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NLRB and the Duty of Fair Representation: The Case of the Reluctant Guardian

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THE NLRB AND THE DUTY OF FAIR REPRESENTATION: THE CASE OF THE RELUCTANT GUARDIAN*

INTRODUCTION

After a prolonged period of bitter and disruptive conflict between labor and management, Congress enacted the National Labor Relations Act (NLRA) of 1935 for the express purpose of remedying identifiable sources of industrial strife and unrest.[1] The NLRA provides that a labor organization receiving the vote of a majority of the employees in a collective bargaining unit shall be the exclusive representative of that unit for the purpose of bargaining with management regarding employment conditions.[2] In vesting the exclusive bargaining representative with this broad authority, however, Congress failed to impose on the bargaining agent a concomitant obligation to represent all employees fairly. This omission is not entirely surprising considering the novelty and magnitude of the task that faced Congress in drafting the NLRA and the then prevailing attitudes about the nature of labor-management relations.[3] Nor did courts, until 1944, begin to recognize that a right of individuals and minority groups to protection against discrimination by union majority interests was implicit in federal labor laws. In the seminal case of *Steele v. Louisville & Nashville Railroad*[4] the Supreme Court refused to infer that legislation

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1. National Labor Relations (Wagner) Act, 49 Stat. 449 (1935), *as amended by* 61 Stat. 136 (1947), 73 Stat. 519 (1959) (codified at 29 U.S.C. §§141-144, 151-167, 171-183, 185-187, 191-197, 557 (1970)) [hereinafter cited as NLRA]. Section 151 provides: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes. . . ."

2. National Labor Relations Act §9(a), 29 U.S.C. §159(a) (1970), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

3. In the 1930's there was but dim anticipation of the possibility that labor unions and management could form a community of interests that would compete against the interests of the individual employee. It is now recognized, however, that in many instances management has come to value its relationship with established unions for the degree of predictability and stability the unions have introduced into labor relations. Conversely, the temptation is great for a union to support employer conduct that will eliminate opposition to the union's retention of its status as exclusive bargaining representative. It has been argued that when a union acquiesces in employer action against an employee, the union, along with the employer, is attempting to control the industrial establishment. The potential for harm to individual interests inherent in such an agglomeration of power necessitates judicial or legislative development of a mechanism to restore a balance of powers to the industrial world. *See* Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority versus Employee Autonomy*, 23 RUTGERS L. REV. 631, 631-36 (1959).

4. 323 U.S. 192 (1944). This case arose under the Railway Labor Act, 45 U.S.C. §§151-188

conferring plenary bargaining power on unions selected to serve as collective bargaining representatives also imposed on such unions a corresponding duty to protect minority interests.[5] The Court analogized this duty to the legislature's constitutional obligation to represent all of its constituents fairly.[6]

After *Steele*, further definition of the standard of conduct owed by a union to its constituency was left to the federal courts.[7] But in *Miranda Fuel Co.*[8] a sharply divided National Labor Relations Board held that a union's breach of its duty of fair representation constituted an unfair labor practice. By adopting the fair representation doctrine already developed by the federal courts, the NLRB inherited a body of often conflicting case law noteworthy for its vague terminology describing the proper standard for fair union conduct.

Both before and after the *Miranda Fuel* decision, some commentators[9] expressed the hope that the Supreme Court would utilize the preemption doctrine[10] to grant the NLRB exclusive jurisdiction over fair representation

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(1970), but its rationale was extended to the NLRA. *See* Syres v. Oil Workers Local 23, 350 U.S. 892 (1955).

5. 323 U.S. at 199. The exclusive bargaining representative must represent fairly both union and nonunion members of the unit. *See, e.g.*, Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944); United Steelworkers Local 2610, 225 N.L.R.B. No. 54 (1976); United Steelworkers Local 937, 200 N.L.R.B. 40 (1972). *But see* Roadway Express, Inc., 150 N.L.R.B. 43, 47 (1964) (A valid union security clause, which makes employment conditional on the retention of union membership, may provide for favorable treatment for union members over nonunion members.).

6. 323 U.S. at 202. This due process analogy has been described as appropriate when applied to prohibit union racial or religious discrimination but not when used to determine the legality of actions taken in the negotiation and administration of collective bargaining agreements. One commentator has stated that any implication that collective bargaining decisions should be accorded the same deference under federal law as the decisions of state legislatures is "preposterous." Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1339-40 (1958). But while the heavy presumption of legality presently accorded union conduct by the courts may be criticized on other grounds (see text accompanying notes 15-28 *infra*), there has been no overt attempt to equate such deference with that given state legislative decisions.

7. For a discussion of the federal case law developing this standard of conduct see text accompanying notes 14-27 *infra*.

8. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

9. *See* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 174 (1957). *See generally* Comment, *Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: A Plea for Pre-Emption*, 26 U. PITT. L. REV. 593 (1965).

10. The Supreme Court originally devised the preemption doctrine to prevent state court interference with the congressional scheme for regulating labor relations contained in the NLRA. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Under the preemption doctrine, commonly referred to as the "*Garmon* doctrine," a challenged activity that arguably is protected or prohibited by the NLRA is subject to federal regulation and is within the exclusive jurisdiction of the NLRB. *See Symposium—A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1037-39 (1973). The preemption doctrine is not expressly stated in the NLRA, but the Supreme Court in *Garmon* found the doctrine necessarily implicit in a federal law establishing a national labor policy. The current controversy over the preemption doctrine concerns its applicability to limit the intrusion of federal courts into areas that arguably should be left to the exclusive jurisdiction of the NLRA. This issue is complicated not only by the fact that the preemption doctrine, as originally announced, limited the jurisdiction of state and not federal courts but also by the

cases. Proponents of this idea argued that limiting the forums available for litigating fair representation issues would end the bewildering proliferation of competing standards developed by the courts[11] and that the NLRB's unique expertise in the field made it the forum best suited for dealing with the complex task of promoting the collective bargaining process while minimizing unnecessary infringment of individual rights.[12] Thus far the Supreme Court has not adopted this approach,[13] and the contemporary viability of the early arguments for exclusive NLRB jurisdiction over fair representation cases is questionable.[14] Nevertheless, the role of the NLRB as the principal enforcement mechanism of national labor policy and its consequent familiarity with the realities of industrial relations lend special significance to its decisions in this area.

This note assesses the NLRB's contribution to the development of the fair representation doctrine and proposes changes in the law that would better satisfy the needs of aggrieved employees seeking to protect essential employment rights against arbitrary or discriminatory union conduct.

BACKGROUND: JUDICIAL GUIDEPOST TO FAIR REPRESENTATION ANALYSIS

The NLRB's treatment of the fair representation doctrine has been heavily influenced by parallel development of this doctrine in the federal courts. In a few instances the courts have categorized specific types of union conduct as illegal per se.[15] But in general both the pre- and the post-*Miranda Fuel* court decisions have described the scope of the duty of fair representation in vague terms that are of little value in identifying impermissible union conduct.

This lack of explicitness is exemplified by the Supreme Court decision of *Ford Motor Co. v. Huffman*,[16] which involved the extent of labor unions' authority to negotiate changes in seniority rights during the term of a collective

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passage of federal legislation, such as §301 of the Taft-Hartley Act, 29 U.S.C. §185 (1970), which guarantees employees access to federal courts in specified types of controversies. See text accompanying notes 55-62 *infra*. Consequently, the *Garmon* doctrine has been riddled with exceptions in recent years. Exhaustion of this topic is beyond the scope of this note, but a concise introduction to contemporary preemption doctrine problems is contained in Hooten, *The Exceptional Garmon Doctrine*, 26 LAB. L.J. 49 (1975).

11. See Comment, *supra* note 9, at 615.

12. *Id.* at 618.

13. The Supreme Court rejected application of the preemption doctrine to fair representation suits in Vaca v. Sipes, 386 U.S. 171, 178-88 (1967). See text accompanying notes 55-62 *infra*.

14. The court has recognized serious constitutional barriers to applying the preemption doctrine to this area of labor law; therefore, arguments for exclusive NLRB jurisdiction appear viable only in the context of an amended NLRA. See text accompanying notes 193-194 *infra*.

15. *E.g.*, Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) (racial discrimination); Ferro v. Railway Express Agency, 296 F.2d 847 (2d Cir. 1961) (distinctions based on internal union power considerations); Cunningham v. Erie R.R., 266 F.2d 411 (2d Cir. 1959) (personal hostility of union officials toward an employee).

16. 345 U.S. 330 (1953).

agreement. The Court's analysis centered on the inevitability of dissension among union members regarding the impact of union decisions and on the unreasonableness of expecting complete satisfaction of all the divergent interests of a union's constituency.[17] Consequently, the Court concluded that a collective bargaining representative must be accorded "a wide range of reasonableness" in performing its functions subject to "complete good faith and honesty of purpose" in serving its constituents.[18] If a union makes a decision detrimental to some individual interests "honestly, in good faith and without hostility or arbitrary discrimination"[19] and based on "wholly relevant considerations, not upon capricious or arbitrary factors,"[20] no breach of the duty of fair representation exists.[21]

In applying these broad standards to specific fair representation cases, the federal courts have usually required a showing of union hostility or bad faith toward an individual employee as a prerequisite for finding union conduct illegal[22] and have generally deemphasized the arbitrariness standard also

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17. *Id.* at 338.

18. *Id.*

19. Humphrey v. Moore, 375 U.S. 335, 350 (1964).

20. *Id.*

21. Several years later the Court adopted essentially the same test in Vaca v. Sipes, 386 U.S. 171 (1967). The duty of fair representation is "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise . . . discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177.

