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The Duty of Fair Representation

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THE DUTY OF FAIR REPRESENTATION

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The doctrine of fair representation imposes upon labor organizations a duty to represent fairly all members of a bargaining unit. Since its inception more than thirty years ago the duty of fair representation has gradually permeated all facets of labor and management relations. Despite countless attempts to define the nature and scope of the duty, it remains an unsettled subject of scholarly debate and is ever present in litigation before the National Labor Relations Board and the federal courts.

From my vantage point as a decisionmaker, the tasks of articulating standards of fair representation and of identifying violations of the duty remind me of Justice Potter Stewart's observation about obscenity: "... perhaps I could never succeed in intelligibly [defining obscenity]. But I know it when I see it ...."[1] For the labor law decisionmaker, the duty of fair representation is equally simple yet elusive.

The application of rigid standards to union conduct is inappropriate, because judging the duty of fair representation requires balancing the rights of individual employees against the competing interests of the union in the concerted action and strength fostered by the collective bargaining system. As an organization that derives strength from its constituency, a union must respond to the needs of its membership. However, in its role as exclusive bargaining representative, it must also consider the interests of nonunion members in the bargaining unit in order to foster unity within the bargaining unit. Both union and nonunion employees expect their statutory representative to advocate their interests.

To carry out its responsibilities as bargaining representative, a union needs autonomy. During collective bargaining negotiations, a union wants discretion to make bargaining transactions for the greatest benefit of the unit which may effect some employees adversely, to set priorities in demands and to husband its bargaining power accordingly. Thus, a union needs to be able to compromise employee demands without fear that its actions will result in civil liability. Such flexibility is the essence of its bargaining power. To maintain this power and to promote administrative effi-

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[1] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ciency, a union desires similar latitude in subsequent administration of the contract. In particular, it wants discretion over the processing of grievances, including the decision to arbitrate. Employees, on the other hand, have forfeited a degree of individual leverage by choosing a union to bargain for them. In return, they are entitled to expect that the union will bargain effectively on their behalf and will not trade off their interests arbitrarily, nor discriminate with regard to race, sex, or union membership.

Ultimately, a decisionmaker must balance employee and union interests in order to determine whether the duty of fair representation has been breached. Although critical to unions and employees, the fair representation doctrine should be evaluated as only one component of federal law. It stands along with the prohibition of unfair labor practices, the provision of contractual remedies in section 301 of the Taft-Hartley Act, and the scrutiny of a labor union's internal affairs under the Landrum-Griffin Act as one element in a statutory scheme designed to effectuate the primary purpose expressed in the NLRA: to protect the public from industrial strife by promoting collective bargaining. Ultimately, then, the duty of fair representation must be examined in relation to this primary purpose of federal labor law.

In this article I shall discuss the origins of the doctrine of fair representation and its evolution both in the Board and in the courts. In this context, I shall consider the reconciliation of the Board's statutory mandate to remedy infringement of collective bargaining rights with judicially developed standards of fair representation. I shall provide, by way of information rather than justification, an awareness of the procedure, constraints, and considerations with which the Board as a decisionmaker must be concerned.

I. THE ORIGINS OF THE DUTY OF FAIR REPRESENTAION

The National Labor Relations Act [NLRA or Act] does not explicitly require that a bargaining representative fairly represent all employees in its bargaining unit. Rather, the duty of fair representation has evolved judicially to protect individual employees stripped of traditional forms of redress from unfair treatment at the hands of their collective bargaining representatives. The doctrine originated in the United States Supreme Court's decision in *Steele v. Louisville & Nashville Railroad.*[2] *Steele* arose under the Railway Labor Act.[3] The union in *Steele* was the exclusive bargaining representative of firemen employed by the Louisville & Nashville Railroad.[4] As such, the union had negotiated seniority clauses with the Louisville & Nashville Railroad and other employers that had the purpose and effect of placing black employees at the bottom of the seniority list.[5] Likening the powers of a statutory representative to those of a legislature — "both to create and restrict the rights of those whom it represents"[6] — the Court

[2] 323 U.S. 192 (1944).

[3] 45 U.S.C. §§ 151 *et seq.* (1970).

[4] 323 U.S. at 194.

[5] *Id.* at 195-96. Black employees were excluded from membership in the union because it maintained discriminatory membership policies. Since the union's white members constituted a majority of firemen in the railroad's employ, black firemen were required to accept the union as their representative. *Id.* at 194-95.

[6] *Id.* at 202.

held that the Railway Labor Act implicitly imposes on a union a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts . . . ."[7] In explaining the practical application of this duty, the Court noted that a statutory representative is not barred from making contracts that have unfavorable effects on some unit employees.[8] Such agreements, however, must be based upon "differences relevant to the authorized purposes of the contract . . . ."[9] An exclusive bargaining representative, therefore, must represent nonunion or minority union members "without hostile discrimination, fairly, impartially, and in good faith."[10]

The concept of fair representation enunciated in *Steele* was alluded to in the context of the National Labor Relations Act in *Wallace Corp. v. NLRB,*[11] a case decided the same day as *Steele.* There, the Court emphatically stated that the duties of a bargaining representative chosen under the NLRA extend to all employees in a unit, and that a representative must represent the employees' interests "fairly and impartially."[12] Hence, the Court concluded, it was unfair for the union in *Wallace* to negotiate a closed shop provision and then deny membership to a group of employees because they previously had belonged to a rival union.[13] Although not relying explicitly upon *Steele,* the Court extended the concept of "irrelevant differences" enunciated in *Steele* to include differences other than race.

The Court's decision in *Steele* established the principle of fair representation inherent in exclusive representative status conferred by the Railway Labor Act. In its *Wallace* opinion, the Court intimated a two-fold broadening of the concept of fair representation: first, an extension of the doctrine beyond a prohibition of racial discrimination; and second, the application of the duty of fair representation to labor organizations subject to the NLRA. Not until its decision in *Ford Motor Co. v. Huffman,*[14] however, did the Supreme Court specifically apply the *Steele* standard of fair representation to unions certified under the NLRA. In *Huffman,* a union which represented a unit of employees of the Ford Motor Company negotiated a seniority clause that gave credit to employees not only for post-employment, but also for pre-employment, military service.[15] As a result, some unit members were passed in seniority by members who had begun employment with Ford later than they had, but who were credited with

[7] *Id.* at 202-03. By finding a statutory basis for the duty of fair representation, the Court avoided confronting any constitutional issues. *Id.* at 198-99.

[8] *Id.* at 203.

[9] *Id.*

[10] *Id.* at 204. In a companion case to *Steele,* Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944), the Court held that federal courts have jurisdiction to entertain nondiversity suits for breach of the duty imposed by the Railway Labor Act. *Id.* at 213. This conclusion was premised upon the Court's view that the right to fair representation is a federal right implied from a federal statute. *Id.*

[11] 323 U.S. 248 (1944).

[12] *Id.* at 255.

[13] *Id.* at 256. In *Wallace,* the Court considered the independent union's duty to represent unit members fairly in the context of discriminatory discharge allegations against Wallace Corp. *Id.* at 250-51. The union's conduct was at issue because the Board found that it was a "company" union which had collaborated with Wallace in order to discharge employees favoring a C.I.O. union. *Id.* at 250.

[14] 345 U.S. 330 (1953).

[15] *Id.* at 331.

prior military service.[16] The passed employees claimed in part that the union's acceptance of the seniority provisions exceeded its authority as a collective bargaining representative under sections 7 and 9(a) of the NLRA.[17] Addressing the scope and nature of a union's authority to bargain collectively, the Court found it limited by the union's "statutory obligation to represent all members of an appropriate unit . . . to make an honest effort to serve the interests of all of those members, without hostility to any."[18] Due to the discretionary nature of negotiation, however, the Court perceived that a "wide range of reasonableness must be allowed a statutory bargaining representative . . ., subject always to complete good faith and honesty of purpose. . . ."[19] Applying this standard of fair representation to the union's negotiation of the seniority clauses in *Huffman*, the Court found the credit given for pre-employment wartime military service reasonably relevant to the purposes of the collective bargaining agreement.[20] Accordingly, the Court sustained the union's authority to accept these terms of the contract.[21]

While *Huffman* treated the union's duty to represent its constituents fairly in the negotiation of a collective bargaining agreement, some eleven years later, in *Humphrey v. Moore*,[22] the Court for the first time considered a union's duty in the administration of a collective bargaining agreement. The dispute in *Humphrey* arose after employees of one company absorbed by another filed grievances with their union, which represented employees in both companies.[23] The aggrieved employees claimed that their collective bargaining contract required the dovetailing of the seniority lists of the two companies.[24] A joint grievance committee composed of employer and union representatives agreed and dovetailed the seniority lists.[25] Since the absorbed company was older, many of its employees obtained continued employment to the detriment of the employees of the acquiring company.[26] Some of the displaced employees then brought suit in state court, successfully obtaining an injunction against implementation of the grievance committee's decision.[27]

The Supreme Court reversed the judgment of the state court, relying upon the standards set forth in *Wallace* and *Huffman*.[28] Finding that the union made its decision to dovetail the lists "honestly, in good faith and without hostility or arbitrary discrimination," the Court concluded that the union had not breached its duty of fair representation.[29]

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[16] *Id.* at 334-35.

[17] *Id.* at 332. These employees also claimed a violation of a provision of the Selective Training and Service Act of 1940, 50 U.S.C. app. § 308(b)(B) (1946), which mandated credit only for post-employment military service.

[18] 345 U.S. at 337 (citations omitted).

[19] *Id.* at 338.

[20] *Id.* at 342.

[21] *Id.* at 343.

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

[23] *Id.* at 337.

