R.R.M. 2191 (E.D. Mich. 1985).

162. *Id.* at 2192. The report of the case fails to indicate whether the plaintiff asked the union what the proper procedure was.

163. *Id.*

164. 782 F.2d 46 (6th Cir. 1986).

58 employees who attended the meeting, and a joint grievance committee later upheld the discipline because the union had never taken steps to authorize a work stoppage. In ruling on charges filed against the union by a disciplined employee, the Board held that the union had violated the duty of fair representation by misleading employees to believe that they were merely attending a union meeting, when the union knew that it was engaged in a work stoppage.[165] The Sixth Circuit did not dispute the Board's factual findings, but refused to enforce the Board's decision as a matter of law. The court held that the duty of fair representation only arose when an individual or group of employees was treated differently than some other individual or employee group.[166] The court flatly rejected the idea of "an undefined fiduciary duty which a union owes to its unit as a whole" as an unwarranted expansion, making the duty of fair representation a "catch-all" for "undesirable union activity."[167] The court contended that a breach of the duty of fair representation could only be found when an individual or group was treated differently than some other individual or group.[168] As this had not happened in *Teamsters Local 299,* the court refused to enforce the Board's order.

In summary of the preceding cases, it can be seen that the Board and the courts have often relied on small factual distinctions to find no breach of the duty of fair representation in instances that are very similar to others where no violations are found. The distinctions are not always convincing—for example, why should the union in *Rainey* escape liability for not providing employees with requested contracts, a violation in *Security Officers,* just because the employees in the latter case were not interested in ascertaining their rights in a particular contract area? Those employees, like the employee in *Security Officers,* could well have been losing particular opportunities to recourse under their collective bargaining

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165. 270 N.L.R.B. 1250 (1984). The Board also found that the Union had acted arbitrarily in never authorizing the work stoppage it had itself instigated, thereby subjecting the employees to discipline which could not have been imposed for an authorized work stoppage. *Id.* at 1251-1252.

166. 782 F.2d at 51-52. The court cited *Vaca, supra,* as quoted in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), as requiring only that in representing all its members, a union must not act with hostility toward any or discriminate among them. 782 F.2d at 51.

167. *Id.* at 51.

168. *Id.* at 51-52. The court noted such cases as *Robesky v. Quantas Empire Airlines, Teamsters Local 282,* and *Retana,* all *supra,* but concluded that in each there was some individual or group that was found not to have been treated the same as other individuals or groups. 782 F.2d at 51.

agreement simply because they did not know the extent of their rights. *Retana* seems to present a better reasoned decision—that a union's knowing failure to provide employees with a way of effectively understanding their contractual rights, whether with respect to a particular problem or not, could constitute grounds for a finding that the union has breached its duty of fair representation.

It is not so difficult to reconcile the outcomes of *Jenkins* and *Teamsters 282* concerning union obligations to advise employees of particular contract provisions, but this reconciliation is most logical if focused on the fact that in *Jenkins*, the agrieved employee had available an alternative source of the needed information—a contract—while in *Teamsters 282* the affected employees were exclusively dependent upon the union to learn of their rights. Unfortunately, the *Teamsters 282* court attempted to justify its holding on a purported showing that the union was "more than merely negligent" in its actions. This is not convincing, where the union was conceded not to have acted in bad faith, nor in a fashion different than the way it had acted in prior situations when arbitration awards issued. Rather than attempting to distort the facts of *Teamsters 282* to fit into a "more than negligence" category, the Board and the enforcing Second Circuit could have reached the same conclusion that the duty was breached on policy grounds—specifically, that where a union is the only essential source of information which could have a serious impact on unit employees' jobs, fairness and the union's fiduciary-like role as employee representative demand that the union use reasonable, non-negligent efforts to communicate the information to the employees.