22. *See, e.g.*, Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974) (quoting Jackson v. Trans World Airlines, Inc., 457 F.2d 202, 204 (2d Cir. 1972)) ("Something akin to factual malice is necessary to establish a breach of duty of fair representation."); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) (A showing of bad faith is required.); Brough v. United Steelworkers, 437 F.2d 748, 750 (1st Cir. 1971) (A union has to meet "only a duty of good faith representation, not a general duty of due care."); Abrams v. Carrier Corp., 434 F.2d 1234, 1251 (2d Cir. 1970) (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)) (The duty of fair representation requires a union "to serve the interests of all members without hostility or discrimination toward any."). *But see* Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972) ("Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation."); Patterson v. Motion Picture Operators Local 513, 446 F.2d 205 (10th Cir. 1971) (To establish a breach of the duty of fair representation it must be shown that the union's conduct was arbitrary, discriminatory, or in bad faith.). In Association of Street Employees v. Lockridge, 403 U.S. 274 (1971), Justice Harlan noted that in order to maintain a fair representation suit an employee must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Id.* at 301. Some courts have seized on this language to defend the legitimacy of the rigid bad faith standard for fair representation analysis. *See, e.g.*, Woods v. North Am. Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973) ("[T]he claim of breach of the duty of fair representation must be measured by the standards whether the union's action was arbitrary, discriminatory or in bad faith . . . *and* whether there is fraud, deceit, dishonest conduct, or discrimination that is intentional, severe, and unrelated to legitimate union activities.") (emphasis added). *Accord*, Reid v. UAW Local 1093, 68 Lab. Cas. ¶12,864, at 24,739 (N.D. Okla. 1972). A reading of the entire *Lockridge* opinion, however, indicates that the quoted language of Justice Harlan is merely dictum. In *Lockridge* the Supreme Court was not required to reevaluate its earlier holdings on the scope of the duty of fair representation. The Court ruled only on the narrow question of the ap-

present in the Supreme Court's definition of the scope of the duty of fair representation.[23] The federal court decisions reflect a belief that a more piercing examination of the rationality of union decisionmaking would undermine the pivotal role of the exclusive collective bargaining representative in maintaining stability in labor-management relations.[24] This heavy burden of proof imposed on aggrieved employees inevitably results in denial of judicial relief to many individuals who have lost important employment rights as a result of union decisions that at best appear only remotely related to a rational or legitimate union purpose.[25] An inordinate number of fair representation suits in the courts end in summary judgments for the defendants based on employees' failure to carry the burden of proving union "hostility."[26]

Commentators have strongly criticized this judicial treatment of the fair representation doctrine.[27] Striking a proper balance between individual and group interests in the field of labor-management relations is a formidable task; however, the prevailing narrow definition of the scope of the duty of fair representation has left the individual with an ephemeral promise of protection against improper union encroachment on basic employment rights.[28]

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plicability of the preemption doctrine to an employee's claim against his union for causing his loss of employment. 403 U.S. at 301.

The Supreme Court has never directly ruled that arbitrary union conduct must be accompanied by a further showing of union "hostility" toward an injured employee in order to constitute a breach of the duty of fair representation. To do so would be a repudiation of the rationale expressed in the line of cases: Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); and Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). See also *Symposium — The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1126 (1973), in which the author criticizes the decisions that have relied on *Lockridge* to raise the standard of proof in a fair representation suit from a proof of a breach of an affirmative duty to represent individual interests fairly to the standard proof for an intentional tort.

23. Vaca v. Sipes, 386 U.S. at 177; Humphrey v. Moore, 375 U.S. at 349.

24. *See* Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260, 265 (1964). "The short of the matter is that to deny the exclusive representative authority to restrict . . . 'individual contract rights' is ipso facto to destroy collective bargaining, for the essence of collective bargaining is nothing more or less than compulsory substitution of collective for individual representation."

25. *See* Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961), *aff'd on rehearing*, 315 F.2d 548 (1963), *cert. denied*, 375 U.S. 826 (1964) (An employer suspected that an employee was stealing money or food but was unable to identify a likely suspect. With union approval the employer laid off five employees selected at random with the intent of firing all of them if the losses ceased in their absence from work. The plaintiff was a member of this experimental group, and subsequently lost her job when the procedure proved effective in stopping the pilferage. Applying a bad faith standard to judge the legality of the union's conduct, the court was unable to find a breach of the duty of fair representation.).

26. *See* Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 78 n.34, 79 n.54 (1972), and the cases cited therein.

27. *See, e.g.*, Flynn, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096 (1974); *Symposium*, *supra* note 22.

28. See Tobias, *supra* note 26, at 91.

THE NLRB'S QUEST FOR A JURISDICTIONAL BASIS

Miranda Fuel *and* Vaca: *An Uncertain Mandate*

In *Miranda Fuel Co.*[29] a majority of the NLRB determined for the first time that a right to fair representation was an integral part of section 7 of the NLRA.[30] The *Miranda Fuel* decision was based on the Supreme Court's recognition[31] that the privilege to act as an exclusive collective bargaining representative granted by section 9 of the NLRA[32] was inseparable from an implicit statutory duty to use this privilege to serve all its members fairly. The Board held that this implicit section 9 duty necessarily gave rise to a corresponding section 7[33] right in union constituents to fair representation by their chosen agents in the collective bargaining process.[34] Hence, a union acting to degrade the employment status of an individual because of "irrelevant, invidious or unfair" considerations or classifications violated section 8(b)(1)(A) of the NLRA, which makes it an unfair labor practice to "restrain or coerce . . . employees in the exercise of their rights guaranteed in Section 7."[35]

The *Miranda Fuel* case involved a union's arbitrary conduct that caused the demotion of one of its members. After returning late from a leave of absence, truck driver Michael Lopuch was confronted with a union demand for a punitive reduction in his seniority status. Lopuch pleaded an illness verified by a physician's statement as an excuse for his late return. The employer accepted this explanation, but the union, reacting to the demands of its members who would be benefited by Lopuch's demotion, continued to press for punitive action.[36] The employer ultimately acquiesced to this union pressure.

The Board found that the union had violated section 8(b)(1)(A) by insisting on a reduction in Lopuch's seniority status that was not required by the terms of the collective bargaining agreement and that served no other legitimate union purpose.[37] The union's action was described as an attempt to

29. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

30. 29 U.S.C. §157 (1970), which provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpse of collective bargaining . . . ." Prior to this time, the NLRB had only asserted jurisdiction in cases in which discrimination motivated by union membership considerations was charged. *See, e.g.*, M. Eskin & Son, 135 N.L.R.B. 666 (1962); Local 825, Int'l Union of Operating Eng'rs, 135 N.L.R.B. 578 (1962); Brunswick Corp., 135 N.L.R.B. 574 (1962). This type of discrimination is clearly forbidden by §8(b)(2) of the NLRA. See note 41 *infra*. By reading the duty of fair representation into §7 of the Act, the NLRB cleared the way for its much broader participation in the development of the duty of fair representation.

31. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955) (per curiam) (petition for writ of certiorari granted).

32. National Labor Relations Act, §9(a), 29 U.S.C. §159(a) (1970). See note 2 *supra*.

33. See note 30 *supra*.

34. 140 N.L.R.B. at 185.

35. 29 U.S.C. §158(b)(1)(A) (1970).

36. This background information is not included in the NRLB opinion but is reported in Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1506 (1963).

37. 140 N.L.R.B. at 188.

impose an arbitrary ex post facto rule of its own making into the employment relation.[38]

The dissenting opinion in *Miranda Fuel* did not directly repudiate the reading of a right to fair representation into section 7 of the NLRA. Instead, the dissenters relied on the Supreme Court's description of the broad discretion of a collective bargaining representative articulated in *Huffman* as authority to reject the premise that the union's action was "arbitrary and invidious discrimination" and thus a breach of its duty to represent all employees fairly.[39]

The differences between the Board factions were more clearly drawn on a second aspect of the case. The *Miranda Fuel* majority concluded that the employer and the union respectively violated sections 8(a)(3)[40] and 8(b)(2)[41] of the NLRA as a consequence of the union's causing the employer to derogate Lopuch's employment status for arbitrary and irrelevant reasons.[42] The dissent disagreed at length with this holding, stating that the discrimination prohibited by these sections is confined to that designed to promote "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations."[43] Since the alleged discriminatory treatment was in no way related to union membership considerations and was not designed to benefit union members to the prejudice of nonunion members, the dissent argued that there was no basis for the application of sections 8(a)(3) and 8(b)(2).[44]

Viewed as a whole, *Miranda Fuel* represented an auspicious beginning for the NLRB's fair representation analysis. In contrast to the earlier Supreme Court pronouncements on the subject,[45] the Board's decision placed the greater emphasis on the absence of the requisite degree of rationality in the union's decisionmaking process. Thus, despite the injured employee's inability to make a strong showing that some form of "hostility" motivated his union's dis-

38. *Id.* at 189.

39. The dissent argued that the union's action promoted the legitimate goals of eliminating the impact of seasonal employment and promoting a timely return to work from leaves of absence. 140 N.L.R.B. at 198 (McCullock, Chairman, & Fanning, Member, dissenting).

40. 29 U.S.C. §158(a)(3) (1970), identifies as an unfair labor practice an employer's interference in employees' exercise of rights guaranteed in §7 of the Act "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

41. 29 U.S.C. §158(b)(2) (1970), provides that a labor union commits an unfair labor practice if it causes an employer to discriminate against an employee in violation of §8(a)(3) of the Act. See note 40 *supra.*

42. 140 N.L.R.B. at 188, 190.

43. *Id.* at 197 (McCullock, Chairman, & Fanning, Member, dissenting) (quoting Animated Displays Co., 137 N.L.R.B. 999, 1010 (1962)).

44. *Id.* at 198-99. According to the majority view in *Miranda Fuel*, a violation of §§8(a)(3) and 8(b)(2) of the Act may be found when it can be inferred from the facts of a case that a union's action will have the natural and foreseeable result of encouraging union membership or loyalty. Thus, an affirmative showing of an unlawful motive to promote union membership is not required to sustain an unfair labor practice charge. *Id.* at 185-89. The dissent, however, would have required an affirmative showing of the proscribed motivation. *Id.* at 195 (McCullock, Chairman, & Fanning, Member, dissenting).

45. See text accompanying notes 15-21 *supra.*

criminatory conduct, the Board nevertheless concluded that the union had violated the standards of fair and impartial conduct implicit in the Act.

A divided Court of Appeals for the Second Circuit denied enforcement of the Board's decision in *Miranda Fuel* but did not disaffirm the holding that a breach of the duty of fair representation was an unfair labor practice.[46] The subsequent activism against racial discrimination in the 1960's gave impetus to the first judicial acceptance of the jurisdictional analysis used by the NLRB in *Miranda Fuel.*[47] The earliest court decisions on the duty of fair representation involved alleged racial discrimination by unions.[48] When dealing with racial discrimination rather than less repugnant forms of arbitrary union conduct, the courts apparently have been less concerned with undermining the objectives of national labor policy through restraints on the authority of collective bargaining representatives.

Following the Second Circuit Court of Appeals decision, the NLRB applied the *Miranda Fuel* rationale to find that racial discrimination in a union's processing of grievances[49] or imposing of work quotas[50] was an unfair labor practice. The Fifth Circuit quickly agreed with the NLRB and held in *Local 12, United Rubber Workers v. NLRB*[51] that a breach of the duty of fair representation contituted an unfair labor practice.

The NLRB has remained divided, however, over the propriety of extending jurisdiction to fair representation cases along the lines drawn in *Miranda Fuel.*[52] The Supreme Court has yet to resolve the controversy; in fact, in *Vaca v. Sipes,*[53] its last significant effort to explicate the duty of fair representation, the Court declined to rule on the appropriateness of NLRB jurisdiction[54] even though presented with a clear opportunity to do so. Nonetheless, the Supreme Court was quite specific in rejecting the contention that the NLRB should be the sole forum for resolving fair representation issues. The majority in *Vaca* determined that the primary justification for applying the preemption doctrine — the need to avoid development of conflicting rules of substantive law governing labor relations — must yield to other overriding policy con-

46. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

47. *See* Comment, *supra* note 9, at 601.

48. *E.g.*, Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

49. Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966); Independent Metal Workers Local 1, 147 N.L.R.B. 1573 (1964).