[24] *Id.*

[25] *Id.* at 339.

[26] *Id.*

[27] *Id.* at 341.

[28] *See id.* at 342, 349. See text at notes 7-13 *supra*.

[29] *Id.* at 350.

The Supreme Court's decisions from *Steele* to *Humphrey* emphasize the broad authority unions enjoy in representing their members. These decisions reveal that, except in instances of discrimination based upon race and prior union affiliation, collective bargaining representatives have the power to balance the interests of the majority and minority within the bargaining unit.

The struggle of employees for fair representation came to a head in the landmark 1967 case of *Vaca v. Sipes*.[30] Although *Vaca* was decided twenty-three years after the Supreme Court first spoke of the duty of fair representation in *Steele*, it was the first case in which the Court both specifically measured a union's duty to employees in its enforcement of contractual grievance and arbitration provisions and gave employees a cause of action to remedy breaches of this duty. The dispute in *Vaca* was precipitated by the troubles of Benjamin Owens, an employee of Swift & Company.[31] After he had been hospitalized for high blood pressure, Owens was certified by his family physician as fit to return to work.[32] The company's doctor disagreed, and as a result Owens was permanently discharged due to poor health.[33] Relying on his medical evidence of fitness, Owens sought his union's help to secure reinstatement.[34] The union processed Owens' grievance through four steps of the contractual grievance procedure. However, before deciding whether to take Owens' grievance to arbitration, the fifth and final step of the procedure, the union sent him to a second physician to secure further medical evidence of his good health.[35] When the results of this examination did not support Owens' position, the union refused to pursue his grievance.[36] Owens then filed suit in state court against the union, claiming that his discharge violated the collective bargaining agreement and that the union "arbitrarily, capriciously and without just or reasonable cause" failed to take his grievance to arbitration.[37]

The Supreme Court first concluded that state court jurisdiction over Owens' claim against the union was not preempted by federal labor law.[38] The union claimed that Owens' action arguably involved an unfair labor practice[39] subject to the exclusive jurisdiction of the NLRB.[40] Assuming arguendo the existence of NLRB jurisdiction over fair representation claims, the Court held that pursuant to section 301 of the Labor Management Relations Act,[41] both state and federal courts have jurisdiction concurrent with the Board to resolve issues of fair representation.[42] Nevertheless, the

[30] 386 U.S. 171 (1967).
[31] *Id.* at 173.
[32] *Id.* at 174.
[33] *Id.* at 175.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 173.
[38] *Id.* at 183-84.
[39] The Board first articulated this approach to breaches of the duty of fair representation in *Miranda Fuel Co.*, 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), *enforcement denied*, 326 F.2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963). For a complete discussion of *Miranda* and its progeny see text notes 148-98 *infra*.
[40] 386 U.S. at 183-84.
[41] 29 U.S.C. § 185 (1970).
[42] 386 U.S. at 184. While the Court referred specifically to jurisdiction under § 301 of the Labor Management Relations Act (LMRA), it did not preclude other bases of jurisdiction over fair representation suits. *Id.*

Court reasoned, the availability of a judicial forum for breach of contract claims does not alter an employee's responsibility to exhaust exclusive contractual grievance and arbitration procedures.[43] The Court concluded, however, that this requirement is waived when an employer repudiates the contractual procedures, or when a union, having sole power to invoke the procedures, refuses to do so wrongfully.[44]

Positing that Owens' claim was a federal common law claim, the Court defined the union conduct proscribed by the duty of fair representation as only conduct which is "arbitrary, discriminatory or in bad faith."[45] Circumscribing the application of these standards to the process of contract administration, the Court explained that its scrutiny of arbitrary or perfunctory union conduct did not signify that an employee has an absolute right to have his grievance arbitrated.[46] In the instant case, the Court concluded, the union's decision to forego arbitration was not arbitrary, discriminatory or made in bad faith, but rather was justifiable in light of the conflicting medical evidence with respect to Owens' health.[47]

The decision in *Vaca* emerged as a watershed in the development of federal labor law governing the duty of fair representation. In *Huffman* and *Humphrey*, the Court had created a federal common law duty of fair representation based upon a union's status as exclusive bargaining agent under the NLRA. In *Vaca*, the Court confirmed the existence of a cause of action for breach of this duty under section 301 of the LMRA. Elaborating upon the nature of such a section 301 action, the Court announced that if employees have delegated to the union exclusive authority to invoke the grievance machinery, in order to prevail against an employer in a suit for wrongful discharge under section 301 an employee first must prove that his union breached its duty of fair representation in presenting his grievance.[48] Additionally, the Court expanded the standards of fair representation to include not only discrimination and bad faith, but also arbitrary conduct.[49]

Since *Vaca*, the Supreme Court has considered further the procedural mechanics of fair representation suits under section 301 but has not fully clarified the substantive standards of the fair representation duty itself. In its 1971 opinion in *Motor Coach Employees v. Lockridge*,[50] the Court cast

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[43] *Id.*

[44] *Id.* at 185.

[45] *Id.* at 190.

[46] *Id.* at 191.

[47] *Id.* at 194.

[48] *Id.* at 186.

[49] *See id.* at 190, 191, 194.

[50] 403 U.S. 274 (1971). In *Lockridge*, an employee brought suit against his union in state court after he was terminated from union membership, and consequently discharged from his employment pursuant to a union security clause. *Id.* at 279. There, as in *Vaca*, the central issue was whether state court jurisdiction was preempted on the ground that the union's action was arguably an unfair labor practice. *Id.* at 285. In contrast to its decision in *Vaca*, the Court concluded that state court jurisdiction was preempted. *Id.* at 285-91. To counter the employee's assertion that he stated a claim against the union for breach of its duty of fair representation, the Court pointed out that the employee had not controverted the state court's finding that the union has not intentionally misinterpreted the security clause. *Id.* at 300. As a result, the Court reasoned that the employee had not presented a claim within the exception to the preemption doctrine carved out for fair representation suits by *Vaca*, where the Court stated proof of "arbitrary or bad-faith conduct on the part of the Union" is required. *Id.* at 299 (quoting Vaca, 386 U.S. at 193).

doubt on the viability of *Vaca's* arbitrariness standard when it noted that there must be "substantial evidence of [a union's] fraud, deceitful action or dishonest conduct" to support a fair representation claim.[51] Most recently, however, in the 1975 case of *Hines v. Anchor Motor Freight, Inc.*[52] the Court appeared to reaffirm *Vaca's* prohibition of arbitrary or perfunctory union conduct.[53] At the same time, the Court did not attempt to resolve whether arbitrary conduct encompasses negligent conduct.[54] With greater clarity than the *Vaca* Court, the *Hines* Court provided a necessary counterbalance

[51] *Id.* at 299 (quoting Humphrey v. Moore, 375 U.S. 335, 348 (1964)). This quoted language prompted some courts of appeals to conclude that bad faith is an element of a fair representation claim and that arbitrary conduct alone therefore does not constitute a breach of the duty of fair representation. Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 293, 90 L.R.R.M. 2996, 2998 (7th Cir. 1975); Suissa v. American Export Lines, Inc., 507 F.2d 1343, 1347, 88 L.R.R.M. 2262, 2264-65 (2d Cir. 1974); Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973). At the same time, however, the *Lockridge* court reasoned that conduct which demonstrates a failure of fair representation must be "deliberate and severely hostile *and irrational* . . . ." 403 U.S. at 301 (emphasis added). Relying upon this ambiguous reference to "irrational conduct", several circuit courts have concluded that *Lockridge* does not signal a retreat from the arbitrariness standard enunciated in *Vaca*. Ruzicka v. General Motors Corp., 523 F.2d 306, 309-10, 90 L.R.R.M. 2497, 2499-500 (6th Cir. 1975); Bures v. Houston Symphony Soc'y, 503 F.2d 842, 843-44, 87 L.R.R.M. 3124, 3124-25 (5th Cir. 1974); Beriault v. Local 40, Int'l Longshoremen, 501 F.2d 258, 264, 87 L.R.R.M. 2070, 2073-74 (9th Cir. 1974); Griffin v. UAW, 469 F.2d 181, 183, 81 L.R.R.M. 2485, 2486 (4th Cir. 1972); Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 875, 80 L.R.R.M. 3208, 3212 (3d Cir. 1972).

[52] 424 U.S. 554 (1976). *Hines* involved three employees who were discharged for allegedly falsifying expense vouchers presented to the employer to cover expenses on the over-the-road trucking assignment. *Id.* at 556. A joint grievance committee consisting of both employer and union representatives sustained the discharge in an arbitration decision considered as final and binding under the contract. *Id.* at 557. After the adverse decision the employees brought suit in federal district court against the employer and the union, claiming that the union failed to make an investigation which would have exculpated them. *Id.* at 558. In opposition to the defendant's motion for summary judgment, the employees presented a deposition of a motel clerk who admitted falsifying the expense vouchers for his own purposes. Although the district court dismissed the complaint against all parties because of the binding and final committee decision, the court of appeals reinstated as to the union on grounds that sufficient facts might be found in a trial which would indicate that the union acted in bad faith or arbitrarily. *Id.* at 559-60. The Supreme Court in *Hines* ultimately reinstated the complaint against the employer. *Id.* at 560-61.

[53] *Id.* at 568-69 (citing *Vaca*, 386 U.S. at 191).

[54] Only the Sixth Circuit has held that negligent conduct may fall within *Vaca's* proscription of arbitrary conduct. Ruzicka v. General Motors Corp., 523 F.2d 306, 310, 90 L.R.R.M. 2497, 2500 (6th Cir. 1975). Other circuits as well as the National Labor Relations Board have declined to find breaches of the duty of fair representation based upon union negligence. *See, e.g.*, Augspurger v. Brotherhood of Locomotive Engineers, 510 F.2d 853, 859, 88 L.R.R.M. 2609, 2612-13 (8th Cir. 1975). *Accord*, Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 789-99, 91 L.R.R.M. 2241, 2244-45 (7th Cir. 1976).

