

Federal Labor Laws

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XXXVI. The Duty of Fair Representation

A. Origins of the Duty of Fair Representation

1. The duty of fair representation is an obligation imposed on a union which results from its right of exclusive representation. While neither the Railway Labor Act nor the Labor Management Relations Act specifically define a duty of fair representation, the Supreme Court has ruled that such a duty exists.
2. The duty of fair representation was first announced in a 1944 Supreme Court case decided under the Railway Labor Act, *Steele v. Louisville & Nashville R.R.*¹
 - a. In the *Steele* case, the Brotherhood of Railroad Firemen was the exclusive bargaining agent for firemen employed by the railroad company, under the procedures of the Railway Labor Act.
 - b. The railroad employed both African-American and white firemen, but the constitution of the Brotherhood prevented African-Americans from joining the union. A substantial majority of the firemen were white.
 - c. In 1940 and 1941, the union and company negotiated an agreement which provided that:
 - 1) Not more than 50% of the firemen in each class of service in each seniority district of the railroad could be African-Americans,
 - 2) Until the 50% figure was reached, all new runs and all vacancies should be filled with white firemen, and
 - 3) No African-Americans could be hired in any seniority district in which they were not already working.
3. The Supreme Court ruled that this agreement was unlawful, because the right of exclusive representation given to a union under the Railway Labor Act carries with it an obligation to exercise that right without hostile discrimination, fairly, impartially and in good faith.

¹ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

- a. The basic obligation of the union is to represent all members of the unit, to act on behalf of the majority as well as the minority. The action of the Brotherhood was objectionable in part because the union was acting against the interests of a substantial number of the craft members.
 - b. The Court recognized that there are legitimate reasons for discriminating among different groups of worker, because of their skill, seniority, type of work or other factors. What is required of the duty of fair representation is that the basis for discrimination not be invidious.
 - c. In the *Steele* case, there were two forms of unlawful discrimination. The language negotiated discriminated on the basis of union membership and race. The union could not maintain a color bar in its constitution and attempt to use that color bar to guarantee that it would forever remain the majority representative of the firemen.
 - d. The Court did not rule that the color bar was itself illegal. The Railway Labor Act did not require the union to admit the African-American workers, but the Court required it to represent them fairly.
4. The duty of fair representation applies under the Labor Management Relations Act as well as the Railway Labor Act.²
 5. The National Labor Relations Board has ruled that violation of the duty of fair representation constitutes an unfair labor practice under § 8(b)(1)(A) of Taft-Hartley.³
 6. Although the duty of fair representation applies to a number of types of invidious discrimination, Title VII of the Civil Rights Act of 1964 outlawed discrimination by unions and employers on the basis of race, color, religion, national origin and sex. Racial and sexual discrimination have also been held to be unfair labor practices under §§ 8(a)(1) and 8(b)(1)(A).⁴
 7. The duty of fair representation applies both in the negotiation of a collective bargaining agreement and in the administration of the agreement through the grievance procedure.⁵

² *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955).

³ *Miranda Fuel Co.*, 140 NLRB 181 (1962).

⁴ See, e.g., *Pacific Maritime Association*, 209 NLRB 519 (1974)(sex discrimination as a violation of Sections 8(b)(1)(A) and 8(b)(2)), *Packinghouse Workers v. NLRB (Farmers Cooperative Compress)*, 416 F.2d 1126 (D.C. Cir. 1969)(race discrimination as a violation of Section 8(a)(1)).

⁵ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)(negotiations), *Humphrey v. Moore*, 375 U.S. 335 (1964)(contract enforcement).

8. Most state laws extending collective bargaining rights to public employees on the basis of exclusive representation also carry the corresponding duty of fair representation, either explicitly by statutory language or through judicial interpretation.⁶

B. Standards of Fair Representation

1. In contract negotiations, the union is given broad latitude in the representation of the membership. What is required by *Steele* and *Huffman*, is that the union act in good faith with honesty to represent the membership as a whole. It is not any discrimination which is objectionable, only hostile or invidious discrimination. As long as the union acts reasonably, there is no guarantee that any particular class of members will be assured of complete satisfaction in the negotiations process.
2. Most allegations of failure to represent involve contract administration. In the leading case developing standards of fair representation, the Supreme Court clarified the obligation of the union under the duty of fair representation.⁷
 - a. In *Vaca v. Sipes*, a worker had been on sick leave for six months for a long-term high blood pressure problem. Although the worker's family physician and a second doctor cleared the worker to return to his heavy job at a meat packing plant, the company doctor refused to allow reinstatement. As a result of the company doctor's assessment, the worker was discharged.
 - b. The union grieved and processed the worker's grievance through the first four steps of the procedure. Before submitting the case to arbitration the union sent the worker to another doctor (at union expense) to "get some better medical evidence so that we could go to arbitration."
 - c. The neutral physical examination did not support the worker's grievance, and the union decided not to go to arbitration. The worker refused a proposed settlement which would have caused a referral to a rehabilitation center. Despite the worker's insistence on taking the case to arbitration, the union refused. The worker sued the union and the company, claiming that the union's refusal to arbitrate was arbitrary and capricious.
3. In holding that the union did not violate the right of the worker to fair representation, the Supreme Court issued a number of important rulings in *Vaca v. Sipes*.