50. Galveston Maritime Ass'n, 148 N.L.R.B. 897 (1966), *enforced*, 386 F.2d 1010 (5th Cir. 1966).

51. 368 F.2d 12 (5th Cir. 1966).

52. Since *Miranda Fuel* there has never been complete unanimity among the members of the Board on the correctness of the holding that a breach of the duty of fair representation motivated by other than union membership considerations is an unfair labor practice. *See, e.g.*, Marquette Cement Mfg. Co., 213 N.L.R.B. No. 33 (1974); Longshoremen's Local 13, 183 N.L.R.B. 221 (1970); Cominco-American, Inc., 182 N.L.R.B. 638 (1970).

53. 386 U.S. 171 (1967).

54. The Court's analysis of this case included an ambiguous comment about the "NLRB's tardy assumption of jurisdiction in these cases." *Id.* at 183.

siderations.[55] The Court argued that without an implied duty of fair representation in federal labor law "grave constitutional problems" would arise if a union could freely use its power as an exclusive bargaining representative to further invidious discrimination.[56] Since the NLRB's General Counsel has unreviewable discretion to refuse to initiate an unfair labor practice complaint,[57] granting the Board exclusive jurisdiction over fair representation cases would resurrect the same constitutional questions that the *Steele* Court had sought to avoid.[58] The *Vaca* Court concluded that denying access to the courts to petitioners bringing unfair representation actions would destroy the judicial bulwark developed in *Steele* "to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."[59]

The *Vaca* Court was also unable to conclude that the NLRB possessed any special expertise that made it particularly suited to serve as a forum for fair representation cases. Since such actions often require examination of the substantive policies followed by a union in negotiation and administration of a collective agreement, matters not usually within the Board's jurisdiction, a majority of the Court believed that the courts were at least equally qualified to make such an inquiry.[60] Consequently, the Court held that fair representation petitioners could continue to invoke section 301 of the Labor Management Relations Act[61] to bring suits in federal courts on a breach of contract

55. *Id.* at 181-82. For a discussion of the application of the preemption doctrine see note 10 *supra.*

56. *Id.* at 182. For discussions of the due process questions arising in this regard, see Flynn, *supra* note 27, at 1096, 2000 n.15; Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining,* 15 HASTINGS L.J. 391, 397 n.28, 402 (1964).

57. 386 U.S. at 182. The Court noted that it is the policy of the General Counsel of the NLRB to refuse to initiate unfair labor practice complaints when the alleged injury was "insubstantial." *Id.* at 182 n.8.

58. *Id.* at 182. See discussion of *Steele* in text accompanying notes 4-6 *supra.*

59. *Id.*

60. *Id.* at 181. Justice Fortas reached the opposite conclusion in his concurring opinion. He argued that while the preemption doctrine should not preclude the initiation of a separate suit for breach of contract against an employer under §301 of the Taft-Hartley Act, the NLRB should have exclusive jurisdiction over claims against a union for a breach of its duty of fair representation. *Id.* at 200-03 (Fortas, J., concurring). The NLRB's expertise in the latter class of cases was irrefutable in Justice Fortas' opinion and made application of the *Garmon* doctrine appropriate. *Id.* at 202.

61. Labor Management Relations (Taft-Hartley) Act, §301(a), 29 U.S.C. §185(a) (1970), provides: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . . without respect to the amount in controversy or without regard to the citizenship of the parties." The Supreme Court had earlier ruled that state courts can also hear §301(a) suits if federal law is applied. Smith v. Evening News Ass'n, 371 U.S. 195, 200-01 (1962). State court jurisdiction is usually subject to the limitation that where the alleged breach of the collective bargaining agreement is also an unfair labor practice, the NLRB retains exclusive jurisdiction. Association of Street Employees v. Lockridge, 403 U.S. 274 (1971). Cases involving the duty of fair representation, however, have been specifically exempted from this limitation, thus paralleling the *Vaca* decision regarding federal courts. *Id.* at 301. See Flynn, *supra* note 27, at 1132-38, and the authorities cited therein for a discussion of the procedural pitfalls involved in choosing a state court as a fair representation forum.

theory regardless of whether the alleged breach also constituted an unfair labor practice within the jurisdiction of the NLRB.[62]

Not only did the *Vaca* Court fail to subject the NLRB's jurisdictional analysis in *Miranda Fuel* to detailed examination, it also failed to consider whether a repudiation of the NLRB's assertion of concurrent jurisdiction would promote consistency in federal labor law by giving the courts an exclusive mandate to develop the fair representation doctrine. This judicial inertia has implied the Court's acquiescence in a free-ranging, ad hoc development of the fair representation doctrine and has left the NLRB to expand on the substantive rationale of *Miranda Fuel*.[63]

The Potential of the NLRB as a Fair Representation Forum

Since the uncertain mandate of *Vaca* permits fair representation suits to be brought before one of several tribunals,[64] the influence of the NLRB on this

62. In addition to resolving negatively the question of the applicability of the *Garmon* doctrine to fair representation cases, *Vaca* also established the general rule that fair representation petitioners must at least attempt to exhaust any grievance and arbitration procedures provided for in an applicable collective bargaining agreement prior to commencing a §301 suit. 386 U.S. at 184.

Failure to do so permits a defendant employer to raise the defense of non-exhaustion of contractual remedies and thus move for dismissal of the suit. *Id.* The *Vaca* Court noted two exceptions to this rule. An employee is not required to resort to the remedial procedures of a collective bargaining agreement when the conduct of the employer is equivalent to a repudiation of the contractual grievance resolution process. *Id.* at 185. A second exception arises when the union has sole authority to invoke the higher stages of grievance procedure leading to arbitration and denies an employee access to these procedures by a wrongful failure to process a grievance. *Id.* When the employer breaches a collective agreement by wrongfully discharging an employee, the employee may maintain a §301 suit without exhausting contractual remedies but only if he proves that his union violated its duty of fair representation in processing his grievance. *Id.* at 185-86. This holding of *Vaca* can enmesh the fair representation plaintiff in a procedural "Catch-22." Unions are not required to process every meritorious grievance to arbitration, and it is highly unlikely under prevailing judicial standards that many union refusals to process grievances will be found illegal. See text accompanying notes 22-28 *supra*. Thus, generally the guilty employer will be successful in obtaining a dismissal of the §301 suit by raising the failure to exhaust contractual remedies as a defense. The employee may then lodge an unfair labor practice complaint against his union but usually will be unable to join the employer as a defendant. See text accompanying notes 68-69 *infra*. Even if his complaint is successful, the employee can only recover those damages directly attributable to the union's misconduct and not those caused by the employer's breach of contract. 386 U.S. at 185-86. Justice Black foresaw this result in his dissenting opinion in *Vaca* and was vociferous in his objection to it: "The Court opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer." *Id.* at 203 (Black, J., dissenting).

63. There is no clear indication in either the language of the Labor Management Relations Act or its legislative history to show congressional intent that §8(b)(1)(A) was to give the NLRB the broad powers to deal with all forms of union discrimination that were asserted in *Miranda Fuel*. *See* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 1142 (1948). Thus, the *Vaca* Court was under no special constraint that would have precluded a reversal of the NLRB ruling.

64. See note 61 *supra*.

facet of labor law has been partially a function of its attractiveness as a forum to potential petitioners. Two important advantages of NLRB hearings over judicial suits are the absence of a requirement to pay litigation costs[65] and the more timely resolution of issues,[66] both of which reduce the cost of litigation to plaintiffs. The Board's special expertise in the nuances of union member conflicts and its more consistent body of jurisprudential analysis may also be advantages in seeking access to the NLRB.[67]

Countervailing considerations such as severe constraints on the jurisdictional and remedial powers of the NLRB may make it an undesirable forum in many cases. For example, absent employer collusion in an alleged unfair labor practice giving rise to a fair representation suit, a plaintiff before the NLRB is without power to join the employer as a party to the action.[68] Thus, in light of the Supreme Court's ruling that damages directly attributable to an employer's breach of contract cannot be assessed against a union in an unfair labor practice proceeding,[69] an employee might recover only a small fraction of his pecuniary loss even under a favorable Board decision. The six month NLRB statute of limitations[70] may also restrict access to Board hearings. Finally, there is some indication that NLRB Regional Directors and their staffs have taken a generally negative attitude toward fair representation suits,[71] but, of course, the incidence of such subjective discrimination cannot be adequately documented.

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65. See Comment, *supra* note 9, at 618 n.158. The author quotes comments made by the General Counsel of the NAACP stressing the importance of this factor in facilitating the progress of racial discrimination cases.

66. Some commentators cite the NLRB's excessive case load to dispute this assertion. See Tobias, *supra* note 26, at 64 n.12. The results of a statistical survey conducted from 1961-1969 showed no significant rise in the NLRB's caseload after the assumption of jurisdiction over fair representation cases. See Comment, *Unfair Representation and the National Labor Relations Board: A Functional Analysis*, 37 J. AIR L. & COM. 89, 104 (1971). This fact may be attributable to restraints on the NLRB's jurisdictional and remedial powers in fair representation cases. Examination of statistics for five fiscal years reveals that the number of charges of illegal union discrimination against employees remains fairly constant on an annual basis:

FISCAL YEAR	NUMBER OF FILINGS WITH NLRB
1969	1,782
1970	1,921
1971	1,882
1973	1,542
1974	1,781

34-40 NLRB ANN. REP. (1970-1975).

67. See Comment, *supra* note 66, at 104.

68. Such employer conduct is an unfair labor practice under §8(a)(3) of the NLRA, thus providing the NLRB with a jurisdictional basis. See note 40 *supra*.

69. Vaca v. Sipes, 386 U.S. at 195-98. See note 62 *supra*. Additionally, the NLRB normally does not hold a union agent personally liable for monetary damages, even when he is named as an individual respondent. *See, e.g.*, United Parcel Serv., 203 N.L.R.B. 799 (1973); Considine Distrib. Co., 166 N.L.R.B. 915 (1967); Elmhurst Contracting Co., 141 N.L.R.B. 53, 56 (1963).