In a subsequent opinion denying a rehearing en banc in *Ruzicka*, the United States Court of Appeals for the Sixth Circuit limited the holding of the case to instances of "unexplained union inaction" that have barred employees from access to grievance procedures. 528 F.2d 912, 913, 91 L.R.R.M. 3054, 3054 (6th Cir. 1975)(denial of petition for rehearing en banc). To this end, the standard announced in *Ruzicka* resembles the standard of rational decision-making prescribed by the United States Court of Appeals for the Ninth Circuit in NLRB v. General Truck Drivers, Local 315, 545 F.2d 1173, 1175, 93 L.R.R.M. 2747, 2749 (9th Cir. 1976), rather than a negligence standard. Some commentators, however, read *Hines* as bringing the Court "closer to considerations of negligence as a standard by which union behavior will be evaluated." Jones, *The Origin of the Concept of the Duty of Fair Representation*, in THE DUTY OF FAIR REPRESENTATION: PAPERS FROM THE NATIONAL CONFERENCE ON THE DUTY OF FAIR REPRESENTATION 41-42 (Cornell University 1977).

to *Vaca's* requirement that an employee prove a fair representation violation by his union in order to prevail in a section 301 action against his employer. The Court held that an employer who believes in good faith he has grounds for a discharge may be liable for breaching a bargaining agreement even though the discharge has been upheld in arbitration if the union breached its duty to represent the employee fairly in that arbitration procedure.[55]

In *Steele* and its progeny,[56] the Supreme Court sketched only the broad outline of the duty of fair representation without much substantive and procedural content. These broad strokes left undefined the scope of the duty of fair representation in the context of proceedings before the National Labor Relations Board as opposed to proceedings arising under section 301 of the LMRA or the Railway Labor Act. Thus, the Board has had to consider whether the NLRA imposes a duty of fair representation upon unions certified under section 9[57] and whether the Board has the statutory authority to enforce such a duty. Moreover, the Board has had to formulate standards of fair representation, a task which continues today. Despite the existence of statutory language in the NLRA capable of safeguarding employees against unfair conduct by their bargaining representatives, the Board has relied partially upon the judicially developed doctrine of fair representation to provide this protection. The next section of this article will examine how the Board has incorporated this federal common law doctrine into the area of statutorily defined unfair practices and will consider how the Board might achieve similar results within the bounds of its statutory mandate.

II. THE DUTY OF FAIR REPRESENTATION AND THE NATIONAL LABOR RELATIONS BOARD

That some form of a fair representation duty inheres in the NLRA was implicit in the *Steele* Court's derivation of the duty as a corollary of a union's exclusive bargaining status.[58] The Court then went on to recognize this implication in its description of the duties of a bargaining agent under the NLRA in *Wallace*.[59] The Board, therefore, had little trouble recognizing that a duty of fair representation exists on the part of the unions it certifies.[60] We have struggled, however, to determine our authority to remedy a union's breach of this duty. This struggle continues today.

The Board has developed two approaches to fair representation issues, depending on whether the issues arise in proceedings previous to certification of a bargaining agent or in unfair labor practice proceedings after establishment of collective bargaining. Each of these contexts has yielded different questions concerning the Board's authority to regulate fair union representation.

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[55] 424 U.S. at 571-72.

[56] See text at notes 2-29 *supra*.

[57] 29 U.S.C. § 159 (1970).

[58] *See Steele*, 323 U.S. at 202-03.

[59] *Wallace*, 323 U.S. at 255-56.

[60] *See, e.g.*, Miranda Fuel Co., 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962, *enforcement denied*, 326 F.2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963); Hughes Tool Co. [*Hughes Tool I*], 104 N.L.R.B. 318, 32 L.R.R.M. 1010 (1953); Larus & Bros., 62 N.L.R.B. 1075, 16 L.R.R.M. 242 (1945).

A. *Representation Proceedings*

The fair representation issue initially surfaced in Board representation proceedings just one year after the Supreme Court's decision in *Steele*. In *Larus & Brothers*,[61] the Board was asked to revoke its certification of a whites-only union. Citing its own precedents as well as *Steele* and its progeny,[62] the Board recognized the duty of a statutory bargaining representative to represent all members of a bargaining unit without discrimination on the basis of race, color, or creed.[63] The Board asserted its power to uphold this duty by revoking the certification of a union which breaches it.[64]

The Board reaffirmed and expanded this formulation of the fair representation duty in its 1953 decision in *Hughes Tool Co.* [*Hughes Tool I*].[65] In *Hughes Tool I*, an all-white certified local union required a fee from the mostly black nonmembers of fifteen dollars for each grievance proceeding and four hundred dollars for each arbitration proceeding handled by the union. Another union, seeking to oust the certified local, filed a motion with the Board to revoke the local's certification on grounds that the fees conflicted with the local's duty to represent employees in grievance proceedings without discrimination.[66] A majority of the Board agreed,[67] and held that it would revoke the union's certification if the unfair conduct were not ceased immediately.[68]

For several years after *Hughes Tool I*, revocation of certification was the Board's only weapon for a fair representation violation. In its 1962 decision in *Pioneer Bus Co.*,[69] however, the Board added a similar, less drastic weapon. In *Pioneer Bus*, a decision in which I participated, the Board declined to invoke its discretionary contract bar rules.[70] While racially segregated into two locals,[71] except for different seniority provisions, the certified union had negotiated identical bargaining agreements. When the union and the employer sought, under existing contract bar rules, to bar a representation election petition by a rival union, the Board unanimously refused.[72] Finding that the racial segregation as well as the different seniority provisions for different races violated the union's duty of fair representation, the Board perceived grounds to revoke the union's certification.

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[61] 62 N.L.R.B. 1075, 16 L.R.R.M. 242 (1945).

[62] *Id.* at 1083, 16 L.R.R.M. at 244, *citing* Carter Mfg. Co., 59 N.L.R.B. 804, 15 L.R.R.M. 164 (1944) decided 9 days before *Steele*; Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999, 13 L.R.R.M. 139 (1943). It is interesting to note that the Board and the Supreme Court reached the conclusion that a statutory bargaining agent is under a duty of fair representation almost simultaneously. In fact, it may well be that the Supreme Court relied upon the Board's *Bethlehem-Alameda* decision in formulating the duty; that Board case was cited in Thurgood Marshall's brief amicus curiae in *Steele*. Brief for the NAACP, *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (brief can be found at 89 L. Ed. 191, 191).

[63] 62 N.L.R.B. at 1083, 16 L.R.R.M. at 244.

[64] *Id.* at 1085, 16 L.R.R.M. at 244.

[65] 104 N.L.R.B. 318, 32 L.R.R.M. 1010 (1953).

[66] *Id.* at 318-19, 32 L.R.R.M. at 1010.

[67] *Id.* at 329-30, 32 L.R.R.M. at 1013.

[68] *Id.* In its remedy the Board declined to revoke certification, and instead gave the union an opportunity to discontinue the offending grievance processing change. *Id.*

[69] 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962).

[70] *Id.* at 55, 51 L.R.R.M. at 1546.

[71] *Id.* at 54-55, 51 L.R.R.M. at 1546.

[72] *Id.*

This remedy, however, was deemed unnecessary in view of the rival union's request for an immediate election.[73]

In *Larus* and *Pioneer Bus,* the Board established the basic approach to fair representation questions which it took for twenty years and which survives today.[74] Under this approach, the Board would review in representation proceedings only claims of an already certified bargaining representative's actual breach of its duty of fair representation. This review would seek to determine whether the union had discriminated invidiously or hostilely against a minority of employees[75] and adversely affected the minority's employment relationship or rights guaranteed by the NLRA.[76] In *Hughes Tool I,* the Board expanded this approach to include along with discrimination based on race, creed, or color, discrimination based on union membership.[77] The *Hughes Tool I* Board also held for the first time that the duty of fair representation applies not only to the negotiation of a collective bargaining contract, but also to the contract's administration.[78] Thus, the Board in *Hughes Tool I* began to broaden the scope of the duty of fair representation to cover a range of union activities previously considered immune from Board examination.[79]

The Board's initial approach to fair representation issues, even as expanded by *Hughes Tool I,* stemmed from its interpretation of the duty of fair representation as a direct corollary of the exclusive bargaining status which section 9 accords a certified union. The Board's authority to remedy breaches of the duty of fair representation in turn stems from the Board's authority to protect that exclusive status. Thus, the Board's factual inquiry remains narrow, limited to a search for hostile or discriminatory union representations which adversely affect the terms and conditions of employment.[80]

More recently, the Board has searched for a broader, constitutional basis for dealing with unions alleged to have discriminated on the basis of race, national origin, or sex.[81] This search has taken the Board's fair repre-

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[73] *Id.* at 55, 51 L.R.R.M. 1546.

[74] *See, e.g.,* Handy Andy, Inc., 228 N.L.R.B. 447, 454, 94 L.R.R.M. 1354, 1361 (1977).

[75] *E.g.,* Pioneer Bus Co., 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962); *Hughes Tool I,* 104 N.L.R.B. 318, 32 L.R.R.M. 1010 (1953).

[76] *E.g.,* Pioneer Bus Co., 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962); Larus & Bros., 62 N.L.R.B. 1075, 16 L.R.R.M. 242 (1945).

[77] 104 N.L.R.B. at 326, 32 L.R.R.M. 1011.

