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Labor Law -- Breach of the Duty of Fair Representation as an Unfair Labor Practice

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practice continues the bifurcated trial process could be utilized to avoid the unfairness of the present situation.

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Since 1962 the National Labor Relations Board has held that the failure of a union to represent its members fairly is an unfair labor practice. The NLRB has used Sections 8(b)(A), 8(b)2 and 8(b)3 of the National Labor Relations Act to reach this result.

Section 8(b)1 provides in part that it shall be an unfair labor practice for a union or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1) (1964).

Section 7 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 purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

Section 8(b)2 provides in part that it shall be an unfair labor practice for a union or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(b) (2) (1964).

Section 8(a)3 provides that it shall be an unfair labor practice for an employer "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. . . ." 61 Stat. 140 (1957), 29 U.S.C. § 158(a)(3) (1964).

Section 8(b)3 provides that it shall be an unfair labor practice for a union or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions ship in any labor organization. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(3) (1964).

Section 8(d) provides in part "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the em-
Until recently appellate review of these opinions has been limited to one inconclusive case.\(^5\) Now the Court of Appeals for the Fifth Circuit, in a landmark decision, has approved the Board’s use of Section 8(b)(1)(A) to reach unfair representation by unions, leaving unanswered the question of whether or not the Board’s reliance on Section 8(b)2 and 8(b)3 was proper.

In *Local 12, United Rubber Workers v. NLRB*\(^8\) the local union had refused to process the grievances of eight Negro members concerning discrimination in employment. The Negroes complained that racially separate plant facilities were maintained. Further, they complained that separate seniority rolls for white male, Negro male, and female employees were maintained prior to 1962 despite the fact that the bargaining contract appeared to give seniority without regard to race or sex. During this period the complainants had been laid off for a year. The eight Negro employees executed affidavits that during the period of the layoff new white workers had been hired in violation of their seniority rights. The union grievance committee concluded that no contract violation existed and that a union complaint would therefore be baseless. The complainants appealed within the union structure and the union’s international president held that the grievance should be processed. However, Local 12 still refused to process the grievances and in October 1962 unfair labor practices charges were filed with the labor board. The Court of Appeals affirmed the NLRB’s finding of a Section 8(b)(1)(A) violation,\(^7\) but failed to consider the Board’s application of Sections 8(b)2 and 8(b)3 to the case.

Neither the National Labor Relations Act nor the Railway Labor Act\(^9\) specifically states that a union owes a duty of fair representation to the employees it represents. The concept of fair representation had its genesis in *Steele v. Louisville & N.R.R.*,\(^6\) a 1944 employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .” 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1964).

\(^{10}\) *Miranda Fuel Co., 140 N.L.R.B. 181 (1962, enforcement denied, 326 F.2d 172 (2d Cir. 1963). The decision by a three judge panel involved a majority opinion, a concurrence on different grounds and a dissent.*

\(^{11}\) 368 F.2d 12 (5th Cir. 1966).

\(^{12}\) *Id. at 24.*


\(^{14}\) 323 U.S. 192 (1944).
cision of the United States Supreme Court. There the court held that a union could not negotiate a contract which would result in Negro employees, who were not union members, losing job opportunities. The court found that under the Railway Labor Act a union is given the exclusive right to represent all employees and as the exclusive bargaining representative is required to "represent non-union or minority union members of the craft without hostile discrimination, fairly, and impartially, and in good faith." This is not to say that there cannot be relevant differences, but "discriminations based on race alone are obviously irrelevant and indivisual." Because Section 9(a) of the National Labor Relations Act makes the union an exclusive bargaining agent, the Supreme Court in Wallace Corp. v. NLRB recognized that the duty of fair representation exists under this act also.