70. See Tobias, *supra* note 26, at 64 n.12.

71. *Id.*

Monetary Damages: The Courts and the NLRB Compared

The problems inherent in the existence of multiple forums for the resolution of fair representation controversies are particularly evident in the treatment of NLRB remedial orders by the federal courts. The Board's broad remedial powers, including the authority to award an employee reinstatement with backpay, are contained in section 10(c) of the NLRA.[72] Section 10(e) makes NLRB remedial orders indefinitely subject to judicial review and enforceable only after an appropriate court order has been entered.[73] In other areas of labor law, the courts' control of NLRB orders has been based on a remedial-penal dichotomy;[74] that is, a Board remedial order will stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[75]

The Supreme Court has created an exception to this general policy of deferment to the Board's discretion by providing redress for unfair labor practices in fair representation cases through an apportionment of liability between the employer and the union based on relative fault in causing monetary loss to the employee.[76] Thus, if an employer infringes the rights of an employee through breach of the collective agreement and a union also violates its duty of fair representation by wrongfully failing to seek a restoration of these rights, the NLRB can assess damages against the union only to the extent that the union's malfeasance compounded the original wrong.[77] If an injured employee desires recovery from the employer on a breach of contract claim, a section 301 suit in a federal or state court must be elected in lieu of an NLRB unfair labor practice proceeding against the union.[78]

A federal court in a section 301 suit may, however, take a much more restrictive view toward the assessment of monetary damages than does the NLRB. In awarding back pay in fair representation cases, the Board has relied on formulae established in *F.W. Woolworth Co.*[79] and *Isis Plumbing & Heating Co.*[80] In *Woolworth*, the NLRB began the practice of computing back pay awards on the basis of each separate calendar quarter from the date of a discriminatory action to a proper offer of reinstatement of employment rights.[81] This policy was implemented to enable an employee to recover gov-

72. 29 U.S.C. §160(c) (1970). This section has been held to permit the NLRB to hold the employer and union jointly and severally liable for back pay when it finds them both responsible for the loss suffered by discharged employees. Union Starch & Refining Co. v. NLRB, 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951). But see text accompanying notes 68-69 *supra*.

73. 29 U.S.C. §160(e) (1970).

74. *See* Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 870-74 (1963).

75. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47 (1953).

76. Vaca v. Sipes, 386 U.S. at 196-98.

77. *Id. See also* Czosek v. O'Mara, 397 U.S. 25, 29 (1970).

78. For a discussion of the procedural difficulties attending a §301 suit, see note 62 *supra*.

79. 90 N.L.R.B. 289 (1950).

80. 138 N.L.R.B. 716 (1962).

81. F.W. Woolworth Co., 90 N.L.R.B. 289, 292-93 (1950). The back pay to be awarded for each quarter is the difference between the employee's normal quarterly earnings over his

ernment employment benefits such as Old Age and Survivors Insurance that are computed on the basis of quarterly earnings and would otherwise be irretrievably lost.[82] *Isis* applied the *Woolworth* quarterly earnings formula and, further, assessed interest at a rate of six percent per annum computed quarterly on back pay due the injured employee.[83] It is now standard practice for the NLRB to enter remedial orders of this type in fair representation cases.

Plaintiffs in section 301 suits have been unsuccessful in getting the courts to apply the NLRB method of determining monetary damages. For example, in *De Arroyo v. Sindicato de Trabajadores Packinghouse*,[84] the First Circuit Court of Appeals refused to compute prejudgment interest according to the *Isis* formula on the ground that jury verdicts, as opposed to the findings of an administrative agency, did not supply the basic data of dates and amounts necessary to compute interest fairly.[85] Similarly, in *Lodges 743 & 1746, International Association of Machinists v. United Aircraft Corp.*[86] the Second Circuit upheld a district court's refusal to apply the *Isis* formula, stating that prejudgment interest was not recoverable on an unliquidated sum incapable of ascertainment by a court.[87] As a consequence of the district court's refusal to apply the *Isis* formula, the forum that is often best suited for joinder of all parties and claims arising from an unlawful derogation of the employment relation is not necessarily the forum that affords the most complete recovery of lost benefits. Thus, from the outset, the fair representation plaintiff faces a difficult decision in selecting the most advantageous forum for his action.

A Search for Consistent NLRB Standards

The NLRB's development of the fair representation concept has escaped the detailed scholarly examination that has accompanied the concurrent activity of the federal courts in this area, but has nonetheless suffered a chilling effect created by judicial ambivalence toward the NLRB's jurisdictional foundation. Although some have contended that the NLRB has engaged in a quiet retreat from the *Miranda Fuel* rationale by consistently refusing to find unfair labor practice violations absent a showing of discrimination clearly motivated by union membership considerations,[88] analysis of the Board's de-

actual "net earnings" for that period. "Net earnings" is defined as income received by the employee from sources other than his usual occupation, less any expenses incurred in obtaining other employment, such as travel and room and board, and includes amounts received for work performed in any government-sponsored work relief program. *Id.* at 293 & n.8.

82. The *Woolworth* formula, which changed a 15-year-old NLRB method for assessing awards of back pay, survived a Supreme Court challenge in NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

83. 138 N.L.R.B. at 721. Prior to 1962, the NLRB uniformly declined to award any interest on back pay awards. *Id.* at 717.

84. 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1970).

85. *Id.* at 290.

86. 534 F.2d 422 (2d Cir. 1975).

87. *Id.* at 445-47. The court did leave the door open for the exercise of sound judicial discretion in awarding interest on back pay, however, noting that a defendant's use of dilatory tactics is not a prerequisite to such an assessment. *Id.* at 447.

88. *See Symposium, supra* note 10, at 1074-84. This argument unduly emphasizes form over substance. The *Miranda Fuel* majority determined not only that discrimination by a

cisions refutes this argument and reveals that the substantive rationale of *Miranda Fuel* retains its vitality as a source of relief for the injured employee. In searching for consistent NLRB standards for union conduct that fulfills the duty of fair representation, an examination of the various phases of the employment relation affected by union decisionmaking facilitates an understanding of the degree to which the NLRB has developed an identifiable theoretical basis for the fair representation doctrine applicable across the entire spectrum of union-employee conflicts.

Unlawful Union Conduct at the Initiation of the Employment Relation: The Hiring Hall Cases

The frequent conflicts between unions and employees over the administration of exclusive hiring hall clauses in collective bargaining agreements have given the NLRB occasion to refine the substantive holdings of *Miranda Fuel.* Hiring hall clauses are unusual in that they vest unions with powers commonly thought to be within the realm of management. These agreements are common to fields of commercial activity with an episodic demand for labor, such as the construction industry, and operate by restricting employer hiring to individuals referred through a union hiring hall.

Hiring hall clauses thus give unions the status of quasi-employers and were unforeseen by the drafters of the original provisions of the NLRA. Consequently, a convincing argument can be made that hiring hall clauses allow unions to assume a unilateral rulemaking role not encompassed by the provisions of section 9 of the NLRA which regulates union conduct in the bilateral aspects of the collective bargaining process. Therefore, union conduct with respect to hiring hall clauses should not be subject to the duty of fair representation found by *Miranda Fuel* to be implicit in section 9.[89] Accordingly, complaints arising from the administration of exclusive hiring hall agreements would be subject to judicial scrutiny only on the ground that a union had breached its fiduciary duty arising from the payment of dues or had breached provisions of the union's constitution.[90] The NLRB has not commented on this analysis, however, and has regularly applied fair representation principles in deciding hiring hall cases.[91]

collective bargaining representative based on grounds other than union membership considerations violated the NLRA but also that a violation of §§8(a)(3) and 8(b)(2) of the Act could be found by inference from the facts of a case. See note 44 *supra.* For this reason, a complete understanding of the NLRB's definition of the scope of the duty of fair representation may be gained only through an analysis of those Board decisions that have applied the *Miranda Fuel* rationale in its purest form as well as those cases that have found unfair labor practices in discriminatory union conduct based on considerations of union membership.

89. Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CAL. L. REV. 663, 808 (1973). Professor Feller successfully argued the union position in the landmark case of Vaca v. Sipes, 386 U.S. 171 (1967).

90. Feller, *supra* note 89, at 808.

91. The NLRB has also held that mere applicants for employment are entitled to the protection of the NLRA, Pacific Maritime Ass'n, 209 N.L.R.B. 519, 526 n.14 (1974) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)), and that application of the *Miranda Fuel* rationale to such cases is not dependent on the union membership of the job applicant. Cargo Handlers, Inc., 159 N.L.R.B. 321 (1966).

The NLRB is an especially desirable forum for fair representation suits arising out of the administration of hiring hall clauses in that the Board has adopted the position that an employer who delegates control over hiring policies to a labor organization is liable for any unfair labor practices resulting from the union's abuse of this power[92] and that an employer may not plead ignorance as a defense to such charges.[93] This ruling enables the employee to join all necessary parties to the unfair labor practice proceeding and thereby obtain full satisfaction of his claimed damages.[94]

Initially, the Board viewed agreements granting unions the exclusive control over hiring policies as per se violative of the NLRA because of the potential use of such agreements to coerce union membership[95] in contravention of sections 8(a)(3) and 8(b)(2) of the Act. The rejection of this argument by the Supreme Court in *Local 357, International Brotherhood of Teamsters v. NLRB*,[96] however, has resulted in requiring a case-by-case determination of whether a hiring hall agreement is in fact administered in an unlawful manner. The Court acknowledged the promotion of union membership that may result naturally from the existence of a hiring hall arrangement and held that only the promotion of membership caused by discriminatory acts is unlawful[97] thereby necessitating the ascertainment of the actual motivation behind a union's hiring policies in each case.[98]

The NLRB has determined that the extent of an employee's burden of proving improper motivation in these cases varies with the fact situation in which the unfair labor practice charge arises. In some circumstances a union's conduct may be so "inherently destructive of employee interests" that a violation of section 8(b)(2) may be found without proof of an underlying improper motive.[99] On the other hand, if the union establishes that a substantial and legitimate purpose is served by its conduct with only a "comparatively slight" degree of resulting harm to employee rights, an affirmative showing of improper motivation must be made to sustain the unfair labor practice charge.[100]

Proof that a union favors union members over nonunion applicants for

92. Pacific Maritime Ass'n, 209 N.L.R.B. 519, 525 (1974).

93. *Id.* The federal courts concur in this position. *E.g.*, NLRB v. Houston Maritime Ass'n, 337 F.2d 333 (5th Cir. 1964); NLRB v. Southern Stevedoring & Contracting Co., 332 F.2d 1017, 1019 (5th Cir. 1964); Morrison-Knudsen Co. v. NLRB, 275 F.2d 914, 917 (2d Cir. 1960).

94. For discussion of the general restrictions on NLRB jurisdictional and remedial powers, see text accompanying notes 68-71 *supra*.

95. *See, e.g.*, Mountain Pac. Chapter of the Ass'n of Gen. Contractors, 119 N.L.R.B. 883 (1956), *rev'd*, 270 F.2d 425 (9th Cir. 1959); Pacific Intermountain Express Co., 107 N.L.R.B. 837 (1954), *enforced sub nom.* NLRB v. Teamsters, 225 F.2d 343 (8th Cir. 1955).

96. 365 U.S. 667 (1961). An otherwise lawful hiring hall clause, however, cannot be applied retroactively to cause the firing of an employee who was hired before the agreement was implemented. Teamsters Local 676, 172 N.L.R.B. 948 (1968).

97. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961). *See also* Radio Officers' Union v. NLRB, 347 U.S. 17, 42-43 (1954); Millwrights Local 1080, 201 N.L.R.B. 882 (1973).

98. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961).