[78] *Id.* at 326-27, 32 L.R.R.M. at 1011 (citing Hughes Tool Co. v. NLRB, 147 F.2d 69, 15 L.R.R.M. 852 (5th Cir. 1945)). The Board reasoned that grievance presentation and adjustment is an important part of the representation of employees under § 9(a). Thus, a union has a duty to accept and process impartially and without discrimination, all grievances by any employees it represents. 104 N.L.R.B. at 326-27, 32 L.R.R.M. at 1011. The Board concluded that the proviso to § 9(a), 29 U.S.C. § 159(a) (1970), added in 1947, which granted individual employees in a unit represented by a certified union the right to present grievances to the employer, did not diminish a certified union's responsibility concerning grievances on which its aid has been requested. 104 N.L.R.B. at 327, 32 L.R.R.M. at 1012.

[79] *See Hughes Tool I,* 104 N.L.R.B. at 331, 32 L.R.R.M. at 1016 (Chairman Herzog and Member Peterson, dissenting). *See also* Independent Metal Workers Union Local 1 [*Hughes Tool II*], 147 N.L.R.B. 1573, 1589, 56 L.R.R.M. 1289, 1299 (1964) (Chairman McCulloch and Member Fanning, concurring in part and dissenting in part).

[80] *See Hughes Tool I,* 104 N.L.R.B. at 326, 32 L.R.R.M. at 1011 (quoting Bethlehem Steel Co., Shipbuilding Division, 89 N.L.R.B. 341, 344, 25 L.R.R.M. 1564, 1566 (1950)).

[81] *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), where the Court stated: "If, as the state court has held, the Act confers this power [of negotiating discriminatory contracts]

sentation inquiry beyond the boundaries of the NLRA. Indeed, a union's duty of fair representation has overlapped its obligations under Title VII of the Civil Rights Act of 1964.[82] The search for a constitutional basis had its origin in *Independent Metal Workers Union Local 1* [*Hughes Tool II*],[83] where the Board for the first time revoked a union's certification for a breach of its duty of fair representation. In *Hughes Tool II* the Board was confronted with two complaints against the same all-white union involved in the *Hughes Tool I* decision.[84] Together with an all-black local, this union had been certified as a joint bargaining representative.[85] To eliminate racial discrimination in the negotiation of job opportunities within the company, the black local filed a motion with the Board to rescind the joint certification. An individual member of the black local simultaneously filed an unfair labor practice complaint against the white local for failing to process his grievance.[86]

In the representation case, a three member majority of the Board, relying on *Pioneer Bus*,[87] held that the previous certification should be rescinded because the certified locals "executed contracts based on race and administered the contracts so as to perpetuate racial discrimination in employment."[88] The majority added a constitutional gloss to the *Pioneer Bus* doctrine. In their view, the Board cannot afford the protection of section 9 to a statutory bargaining representative which discriminates racially without itself discriminating unconstitutionally.[89]

Chairman McCulloch and I concurred in the recission of certification, but opposed the majority's constitutional rationale.[90] We believed it unnecessary, and perhaps inappropriate, to define constitutional limitations on the Board's section 9 powers. In our view, it was enough that contracts patently discriminatory in the terms and conditions of employment negotiated by the certified union and the employer violated the duty arising from section 9.[91] Hence we would have rested the decision squarely on the NLRA.

In the early 1970's employers began to challenge union petitions for elections based on allegations that the union seeking certification invidiously discriminated against employees in the bargaining unit. These challenges arose before the unions were certified as exclusive bargaining representatives, a time when the duty of fair representation concomitant with that status had not arisen. The employers nevertheless contended that the Board was constitutionally precluded from certifying these unions in view

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on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise." *Id.* at 198.

[82] 42 U.S.C. §§ 2000e *et seq.* (1970 & Supp. V 1975).

[83] 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964).

[84] See notes 65-68 *supra.*

[85] *Id.* at 1578, 56 L.R.R.M. at 1290.

[86] *Id.* at 1579, 56 L.R.R.M. at 1290.

[87] 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962). See text at notes 70-73 *supra.*

[88] 147 N.L.R.B. at 1566, 56 L.R.R.M. at 1294.

[89] *Id.* (citing Bolling v. Sharpe, 347 U.S. 497 (1954)); Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948).

[90] 147 N.L.R.B. at 1579, 56 L.R.R.M. at 1295.

[91] *Id.* (citing Pioneer Bus Co., 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962)).

of their discriminatory practices.[92] In 1974, in *Bekins Moving & Storage Co.*,[93] three members of the Board accepted this contention.

In *Bekins*, the employer contended that a union should be barred from a representation election because it discriminated on the basis of sex and national origin.[94] To resolve this issue, framed as a challenge to the union's capacity to represent unit employees fairly, a plurality of the Board employed a constitutional approach similar to that in *Hughes Tool II*. Former Chairman Miller and Member Jenkins reasoned that Board certification of a discriminatory union violates the due process clause of the fifth amendment to the Constitution.[95] In their view, when the NLRB, as a federal instrumentality, certifies a union which has shown a "propensity to fail fairly to represent employees," it unconstitutionally furthers invidious private discrimination.[96] Thus, former Chairman Miller and Member Jenkins believed that the Constitution compels the Board to investigate allegations of union membership discrimination and to evaluate a union's willingness and capacity to represent employees on a fair and equal basis.[97] Accordingly, they concluded that the Board should grant a precertification inquiry into the employer's pre-election discrimination charges if the union subsequently wins the election and the employer raises his objections within five days of the vote tally.[98]

Former Member Kennedy concurred in the majority's constitutional approach. He agreed that the Board is constitutionally foreclosed from certifying a union that discriminates on the "inherently suspect" basis of race, alienage or national origin.[99] He nevertheless opposed the inquiry into whether a union has a "propensity" for unfair representation. Such inquiry, he reasoned, inappropriately incorporates into the constitutional precertification inquiry issues of fair representation properly treated after certification.[100] Since a majority did not endorse the broader precertification test favored by former Chairman Miller and Member Jenkins, Member Kennedy's view was the common ground of *Bekins*.

Member Penello and I dissented from this view. We concluded that the Constitution does not require and the NLRA does not permit the Board to withhold certification because of a union's alleged discriminatory practices.[101] We pointed out that:

> [C]ertification . . . will give members of the bargaining unit rights enforceable not only under the Act, but under the Civil Rights

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[92] *E.g.*, Office & Professional Employees International Union, Local 2, 199 N.L.R.B. 728, 81 L.R.R.M. 1305 (1972) (sex discrimination); Bookbinders & Bindery Workers Union, Local 144, 197 N.L.R.B. 246, 80 L.R.R.M. 1294 (1972) (sex discrimination); Retail Clerks Local 588, 194 N.L.R.B. 1135, 79 L.R.R.M. 1163 (1972) (religious discrimination).

[93] 211 N.L.R.B. 138, 86 L.R.R.M. 1323 (1974), *noted in Annual Survey of Labor Relations & Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 986 (1975).

[94] 211 N.L.R.B. at 138, 86 L.R.R.M. at 1324.

[95] *Id.* at 138-39, 86 L.R.R.M. at 1325. A similar constitutional rationale had been enunciated previously by the United States Court of Appeals for the Eighth Circuit in NLRB v. Mansion House Center Management Co., 473 F.2d 471, 82 L.R.R.M. 2608 (8th Cir. 1973).

[96] 211 N.L.R.B. at 139, 86 L.R.R.M. at 1326.

[97] *Id.*

[98] *Id.* at 141-42, 86 L.R.R.M. at 1328.

[99] *Id.* at 143, 86 L.R.R.M. at 1329.

[100] *Id.* at 144, 86 L.R.R.M. at 1330.

[101] *Id.* at 145-46, 86 L.R.R.M. at 1331-32.

> Act as well, and in law suits arising under the laws of the United States.
>
> The rights which may be enforced by minority members of the bargaining unit against their exclusive representative include, of course, the right to be represented fairly and without hostility or discrimination. Among those rights also is the right to participate in the affairs of the exclusive representative, including the right to be admitted to membership.[102]

Under such circumstances, we reasoned that certification does not operate to support a union's discriminatory practices. Rather, it places minority groups within the bargaining unit in a position to challenge discriminatory practices in proceedings before the Board or other federal forums.[103] We also argued that it is beyond the authority of the Board to withhold certification. Nowhere in the NLRA is there express or implied power to withhold certification for reasons other than election irregularities. On the contrary, section 9(c)(1) *requires* the Board to certify a union which has won a fairly conducted representation election.[104] To do otherwise, we noted, would deny employees their section 7 right to bargain collectively through their chosen representative.[105] Moreover, "[a]ny defects in the certification which may flow from the [union's] allegedly discriminatory membership policies are subject to review in proceedings which may arise under Section 10 of the Act,"[106] whereas withholding certification might leave the offending practices untouched.[107] We concluded that a precertification inquiry into a union's qualifications is unwarranted on constitutional or statutory grounds, and we maintained that the issue of a union's fair representation should be considered in other proceedings under the Act but only after certification.[108]

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[102] *Id.* at 146, 86 L.R.R.M. at 1332.

[103] *Id.*

[104] 29 U.S.C. § 159(c)(1) (1970) provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board-
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

[105] 211 N.L.R.B. at 148, 86 L.R.R.M. at 1334.

[106] *Id.*

[107] *Id.* at 147, 86 L.R.R.M. at 1333-34.

[108] *Id.* at 148, 86 L.R.R.M. at 1334-35.