**Steele** and **Wallace** may have seemed sufficient for the enforcement of the duty of fair representation, but they actually established a judicial remedy of limited value. A party faced delay, expense, and technical barriers when he carried his complaint into the courts. The first application of the effective administrative remedy of unfair labor practice proceeding for breach of the duty of fair repre-

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10 Id. at 204.
11 Id. at 203.
12 Section 9(a) provides "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . 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 . . . ." 61 Stat. 143, U.S.C. § 159(a) (1964).
13 323 U.S. 248 (1944).
15 There are other administrative remedies available in addition to unfair labor practice proceedings. One method used by the Board to discourage a union becoming or remaining an exclusive representative is the removal of the contract bar. Normally the NLRB makes a collective bargaining agreement a bar to a new election for three years. However, in Pioneer Bus Co., 140 N.L.R.B. 54 (1962) the Board implied that discriminatory contracts would not bar a new election. Independent Metal Workers Union, 147 N.L.R.B. 1573 (1964) the Board overruled previous decisions which allowed a union to retain certified status while it excluded
sentation came in 1962 with *NLRB v. Miranda Fuel Co.* The union had requested that one of its members be reduced in seniority when circumstances indicated no valid reason for this demand. Under pressure from the union the employer acquiesced and the employee was reduced in seniority. The majority of the Board indicated that Section 7 protected employees from such "invidious treatment by their exclusive bargaining agent in matters affecting their employment." The remedy for such discrimination was available under Section 8(b)(1)(A). Further, the Board found violations of Sections 8(b)2 and 8(b)3 which impose duties on both unions and employers not to conduct themselves in such a manner as to encourage or discourage union membership. Presumably, the union by demonstrating its arbitrary power forced non-members and members in poor standing to become active in union affairs to preserve their jobs. Two Board members dissented in *Miranda* pointing out that the concept of fair representation had not been advanced or litigated in the case and that the legislative history of the act did not support the interpretation of the majority. On appeal enforcement was denied, but the court was badly split and did not really decide whether the new theory was valid. Until *Rubber Workers* this was the only appellate decision dealing with fair representation as an unfair labor practice.

Racial discrimination was not involved in *Miranda* so it remained for *Hughes Tool* to extend the theories of *Miranda* into that area. In *Hughes Tool* Locals 1 and 2 of the Independent Metal Workers Union had been certified as joint bargaining representatives; Local 1 was white and Local 2 was Negro. After a bid for an apprenticeship by a Negro employee was refused consideration by the company, the grievance committee of Local 2 protested.

Negro employees from membership and classified or segregated its members on a racial basis.

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

17 Id. at 185.

18 Id. at 185.

19 See note 3 supra.

 Accord, Murphy, *The Duty of Fair Representation Under Taft-Hartley,* 30 Mo. L. Rev. 373, 382 (1965). Contra, Sovere, Legal Restraints on Racial Discrimination in Employment 163 (1966) where it is averred that Congress implicitly accepted Steele and gave Negroes the right of equal treatment when Taft-Hartley was enacted in 1947.

21 326 F.2d at 172.

22 147 N.L.R.B. 1573 (1964).
When this failed to get results, Local 1 was asked to intervene. The Board affirmed the trial examiners finding that Sections 8(b)(1)(A), 8(b)2, and 8(b)3 were violated because Local 1 refused to process grievances as requested.

In Hughes Tool the majority of the Board expanded its theory to include Section 8(b)3, and the dissenters of Miranda clarified their opposition to holding unfair representation an unfair labor practice. The principal dispute among the Board members concerned the technicalities of the application of the first three Sections of 8(b) to fair representation, but there was a related schism involving the philosophy of the function of the NLRB. In Hughes Tool the majority of the Board cited Brown v. Board of Educ.\(^2\) and Shelley v. Kraemer\(^4\) for the proposition that racial segregation in union membership, when engaged in by an exclusive bargaining agent under the NLRA, cannot be condoned by a "Federal Agency."\(^2\)\(^5\) This line of thought can be linked to the Steele case which recognized the possibility that a favored status under a statute might be enough to make collective bargaining governmental action and hold a union to constitutional standards.\(^6\) However, no Supreme Court opinion has yet held that the Constitution requires a union and employer not to discriminate.\(^7\) The reasoning of the majority in effect makes the NLRB a fair employment practices committee for it becomes the function of the Board to use its power to eliminate discrimination.