99. Austin & Wolfe Refrig., 202 N.L.R.B. 125 (1973).

100. *Id.* at 135.

job referrals under a hiring hall clause[101] or that the freezing of all job referrals was designed to deny employment to black applicants[102] has established clear violations of the NLRA. These Board rulings are consonant with federal court decisions that recognize limited circumstances in which union conduct may be categorized as per se illegal.[103] The court decisions also appear to equate union conduct "inherently destructive of employee rights" with any discriminatory conduct cognizable under the traditional bad faith standard.

In contrast to the NLRB cases dealing with more evident discriminatory conduct by labor organizations, union restriction of job referrals to local applicants only has been held to serve a legitimate union purpose of easing local unemployment problems if a "rational nexus between the problem and the remedy"[104] existed and the stated union purpose for such discrimination was not a "sheer pretextual rationalization for improper motivation."[105]

The NLRB decisions in hiring hall cases indicate that a breach of the duty of fair representation is not necessarily established by proof that a union discriminated against an employee by exceeding the authority contained within the four corners of a collective bargaining agreement. The Board has recognized that in order to classify a union's conduct as arbitrary under the *Miranda*

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101. *E.g.*, Elevator Contractors Local 1, 214 N.L.R.B. 257 (1974); Motor City Elec. Co., 204 N.L.R.B. 460 (1973); Telephone Workers Local 58, 194 N.L.R.B. 461 (1971).

102. Houston Maritime Ass'n, 168 N.L.R.B. 615 (1967). More recently, hiring hall discrimination on the basis of sex has also been condemned. Pacific Maritime Ass'n, 209 N.L.R.B. 519 (1974).

103. *See* cases cited at note 15 *supra*.

104. However, the Board will not attempt to impose what it feels be a more rational solution on parties to a collective agreement who have attempted in good faith to resolve known problems. Local 10, Chicago Fed. of Musicians, 153 N.L.R.B. 68, 81 (1965). *Accord*, Local 8, Int'l Bhd. of Elec. Workers, 221 N.L.R.B. No. 180 (1975).

105. Local 8, Int'l Bhd. of Elec. Workers, 221 N.L.R.B. No. 180 (1975). Bricklayers Local 15, 150 N.L.R.B. 1496, 1500 (1965), required that the plaintiff establish by a preponderance of the evidence that the union's true motive was to prefer union members rather than local area men. In the context of a refusal to process grievances, union discrimination on the basis of geographical preference has been condemned as an unfair labor practice. *See* United Parcel Serv., 203 N.L.R.B. 799, 805 (1973).

The difficulty a union encounters in rebutting a charge of discriminating on the basis of union membership is evidenced by Local 542, Int'l Union of Operating Eng'rs, 196 N.L.R.B. 1 (1972). In that case a union denied referrals to a nonunion oiler who dropped out of a union-sponsored apprenticeship program but continued to refer union oilers with similar work experience. The union's stated purpose was to provide the industry with skilled employees from a government funded training program of "paramount concern" to the state of Pennsylvania. In reversing the finding of the trial examiner, the Board ruled acceptable the union's justification for its discrimination and held that no unfair labor practice had been committed. *Id.* at 8.

The ruling of *Operating Engineers* is consistent with that of Austin & Wolfe Refrig., 202 N.L.R.B. 135 (1973), which dealt with union interference in an established employment relationship. *Austin & Wolfe* involved a derogation of the employment status of a nonunion member for the stated union purpose of increasing the salaries of all employees in the unit. The suspected presence of an unstated secondary purpose of evading federal wage guidelines coupled with the adverse effect of the union action on the nonunion plaintiff provided the NLRB with sufficient basis for finding a fair representation violation. See text accompanying notes 112-116 *infra* for a further discussion of *Austin & Wolfe*.

Fuel rationale, more must be proven than a mere overstepping of contractual limits. The legality of union discrimination must be determined by examining the totality of the labor organization's conduct, including its motivation.[106]

In *Local 465, International Brotherhood of Electrical Workers*[107] a hiring hall clause authorized the union to "delist" from its referral rolls any employee discharged for incompetence or insubordination. The petitioner had been fired three times on such grounds and was a candidate for complete exclusion from the hiring hall. In spite of this poor performance record, the union agent in charge of the hiring program continued to refer the employee to selected jobs based on the agent's evaluation of the employee's efficiency although the hiring hall contract did not require such lenient treatment. The employee then sought NLRB action to force the union to refer him to jobs without regard to the agent's evaluations of efficiency. The union conceded that the agent's actions were not authorized under the collective bargaining agreement but explained that for humanitarian reasons the agent was reluctant to take the drastic step of delisting any employee.[108] The NLRB trial examiner refused to find an unfair labor practice in the union's failure to adhere rigidly to the terms of its contract since the deviations promoted the legitimate goal of enhancing industrial efficiency.[109]

In this case the union's departure from contract terms resulted in more favorable treatment for the employee; however, the language of the decision conveys the impression that, in the absence of some other impermissible motive, the union could have legitimately extended the policy of assigning jobs on the basis of subjective evaluations of relative efficiency to any employee.[110] The outcome of this case may be justifiable in light of the fact situation involved, but the rationale of the decision does not fit comfortably within a generalized theory of the duty of fair representation. Injection of the nebulous concept of relative employee efficiency into an area of the law already riddled with indefinite terminology does not promote predictability in the outcome of Board decisions. This is not to say that cases concerning the administration of hiring hall clauses should not be subject to fair representation analysis,[111] but merely to emphasize the potential for confusion inherent in equating rational union conduct and rational employer conduct. A conclusion in *Electrical*

106. Local 456, Int'l Bhd. of Elec. Workers, 183 N.L.R.B. 1277 (1970).

107. *Id.*

108. *Id.* at 1281.

109. *Id.* at 1283.

110. "Such discrimination [on the basis of relative efficiency] does not cease to be relevant to the industrial scene because it is practiced . . . by a union rather than an employer. Nor does it cease to be relevant because the union's contract limits the extent to which it may base its actions on differences in employee efficiency and the union exceeds those limits. Such a contractual provision cannot change the facts of industrial life nor detract from the importance of efficiency of operations or its relevance to the vital interests of employers and employees." *Id.* at 1283-84. The NLRB affirmed the trial examiner's decision on the narrow ground that the evidence adduced by the petitioner was insufficient to support a finding of an unfair labor practice. *Id.* at 1277. The Board's refusal to comment on this type of overly expansive *Miranda Fuel* analysis does little to dispel uncertainty regarding the precise nature of the duty of unions to represent members in a fair and impartial manner.

111. See text accompanying notes 89-90 *supra.*

Workers that the union's departure from the express terms of the collective agreement was within the reasonable bounds of discretion because its primary motivation — to insure the continued employment of all its members — was a permissible motivation would be more consistent theoretically with the duty of fair representation as developed by the Board.

The hiring hall cases decided against the union have often involved a finding of improper union membership considerations behind discriminatory union conduct; nonetheless, it is evident that the *Miranda Fuel* rationale has also had an important influence on the Board's decisions. The "inherently destructive-substantial union purpose" dichotomy advanced as the test for gauging the legality of union conduct is a significant departure from the pure bad faith test used by many courts.

Union Interference with the Established Employment Relation

Closely related to the hiring hall cases are Board decisions regarding breaches of the duty of fair representation arising out of improper union interference with an established employment relationship. Unlike the hiring hall cases, which have usually dealt with types of union discrimination clearly prohibited by the NLRA, these cases have involved union conduct less obviously arbitrary or invidious.

In *Austin & Wolfe Refrigeration, Inc.*,[112] for example, the NLRB found a breach of the duty of fair representation in a complex union scheme to avoid the effect of a federal wage freeze. In order to avoid a direct violation of the freeze restrictions, the union persuaded an employer who was paying less than union scale to discharge its workforce and to take on new employees referred through the union's hiring hall at the higher contract rate. The former employees were then referred through the hiring hall to new employers already paying the scale rate. The petitioner, a nonunion member, was the only employee who ultimately lost employment through this arrangement. A majority of the reviewing panel found the union's action so inherently destructive of employee rights that it should be deemed unlawful without proof of an underlying improper motive and stated that circumvention of government wage controls could not be considered a legitimate business end.[113] The panel held that the plan would have the inevitable result of encouraging union membership and therefore violated sections 8(b)(1)(A) and 8(b)(2) of the Act.[114]

Chairman Miller dissented on the ground that the case contained no evidence of unlawful discrimination in the impairment of the petitioner's employment rights. He felt that the true union motive was to increase the wages being paid all employees, regardless of their union affiliation and that the fact that the scheme devised by the union to serve this legitimate collective bargain-

112. 202 N.L.R.B. 135 (1973).

113. *Id.* at 135. The Board justified this conclusion by emphasizing the parallelism of the case to the facts in American News Co., 55 N.L.R.B. 1302 (1944), which held that a strike for wage increases prohibited by the National War Labor Board was not protected activity under the Act.

114. *Id.* at 142.

ing objective may have contravened the terms of a Presidential wage freeze order was immaterial under the *Miranda Fuel* rationale to a resolution of the unfair labor practice charge.[115] Since the petitioner did not allege that his failure to obtain reemployment was due to union discrimination in referring him through its hiring hall,[116] Chairman Miller found no basis to support the unfair labor practice charge. The clear message of *Austin & Wolfe* is that complete destruction of a nonunion member's existing employment rights will not be tolerated unless the union's action not only substantially promotes a recognized collective bargaining objective but also is otherwise free of the slightest taint of illegality.

In contrast to the holding in *Austin & Wolfe,* the Board has consistently recognized a union's broad authority to interfere in the employment relationship where a rational nexus between the union's action and a lawful collective bargaining objective has been identified. The NLRB has dismissed charges against a union that caused the dismissal of an employee who insisted on working without a subsistence allowance called for by the collective bargaining agreement.[117] The Board accorded similar treatment to a complaint alleging union deprivation of an employee's seniority rights for violation of a union rule calling for such action whenever an employee rejected a job offer.[118] The NLRB has also held that a union member's embezzlement of union funds was proper justification for a union to seek termination of the member's employment.[119]

The requisite strength of the nexus between union discriminatory conduct and a permissible collective bargaining objective posed an especially difficult problem for the Board in *Dispatch Printing Co.*[120] In that case an employee was discharged from her job as a proofreader because of union insistence on enforcement of its rule that only persons classified as "practical printers" could be assigned such work. The employee did not have this skill classification, but at the time she was hired for the job there were no practical printers in the shop available for reassignment.[121] The NLRB reversed the trial examiner's finding of an unfair labor practice under sections 8(b)(1)(A) and 8(b)(2) of the Act.[122] A majority of the Board accepted the union's argument that it had insisted on enforcement of the rule for the legitimate purposes of preserving job opportunities for practical printers who might become physically or technologically unqualified for their usual occupation.[123] Since the rule was ap-

115. *Id.* at 136-38 (Miller, Chairman, dissenting).

116. *Id.* at 136.