Constitutional theory surfaced during the same year as *Bekins* in *Bell & Howell Co.*[109] In that case, an employer filed a post-election motion to disqualify a union from certification on grounds that the union engaged in sex discrimination. As in *Bekins,* the Board was split; this time, however, Member Penello and I were in the majority. We restated our view that the Board can resolve in proceedings other than certification proceedings any question concerning a union's willingness and capacity to represent bargaining unit employees,[110] and we adhered to our position that precertification inquiry into such questions is not constitutionally required.[111] Member Kennedy concurred in denying the employer a precertification hearing.[112] Although Member Kennedy reaffirmed his constitutional reasoning in *Bekins,* he distinguished *Bell & Howell* on the ground that the sex discrimination alleged in that case, unlike discrimination based on race, alienage, and national origin, is not constitutionally suspect.[113] Accordingly, certification of the union in the present case was not constitutionally barred.

Chairman Miller and Member Jenkins dissented, echoing their reasoning in *Bekins.*[114] They argued that a precertification hearing should have been held to consider the employer's evidence of sex discrimination challenging the union's ability to represent employees fairly.[115] Thus, *Bell & Howell,* in limiting *Bekins* to constitutionally suspect classifications, clarified that the *Bekins* doctrine would not lead to a wideranging precertification inquiry into a union's willingness or capacity for future fair representation.

Last year, we narrowed the scope of precertification consideration of fair representation issues still further. In *Handy Andy, Inc.,*[116] we expressly overruled *Bekins.* The *Bekins* dissenters, Member Penello and I, joined by then Chairman Murphy, with Member Walther concurring, became the majority in *Handy Andy.* In that case, an employer objected to certification of a union on the basis of several federal court decisions which had held that the challenged union's bargaining agreements with other employers constituted employment discrimination.[117] The employer contended that these decisions demonstrated that the union would invidiously exclude persons from membership and that the union had a propensity to discriminate in employee representation.[118] *Handy Andy* thus presented the Board with an opportunity to reevaluate the constitutional doctrine set forth in *Bekins.*

The Board in *Handy Andy* viewed *Bekins* as grounded on a dated analysis of Supreme Court decisions concerning unconstitutional governmental action. The Board looked to more recent Supreme Court decisions which indicated that "where the impetus for the discrimination is private,

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[109] 213 N.L.R.B. 407, 87 L.R.R.M. 1172 (1974), *noted in Annual Survey of Labor Relations and Employment Discrimination Law,* 16 B.C. IND. & COM. L. REV. 965, 986-92 (1975).

[110] 213 N.L.R.B. at 408, 87 L.R.R.M. at 1174.

[111] *Id.*

[112] *Id.*

[113] *Id.* (citing Geduldig v. Aiello, 417 U.S. 484 (1974)); Kahn v. Shevin, 416 U.S. 351 (1974).

[114] Bell & Howell Co., 213 N.L.R.B. 407, 409, 87 L.R.R.M. 1172, 1175, (1974).

[115] *Id.*

[116] 228 N.L.R.B. 447, 94 L.R.R.M. 1354 (1977), *noted in Annual Survey of Labor Relations and Employment Discrimination Law,* 18 B.C. IND. AND COM. L. REV. 1045, 1103 (1977).

[117] 228 N.L.R.B. at 447-48, 94 L.R.R.M. at 1355. *See, e.g.,* Rodriquez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), *vacated and remanded,* 431 U.S. 395, 406 (1977).

[118] 228 N.L.R.B. at 447, 94 L.R.R.M. at 1355.

the [governmental agent] must have *'significantly involved* itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."[119] Accordingly, the Board reasoned that governmental involvement with a private party which discriminates, without more is not proscribed by the Constitution.[120] Thus, the legal issue presented by a precertification claim of union discrimination is whether there is a sufficiently close nexus between the Board's certification processes and any discrimination undertaken by a certified union. The Board in *Handy Andy* concluded that there is not.[121]

This conclusion stemmed from the nature of certification. NLRB certification, while conferring substantial benefits on a union, does not enforce, require, or encourage a union's discriminatory practices.[122] It does not permit unions to engage in discriminatory practices otherwise prohibited either by the duty of fair representation[123] or Title VII of the Civil Rights Act of 1964.[124] Rather, certification by the Board is a routine acknowledgement that a majority of employees in a bargaining unit duly have selected the union as their exclusive bargaining representative.[125] Thus, in the *Handy Andy* Board's view, NLRB certification is a facially neutral act which does not "significantly involve" the Board with any labor organization discrimination. Hence, it does not rise to the level of unconstitutional governmental action. Accordingly, the Board in *Handy Andy* held that denial of certification of an allegedly discriminatory union is not constitutionally required.[126]

The Board in *Handy Andy* also considered whether denial of certification for breaches of the duty of fair representation is nevertheless appropriate under the NLRA. The crux of this issue was whether an allegation of a breach of fair representation should be considered in representation proceedings, unfair labor practice proceedings, or both. In resolving this question, the Board first examined the certification requirements detailed in 9(c)(1) of the Act. The Board reasoned that the mandatory language of that section commands the NLRB in a representation proceeding to issue certification to a labor organization which has won a valid election.[127] The only remedies available for an election found invalid are to set the election aside or to direct a second election. Hence, the Board concluded, its only

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[119] *Id.* at 450, 94 L.R.R.M. at 1357 (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1973) (emphasis supplied by Board). The *Bekins* Board had relied on Shelley v. Kraemer, 334 U.S. 1 (1948), in which judicial enforcement of a racially restrictive private covenant was held to be unconstitutional governmental action.

[120] 228 N.L.R.B. at 450, 94 L.R.R.M. at 1357.

[121] *Id.*

[122] *Id.*

[123] The Board reasoned that the duty of fair representation "specifically prohibits" a union from practicing unlawful discrimination against any unit member. *Id.* at 450, 94 L.R.R.M. at 1358.

[124] Title VII provides that it is an unlawful employment practice for a labor organization to exclude any individual from membership or otherwise adversely affect an employee's status on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(c) (Supp. V 1975).

[125] 228 N.L.R.B. at 450, 94 L.R.R.M. at 1357 (citing Alto Plastics Mfg. Corp., 136 N.L.R.B. 850, 851, 49 L.R.R.M. 1867, 1867 (1962).

[126] 228 N.L.R.B. at 448, 450, 94 L.R.R.M. at 1355, 1357.

[127] *Id.* at 452, 94 L.R.R.M. at 1359.

duty under section 9(c)(1) is to ensure the fairness of elections. Accordingly, it lacks authority to consider in representation proceedings the potential future consequences of union discrimination.[128]

The Board found this conclusion buttressed by Congress' desire that representation questions be resolved expeditiously to advance the statutory objectives of fostering collective bargaining and assuring stability in labor-management relations. To that end, Congress denied direct judicial review of representation proceedings and exempted such proceedings from the Administrative Procedure Act.[129] Similarly, Congress provided that representation questions be decided in nonadversary factfinding proceedings.[130] This choice of procedure for certification suggests a congressional perception that the importance of permitting employees to decide expeditiously whether they desire a particular bargaining representative justifies elimination of adversarial procedural safeguards. In this light, the Board recognized, it should not deny or delay the majority's choice of a bargaining representative.[131]

The Board contrasted the streamlined procedures established for certification matters with the NLRA's provisions for unfair labor practice proceedings.[132] Rather than delaying the onset of collective bargaining, the unfair labor practice provisions protect the rights of employees to organize and bargain through representatives of their own choosing. To this end, the Act grants the Board broad remedial powers including reinstatement and backpay orders,[133] to prevent unfair labor practices. Such remedies are imposed only after an adversary proceeding which accords the full due process panoply of a formal complaint framing the issues, a hearing before an administrative law judge, confrontation of witnesses, and the right of review in the circuit courts of appeals.[134] Since deferring consideration of fair representation questions permits thorough adjudication of those issues and speeds the collective bargaining process, the Board in *Handy Andy* concluded that an unfair labor practice proceeding is the most appropriate forum for resolving fair representation issues.[135]

Despite its preference for adjudicating fair representation questions in unfair labor practice proceedings, the Board clarified that it was not ruling out issues of union discrimination from representation proceedings altogether. The Board unequivocally stated that it will continue to consider discrimination issues where required to preserve the integrity of its own

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[128] *Id.*

[129] *Id.* at 454, 94 L.R.R.M. at 1361 (citing AFL v. NLRB, 308 U.S. 401, 409-11 (1940)). *See* Leedom v. Kyne, 358 U.S. 184, 188-91 (1958) (representation proceedings can be reviewed in federal court only to consider whether the Board acted in excess of its statutory authority and contrary to a specific prohibition in the NLRA).

[130] 228 N.L.R.B. at 454, 94 L.R.R.M. at 1361.

[131] *Id.* at 454, 94 L.R.R.M. at 1361.

[132] *Id.* at 454, 94 L.R.R.M. at 1361.

[133] *Id. See, e.g.*, IBEW, Local 2088 (Federal Electric Corp.), 218 N.L.R.B. 396, 397, 89 L.R.R.M. 1590, 1592 (1975) (union required to treat employee as promoted and make him whole for loss of earnings which resulted from union's failure to process his grievance concerning promotion).

[134] *See* 228 N.L.R.B. at 454, 94 L.R.R.M. at 1361. These procedures parallel those required under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e *et seq.* (1970 & Supp. V 1975).