The most disturbing case in this section is *Teamsters 299*, with its holding that as a matter of law, no breach of the duty of fair representation can occur unless an employee or group of employees is treated differently than another group of employees. As noted earlier in this survey, the Supreme Court has consistently maintained that the duty of fair representation is essentially a protection for employees extended in return for their surrendering the right to bargain individually with their employer. It is difficult for this author to see why a union's abuse of its bargaining authority which affects *all* of the employees who have surrendered their individual bargaining rights should not be protected by the duty of fair representation, when it is clear that a similar abuse affecting only some of the employees would universally be found to breach the duty.

F. *Information Concerning Internal Union Matters*

While, to some extent, ratification of a contract might be considered an internal union matter, it can be seen from the preceding discussion that the Board and the courts have held that it touches upon the employment relationship sufficiently to invoke some duty of fair representation protections for unit employees. In cases involving certain other situations generally considered to be internal union matters, such as the right to resign from union membership and eligibility to be elected as a union steward, the Board and a federal district court have likewise held duty of fair representation priciples to be applicable.

In Local 1384, Auto Workers,[169] a number of employees resigned from their union during a strike via letters of resignation. The employees were all new union members, and not aware that the union's constitution and bylaws placed certain procedural limits on the rights of members to resign. Copies of these documents were not available at the union office, though, and the union never notified any of the employees that it considered their resignations to be invalid. Subsequently, over a year after the attempted resignations, the union contacted 28 employees who had attempted to resign and advised them of back dues obligations. After most of the employees refused to pay back dues, the union requested their discharges under the union security provisions of the contract. In holding that the union could not consider the resignations to be invalid, the Board observed that the employees' weak and short-term membership ties to the union, the union's failure to notify the employees that there were limits on resignations, and its lack of reasonable notice to the employees that it did not consider their resignations to be effective lead to a necessary conclusion that the union had breached "its fiduciary duty to deal fairly with employees."[170]

In LaMarche v. Auto Workers Local 632,[171] the plaintiff argued that a union had the obligation to advise him of his rights and duties as a union member-specifically, with respect to rules concerning eligibility for union office. Plaintiff, a laid-off employee, was nominated to be a union steward, and received enough votes to apparently win an election to that position. However, before he could take the office another employee successfully challenged the

169. 227 N.L.R.B. 1045 (1977).
170. *Id.* at 1049.
171. 119 L.R.R.M. 3203 (W.D. Mich. 1984).

election on the grounds that the plaintiff had filed to meet requirements of the union constitution and bylaws that he certify to the union his eligibility, while not paying dues during his layoff, for membership in good standing. As a result of not being able to hold the steward office, the plaintiff lost the opportunity to return to work from layoff by virtue of contractual superseniority provisions.[172] Because the impact of plaintiff's inability to hold office based on his lack of information about union office requirements had directly affected his employment, the U.S. District Court for the Western District of Michigan held that the claim was cognizable under the duty of fair representation.[173] Notwithstanding this, though, the court held that in this case the duty had not been violated because the union had copies of its constitution and bylaws available upon request, but the plaintiff had failed to request a copy.[174] The court also rejected a claim by the plaintiff that laid off employees had been mislead by the union to believe that they were members in good standing when in fact they were not. While the local union had been under the belief that plaintiff and others had in fact been members in good standing, and communicated that belief to the employees, the district court noted that the local's belief was based on information from an International union official, and that that interpretation had never been questioned by anyone until the plaintiff's election was challenged.[175] Under these circumstances, the court concluded that the union's ignorance of the constitution and bylaw provisions was "based on misinformation and past practice and was not the type of arbitrariness which reflects reckless disregard for the rights of the individual employee."[176]

The above cases are primarily important because they illustrate the potential scope of the duty of fair representation and the potential for an infomation disclosure obligation on the part of a union. Specifically, they indicate that where a union's action can be shown to affect or potentially affect the employment relationship of employees, a union will probably not be able to defeat a

172. *Id.* at 3209. Under superseniority provisions, employees who hold certain union offices are constructively accorded by contract more seniority than any other unit employees in areas that they represent to enable them to avoid layoffs and thereby remain available at the workplace to handle problems of unit employees whom they are charged to represent. *See* Gulton Electro-Voice, Inc. 266 N.L.R.B. 406 (1983).