117. Millwrights Local 1102, 144 N.L.R.B. 798 (1963).

118. Houston Typographical Union No. 87, 145 N.L.R.B. 1657 (1964).

119. Philadelphia Typographical Union No. 2, 189 N.L.R.B. 829 (1971).

120. Columbus Typographical Union No. 5 (Dispatch Printing Co.), 177 N.L.R.B. 855 (1969).

121. *Id.* at 855.

122. *Id.* at 856. The trial examiner conceded that a substantial union justification was behind the original promulgation of the rule but concluded that by demanding enforcement of the rule when no other employee was seeking the petitioner's job, the union, in effect, was imposing an absolute bar on employment of new practical printers. Such action was condemned as being arbitrary, unfair, and without a reasonable basis. *Id.*

123. *Id.*

plied uniformly to all members of the shop, the Board was unable to characterize the union's conduct as so arbitrary as to be a breach of the duty of fair representation.[124] Board member Jenkins dissented, concluding that as applied to the special facts of the case, the restrictive rule possessed an invidious quality that caused the protection of one group of union employees at the expense of others without any relevant basis in the actual conditions of employment.[125]

The rationale of the majority in *Dispatch Printing Co.* is supported by the argument that a collective bargaining representative should have the flexibility not only to deal with the current problems of its constituents but also to plan for future contingencies.[126] But if this is to be a basis for upholding discriminatory union conduct, more attention needs to be given to the potential dangers of presently disadvantaging an employee in the hope that others might be benefited in the future.[127]

Dispatch Printing Co. is also difficult to reconcile with the tone of other Board decisions that have found violations of the duty of fair representation in otherwise unobjectionable union conduct when union members were benefited at the expense of nonunion members.[128] To be consistent with the underlying rationale of that latter group of decisions, the Board would have had to decide against the union in *Dispatch Printing Co.* if the aggrieved employee had been a nonunion member. This would lead, however, to the anomalous result of according a union member less protection than a nonunion member under identical factual circumstances. In cases involving the total loss of employment by the petitioner, Board rulings should not be made to turn solely on the presence or absence of union membership considerations in the decisions of collective bargaining representatives.

The NLRB has also been called on frequently to determine whether union interference in the established employment relation can be justified by the express terms of the collective bargaining agreement. When a union bases its authority to derogate an employee's position on a provision of a collective bargaining agreement,[129] the NLRB has refused to find a breach of the duty of fair representation as long as the union's interpretation of an otherwise lawful contract could be deemed reasonable. Thus, where a contract states that seniority rights will be interrupted only by discharge, voluntary resignation, or a layoff of more than two years, the Board has held that a union commits an unfair labor practice by imposing the sanction of loss of seniority rights on an employee for an alleged dues deficiency.[130]

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124. *Id.*

125. *Id.* at 857 (Jenkins, Member, dissenting).

126. The language of the Board's decision implies that this consideration weighed heavily in the outcome of the case. *Id.* at 856.

127. *Id.*

128. *See* cases cited at note 105 *supra.*

129. *See* United Parcel Serv., 203 N.L.R.B. 799, 805 (1973). (The NLRB will construe the provisions of collective bargaining agreements in passing on complaints of unfair labor practices and in formulating remedies therefor.).

130. Pacific Motor Trucking Co., 175 N.L.R.B. 712 (1969).

The decision in *New York Times Co.*[131] further illustrates the Board's approach to cases involving questions of the reasonableness of union interpretations of collective bargaining agreements. Here, an employee suffered a loss of seniority rights when his union discovered that he held a second full-time job as a high school principal. The employee charged that this action was taken in contravention of the terms of the collective bargaining agreement.[132] The union asserted that a provision in the agreement empowering it to establish a regulation providing for loss of seniority if an employee worked outside the trade for more than ninety days gave the union authority to reduce the employee's seniority.[133] The trial examiner disagreed and held that the union had committed a breach of the duty of fair representation, basing his decision on the proposition that the provision relied on by the union was entitled "Necessary Absences" and was therefore inapplicable to the petitioner's situation. The Board reversed, stating that it was not necessary to determine which of several possible interpretations was correct since the union's construction was at least a reasonable one.[134] The Board further concluded that the union's purpose in so construing the contract was the legitimate one of giving work in the trade to those who truly needed it rather than to those who had other full-time employment. The fact that the union had previously applied the contractual provision in a manner consistent with the construction now urged before the Board was also identified as an important consideration in vindication of the union's conduct.[135]

Cases such as *New York Times Co.*, in which employees have attempted to overturn union decisions reducing accrued seniority rights, have become common fare for the NLRB since its assumption of jurisdiction over fair representation questions. This fact is an inevitable consequence of the *Miranda Fuel* ruling since an employee's seniority status is one of the most important of the individual rights to be protected under a collective bargaining agreement. Priority of access to overtime and available jobs and protection against layoff in times of economic reversals are but a few of the benefits that commonly flow from seniority.[136] Notwithstanding the importance of seniority rights, decisions of both the NLRB and the Supreme Court have recognized that unions must be granted wide latitude in negotiating for changes in a seniority system during the term of a collective bargaining agreement.[137] The rationale of these decisions is that a union should be able to deal with a collective bargaining agreement as a living document rather than as an instrument that

131. New York Typographical Union No. 6 (New York Times Co.), 144 N.L.R.B. 1555 (1963).

132. *Id.* at 1558.

133. *Id.*

134. *Id.*

135. *Id.* at 1558 n.9-10.

136. *See generally* Kovarsky, *Current Remedies for the Discriminatory Effects of Seniority Agreements*, 24 VAND. L. REV. 683 (1971); Note, *Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885 (1974).

137. *E.g.*, Humphrey v. Moore, 375 U.S. 335, 349-50 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39 (1953).

fossilizes the union's freedom to act for the welfare of all in the unit, even in the face of circumstances unforeseen at the agreement's inception.[138]

This prevailing attitude is reflected in the NLRB's decision in *Cominico-American, Inc.*[139] A union had construed a collective bargaining agreement regarding the calculation of seniority rights during layoffs to mean that seniority would be measured only by time served within the particular bargaining unit it represented without including seniority accrued at other mines run by the same employer outside the unit's jurisdiction. The employer initially resisted this interpretation but eventually acquiesced to the union's position. The Board determined that the union's desire to benefit employees regularly assigned to work in the unit at the expense of other union members transferred on a temporary basis from other locals was a proper collective bargaining objective.[140] Evidence presented to the NLRB panel established that the employees whose seniority status was derogated by the union's interpretation of the layoff provisions had had ample notice of the change before the employer found it necessary to reduce its work force.[141] This factor served to prevent application of the *Miranda Fuel* ruling condemning the imposition of union-made rules with an excessively ex post facto flavor.[142]

The general rule allowing a union wide discretion in reordering seniority rights has not been applied by the NLRB when union officials have made differences over seniority rights an intraunion political question in order to obtain the favor of a majority of the union's membership.[143] In *Barton Brands, Ltd.*[144] the employer (Barton) acquired a competitor distillery with the objective of significantly expanding the scope of the acquired facility's operating capacity. Both Barton's employees and the employees of the former Glencoe plan were represented by the same union but under separate collective bargaining agreements. After the buy-out, Barton insisted that all of its employees be covered by a single collective agreement with a "dovetailing" provision for seniority rights.[145] To encourage acceptance of this plan, Barton took the position that there would be no transfer of employees between the two plants if seniority ladders remained separate. Consequently, both groups of employees

138. "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war." Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 525 (1949).

139. 182 N.L.R.B. 638 (1970).

140. *Id.* at 638.

141. *Id.*

142. See text accompanying notes 36-38 *supra.*

143. Interference with seniority rights based on racial classifications has been similarly treated. See UAW Local 453, 149 N.L.R.B. 482 (1964), for a seniority rights case involving both intraunion political issues and racial discrimination. The complex fact situation involved what is possibly one of the earliest charges of reverse racial discrimination. The three reviewing Board members split on the basis for finding an unfair labor practice, the opinion of each member reflecting the extent of his acceptance of the then recent *Miranda Fuel* ruling.

144. 213 N.L.R.B. 640 (1974), *enforcement denied,* 529 F.2d 793 (7th Cir. 1976).

145. "Dovetailing" is a term of art in labor relations, describing the practice of ranking transferred employees on a seniority ladder according to the time served in both their past and present places of occupation.

voted in favor of the seniority plan. Barton subsequently failed to expand its operations and was even forced to lay off some of its employees. Implementation of the dovetailing plan led to a loss of employment for some employees who had worked longer for Barton than some former Glencoe employees who were retained. A candidate for the office of chief steward of the Barton plant waged a successful election campaign replete with promises to bring about a reduction in the seniority ranking of the former Glencoe employees. Later the union negotiated a change in the collective agreement that placed the former Glencoe employees at the bottom of Barton's seniority ladder, thus fulfilling the expectations of a majority of the union electorate. The NLRB determined that the union had taken this action largely to advance the political cause of one of its senior officials and thereby had breached the duty to represent fairly all members in the bargaining unit.[146]

Member Jenkins was unable to concur in this view. He argued that the union had simply reacted to the demands of a majority of its members without any special purpose of promoting the election of one of its officials.[147] Not only had a majority of the union membership approved the proposed "endtailing" plan before the commencement of contract negotiations, but the union had also sought several legal opinions before presenting it to management.[148] Member Jenkins therefore found no invidious discrimination in the alteration of the seniority system and concluded that the actions of the union were within the scope of permissible union discretion as described by the Supreme Court in *Huffman*.[149]

Evidence of improper political motivations behind a decision by union officials to strip a member of his seniority rights led the NLRB in one instance to probe the outer reaches of the fair representation doctrine. In *Food Employees Local 590*[150] a union shop steward, dissatisfied with his local's processing of a grievance, filed unfair labor practice charges with the Board. The union reacted by removing the employee from his office as shop steward thereby causing him to lose the special perquisite of that position, super-seniority. Under these circumstances the Board found the union's action causing the loss of super-seniority rights violative of section 8(b)(2), notwithstanding the contention that no incident of the petitioner's status as an employee had been affected.[151] In his dissent, Board member Brown agreed with the union, citing his inability to perceive any infringement of section 7 *employee* rights resulting from the petitioner's "minor contest" with the union.[152]

146. 213 N.L.R.B. at 641. The NLRB had previously found a violation of the duty of fair representation where one of two unions competing for support in a representation election promised its members seniority over the members of a competing unit. Truck Drivers Local 568 (Red Ball Motor Freight, Inc.), 157 N.L.R.B. 1237 (1966), *aff'd*, 379 F.2d 137 (D.C. Cir. 1967). The Board in *Barton Brands* found the situation in *Red Ball* indistinguishable from the instant case. 213 N.L.R.B. at 641.

147. 213 N.L.R.B. at 646 (Jenkins, Member, dissenting).

148. *Id.*

149. *See* Ford Motor Co. v. Huffman, 345 U.S. at 337-38.

150. 181 N.L.R.B. 773 (1970).

151. *Id.* at 776.

152. *Id.* at 773 (Brown, Member, dissenting).