[135] 228 N.L.R.B. at 454, 94 L.R.R.M. at 1361.

processes.[136] Thus, for example, the Board will consider "the possible impact of clearly existing invidious discrimination within the unit at issue or of appeals to prejudice directed at employees . . . ."[137] Discrimination could form the basis for recission of certification or lifting of contract-bar rules; an election appeal to prejudice could undermine the validity of a representation election and require a second election.[138]

The Board in *Handy Andy* stated that it would consider all other claims of discriminatory practices by a union in the context of unfair labor practice proceedings.[139] The *Handy Andy* decision thus sets out in boldface the Board's current approach to fair representation issues in representation proceedings. A majority of the Board now believes no constitutional or statutory considerations require or warrant withholding certification of a union duly selected as exclusive representative of a bargaining unit.[140] At the same time, all the Board's members hold that employees have a right to be free from invidious discrimination by their bargaining representative.[141] A majority believes this right does not arise until the union actually represents employees in a specific bargaining unit. Thus, a majority holds that litigation concerning the duty in precertification hearings is premature[142] and that fair representation issues are best resolved after certification in unfair labor practice proceedings where employees, rather than employers, may seek elimination of demonstrable unfair discriminatory practices by their bargaining representative.[143] Yet, the Board has allowed for flexibility in its approach to fair representation issues by stating that it will review certain discrimination issues in representation proceedings to protect its processes from being implicated in unfair representation.[144]

Handy Andy perhaps closes the door on the Board's search for a constitutional basis for dealing with union discrimination. Instead, the Board has returned to an inquiry into fair representation issues rooted firmly in section 9 of the NLRA. Thus, the Board's treatment of the duty of fair representation in representation proceedings reinstates the approach developed in *Hughes Tool I* and *Pioneer Bus.*[145] In short, *Handy Andy* estab-

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[136] *Id.* For its authority to protect its own processes, the Board in *Handy Andy* relied upon Pioneer Bus Co., 140 N.L.R.B. 54, 55, 51 L.R.R.M. 1546, 1546 (1962), where the Board held that it has the discretionary authority to revoke certification of a union with collective bargaining agreements which patently discriminate between black and white employees. For a discussion of *Pioneer Bus,* see text at notes 70-73 *supra.*

[137] 228 N.L.R.B. 454, 94 L.R.R.M. at 1361.

[138] *Id. See, e.g.,* Pioneer Bus Co., 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962); Sewell Mfg. Co., 138 N.L.R.B. 66, 71-72, 50 L.R.R.M. 1532, 1534-35 (1962) (employer's election victory overturned due to employer's racially oriented election propaganda). For a recent Board decision rescinding certification, see Local 671 (Airborne Freight Corp.), 199 N.L.R.B. 994, 81 L.R.R.M. 1454 (1972) and cases cited therein.

[139] 228 N.L.R.B. at 454-55, 94 L.R.R.M. at 1361-62.

[140] *See* Bell & Howell Co., 230 N.L.R.B. No. 57, 95 L.R.R.M. 1333, 1334-35 (June 24, 1977), *supplementing* 220 N.L.R.B. 881, 90 L.R.R.M. 1448 (1975); Handy Andy, Inc., 228 N.L.R.B. 447, 456, 94 L.R.R.M. 1354, 1363 (1977).

[141] *See Handy Andy,* 228 N.L.R.B. at 455, 94 L.R.R.M. at 1362; *id.* at 456-57, 94 L.R.R.M. at 1363-64 (Member Walther, concurring); *id.* at 457-61, 94 L.R.R.M. at 1366-67 (Member Jenkins, dissenting).

[142] *See Bell & Howell,* 230 N.L.R.B. No. 57, 95 L.R.R.M. at 1336; *id.,* 95 L.R.R.M. at 1337 (Member Walther, concurring).

[143] *See Bell & Howell,* 230 N.L.R.B. No. 57, 95 L.R.R.M. at 1336; *Handy Andy,* 228 N.L.R.B. at 454, 94 L.R.R.M. at 1361.

[144] *Handy Andy,* 228 N.L.R.B. at 454, 94 L.R.R.M. at 1361.

[145] See text at notes 74-80 *supra.*

lishes that under existing legislation, employment discrimination issues which are unrelated to the statutory collective bargaining process regulated by the NLRB should be redressed in other proceedings.[146]

The Board's reinstated basic approach to certification proceedings removes the invitation which existed under the *Bekins* doctrine for employers to present discrimination claims in certification proceedings merely to avoid dealing with employees collectively. It also eliminates the need to determine whether a union engages in discriminatory membership practices even if these practices do not effect the representation afforded to employees in the bargaining unit. By narrowing its approach to the duty of fair representation questions in representation proceedings, the Board effectuates its traditional primary functions of fostering collective bargaining and protecting employees' rights to act concertedly.

B. *Unfair Labor Practice Proceedings*

In *Handy Andy*, the Board freely debated whether unfair labor practice or representation proceedings are the most appropriate forum for deciding certain fair representation issues. Implicit in this debate was the assumption that a breach of the duty of fair representation is an unfair labor practice. Yet, it was not until its controversial 1962 decision in *Miranda Fuel Co.*[147] that the Board decided that it has jurisdiction to enforce the duty of fair representation in unfair labor practice proceedings. To this day, the Supreme Court, though it has accepted this decision for the purposes of argument,[148] has not upheld it.

In *Miranda*, a union, under pressure from employees in the bargaining unit, caused an employer to reduce one employee's seniority because of his early departure for an authorized vacation for reasons not within the collective bargaining agreement.[149] The union's reasons did not appear arbitrary or invidious, though they were wholly unrelated to any union considerations of union membership, loyalty, or activity.[150] A three-member majority of the Board concluded that the union and the employer had committed unfair labor practices in violation, respectively, of sections 8(b)(1)(A) and 8(b)(2), and 8(a)(1) and 8(a)(3) of the NLRA.[151]

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[146] *See* Independent Metal Workers Local 1 (Hughes Tool Co.), 211 N.L.R.B. at 149, 86 L.R.R.M. at 1334-35 (Chairman McCulloch, dissenting). For discussion of the relationship between the NLRA and federal employment discrimination policy, see C. MORRIS, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 740 (Section of Labor Relations Law, American Bar Association 1971). There is a considerable amount of scholarly debate on this point, however. *See generally* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L. F. 69, 125; Lopatka, *Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees Who Protest Discrimination in Private Employment*, 50 N.Y.U. L. REV. 1179, 1224 (1975); Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?* 42 U. CHI. L. REV. 1, 10 (1974).

[147] 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), *enforcement denied*, 326 F.2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963). For previous litigation, see Miranda Fuel Co., 125 N.L.R.B. 454, 45 L.R.R.M. 1122 (1959), *vacated and remanded*, 366 U.S. 763 (1961).

[148] Vaca v. Sipes, 386 U.S. 171, 182-84 (1967).

[149] 140 N.L.R.B. at 181, 51 L.R.R.M. at 1585.

[150] *See Miranda*, 326 F.2d at 175, 54 L.R.R.M. at 2716; see also *Miranda*, 140 N.L.R.B. at 198, 51 L.R.R.M. at 1593 (Chairman McCulloch and Member Fanning, dissenting).

[151] 140 N.L.R.B. at 190, 51 L.R.R.M. at 1589.

The majority reached this novel conclusion through a three-step process of statutory construction. First, building on the settled premise that a statutory bargaining representative is charged under section 9 of the NLRA with the duty to represent employees in the unit fairly and impartially, the majority concluded that this duty must be "read into" the right guaranteed employees by section 7 "to bargain collectively through representatives of their own choosing."[152] The majority then reasoned that any default by a union in the performance of its section 9 obligations automatically constitutes an infringement of an employee's section 7 rights.[153] Since any union interference with an employee's exercise of his section 7 rights is an unfair labor practice, a union which breaches its duty of fair representation commits an unfair labor practice.[154] Thus, the majority concluded, section 8(b)(1)(A) of the Act prohibits labor organizations acting in a statutory representative capacity from acting against any employee on considerations or classifications which are "irrelevant, invidious, or unfair."[155]

Since *Miranda*, a majority of the Board has adhered to the position adopted in that case and expanded on it. In *Hughes Tool II*,[156] for example, the Board held that a union which failed to process an employee's grievance because of his race committed an unfair labor practice. The majority found that the union's conduct violated not only sections 8(b)(1)(A) and 8(b)(2) but also section 8(b)(3).[157] Thus, the Board adopted the theory that section 8(b)(3), which speaks only of refusals "to bargain collectively with an employer," prescribes a duty not only to an employer but to employees as well.

Joined by former Chairman McCulloch, I dissented in *Miranda*.[158] I questioned the majority's proposition that a statutory bargaining representative's section 9 obligations must be implied in other rights which the NLRA guarantees employees expressly. While former Chairman McCulloch

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[152] *Id.* at 185-86, 51 L.R.R.M. at 1587. Section 7, 29 U.S.C. § 157 (1970), provides in part that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[153] 140 N.L.R.B. at 184-86, 51 L.R.R.M. at 1586-87.

[154] *Id.* at 185, 51 L.R.R.M. at 1587. 29 U.S.C. § 158(b)(1)(A) (1970) provides in pertinent part that "[i]t shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7] . . . ."

The majority in *Miranda* also held that to the extent an employer acquiesces in a union's request for action against an employee that breaches the union's duty of fair representation, the employer also commits an unfair labor practice. 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587. 29 U.S.C. § 158(a)(1) (1970) provides in pertinent part that "[i]t shall be an unfair labor practice for an employer — (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section [7] . . . ." The majority also concluded that the union and the employer also violate respectively § 8(b)(2), 29 U.S.C. § 158(b)(2) (1970), and § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), if for arbitrary, irrelevant or unfair reasons, "the union attempts to cause or does cause an employer to derogate the employment status of an employee." 140 N.L.R.B. at 186, 51 L.R.R.M. at 1587.

[155] 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587.

[156] *Hughes Tool II*, 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964). See text at notes 83-87 *supra*.

[157] *Id.* at 1574-75, 56 L.R.R.M. 1293-94. Section 8(b)(3), 29 U.S.C. § 158(b)(3) (1970), provides that in pertinent part "[i]t shall be an unfair labor practice for a labor organization or its agents . . . (3) to refuse to bargain collectively with an employer . . . ."

