

THE DUTY OF FAIR REPRESENTATION

I. The Origin of the Duty of Fair Representation

- A. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 15 LRRM 708 (1944).

The Supreme Court, in a case involving the Railway Labor Act, held that the Act implicitly expresses the aim of Congress to impose on the exclusive representative the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them. See also, Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 15 LRRM 715 (1944).

- B. Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1952).

The Supreme Court applied the fair representation analysis developed initially under the RLA to a case arising under the National Labor Relations Act. This case, like the previous RLA cases, dealt with a Union's power to negotiate a contract. See also, Syres v. Oil Workers Int'l Union, 350 U.S. 892, 37 LRRM 2068 (1955).

- C. Conley v. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957).

The Supreme Court, in a case involving a claim under the RLA against a Union for alleged racial discrimination in the application of a nondiscriminatory contract, held that the duty set out in Steele to represent all fairly did not come to an abrupt end with the making of the contract between the Union and the Employer. The Court held that the Union could no more unfairly discriminate in carrying out its grievance functions than it could in negotiating a contract. See also, Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964).

II. General Standards for Breach of the Duty of Fair Representation

- A. Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964).

The exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

- B. Vaca v. Sipes, 386 U.S. 171, 190, 64 LRRM 2369, 2376 (1967).

"A breach of the statutory duty of fair representation occurs only when a Union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."

- C. United Steelworkers of America v. Rawson, 495 U.S. 362, 134 LRRM 2153 (1990).

In a case involving preemption of tort claims by the Labor Management Relations Act, the Supreme Court noted in dicta that mere allegations of negligence by a Union do not state a claim for breach of the duty of fair representation.

D. Air Line Pilots Assoc. v. O'Neill, 499 U.S. 65, 67 (1991)

Court held that “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a `wide range of reasonableness,’ as to be irrational.”

E. The Courts of Appeals agree that mere negligence by a Union does not constitute a breach of the duty. See, e.g., Stevens v. Teamsters, Local 600, 794 F.2d 376, 122 LRRM 3040 (8th Cir. 1986); Dober v. Roadway Express, 707 F.2d 292, 113 LRRM 2594 (7th Cir. 1983); Harris v. Schwerman Trucking Co., 668 F.2d 1204, 109 LRRM 3135 (11th Cir. 1982); Riley v. Letter Carriers, Local 380, 668 F.2d 224, 109 LRRM 2772 (3^d Cir. 1981); Ruzicka v. General Motors Corp., 649 F.2d 1207, 107 LRRM 2726 (6th Cir. 1981).

F. However, the Courts of Appeals differ regarding what level of culpability beyond simple negligence is required to state a claim for breach of the duty of fair representation.

1. The Seventh Circuit requires intentional misconduct. Adams v. Budd Co., 846 F.2d 428, 128 LRRM 2387 (7th Cir. 1988), cert. denied, 488 U.S. 1008, 130 LRRM 2192 (1989); Hoffman v. Lonza, Inc., 658 F.2d 519, 108 LRRM 2311 (7th Cir. 1981). But see, Ooley v. Schwitzer Div., Household Mfg. Inc., 961 F.2d 1293, 1302 (7th Cir. 1992) (Union could breach its duty not only by intentional conduct but also by wholly unreasonable conduct). Garcia v. Zenith Electronics, 58 F.3d 1171, 149 LRRM 2740 (7th Cir. 1995) (Union’s conduct will not breach its duty of fair representation unless it is irrational or unreasonable, and the employee must show that actual harm resulted from the breach); and
2. Gross negligence, gross deficiency, or reckless disregard may suffice in the Fourth, Sixth and Eleventh Circuits. Linton v. United Parcel Service, 15 F.3d 1365, 145 LRRM 2403, 2409 (6th Cir. 1994); Smith v. Steelworkers, Local 7898, 834 F.2d 93, 126 LRRM 3232 (4th Cir. 1987); Harris v. Schwerman Trucking Co., 668 F.2d 1204, 109 LRRM 3135 (11th Cir. 1982).
3. Several Circuits find Union liability if the Union is unable to articulate a rational explanation for its conduct. See, e.g., NLRB v. Teamsters, Local 282, 740 F.2d 141, 116 LRRM 3292 (2^d Cir. 1984); White v. Arco/Polymers, Inc., 720 F.2d 1391, 115 LRRM 2332 (5th Cir. 1983); Ruzicka v. General Motors Corp., 649 F.2d 1207, 107 LRRM 2726 (6th Cir. 1981); NLRB v. Postal Workers, 618 F.2d 1249, 103 LRRM 3045 (8th Cir. 1980); Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 99 LRRM