173. 119 L.R.R.M. at 3209.

174. *Id.*

175. *Id.* at 3210.

176. *Id.*

duty of fair representation claim on the grounds that the action was related to an internal union concern rather than the collective bargaining agreement with the employer. As with the cases involving contract information, though, the cases on internal union matters discussed above illustrate that a union can at least to some extent immunize itself from liability by providing employees with access to constitutions, bylaws and other documents which advise employees of union rules, regulations and procedures.

III. Conclusions

The cases presented in the foregoing sections of this comment are not entirely consistent with each other, a result which is not surprising considering the unsettled nature of the duty of fair representation in general. Nevertheless, it appears that certain generalizations can be made which might assist efforts to determine precisely when a union has an obligation to disclose information to employees whom it represents.

First of all, it seems that no duty to disclose information will arise unless a failure to disclose can be found to have adversely affected the employment relationship, or at least to potentially prejudice the relationship. Thus, duties to disclose have been almost universally found in the union security cases, where absent being advised of what his financial obligations to a union are, an employee can face discharge for nonpayment of those obligations. Similarly, employees have been held to be entitled to extensive information concerning the operation by unions of exclusive hiring halls, where without such information an employee could suffer discrimination in employment opportunities virtually at the whim of the union. On the other hand, duties to disclose have not been found in cases where a failure to disclose has been viewed by the court or the Board as *not* causing or potentially causing harm to the employment relationship. One example of such a case is Office Employees Local 2, where nondisclosure by a union of the fact that it did not file a grievance for an employee made no difference because the would-be grievance lacked merit. The same reasoning can be seen in the *Anderson* and *Acri* cases involving alleged misrepresentations by unions, where no violations were found because the plaintiff employees were unable to show that proper union disclosures would have resulted in the employees avoiding harm caused by their employers.

A second generalization indicated by the cases is that violations of a duty to disclose are more likely to be found where the union is

the only source from which the information can be obtained than where the information is procurable from other sources. Again, it seems that an important consideration in the consistent findings of a disclosure requirement in union security and hiring hall cases is the fact that in those situations, the union is the *only* possible source of the vital information. The courts and the Board also seem to be generally willing to hold the union responsible for disclosing information in situations where, apart from the union, the information could only be obtained from the employer.[177] This may well be due to the traditional view that in collective bargaining situations the interests of the employer and its employees are adverse, and a resulting belief by the Board and the courts that employees should not be compelled to seek information from an adversary which they are not able to obtain from their purported advocate, the union. However, where an employee or employee group has access to desired information through sources other than union officials or the employer, such as available collective bargaining agreements or union constitutions and bylaws, the courts and Board have often held union failures to disclose information not to violate the duty of fair representation.[178]

A third generalization that arises from the cases is that misrepresentations in disclosure are more likely to be found to breach the duty of fair representation than simple nondisclosures. This is not surprising, as misrepresentation is generally an affirmative and intentional action cognizable under "bad faith" aspect of the duty of fair representation. Conversely, to characterize a simple failure to disclose information as a breach of the duty, the Board and the courts have been faced with the task of finding the union's action to be "something more than mere negligence," an undertaking that has sometimes required the exercise of considerable ingenuity by tribunals interested in obtaining just results.[179]

With respect to misrepresentation cases, it further appears that an employee must rely on the union's false statements in order for them to be considered a breach of the duty of fair representation. This element is illustrated clearly in *Chavez*, where employees who

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177. *See*, e.g., *Security Officers Local 40B*, *supra*, and Teamsters Local 282, *supra*, where union liability for disclosure was not absolved although the employers of the affected employees were no doubt also in possession of the collective bargaining agreement and arbitration award which were the subjects of these cases.

178. *See*, e.g., *Lamarche*, discussed *supra* at note 171 and accompanying text.