[158] 140 N.L.R.B. at 191-202, 51 L.R.R.M. at 1589-95.

and I recognized that the Board has broad authority to insure a bargaining representative's compliance with its fair representation duty in a representation proceeding, we did not believe that such authority exists in an unfair labor practice proceeding.[159] Indeed, when Congress amended the NLRA by adding section 8(b) to regulate unfair labor practices by labor organizations, it did not mention the duty of fair representation, even though the Supreme Court had enunciated the duty in *Steele* nearly three years earlier.[160] Thus, we would have adhered to the language of section 8(b)(1)(A) and held that a labor organization commits the unfair labor practice of breaching its duty of fair representation only when it "'restrain[s] or coerce[s]' . . . employees in the exercise of rights guaranteed in section 7 . . . ."[161]

We elaborated on these views in *Hughes Tool II*, again dissenting.[162] There, we argued that making any violation of the duty of fair representation an unfair labor practice would foster Board intrusion into the internal affairs of labor organizations.[163] The Board consequently would have to judge the substantive matters of collective bargaining. Since in *Hughes Tool II* the grievant's nonmembership was a factor in the union's refusal to process his grievance, the Board could have found that the union restrained and coerced the grievant in violation of 8(b)(1)(A) of the Act.[164] Chairman McCulloch and I predicted that, by choosing not to rest its decision on those grounds, the Board was venturing into a "wholly new field of activity" in which it would review a wide range of actions by labor organizations under the general rubric of fair representation.[165] That the same result might have been reached in *Hughes Tool II* by traditional statutory reasoning rather than by the majority's "reading in" process illustrates the essential difference between the approach adopted by the Board and the one I advocated. Practically speaking, there is much overlap between the two, for conduct which breaches the duty of fair representation frequently will operate to restrain or coerce union members in the exercise of section 7 rights. Where the majority would import lock, stock, and barrel the judicially-implied duty into the unfair labor practice field and there expand upon it, however, I would consider these issues entirely under the existing mandate committed to the Board by statute. As with consideration of precertification issues,[166] it is a matter of effectuating the Board's traditional and primary functions rather than using the Board as an instrument of every national policy implicated in labor-management relations.

These differences recur in cases involving fair representation issues arising in the administration of grievance procedures in an established collective bargaining agreement, to which the Board's attention in this area

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[159] *Id.* at 200, 51 L.R.R.M. at 1594. *See also Hughes Tool II*, 147 N.L.R.B. 1573, 1588, 56 L.R.R.M. 1289, 1298-99 (1964) (Member Fanning and Chairman McCulloch, dissenting).

[160] 140 N.L.R.B. at 201-02 & n.37, 5 L.R.R.M. at 1594-95 & n.37.

[161] *Id.* at 201, 51 L.R.R.M. at 1594. *See also Hughes Tool II*, 147 N.L.R.B. at 1586, 56 L.R.R.M. at 1298.

[162] 147 N.L.R.B. at 1578, 56 L.R.R.M. at 1295.

[163] *Id.* at 1590, 56 L.R.R.M. at 1300.

[164] *Id.* at 1586, 56 L.R.R.M. at 1297-98.

[165] *See id.* at 1590, 56 L.R.R.M. at 1300 (Chairman McCulloch and Member Fanning, concurring in part and dissenting in part).

[166] See text at notes 145-47 *supra*.

has primarily been directed since *Hughes Tool II*.[167] These fall into two types of grievance cases: those where an employee sues a union for acting unfairly in refusing to process his grievance, and those where an employee claims a union treated him unfairly in processing his grievance.

In cases involving refusals to process grievances, the determinative issue is the motivation behind the refusal. Where an employee raises a duty of fair representation claim regarding a decision not to process his grievance, union considerations often appear to be the motivation behind the decision and hence these cases can be decided under traditional doctrines. In *Automotive Plating Corp.*,[168] for example, an employee wanted to grieve his discharge. The union decided not to process his grievance at all or even to discuss his discharge with the employer informally. The Board, relying on evidence that the union's business manager resented the employee's opposition to an issue discussed at a recent union meeting, found that the union had violated section 8(b)(1)(A).[169] The union's failure to process the grievance, the Board reasoned, was in retaliation for union activity and hence unlawfully restrained the employee in the exercise of his section 7 right to engage in concerted activity.[170] Clearly the union's refusal to handle the employee's grievance was improperly motivated, and consequently, the Board did not have to consider directly whether the union breached its duty of fair representation under *Miranda* standards.

Similarly, in the recent case of *H.O. Canfield Rubber Co.*,[171] the Board concluded that a union violated section 8(b)(1)(A) in refusing to process the grievance of a nonmember employee in the bargaining unit unless he reimbursed the union for its costs in processing his grievance, where no such assessment was made upon union members.[172] The majority, in which I joined, agreed that the validity of the union's requirement for nonmembers did not turn upon the union's duty of fair representation. Rather, as I prefer, it turned on whether the union's discrimination against nonmembers restrained or coerced them in the exercise of their section 7 rights.[173] Here again, it was clear that the discrimination against nonmembers was motivated by improper union considerations — in this case union membership itself. "[A]lthough a union is permitted wide discretion in its handling of grievances," we concluded, "a union cannot lawfully refuse to process a grievance of an employee in the unit because he is a nonmember."[174]

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[167] For other Board decisions discussing fair representation issues in the context of contract administration, see Local 324, International Union of Operating Engineers, 226 N.L.R.B. 587, 93 L.R.R.M. 1415 (1976) (job referral information); Barton Brands, Ltd., 213 N.L.R.B. 640, 87 L.R.R.M. 1231 (1974) (dovetailing seniority lists); Local 106, Glass Bottle Blowers Ass'n 210 N.L.R.B. 943, 86 L.R.R.M. 1257 (1974), *enforced*, 520 F.2d 693, 89 L.R.R.M. 3020 (6th Cir. 1975) (locals segregated on the basis of sex); Painters, Local 1066 (W.J. Siebenoller, Jr., Paint Co.), 205 N.L.R.B. 651, 84 L.R.R.M. 1013 (1973) (discharge of black employee); Jubilee Mfg Co., 202 N.L.R.B. 272, 274, 82 L.R.R.M. 1482, 1486 (1973) (Member Jenkins dissenting in alleged sex discrimination case).

[168] 170 N.L.R.B. 1234, 67 L.R.R.M. 1609 (1968).

[169] *Id.*, 67 L.R.R.M. at 1610.

[170] *Id.* The Board ordered the union to seek the employee's reinstatement and to make him whole for any loss he may have suffered as a result of the discharge. *Id.* at 1234-35, 67 L.R.R.M. at 1610-11.

[171] 223 N.L.R.B. 832, 91 L.R.R.M. 1529 (1976).

[172] See text at notes 65-69 *supra* for discussion of a similar problem arising in a representation case, *Hughes Tool I*, 104 N.L.R.B. 318, 32 L.R.R.M. 1010 (1953).

[173] 223 N.L.R.B. at 834, 91 L.R.R.M. at 1531.

[174] *Id.*, 91 L.R.R.M. at 1532.

Regrettably, the Board has not consistently adhered to its fundamental statutory role in cases where there has been a refusal to grieve claims. *Local 12, United Rubber Workers,*[175] like *Hughes Tool II,* involved a union's refusal to process the grievances of black employees in the bargaining unit. A majority again found violations of sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) on the basis of union's duty not to discriminate against members of a bargaining unit in presenting grievances.[176] As in *Hughes Tool II* and *Miranda,* Chairman McCulloch and I dissented.[177] We found no statutory basis for holding that the refusals violated section 8(b)(1)(A). The grievants in the instant case were union members, and there was no showing that union's unfair conduct was motivated by union considerations. Therefore, in our view, the union's conduct was not covered by section 8(b) of the NLRA even though the conduct may have been racially motivated.[178] Invidious as such conduct may be, we felt that it is not within the scope of statutorily-defined practices which are given to the Board to regulate.[179]

Rubber Workers is nonetheless the exception to the Board's treatment of refusals to process grievances. In general, the Board has stayed within its statutory bounds in such cases.[180] However, in cases where a union actually has presented and processed a grievance to arbitration, the Board has ranged further from its statutory mandate. In those cases, the Board is more apt to rely on *Miranda's* duty of fair representation principles.[181] However, I would still adhere to the traditional test expressed in 8(b)(1)(A)

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[175] 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964), *enforced,* 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

[176] 150 N.L.R.B. at 317, 57 L.R.R.M. at 1537.

[177] *Id.* at 324, 57 L.R.R.M. at 1540.

[178] *Id.* at 325-26, 57 L.R.R.M. at 1541.

[179] The United States Court of Appeals for the Fifth Circuit nevertheless accepted the majority's view that a breach of the duty of fair representation in failing to process a grievance violates § 8(b)(1)(A). Local 12, 368 F.2d 12, 20, 63 L.R.R.M. 2395, 2400 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967). *See also* Truck Drivers Local 568 v. NLRB, 379 F.2d 137, 141-46, 65 L.R.R.M. 2309, 2311-15 (D.C. Cir. 1967).