2198 (1st Cir. 1978); Foust v. Electrical Workers, IBEW, 572 F.2d 710, 97 LRRM 3040 (10th Cir. 1978), rev'd on other grounds, 442 U.S. 42, 101 LRRM 2365 (1979).

4. The Ninth Circuit considers the merits of the employee's grievance when determining whether the Union's explanation for its conduct is sufficiently rational. See, e.g., Gregiz v. Teamsters, Local 150, 699 F.2d 1015, 112 LRRM 2924 (9th Cir. 1983). But see Banks v. Bethlehem Steel Corp., 870 F.2d 1438 (9th Cir. 1989) (explaining that the union violated the Duty of Fair Representation in Gregg because it avoided making an informed judgment. The union abandoned claims too early without considering the individual merits of individual claims.)

III. Standards for Breach of the Duty of Fair Representation in the Context of Grievances and Contract Administration

- A. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

A Union member does not have an absolute right to have his grievance taken to arbitration. However, the Union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. The Union does not breach its duty of fair representation merely because it settles the grievance short of arbitration.

- B. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1952).

In administering the grievance and arbitration machinery as statutory agent of the employees, a Union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances.

- C. Failure of union to timely process a grievance only breaches duty of fair representation if motivated by bad faith or discriminatory reasons or if its conduct is "arbitrary." See e.g., Landry v. Cooper/T. Smith Stevedoring Co., 880 F.2d 846, 132 LRRM 2248 (5th Cir. 1989)
- D. Teamsters, Local 315, 217 NLRB 616, 617, 89 LRRM 1049, 1051 (1975), enf'd, 545 F.2d 1173, 93 LRRM 2747 (9th Cir. 1976).

A Union may refuse to pursue a grievance "for a multitude of reasons, but it may not do so without a reason" (citation omitted).

- E. Wilder v. GL Bus Lines, 164 LRRM 2906 (2000), aff'd in relevant part, 258 F.3d 126, 168 LRRM 2203 (2d Cir. 2001); Connell v. Merck & Co., Inc., 76 Fed. Appx. 438 (3rd Cir. 2003)

Proof of thoughtful analysis regarding the merits of a grievance will defeat a fair representation claim.

- F. Curth v. Faraday, Inc., 401 F.Supp. 678, 90 LRRM 2735 (E.D. Mich. 1975).

A Union may refuse to arbitrate a grievance of acknowledged merit based on a lack of funds and the advice of the International Union that arbitration would be futile.

- G. Self v. Teamsters, Local 61, 620 F.2d 439, 104 LRRM 2125 (4th Cir. 1980).

If a member's grievance is unmeritorious, then inadequate handling of the grievance by the Union is not actionable.

- H. MacKnight v. Leonard Morse Hospital, 828 F.2d 48, 126 LRRM 2259, 2261 (1st Cir. 1987).

Neither negligence nor error nor bare hostility toward a grievant by a Union is actionable. The grievant must instead show that the Union's handling of the grievance itself was "materially deficient." G. Machinists, Local 697, 223 NLRB 832, 91 LRRM 1529 (1976).

A Union breaches its duty of fair representation if it discriminates against non-Union members in the pursuit of grievances.

- I. Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 103 LRRM 2321 and 2976 (8th Cir. 1980), cert. denied, 449 US 839 (1980).

A Union breached its duty of fair representation when in grievances involving promotions it strictly adhered to the principle of seniority, and thereby discriminated against employees receiving promotions on the basis of merit.

- J. Automobile Workers, Local 600, 225 NLRB 1299, 93 LRRM 1233 (1976),

A potential conflict of interest between grievants and their Union representatives does not constitute a breach of the duty unless the representative has a personal stake in the outcome that is contrary to the grievants' interest.

- K. Phillips v. Lenox Hill Hospital, 673 F.Supp. 1207, 127 LRRM 2871 (S.D.N.Y. 1987).