⁶ See, e.g., Iowa Code, § 20.17. For an interesting variation on the duty of fair representation, see, Florida Laws, Title 30, § 447.401.

⁷ *Vaca v. Sipes*, 386 U.S. 171 (1967).

- a. Even though the NLRB recognizes violations of the duty of fair representation as an unfair labor practice, that does not prevent private suits to enforce the duty. An individual may sue in federal or state court to enforce the duty, and the principles of § 301 apply. The duty of fair representation is an obligation of federal law enforceable in either federal or state court.
 - b. The union is given broad discretion in its control over the grievance procedure. The individual has no absolute right to insist that a particular grievance be submitted to arbitration.
 - c. In exercising its discretion, the obligation of the union is to consider each grievance on its own merits. A decision to process, withdraw or settle a grievance should be based on objective considerations.
 - d. The duty of fair representation is breached only if the conduct of the union toward the member is arbitrary, discriminatory or in bad faith.
 - e. A breach of the duty of fair representation is not established by proof that the underlying grievance is meritorious. As long as the union acted properly in deciding whether to pursue the grievance, a court should accept the union's determination of the merits.
 - f. Procedurally, an individual must prove that the union acted improperly in the handling of the grievance. Only if there has been a breach of the duty of fair representation is the individual given an opportunity to prove that the employer violated the collective bargaining agreement.
4. Since *Vaca v. Sipes*, a number of courts have elaborated on the basic standards of the duty of fair representation. Simple negligence on the part of the union in the handling of a grievance has generally been regarded as insufficient for a finding that the union has violated its duty. However, perfunctory treatment, or simply going through the motions of representation, will be regarded as inadequate representation under the duty of fair representation.⁸
 5. In response to the different interpretations of "arbitrary" made by the lower courts, the Supreme Court defined the arbitrary standard as "so far outside a wide range of reasonableness as to be irrational." The Court also clarified that the duty of fair representation applies to all union activities, including both the

⁸ *Hines v. Anchor Motor Freight*, 421 U.S. 928 (1975).

representation of individuals and negotiations on behalf of all the members.⁹

6. The Board has described the duty of fair representation as having three aspects, including (1) the duty of the union to serve all unit employees without hostility or discrimination, (2) the duty to act in good faith and honestly, and (3) the duty to avoid arbitrary conduct. The Board regards the relationship of the union to the employees it represents as similar to that of a fiduciary to its beneficiaries.¹⁰
6. The Board now requires, under the duty of fair representation, that a union with a union security agreement provide specific notice of rights to employees covered by that agreement. In determining the relationship between the Supreme Court's *Communication Workers v. Beck*¹¹ decision and the duty of fair representation, the Board requires that the following notices be given.
 - a. Newly hired non-members must be notified of their right, under Beck, to pay less than full dues, if they object to the payment of that portion of dues not related to the collective bargaining related functions of the union. The obligation to notify applies when the union first attempts to collect dues from the newly hired worker. This notice must be sufficient to inform the newly hired worker of the right to object, to provide a basis to allow the non-member to choose whether to object, and to inform the individual that there are internal procedures for filing objections.¹²
 - b. Unit employees who indicate that they will become objectors must be given notice of the amount of dues related to representational activities. They must also be given sufficient information concerning the computation of the reduced dues amount and procedures for challenging the amount of dues that are charged.¹³
7. For unions operating exclusive hiring halls or referral systems, the duty of fair representation also applies to work assignments. The union has a duty to operate the referral system in a non-discriminatory manner. Arbitrary deviations from the guidelines for making referrals may constitute a breach of the duty of fair representation. As with other applications of the duty, violations

⁹ *Air Line Pilots Association, Int'l v. O'Neill*, 499 U.S. 65 (1991).

¹⁰ *Electrical Workers (IUE) Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993).

¹¹ 386 U.S. 171, 128 LRRM 2729 (1988).

¹² *California Saw and Knife Works*, 320 NLRB 224 (1995).