179. *See Teamsters Local 282*, discussed *supra* at note 154 and accompanying text, for a good example of this problem.

relied on union representations that they would be unfair labor practice strikers in voting to strike their employer were found to have fair representation actions against their union, while employees who stated that they would have supported a strike in any event were barred from any possible recoveries.[180]

Turning from these generalizations to policy considerations, it is this author's belief that the duty of fair representation should continue to be applied to situations where unions fail to convey important information which impacts upon the employment relationship to employees, and even more certainly applied where misrepresentations are involved. If anything, the courts and the Board should be less hesitant to find violations of the duty in information cases than in other situations where the duty is implicated. The chief policy behind the duty of fair representation is to protect employees who have surrendered their individual rights to bargain with their employers from abuse of their employment relationships by actions of their exclusive bargaining representative, and it can readily be seen that such abuses can occur as a result of unions failing to properly provide information to bargaining unit employees. Moreover, as the Ninth Circuit pointed out in *Robesky*, the principal policy considerations that support limitations on the duty of fair representation do not ordinarily apply to information disclosure cases.[181] More specifically, disclosure of information would not generally force unions to expend collective resources in pursuing frivolous negotiations goals or nonmeritorious grievances, nor limit union discretion to act reasonably when faced with conflicting interests from different segments of a bargaining unit.

It might finally be argued that an expanded duty upon unions to disclose information to employees would open the door to courts and the Board imposing new affirmative duties upon unions not contemplated by the Supreme Court, and in contravention of a policy goal of limiting judicial and administrative interference with the actions of unions.[182] It has been argued that the duty of fair representation is analogous to the duty of a legislator to his constituents, and that in order to maximize the freedom of a union to represent diverse employee interests, it is desirable to limit regulation of most actions of union officials to exercise of the power of employees to vote the officials into or out of office.[183] It has also

180. *See* note 129, *supra*, and accompanying text.
181. *See* note 112, *supra*, and accompanying text.
182. *See* Vaca v. Sipes, *supra*, at note 30, and accompanying text.
183. *See* N.L.R.B. Policy on Union's Duty of Fair Representation (N.L.R.B. General

been pointed out that union officials generally lack extensive training in their representative functions, and it is therefore unfair and unrealistic to judge their actions as one might be entitled to scrutinize and pass judgment upon the conduct of an attorney.[184] In answer to these arguments, though, it can be countered that the Board and the courts have also analogized the duty of fair representation as that of an agent to its principal, and have repeatedly spoken of the duty as being fiduciary in nature or at least akin to a fiduciary duty. If nothing else, fiduciary duties generally involve an affirmative obligation of the fiduciary to truthfully disclose information that is important to the party that it is acting on behalf of. Finally, while this author would not advocate holding union officials to the standard of conduct expected of attorneys, it is submitted that unions should be liable to a considerable degree for nondisclosure or misrepresentation of information to employees whom they represent. Holding union officials to a simple negligence standard in this area would not be inequitable. Unions should remain free from liability where the information involved does not seriously impact upon the employment relationship, or where it was readily available to plaintiff employees from other sources, or where employees did not act in reliance upon the misrepresentation or nondisclosure of the information. With these protections, though, and considering the low costs of information disclosure to unions in comparison to the potentially severe and even devastating costs to employees of nondisclosure, it not only seems fair, but virtually required by the interests of justice that unions be legally accountable for negligent nondisclosure or misrepresentation of information significantly related to the employment relationships of employees.

Michael Eggert

Counsel Memorandum 79-55, July 9, 1979) as cited in Labor Relations Yearbook, 341-349 (Bureau of National Affairs, 1969). The purpose of this memorandum was to provide guidance to N.L.R.B. field offices charged with investigating unfair labor practice charges implicating the duty of fair representation. *Id.* at 349.

184. *See*, e.g., Freeman v. O'Neal Steel, Inc., 609 F.2d 1123 (5th Cir. 1980), for a case upholding this viewpoint. *See also* N.L.R.B. Policy on Union's Duty of Fair Representation, *supra*, at 346.