A Union did not breach its duty of fair representation by consolidating the grievances of two employees who were discharged for fighting and affording them the same attorney, where one grievant settled before the arbitration and the Union represented at the hearing that the other was not the aggressor.

- L. Taylor v. Ford Motor Co., 866 F.2d 895, 130 LRRM 2513 (6th Cir. 1989).

An International Union was not liable for breach of the duty when it took a neutral position in the arbitration of a dispute over seniority between two bargaining units within the local Union.

M. Courts differ as to whether a Union can be held liable for failure to call witnesses at grievance or arbitration proceedings. Compare Banks v. Bethlehem Steel Corp., 870 F.2d 1438, 130 LRRM 3005 (9th Cir. 1989) (Union liable when it failed to call any employee witnesses in a case involving a fight with a coworker) with Barr v. United, Parcel Service, 868 F.2d 36, 130 LRRM 2593 (2d Cir. 1989), cert. denied, 493 U.S. 975 (1989) (Union's failure to call employee witnesses was a tactical error at most).

N. Reid v. Automobile Workers, Local 1093, 479 F.2d 517, 83 LRRM 2406 (10th Cir. 1973); cert. denied, 414 US 1076 (1973); Brough v. United Steelworkers of America, 437 F.2d 748, 76 LRRM 2430 (1st Cir. 1971); Bazarte v. United Transportation Union, 429 F.2d 868, 75 LRRM 2017 (3rd Cir. 1970).

Mistakes, poor tactics, or failures to present specific arguments are not of themselves enough to support a claim of breach of the duty of fair representation.

O. Zuniga v. United Can Co., 812 F.2d 443, 124 LRRM 2888 (9th Cir. 1987).

A Union breaches its duty if it fails to perform ministerial acts on a grievant's behalf.

P. Branch 529, Nat'l Ass'n of Letter Carriers, 319 NLRB 879, 151 LRRM 1017 (1995)

Union violated Duty of Fair Representation by arbitrarily refusing to provide represented employee with copies of forms pertaining to grievance.

Q. Failure to notify grievant that grievance has been dropped may violate Duty of Fair Representation because failure may preclude grievant from seeking an alternative forum. Willets v. Ford Motor Co., 583 F.2d 852, 99 LRRM 2399 (6th Cir. 1978).

R. Trnka v. Local Union No. 688, 30 F.3d 60, 146 LRRM 2790 (7th Cir. 1994).

Union representative's statement that he did not want member's grievance granted was not evidence of bad faith or discrimination needed to establish that Union breached its duty of fair representation; instead the representative merely repeated his opinion that the member's grievance, if granted, would result in more senior employees filing grievances.

IV. Standards for Breach of the Duty of Fair Representation in the Context of Contract Negotiation

- A. Air Line Pilots v. O’Neill, 499 U.S. 65, 79,113 L Ed 2d 51, 136 LRRM 2721, 2726 (1991).

The duty of fair representation applies to contract negotiations as well as contract administration. However, the court will review the Union’s actions with a high degree of deference, since negotiators need broad latitude to perform their bargaining responsibilities. In order to constitute a breach of the duty, the Union’s conduct must be “so far outside a `wide range of reasonableness,’ ... that it is wholly `irrational’ or ‘arbitrary,’” The court will examine the “legal landscape” at the time of the Union’s action, rather than apply hindsight. The Court said that “a settlement is not irrational simply because it turns out in **retrospect** to have been a bad settlement. Viewed in light of the legal landscape at the time of the settlement, ALPA’s decision to settle rather than give up was certainly not illogical”.

- B. Marquez v. Screen Actors Guild, Inc., 119 S. Ct. 292, 159 LRRM 2539 (1998)

Reaffirmed an applied O’Neill in holding that the union did not violate its duty of fair representation when it negotiated a union security clause mirroring the language from 8(a)(3) of the Act. The claim was that the union did not explain to the member that under the law, he only had a duty to contribute core financial support. The Court held that the union security clause was consistent with Federal Law permitting unions to require such payments, and using statutory language was neither arbitrary or in bad faith.

- C. A Union breaches its duty of fair representation if its bargaining position is motivated . by hostility or illegal considerations.