¹³ *Teamsters Local 166*, 327 NLRB 950 (1999).

must be based on more than mere negligence in the operation of the referral system.¹⁴

C. Procedures in Fair Representation Cases

1. Prior to implementing a suit to enforce rights under a collective bargaining agreement, an individual must first provide the union with the opportunity to act. The individual must first attempt to use the grievance procedure as a precondition for initiating a failure to represent action against the union.¹⁵ However, there are exceptions to this requirement.
 - a. Exhaustion of contractual remedies may not be required where the union has previously violated the duty of fair representation, where the union prevents access to the grievance procedure by failure to inform the worker of the events giving rise to the potential grievance, or in other similar situations where the union's action has effectively deprived the individual access to the grievance procedure.
 - b. Exhaustion of contractual remedies may also be excused under the futility doctrine. If pursuing a grievance would be futile, because of the violation of the duty of fair representation, there is no obligation to first use the contractual procedures.¹⁶
2. If the constitution of the union provides an internal appeal mechanism for the review of actions with respect to individual workers, there may be an obligation to use those procedures as a condition of initiating an action concerning the duty of fair representation. Use of internal appeals mechanisms will generally not be required if:
 - a. Hostility of union officials toward the individual initiating the action would preclude a fair hearing;
 - b. The remedies available through the internal appeals process would not be adequate as remedies for the violation of the duty of fair representation; or

¹⁴ *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549 (2001), supplementing 329 NLRB 688 (1999) on remand from *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2001). See, also, *Operating Engineers Local 150*, 352 NLRB 360 (2008), *Electrical Workers Local 48 (Oregon-Columbia Chapter)*, 344 NLRB 829 (2005).

¹⁵ *Republic Steel v. Maddox*, 379 U.S. 650 (1965).

¹⁶ *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969).

- c. Use of the internal appeals procedures would cause undue delay in allowing the individual to receive a fair hearing on the merits of the action.¹⁷
3. In § 301 suits alleging a violation of the duty of fair representation, there is a necessary two stage process for determining whether a violation exists.
 - a. The individual must first establish that the union has violated its duty of fair representation, under the recognized standards.
 - b. Only if the union has breached its duty is the issue of an underlying contract violation relevant. If the union did not violate the duty of fair representation, it is irrelevant how the case might have been decided had it been pursued through arbitration.
 - c. If the union did breach the duty of fair representation, the individual is given the opportunity to prove that the grievance was meritorious, that the individual suffered damages as a result of the employer's violation of the contract.
4. Damages in a failure to represent case are compensatory only. The appropriate relief for a violation is to make the individual whole, not to punish the union for its violation.
5. A critical question concerning the damages resulting from a failure to represent is the allocation of liability between the union and the company. A successful failure to represent suit presupposes that the company violated the collective bargaining agreement and the union violated the duty of fair representation.
 - a. The general rule for the allocation of damages is that the employer is liable for the damages resulting from the contract violation, and the union is liable for the increased cost to the individual of collecting the appropriate back pay. A union will customarily be liable for the litigation expenses and related costs of pursuing the case.
 - b. In discharge cases, the potential liability to the union is much greater. The Supreme Court has ruled that the employer is liable for back pay only up to a point at which the grievance should have been resolved, but not for the delays caused by the union's violation of the duty of fair representation.¹⁸
 - c. Under this principle, the appropriate court establishes a date at which it is presumed the victim would have been

¹⁷ *Clayton v. Auto Workers*, 451 U.S. 679 (1981).

¹⁸ *Bowen v. United States Postal Service*, 459 U.S. 212 (1983).

reinstated, but for the failure to represent. The employer is liable for back pay up to that date, and the union is liable for additional back pay and the costs of pursuing the case.

6. Because the Board also recognizes a breach of the duty of fair representation as an unfair labor practice issue, there is a second set of procedures applicable in Board charges.
 - a. If charges are filed only against the union alleging a failure to represent, the issue of an underlying contractual violation may never be adequately raised.
 - b. The Board will presume that the underlying grievance is meritorious for purposes of developing a remedy for a union breach of the duty. The union may be ordered to pursue the grievance with the employer even though the time limits of the grievance procedure have elapsed.
 - c. Because the union may also be liable for back pay resulting from the violation of the duty of fair representation, it is important to bring the employer into the case if at all possible. If an individual files charges only against the union, the union may have to file additional charges against the employer as leverage to assure that the grievance can be processed.
7. There is a uniform six month statute of limitations applicable to all allegations of breaches of the duty of fair representation.¹⁹
8. A jury trial is available to workers suing for breach of the union's duty of fair representation, if the worker is seeking compensatory damages such as back pay.²⁰

D. Guidelines for Effective Representation

1. Given the duty of fair representation, the best strategy for a union, practically and legally, is to avoid even the appearance of impropriety. Although it is not always easy to do, union representatives should constantly remember that effective enforcement of the collective bargaining agreement is advantageous for all represented workers. Allowing invidious factors to affect the negotiation or contract administration process undermines the effectiveness of the union as a body.
2. The objective of the union should not be to provide representation which meets the standards of the duty of fair representation. The objective is to provide effective representation for all represented workers. Fair representation cases arise when this broader

¹⁹ *DeICostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

²⁰ *Teamsters Local 391 v. Terry*, 494 U.S. 558 (1990).

objective is not met. Going beyond the legal minimum standards makes good sense, both as a means of assuring adequate representation and as a means of avoiding unnecessary legal problems.