The minority of the Board replied that Congress up to that time had been unable to pass fair employment legislation and that it was clearly not the congressional intent that the NLRA operate as a substitute.\(^2\)\(^8\) Further, it may be argued that collective bargaining operates best with a minimum of interference, governmental or otherwise. For this reason application of constitutional standards to fair representation by unions might disrupt collective bargaining by requiring burdensome judicial and administrative regulation. It appears possible to the advocates of the minority view that the application of constitutional standards to collective bargaining could seri-

\(^3\) 334 U.S. 1 (1948).
\(^4\) 147 N.L.R.B. at 1574 & n.3.
\(^6\) Steele was based on an interpretation of the Railway Labor Act.
\(^7\) Hughes Tool, 147 N.L.R.B. 1573, 1578-93 (1964) (separate opinion).
ously hamper the Board in implementing the act's principal goal of promoting union-employer relations because strict constitutional standards would result in a loss of necessary flexibility in collective bargaining.

The advocates of each viewpoint manifest the basic split in philosophy by their varied interpretations of Section 8(b) and its related provisions. The approach of the minority of the Board emphasizes statutory intent and is strictly an argument of logic, while the results reached by the majority, although at times seemingly based on illogical reasoning, are more equitable. An example of this is the interpretation put on Section 8(b)(1)(A) by the majority of the Board in Rubber Workers. The reasoning in this opinion was simply that by refusing to process grievances the respondent union "restrained or coerced" the Negro employees in exercising their right to be represented without invidious discrimination. The Board stated simply that there was no justification for the refusal to process the grievances since the sole reason for the refusal was racial discrimination. The dissenters freely admitted a duty of fair representation under Section 9(b), but indicated that there was nothing in the legislative history to indicate a congressional intent to make fair representation a protected Section 7 right. They argued that an unfair labor practice occurs only where there is conduct relating to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligation." Reasoning that the refusal to process a grievance did not relate to any of these factors, the minority found no unfair labor practice within the meaning of Section 8(b)(1)(A). The fifth circuit expressly rejected this narrow view of Section 8(b)(1)(A) stating that the breach of every

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30 Id. at 755.
31 150 N.L.R.B. at 312.
32 Section 9(b) provides:
The Board shall decide in each case whether, in order to assure to the employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .
33 150 N.L.R.B. at 324 (dissenting opinion).
34 Id. at 325.
other duty imposed by the act has been held an unfair labor practice and there is no reason for this single exception.35

Still unanswered by the court is the propriety of the Board's use of Sections 8(b)2 and 8(b)3 to enforce the duty of fair representation. Section 8(b)(1)(A) specifically gives a union the right to establish its own regulations concerning membership, but in light of Steele it is unclear whether a union may exclude Negroes from membership on the arbitrary and invidious basis of race.36 However, Section 8(b)2 and 8(a)3 make it clear that if workers denied membership are then denied jobs the law is violated.37 The disagreement between the majority and the minority of the Board is over the conclusion of the majority that Section 8(b)2 and 8(a)3 are violated regardless of union membership or lack of it, when for "arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee."38 The critical question is whether the conclusion of the Board is tenable on the somewhat strained logic that an employee will be encouraged to be a "good union" member because he sees the union coerce the employer to arbitrarily discriminate against a fellow worker. The minority sees no direct effect on union membership by such arbitrary conduct for the discrimination is unrelated to the union activities of the employee.39 Although this view is logical, the majority position seems more responsive to actual human behavior. Fear of the union's power to discriminate arbitrarily results in union members striving to remain on good terms with the union, and this necessarily entails maintaining union membership.