The *Food Employees* decision is noteworthy not only for the unusual degree of Board intrusion into union political infighting but also for the fact that a remedy was provided for a purely speculative harm to the employee. The super-seniority of the petitioner would have become important in maintaining the employment relationship only if every other employee in the shop had been laid off.[153] Further extension of such intrusion seems undesirable.[154]

Political discrimination cases pose especially difficult problems for fair representation analysis under either the rationality test or the more narrow bad faith standard. It is inevitable in a political system based on majority rule that candidates for leadership positions will express a willingness to satisfy the greatest number of the electorate. It is neither practical nor just in the context of union politics to base the finding of an unfair labor practice on campaign rhetoric alone.[155] The primary focus in such cases should be, therefore, the decisionmaking process itself. Once union leaders are elected, they must not be allowed to abrogate decisionmaking authority regarding members' employment rights to a segment of their constituency.[156] Beyond this point, the duty of fair representation has little value in promoting union fair play. Decisions such as *Barton Brands* will only drive the competition for union political power underground and stifle honest and open debate on issues of genuine concern to union members. Because line drawing is so difficult in these cases, the NLRB should decline to find unfair labor practice violations unless employees make a clear showing of a loss of important employment rights.

Maintaining the Employment Relation: Union Processing of Employee Grievances

The application of the fair representation doctrine to union conduct in the processing of employee grievances has generated the greatest controversy. Collective bargaining agreements commonly provide for a multi-stage grievance resolution procedure capped with a provision for removal of a case not resolved at the lower stages of the process to a neutral arbitrator for a final decision binding on the parties to the agreement.[157]

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153. *Id.* at 776.

154. *See also* Teamsters Local 923, 172 N.L.R.B. 2137 (1968). A union official successfully obtained reemployment for some members of a local who had been displaced from their jobs as a result of a merger, but he failed to make similar efforts on behalf of other members who had actively opposed his reelection to union office. Even though the official had taken no steps to prevent the reemployment of his political opponents and the petitioners could have found employment without union assistance, the NLRB found the union guilty of discriminatory and coercive conduct. *Id.* at 2138.

155. Of course, there would be no difficulty in finding a violation of the duty of fair representation if incumbent union officials took discriminatory action during the course of a campaign to insure reelection. In such a case the nexus between the discriminatory action and an illegal motivation is clearly discernable.

156. For a discussion of an NLRB case dealing with such a fact situation, see text accompanying notes 183-192 *infra*.

157. The following example illustrates the stages of dialogue that may precede the binding arbitration commonly provided for in collective bargaining agreements: Step One: Employee or shop steward and foreman. Step Two: Chief steward of department and foreman.

The courts and the NLRB have generally accorded great deference to decisions flowing from agreements to refer grievances to arbitration.[158] Under arbitration agreements the employee must often look to his representative union as the exclusive vehicle for promoting a speedy vindication of his contractual rights. Commentators have deplored the heavy presumption of legality accorded by the courts to union administration of grievance procedures on the ground that it creates an atmosphere in which a union may freely bargain away one employee's meritorious grievance in the interest of promoting some other concern.[159] Grievances that contest the grounds for discharge from employment,[160] "the capital punishment of the industrial world," have been particularly instrumental in creating the demand for a heightened judicial scrutiny of union conduct.[161]

The Supreme Court's decision in *Vaca* is the present touchstone for determining whether a union's alleged failure to process a grievance properly has resulted in the breach of the duty of fair representation. Noting that the duty of fair representation is breached when union conduct is "arbitrary, discriminatory, or in bad faith,"[162] the *Vaca* Court held that a union may not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[163]

Step Three: Plant grievance committee and plant manager. Step Four: Plant grievance committee-national union representative and company president or his representative. O. PHELPS, DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM 12 (1959). Commonly, collective agreements provide that employee grievances will be processed only if the union determines that it would be worthwhile to do so. There are variants to this approach, however. For example, processing at one or more of the lower stages might be automatic, while the union has the discretion to decline to pursue the complaint to the arbitration stage. *See* Carpenters Local 1104, 215 N.L.R.B. 537 (1974) (union does not breach its duty of fair representation by good faith refusal to process a grievance believed to be without merit); Retail Clerks Local 1357, 192 N.L.R.B. 1171 (1971) (union not automatically required to process a grievance). *See generally* Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950). The alternative to contractual grievance resolution procedures is the right to strike in response to individual complaints. This alternative makes the employee dependent on the uncertain protection of a majority vote of the collective bargaining unit. Management prefers the contractual alternative because it lessens the danger of disruptive "wildcat" strikes. There have been indications that some of the grievance resolution systems are in trouble because an inordinate number of grievances are processed, causing delays and excessive costs. See Feller, *supra* note 89, at 809-11. Given this circumstance, it can be argued that holding unions to a higher standard of conduct than bad faith encourages grievance complaints and thereby hastens the demise of a system designed to promote stability in industrial relations.

158. This policy was developed by the Supreme Court in the "Steelworkers Trilogy," (United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)), and in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). The leading NLRB cases in this respect are Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), and Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). This practice of deferring to arbitration decisions recently suffered some erosion in a racial discrimination case. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Arbitration of an employment discrimination grievance is not a bar to a separate Title VII suit involving the same issues.). *See generally* Oppenheim, Gateway *and* Alexander — *Whither Arbitration?*, 48 TUL. L. REV. 973 (1974); Siber, *The* Gardner-Denver *Decision: Does it Put Arbitration in a Bind?*, 25 LAB. L.J. 708 (1974). Some commentators have concluded that an automatic NLRB deferral to arbitral decisions leads to an undue sacrifice of individual rights. *See generally* Atleson, *Disciplinary*

In giving substance to this ambivalent guideline, the Board's rulings on fairness in the administration of contractual grievance procedures have generally followed the familiar pattern followed by the federal courts. Relying on *Vaca*, the NLRB has recognized that a union must be allowed a considerable range of discretion in screening out or settling those grievances that it in good faith determines to be of insufficient merit to justify resort to the costly and time consuming process of arbitration.[164] Standing alone, a petitioner's allegation that a bargaining agent has refused to process a complaint through any stage of a contractual grievance procedure has proven insufficient to sustain a fair representation suit.[165] Additionally, the NLRB has ruled that in the processing of grievances, "[m]ere forgetfulness or inadvertant error is not the type of conduct that the principles of *Miranda* [*Fuel*] were intended to reach."[166]

In the processing of grievance cases in which the Board has found a breach of the duty of fair representation, the presence of some form of union hostility toward a grievant has been a consistent element.[167] When there is strong evidence of union animus toward a grievant because of his position in intra-union political affairs, the union's failure to discuss the complaint with the employee is more than mere negligence and constitutes "a reckless disregard of his rights."[168] If, on the other hand, the union is able to show a sound reason for refusing to process a grievance, the likelihood of finding an unfair labor

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Discharges, Arbitration, and NLRB Deference, 20 BUFFALO L. REV. 355 (1971); Isaacson, *Agency Deferral to Private Arbitration of Employment Disputes*, 73 COLUM. L. REV. 1383 (1973).

159. Professor Summers has described three possible uses of the grievance procedure particularly relevant to the protection of individual rights under a collective bargaining agreement: to complete the collective agreement, to amend the collective agreement to meet changing industrial conditions, and to act as a clearing house for balancing off unrelated claims. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 390-91 (1962). The first two objectives are usually relied on by unions to rebut charges of an unwarranted sacrifice of an individual employee's complaint. It is generally conceded that although grievance resolution plans leave much room for manipulation and union politics, a systematic form of protection for individual rights under the collective bargaining agreement remains attractive to most employees. *See* O. PHELPS, *supra* note 157, at 14-15.

160. One study concluded that a desire for protection against capricious discharge was a primary factor in the growth of the organized labor movement in the United States. O. PHELPS, *supra* note 157, at 5.

161. *See generally* Summers, *supra* note 159; Note, *The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual's Grievance*, 20 S.C.L. REV. 283 (1968).

162. Vaca v. Sipes, 386 U.S. at 190.

163. *Id.* at 191.

164. Meat Cutters Local 575, 206 N.L.R.B. 576, 579 (1973).

165. *Id.*

166. Teamsters Local 692, 209 N.L.R.B. 446, 448 (1974).

167. This view is supported by the statement of the administrative law judge in United Automobile Workers, 194 N.L.R.B. 1085, 1087 (1974) ("[I]n all the cases decided by the Board since *Miranda* . . . where a violation of Section 8(b)(1)(A) was found, *some form* of hostility or opposition to the individual discriminated against was an element that also always was present.").

168. E.L. Mustee & Sons, Inc., 215 N.L.R.B. 203 (1974).

practice is substantially diminished, even in the face of other evidence tending to prove hostility. In *Carpenters Local 1104*,[169] for example, a union agent to whom a wrongful discharge complaint had been referred refused to process the grievance after learning from the employer that the discharge was based on alleged incompetence. Although there was evidence of personal animosity between the agent and the aggrieved employee, the Board dismissed the unfair labor practice charge against the union, noting that there was no showing that the petitioner had been treated differently from any other employee.[170]

At first glance this ruling appears to conflict with the rationale of *Whale Oil Co.*,[171] which held that a union could not justify its refusal to process a grievance because of its obviously frivolous nature when its action was also tainted by a form of invidious discrimination. The Board also determined that the union's secondary motivation, a desire to retaliate against the grievant for having previously filed unfair labor practice charges with the Board, was a clear violation of section 8(a)(4) of the Act that demanded administrative sanction.[172]

Some grievance processing cases reaching the NLRB have involved questions of the manner in which unions present employees' cases before grievance tribunals. The usual complaint is that the union agent in charge of the case evinced a prejudice against the merits of the complaint that influenced an ultimate ruling adverse to the interests of the grievant. In *Penntruck Co.*[173] a divided Board took a very conservative stance on this issue. The grievant had based his charge of biased representation in the processing of his wrongful discharge grievance on two grounds: the union agent's personal hostility toward the complaint,[174] and the agent's failure to notify the employee of the time of the grievance committee meeting.[175] Despite this evidence, the Board was unable to find that the employee's "unpromising grievance" had been handled "in bad faith, arbitrarily, or perfunctorily."[176] Conceding that the employee may have thought that he was receiving biased representation, the

169. 215 N.L.R.B. 537 (1974).

170. *Id. Accord*, Local 485, Elec. Workers, 170 N.L.R.B. 1234 (1968).

171. 169 N.L.R.B. 51 (1968).

172. *Id.* at 54.

173. Teamsters Local 729 (Penntruck Co.), 189 N.L.R.B. 696 (1971).

174. The hostile attitude was evidenced by the agent's statement that he did not care whether the grievant got his job back. *Id.* at 700-01.