1. Red Ball Motor Freight, Inc., 157 NLRB 1237, 61 LRRM 1522 (1966), enf’d, 379 F.2d 137,65 LRRM 2309 (D.C. Cir. 1967).

A Union was liable where it refused to consider an alternative bargaining position because it wanted to advance its interest in winning a representation election.

2. Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944).

Intentional racial discrimination in the negotiation of contracts breaches the duty of fair representation.

- D. Ekas v. Carling National Breweries, 602 F.2d 664, 101 LRRM 3100 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980).

Unions have wide discretion in negotiating over mergers or consolidations of bargaining units, as long as they do not arbitrarily ignore the interest of any group.

- E. International Longshoremen's and Warehousemen's Union, Local 13 v. Pacific Maritime Association, 441 F.2d 1061, 77 LRRM 2160 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); Corcoran v. Allied Supermarkets, Inc., 498 F.2d 527, 86 LRRM 2883 (8th Cir. 1974).

Neither bad faith nor arbitrariness is demonstrated by proving that the Union "swapped" a concession on another issue if the swap of the Union contract terms was motivated by a good faith balancing of the burden to the individual and the benefit to others in the Union.

- F. Letter Carriers Branch 6000 (United States Postal Service) v. NLRB, 595 F.2d 808, 100 LRRM 2346 (D.C. Cir. 1979).

A Union's refusal to allow non-Union members to have input in their working conditions violated the duty of fair representation.

- G. Courts differ as to whether Unions have a duty to keep their members informed about the status of contract negotiations. Compare Deboles v. Trans World Airlines, 90 LRRM 3064, 3072 (E.D. Pa. 1975) (Union has duty of "honest disclosure") with Knoll v. Phoenix Steel Corp., 325 F.Supp. 666, 77 LRRM 2038 (E.D. Pa. 1971) (failure to inform membership not a breach of the duty), aff'd, 465 F.2d 1128, 81 LRRM 2143 (3d Cir. 1972), cert. denied, 409 U.S. 1126 (1973).

- H. Union's duty in negotiating a collective bargaining agreement is not breached by failing to negotiate every possible term. Conrad v. Machinists, 338 F.3d 908, 172 LRRM 3262 (8th Cir. 2003)

- I. Actions taken in bad faith violate the Duty of Fair Representation. Lewis v. Tuscan Dairy Farms, 25 F.3d 1138, 146 LRRM 2601 (2d Cir. 1994)

Union president breached Duty of Fair Representation by telling employees seniority would be dovetailed if plant purchased after secretly agreeing with new purchaser that seniority lists would not be dove tailed. President's actions violated bylaws, which required membership ratification and approval of contract modification.

- J. Rakestraw v. United Airlines, 981 F.2d 1524, 142 LRRM 2054 (7th Cir. 1992), reh'g denied, 989 F.2d 944, 142 LRRM 3006 (7^h Cir. 1993), cert. denied, 510 U.S. 906, 144 LRRM 2392 (1993)

Duty of Fair Representation is not violated if the Union seeks to serve the interests of its members as a whole, even if some members of the minority are adversely affected.

K. Denying members the right to vote on contract ratification does not violate the Duty of Fair Representation.

1. White v. White Rose Food, 237 F.3d 174, 166 LRRM 2281 (2d. Cir. 2001)

Union not required under the Act or its own constitution or bylaws to submit an amendment to the collective bargaining agreement to its membership for ratification, even though the original agreement had been so ratified.

2. Longshoreman (ILA) Local 1575, 332 NLRB No. 139, 165 LRRM 1377 (2000)

The Board found that the Union did not violate the Duty of Fair Representation because the union was not required to request a vote of its membership to ratify the contract.

V. **Standards for Breach of the Date of Fair Representation in the Context of an Exclusive Hiring Hall**

- A. Steamfitters Local 342, 329 NLRB 688 (1999), *decision on remand*, 336 NLRB 549, 168 LRRM 1256 (2001)

A union does not violate the duty of fair representation if they are merely negligent in operating referral halls. The Board held no breach when the union lost an employment opportunity as a result of an honest, inadvertent mistake in failing to refer a member in the proper order. This case overruled International Ass'n of Bridge, Structural & Ornamental Workers, 309 NLRB 808, 142 LRRM 1168 (1992), which had imposed liability on unions for ordinary errors in operating referral halls.