The use of Section 8(b)3 by the Board to reach unfair representation by the union raises some interesting problems of statutory interpretation. This section can be viewed in at least two ways as observed by Professor Archibald Cox:

35 368 F.2d 12, 21 (5th Cir. 1966).
37 See SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 165 (1966).
39 Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964). The same division present on the Board in Miranda continues here but is clarified to some extent.
The critical inquiry would seem to be whether section 8(b)3 should be construed: (1) to regulate only the union's conduct in relation to employer, or (2) to embody all its statutory obligations in negotiating or administering an agreement as the employees' exclusive representative. The former interpretation leaves room for judicial remedies for breach of the duty of fair representation. The latter makes breach of the duty an unfair labor practice. ... 40

The Board has followed the second view that the "duty to bargain collectively includes the duty to represent fairly." 41 The Board reasoned earlier in Local 1367, Int'l Longshoremen's Ass'n 42 that Section 8(d) 43 contemplated only lawful agreements and that bargaining agreements which discriminated invidiously were unlawful. Thus, employers and unions were enjoined from entering such contracts. When such unlawful agreements were entered, the contract could not be one envisioned by Section 8(d) nor could the union be said to have bargained in good faith as to either the employees it represents or employers. 44 Professor Sovern and the minority of the Board dispute this view and claim that Section 8(b)3 is simply the counterpart of Section 8(a)5, 45 with a duty only between unions and employers to bargain collectively. 46 This is a more logical conclusion and the history of the act lends it support. 47

41 Local 1367, Int'l Longshoremen's Ass'n, 148 N.L.R.B. 897, 899 (1964).
42 See note 4 supra.
43 148 N.L.R.B. at 899-900.
44 Section (8)5 provides that it shall be an unfair labor practice for an employer: "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 61 Stat. 140 (1947), 29 U.S.C. § 158 (a)(5) (1964).
46 In addition to the problems raised by this paper, Rubber Workers has implications in the area of preemption. Obiter dictum in this case approved the doctrine of giving exclusive jurisdiction to the NLRB where the activity was arguably subject to Sections 7 and 8 of the NLRA. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). For a discussion of preemption see Sovern, Legal Restraints on Racial Discrimination in Employment 171-74 (1966).
Regardless of the technique used by the majority of the Board to conclude that it is an unfair labor practice to breach the duty of fair representation, the courts should hesitate to accept this result. Under its present course of action, apparently approved in Rubber Workers, the Board seems to have established itself as a fair employment practice committee. This development is undesirable for the expansion of the Board's jurisdiction to include fair employment practices has an adverse effect on the primary function of the Board, that of supervising the collective bargaining process. Setting up fair employment standards to be applied by the Board while labor and management engage in collective bargaining would destroy much of the flexibility and perhaps the effectiveness of the collective bargaining process. The extensive supervision required might amount to little less than governmental control of labor-management relations. To those who contend that only the administrative remedy offered by the NLRB is sufficient, one might reply that a potent fair employment practices committee with power to institute court action on a complaint or to give effective remedies for discrimination in employment could achieve the same end as the NLRB without interfering with the present function of the Board.

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Securities Regulation—Unlisted Tradings: A Vanishing Art?

The historical background of unlisted trading reflects the development of our national securities exchanges. Prior to the evolution of exchanges, local brokers, gathering on street corners, would trade in any available securities. In 1817, the New York Stock Ex-

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48 For methods used by the courts to reach desired results see Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1445-46 (1963).
49 Murphy, The Duty of Fair Representation Under Taft-Hartley, 30 Mo. L. Rev. 373, 385-86 (1965).
5 In 1958-1959] 25 Sec. Ann. Rep. 71. As early as 1752 American merchants established an "exchange" at Broad Street in New York City, for dealings in meal and water borne produce. At the tip of Wall Street nearest