[180] *See, e.g.,* Local 106, Glass Bottle Blowers Ass'n, 210 N.L.R.B. 943, 86 L.R.R.M. 1257 (1974), *enforced,* 520 F.2d 693, 89 L.R.R.M. 3020 (6th Cir. 1975) (sex); Painters Local 1066 (W.J. Siebenoller, Jr. Paint Company), 205 N.L.R.B. 651, 84 L.R.R.M. 1013 (1973) (race); Southwestern Pipe, Inc. and United Steelworkers, 179 N.L.R.B. 364, 72 L.R.R.M. 1377 (1969) (post-strike reinstatement); Houston Maritime, Inc., 168 N.L.R.B. 615, 66 L.R.R.M. 1337 (1967), *enforcement denied on other grounds,* 426 F.2d 584, 74 L.R.R.M. 2200 (1970) (race); Cargo Handlers, Inc., 159 N.L.R.B. 321, 62 L.R.R.M. 1228 (1966) (race); Longshoremen, Local 1367 (Galveston Maritime Ass'n, Inc.), 148 N.L.R.B. 897, 57 L.R.R.M. 1083 (1964) (race); *Hughes Tool II,* 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964) (race).

In the *W.J. Siebenoller* case, I joined my colleagues in finding that the union violated sections 8(b)(1)(A) and (b)(2) in attempting to cause an employer to discharge an employee because of his race. I did not rely on *Miranda* principles. Rather, I did so only because the union could not "demonstrate that advocation and enforcement of a racially discriminatory hiring policy serves in any statutorily cognizable way to further the Union's performance of its statutory representative function." 205 N.L.R.B. at 652 n.4, 84 L.R.R.M. at 1016 n.4. In *Glass Blowers,* I joined in the plurality decision finding that a union which maintained locals segregated on the basis of sex *restrained and coerced* the employees in the exercise of § 7 rights in violation of § 8(b)(1)(A). 210 N.L.R.B. at 944, 86 L.R.R.M. at 1259. Thus *Glass Blowers* does not rest on duty of fair representation principles enunciated in *Miranda.*

[181] *See, e.g.,* PPG Industries, Inc., 229 N.L.R.B. No. 107, 95 L.R.R.M. 1366, 1369 (May 17, 1977). *See also* Local 705, International Bhd. of Teamsters (Associated Transport, Inc.), 209 N.L.R.B. 292, 86 L.R.R.M. 1119 (1974). See text at notes 192-95 *infra* for discussion of *Associated Transport.*

before finding a violation in any grievance administration case. For example, in *General Truck Drivers, Local 692 (Great Western Unifreight System),*[182] I concurred specifically to present my views on the inappropriateness of reliance on *Miranda* in a fact situation involving allegedly unfair grievance processing.

In *Great Western,* a union failed to file in a timely fashion an admittedly meritorious grievance, causing an employee to lose his contractual grievance procedure rights. Countering the employee's subsequent unfair labor practice complaint, the union argued that its failure to process the employee's grievance was not an arbitrary refusal but merely a negligent omission.[183] Two members of the Board agreed with the union that something more than negligence is required to find a breach of the duty of fair representation under *Miranda* principles. Mere negligence, in their view, does not equal "irrelevant, invidious, or unfair considerations" which the Board in *Miranda* characterized as arbitrary conduct.[184] Accordingly, they rejected the employee's claim.

While I concurred in this result, I did not agree with the plurality's analysis for three reasons. First, the plurality stated erroneously that the Supreme Court has "approved" the Board's *Miranda* doctrine.[185] To this day, the Supreme Court has only *assumed* that a breach of the duty of fair representation is an unfair labor practice.[186] Congress has remained equally silent as to whether a violation of the duty of fair representation should be an unfair labor practice.[187] Second, I do not believe "that every arbitrary or putatively 'unfair' act by a union . . . [is] automatically an unfair labor practice proscribed by Congress."[188] That proposition unreasonably restricts the discretion a union should have in exercising its representation function. Not every intraunion resolution of a seniority question or a grievance should be subject to the Board's over-the-shoulder appraisal for fairness when it does not affect the basic economic machinery of labor management relations which the unfair labor practice provisions regulate.[189]

Finally and above all, I disagree with the nearly automatic invocation of the magic phrase "duty of fair representation" wherever a union engages in alleged misconduct against an employee or a group of employees. This invocation is immediately followed by citation to *Miranda* and its imprecise "irrelevant, invidious or unfair" test for unlawful conduct under section 8(b)(1)(A) of the Act.[190] The better and perhaps only statutorily permissible test in cases such as *Great Western* is "whether or not the Union restrained and coerced the charging party in the exercise of his section 7 rights by failing to process his grievance in a timely manner."[191] In my view, negligence without some motivation amounting to restraint or coer-

[182] 209 N.L.R.B. 446, 85 L.R.R.M. 1385 (1974).

[183] *Id.* at 447, 85 L.R.R.M. at 1386.

[184] *Id.* at 447-48, 85 L.R.R.M. at 1386.

[185] *See id.* at 447 n.3, 85 L.R.R.M. at 1386 n.3.

[186] *See Vaca v. Sipes,* 386 U.S. 171, 176-78 (1967). See text at notes 39-44 *supra.*

[187] *See Hughes Tool II,* 147 N.L.R.B. at 1588, 56 L.R.R.M. at 1298-99 (Chairman McCulloch and Member Fanning, concurring in part and dissenting in part).

[188] 209 N.L.R.B. at 449, 85 L.R.R.M. at 1387-88 (Member Fanning, concurring).

[189] *Id.,* 85 L.R.R.M. at 1388.

[190] *Id.* at 450, 85 L.R.R.M. at 1388.

[191] *Id. But see* Penn Industries, Inc., 233 N.L.R.B. No. 133, 97 L.R.R.M. 1299 (December 5, 1977) (adopted trial examiner's findings).

cion does not satisfy such a test. But despite any objections to the use of *Miranda* standards in reviewing union grievance decisions, a majority of the Board apparently will apply those standards in grievance handling disputes.

I nevertheless agree that once a union undertakes to process an employee's grievance, it has a duty to present the grievance in the light most favorable to the employee. Otherwise, the union operates to restrain the employee in his section 7 right to present grievances. The duty to present an employee's grievance in its best light was first articulated by the Board in *Truck Drivers Local 705 (Associated Transport, Inc.),*[192] in which I participated. There, a union agent stated openly in a joint grievance committee meeting that he did not believe an employee's grievance was valid. By making this statement, the Board concluded, the agent, and hence the union, not only had restrained and coerced the employee in the exercise of his section 7 rights but had breached its duty of fair representation as well.[193] The Board reasoned that once the union undertook the obligation to process the employee's grievance, it became obligated to represent him fully and fairly. This obligation included "the duty to act as advocate for the grievant . . . ."[194] To the extent that this holding was grounded on section 7 of the NLRA, it is consistent with my position with respect to the appropriate method of reviewing a union's grievance handling procedures.[195]

My objection to the importation of *Miranda's* irrelevant, invidious, and unfair conduct standards is based primarily on my view that the Board should not be involved in a substantive review of purely internal union matters which have little to do with the protection of employees' right to organize and bargain collectively and the maintenance of industrial peace.[196] Under *Miranda* standards, in addition to determining whether arbitrary conduct encompasses merely negligent actions, the Board could be forced to review a variety of union grievance decisions which might not reach the level of restraint and coercion under section 8(b), yet seem unfair or even arbitrary. What about the union which inadequately prepares for arbitration or ineffectively counsels a grievant? Or a union which decides not to investigate purported evidence or contact all potential witnesses?[197] What of the union which agrees with an employer to drop one grievance in an exchange for favorable settlement of another?[198] Despite the unfairness which might result from such actions, I continue to doubt if it is proper for the Board to second-guess a union's grievance handling decision in an unfair labor practice proceeding if the decision was not improperly motivated

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[192] 209 N.L.R.B. 292, 86 L.R.R.M. 1119 (1974). *See also* United Steelworkers (Inter-Royal Corp.), 223 N.L.R.B. 1184, 92 L.R.R.M. 1108 (1976).

[193] 209 N.L.R.B. at 292, 86 L.R.R.M. at 1121.

[194] *Id.*

[195] *See, e.g.; Great Western* 209 N.L.R.B. at 4490, 85 L.R.R.M. at 387-88 (Member Fanning, concurring). *But see* Mass. Laborers' Dist. Council of the Laborers' Int'l Union (Manganaro Masonry Co.), 230 N.L.R.B. No. 95, 95 L.R.R.M. 1564 (July 5, 1977).

[196] *See Great Western,* 209 N.L.R.B. at 449-50, 85 L.R.R.M. at 1387-88. (Member Fanning, concurring).

[197] *Cf.* Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976) (union breached duty of fair representation by failure to investigate).

[198] *Cf.* Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation,* 5 TOL. L. REV. 514, 527 n.40 (1974).

in light of section 7 of the NLRA. How these doubts affect the resolution of these questions, I cannot, as the current Chairman of the Board, predict.

CONCLUSION

After serving on the Board for almost half its life, I am persuaded that fair representation issues have posed some of the most difficult problems it has confronted. Professor Summers aptly described the complexities and conflicts inherent in duty of fair representation issues; he compared the Supreme Court's landmark duty of fair representation decision in *Vaca v. Sipes* to a giant squid having "a number of procedural tentacles, any one of which may be more than we can master, but with all of which we must ultimately contend."[199] The Board has contended with some of these tentacles, and undoubtedly has not met them all.

As the current Chairman, I am limited to describing the past rather than predicting the future. This article has not proposed statutory solutions to some of the conflicting considerations posed by the duty. Instead, I have discussed the Board's current analytical approaches to fair representation issues and pointed out what I believe to be the strengths and weaknesses of these approaches. So, as long as the Board retains its present statutory mandate, many of the weaknesses will persist. In the meantime, the Board, in resolving fair representation issues in the future, will continue to balance competing interests, and when called upon to do so, will fashion fair and workable rules concerning the duty of fair representation.

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[199] Summers, *The Individual Employees Rights Under the Collective Bargaining Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 251 (1977).