175. This lack of notification occurred in spite of earlier promises to notify the employee of the time of the committee meeting so that he could be present during the hearing of the case. *Id.*

176. *Id.* at 702. *Cf.* Meva Corp., 189 N.L.R.B. 31 (1971) (It must at least appear from the record that the grievance is not clearly frivolous.). The NLRB in *Penntruck* came unusually close to the point of deciding the case on the merits of the grievance alone. In view of what was characterized as the agent's later solicitous attitude toward the employee, it could not be concluded from a single adverse remark that the agent was truly hostile toward the case. The majority accepted the union's evidence that a grievant's personal appearance at a grievance committee hearing had been customarily left to the discretion of the agent handling the case. *Cf.*, United Automobile Workers, 194 N.L.R.B. 1085, 1087 (1972) (The union did not breach its duty of fair representation when its refusal to process a grievance was consistent with past practice *and* there was no evidence of personal hostility between union officials and the employee.).

Board, nevertheless, concluded that an unfair labor practice charge could not be based on "psychologically unfair representation"[177] although there was evidence available to the Board indicating that the union agent's presentation of the case before the grievance committee was less than adequate.[178]

In the later case of *Teamsters Local 705*[179] the Board did find a breach of the duty of fair representation on evidence that a union spokesman at a grievance committee hearing openly stated his disbelief in the validity of the grievance he was presenting. The Board held that having undertaken to present the employee's complaint to a grievance tribunal, the union assumed an advocate's duty to represent the employee fully and fairly.[180] This latter approach to the quality of union representation is preferable to that demonstrated in *Penntruck*. Whether this concept will be extended to cases involving more subtle forms of union misfeasance remains to be seen.

The overall performance of the NLRB in the grievance processing cases is disappointing. Reliance on a bad faith standard is perhaps justifiable in some instances in view of the dangers inherent in requiring unions to process all grievances regardless of their merit.[181] Nevertheless, the degree of scrutiny accorded union conduct should at least be a function of the importance of the employment rights at stake in a particular case.[182] This approach is not only desirable from the standpoint of theoretical consistency but is also essential to the promotion of justice.

The Future of Fair Representation: A Second Generation of Miranda Fuel *Decisions?*

The recent case of *Rhodes & Jamieson, Ltd.*[183] stands as the single most important post-*Miranda Fuel* decision on the breach of the duty of fair representation as an unfair labor practice. The case may presage a significant reevaluation of past applications of *Miranda Fuel*. In *Rhodes & Jamieson* an employer announced that a dump driver's job held by union member Ted Holman was to be eliminated. The provision of the multi-employer collective bargaining agreement that governed Holman's chances of being reassigned to another type of work with his employer was drafted in ambiguous terms: "Where jobs or equipment are eliminated, senior employees shall be re-

177. 189 N.L.R.B. at 702.

178. In support of the dismissal action, the employer relied on several warning letters, previously issued to the employee, which had charged him with excessive absenteeism and a poor work attitude. The employee insisted that these warning letters had been cancelled and that the union office did not have copies of the warnings that it ordinarily should have received. *Id.* at 701. The agent chose not to raise this issue before the grievance committee, simply accepting the word of management representatives that the letters had in fact been issued. *Id.* at 701 n.10. The NLRB considered this action justifiable in light of the employee's failure to provide the agent with objective evidence of the cancellation of the warnings. *Id.* at 702.

179. 209 N.L.R.B. 292 (1974).

180. *Id.* at 292.

181. This approach is suggested in *Symposium*, *supra* note 22, at 1175-77.

182. *Id.*

183. Teamsters Local 315 (Rhodes & Jamieson, Ltd.), 217 N.L.R.B. 616 (1975).

assigned by the employer to another classification with full seniority rights subject to employee qualifications. *Local 315 reserves the right to apply this principal [sic] by individual employer.*"[184]

Subsequent to the employer's announcement, the union held a vote among its members to determine whether Holman and others similarly situated should be assigned a new job classification. The language of the ballot used, which became a factor of importance in the outcome of the case was as follows: "Do you want warehousemen, yard men, flat rack and dump drivers, with their full seniority, as ready-mix drivers?"[185] This proposition was defeated by a majority vote of the union electorate. In spite of the fact that the employer felt Holman should be retained under the contractual reassignment principle, the union was firm in its resolution to abide by the results of the election, and Holman was given a discharge notice.[186]

On review, the Board began with an analysis of the leading decisions of the NLRB and the federal courts defining the basic elements of the duty of fair representation. The Board emphasized that the duty of fair representation connotes more than a mere absence of bad faith or hostile motivation in administering rights under a collective agreement. The essence of the union's duty was described as "the avoidance of arbitrary conduct;" that is, a union has an affirmative responsibility to take action against an employee only when there is some acceptable reason for doing so.[187] If a union's reason for acting against the interests of an employee is not apparent, the Board will deem the conduct arbitrary in the absence of a clarifying explanation.[188]

Turning to the facts of the case, the Board assumed that the language of the governing agreement was so indefinite that the union lawfully could take the position that an employee should not have "bumping rights" on certain jobs. But the Board considered the single issue in the case to be whether in phrasing the ballot so adversely to Holman's situation, the union accorded him the fair and impartial treatment prescribed by *Miranda Fuel.*[189] The Board concluded that the union had not fulfilled this obligation because the language of the ballot contained a grossly inaccurate description of the impact of the layoff that gave the clear impression that groups of employees other than dump drivers would also be claiming bumping rights. The Board stated that the affirmative nature of the duty of fair representation is such that a union cannot delegate its authority to make a decision affecting individual rights to a group of its members whose interests are directly opposed to the interests of those relying on the union to evaluate the weight of their rights.[190]

184. *Id.* at 616 (emphasis added).

185. *Id.*

186. Pending the results of an appeal to the Teamsters Joint Council on the correctness of the local's action, Holman's employer gave him interim employment as a greaser-washer. Holman was subsequently killed in performing these duties and the Joint Council dismissed his appeal as moot. *Id.*

187. *Id.*

188. *Id.* at 617-18. However, the majority opinion emphasized that its language should not be construed to signify adoption of "a fullblown requirement of rational decisionmaking." *Id.* at 618 n.9.

189. *Id.* at 618-19.

190. *Id.* at 619. "Were it [the duty of fair representation] held powerless to protect the

It is significant that the NLRB in *Rhodes & Jamieson* chose not to become embroiled in the old argument over whether an employee may have certain "vested rights" under a collective agreement.[191] The Board elected instead to underscore the point that any allocation of collectively bargained-for rights must be made in an atmosphere of union fairness and impartiality.[192] Although this analysis abandons the standard of bad faith, it does not give rise to legitimate fears that unions will be stripped of the flexibility necessary to deal with contingencies in a manner that will further the welfare of a majority of their members.

CONCLUSION

The language used in fair representation decisions has created as much controversy as the results themselves. Prohibitions against arbitrary, invidious, and perfunctory conduct give rise to a wide range of expectations, all of which cannot be satisfied. The NLRB decision in *Rhodes & Jamieson* may clear away some of the verbal fog concealing the essential elements of fair representation cases. There is a strong indication that the Board is now prepared to examine union decisionmaking more closely than has heretofore been the case, at least when the administration of rights under an existing contract is at issue. The NLRB is embarking on this course at a time not only marked by popular support for the vindication of individual over institutional rights but also by economic reversals that will test the capacity of the NLRA to maintain a stable pattern of industrial relations.

Adequate protection for individual rights in the industrial world can best be achieved by amending the NLRA. This is the only viable solution for removing the procedural barriers that confront the individual employee seeking a restoration of rights lost through discriminatory union conduct.[193] There is a pressing need for a reconciliation of the decisional law that recognizes rights and jurisdictional boundaries implicit in the NLRA with the more recent additions to federal labor law, such as the Taft-Hartley Act, which have been construed by the courts to undercut the role of the NLRB as the primary arbiter of labor disputes.[194]

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employee in this case, where the Union permitted in the exercise of its power, what would be only a slight exaggeration to call a mockery of fair procedures, this bulwark will have proved to be as illusory as the Maginot Line." *Id.*

191. *See generally* Ratner, *supra* note 24.

192. In his dissenting opinion Member Penello did rely on the argument that to rule in favor of the employee was to recognize the existence of such vested rights. 217 N.L.R.B. at 620 (Penello, Member, dissenting). He further emphasized the lack of any hostile motivation in the union's conduct and his failure to detect any element of arbitrary inconsistency in the case since the union had never before been called on to administer the particular clause of the collective agreement at issue. *Id.* at 621. This view reflects the traditional line of analysis that has generally prevailed in the courts. See text accompanying notes 15-28 *supra.*

193. See text accompanying notes 64-87 *supra.*

194. See text accompanying notes 60-62 *supra.* In the area of race and sex discrimination, serious questions have also arisen concerning the interplay of civil rights legislation and the NLRA. These problems are beyond the scope of this note. *See generally* Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?,*

Ideally, the NLRB should be made the exclusive forum for fair representation questions. The Board's relatively simple procedures and lower litigation costs make it best suited to deal with cases in which there is a great disparity in the financial resources of industrial litigants.[195] The outlook for amending legislation, however, is not bright. Both unions and management would probably oppose such a change.[196] Also, there is no cohesive employee interest group to press for new labor legislation to codify the duty of fair representation and streamline the mechanism for its enforcement.[197]

In the interim, the Supreme Court should recognize the contribution of the NLRB to the evolution of the duty of fair representation and formally approve *Miranda Fuel's* jurisdictional analysis. Such a ruling would attenuate the debate over fair representation jurisdiction that has continued within the NLRB since *Miranda Fuel*[198] and would permit the Board to concentrate on the substantive issues.

Hopefully the NLRB will continue its basic approach to decisionmaking under the *Miranda Fuel* rule as exemplified in *Rhodes & Jamieson.*[199] The duty of fair representation will not deny labor organizations the leadership role in industrial relations that was originally contemplated for them under the NLRA. As the NLRB cases have indicated, it is the abrogation of this leadership role by collective bargaining representatives, and not mistakes of judgment in the decisionmaking process, that the duty of fair representation condemns.

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42 U. CHI. L. REV. 1 (1974); Note, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158 (1974). These articles give added support for the proposition that legislative action is the best solution for the current jurisdictional problems that interfere with the efficient protection of individual rights in the industrial world.

195. See text accompanying notes 64-67 *supra.*

196. This view is disputed in *Symposium, supra* note 22, at 1121-22, in which the author points out that employers are now frequently involved in triangular §301 suits in which their liability for contract breach depends on proof that a union violated its duty of fair representation (see also note 62 *supra*) and that employers probably would welcome clearer standards for union conduct that would enable employers to settle more suits. *Symposium, supra* note 22, at 1122. It appears, however, that under the present state of the law, employers win the majority of such actions either on the merits or through summary judgment. Therefore it is likely that employers would oppose a simplification of procedures for trying fair representation suits because such a simplification may encourage more employees to bring fair representation suits.

197. Tobias, *supra* note 26, at 91. There is little public awareness of the problems confronting individual employees wronged by their unions.

198. See note 52 *supra.*

199. See text accompanying notes 183-192 *supra.*