- B. Lucas v. NLRB, 333 F.3d 927, 172 LRRM 2206 (9th Cir. 2003), *rev'g and remanding* 332 NLRB 1, 165 LRRM 1163 (2000)

Court held that the Board's reliance on the very deferential standard for union action in Air Line Pilots Ass'n v. O'Neill was inappropriate when the issue arose in the context of an exclusive hiring hall. The court held that the union breached its duty of fair representation by permanently barring an employee from the hiring hall, where it was unable to show that the expulsion was necessary to "promote the efficiency and integrity of its hiring hall operations." The court's reasoning was that when a union has control over workers' livelihood, it has an added responsibility.

VI. **The Duty of Fair Representation is Not Pre-empted by the NLRB.**

- A. Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962), *enf, denied*, 326 F.2d 172, 54 LRRM 2715 (2d Cir. 1963).

The National Labor Relations Board held that a Union's breach of the duty of fair representation may constitute an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act, since Section 7 of the Act gives employees the right to be free from unfair or invidious treatment by their exclusive representative. See also, Graphic Communication Workers Local 388 & District 2, 287 NLRB 1128, 128 LRRM 1176 (1988).

- B. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

Based upon the Board's tardy assumption of jurisdiction in a duty of fair representation case, the Supreme Court refused to infer that Congress intended the Board to have exclusive jurisdiction over claims of arbitrary conduct by Unions. The Court assumed that a breach of the duty of fair representation amounts to an unfair labor practice.

- C. Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67, 132 LRRM 3001 (1989).

Fair representation suits arising out of the operation of Union hiring halls are not preempted by the NLRA. Just because a breach of the duty of fair representation might also constitute an unfair labor practice does not deprive federal courts of jurisdiction over the fair representation claim.

- D. Communications Workers v. Beck, 487 U.S. 735, 108 S.Ct. 2641, 128 LRRM 2729 (1988).

The NLRB has primary jurisdiction over a claim that a Union committed an unfair labor practice by charging non-Union members a fee that was higher than the cost of representation activities. However, a federal court has jurisdiction to decide the unfair labor practice claim if such decision is necessary to dispose of a fair representation claim.

- E. Lintz v. Great Plains Beef Co., 102 LRRM 3049 (S.D. Iowa 1979).

The filing of an unfair labor practice charge may result in abstention by a federal court on a pending and related fair representation claim.

- F. Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 103 LRRM 2321 and 2976 (8th Cir. 1980), cert. denied, 449 US 839 (1980).

The General Counsel's refusal to issue an unfair labor practice complaint does not bar a fair representation suit in federal court.

- G. The General Counsel of the NLRB has issued substantive guidelines for use by Regional Offices in Section 8(b)(1)(A) cases involving a Union's duty of fair representation. Memorandum 79-55, Office of the General Counsel, NLRB (July 9, 1979).

1. If the Union's conduct falls within one of the following four categories, the Region is directed to issue a complaint, absent settlement:
 - a. Improper motives or fraud. See, Pacific Coast Utilities, Inc., 238 NLRB 599, 99 LRRM 1619 (1978), enf d, 638 F.2d 73, 104 LRRM 2320 (9th Cir. 1980); ITT Artic Services, 238 NLRB 116, 99 LRRM 1659 (1978) (overruled on other grounds); and Owens-Illinois, 240 NLRB 324, 100 LRRM 1294 (1979).
 - b. Arbitrary conduct. See, Beverly Manor Convalescent Center, 229 NLRB 692, 95 LRRM 1156 (1977); U.S. Postal Service, 240 NLRB 1198, 100 LRRM 1371 (1979), enf'd in relev. part, 618 F.2d 1249, 103 LRRM 3045 (8th Cir. 1980); and Boilermakers Local 667, 242 NLRB 1153, 101 LRRM 1430 (1979).
 - c. Gross negligence. See, Great Western Unifreight System, 209 NLRB 446, 85 LRRM 1385 (1974). See also, Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 98 LRRM 2090 (9th Cir. 1978).
 - d. Union's conduct after it has decided to grieve on behalf of the employee. See, Owens-Illinois, 240 NLRB 324, 100 LRRM 1294 (1979).
2. If the Union's conduct does not fall within one of the above categories, the Region should dismiss the charge, absent withdrawal, unless the case presents unusual circumstances not contemplated by the Memorandum, in which case it should be submitted to the Division of Advice.
3. The Memorandum stated that, "The mere fact that the union is inept, negligent, unwise, insensitive, or ineffectual, will not, standing alone, establish a breach of the duty [of fair representation]." Washington-Baltimore Newspaper Guild, 239 NLRB 1321, 100 LRRM 1179 (1979); Pacific Coast Utilities Service, Inc., supra; and Great Western Unifreight System, supra.

VII. State Claims Against a Union May be Pre-empted by Section 301 of the Labor Management Relations Act.

- A. United Steelworkers of America v. Rawson, 495 U.S. 362, 134 LRRM 2153 (1990).

State wrongful death claims against a Union were pre-empted by Section 301 of the LMRA, because the existence, scope, and nature of any duty by the Union to safeguard the safety of its members were defined by the collective bargaining agreement.

- B. Electrical Workers v. Hechler, 481 U.S. 851, 125 LRRM 2353 (1987).

Section 301 pre-empted the claim of an employee-apprentice that her Union breached its state law duty to provide her with a safe workplace, since the existence of any such duty depended on the construction of the collective bargaining agreement.

- C. Peterson v. Kennedy, 771 F.2d 1244, 120 LRRM 2520 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986).

Union member could not maintain a state malpractice action against the attorney employed by the Union to advise him on his grievance, since the malpractice claim was subsumed in and precluded by the member's fair representation claim against the Union. The attorney acted on the Union's behalf in representing the plaintiff as part of the Union's obligations under the collective bargaining agreement.

VIII. State Claim Against A Union May Be Pre-empted By The Railway Labor Act.

- A. The Railway Labor Act pre-empts state law claims which turn on interpretation of collective bargaining agreements. Andrews v. Louisville and Nashville R. Co., 406 U.S. 320, 324, 80 LRRM 2240 (1972); and Griffin v. Air Line Pilots Assn., 32 F.3d 1079, 146 LRRM 3092 (7th Cir. 1994). [Alleged tortious interference with employment].

IX. The Duty of Fair Representation Does Not Pre-empt a Section 301 Suit Against a Union.

- A. United Steelworkers of America v. Rawson, 495 U.S. 362, 134 LRRM 2153 (1990).

The duty of fair representation does not pre-empt a Section 301 suit by members against their Union, if it undertakes a contractual duty to its members that extends beyond its statutory fair representation duty. Such a contractual duty must be found in the language of the collective bargaining agreement. Under the facts of this case, the Court found that the Union had not assumed any duty to protect its members' safety.

X. Proper Parties to a Fair Representation Claim.

- A. Only the collective bargaining representative is a proper defendant in a fair representation proceeding. The following parties are **not** proper defendants;
1. An International or Regional Union, unless the Local Union was acting at its direction. See, Chavez v. Food & Commercial Workers, 779 F.2d 1353, 121 LRRM 2054 (8th Cir. 1985); Sine v. Teamsters Local 992, 730 F.2d 964, 115 LRRM 3347 (4th Cir. 1984) cert. denied, 454 U.S. 965, 108 LRRM 2923 (1981). However, an International Union may owe a duty of fair representation to its member Locals. See, Hospital & Health Care

Employees Local 1199 DC v. Hospital & Health Care Employees, 533 F.2d 1205, 91 LRRM 2817 (D.C. Cir. 1976).

2. Union representatives on Joint Employer-Union Grievance Panels, or the Panels themselves. See, Shropshire v. Teamsters Local 957, 102 LRRM 2751 (S.D. Ohio 1979).
3. Individual Union members or Unions other than the exclusive bargaining agent. See, Wells v. Southern Airways, Inc., 616 F.2d 107, 104 LRRM 2338 (5th Cir. 1980), cert. denied, 425 U.S. 914, 91 LRRM 2916 (1976). Katir v. Columbia University, 15 F.3d 23, 145 LRRM 2263 (2d Cir. 1994).
4. Union officers. See, Evangelista v. Inland boatmen's Union of the Pacific, 777 F.2d 1390, 121 LRRM 2570 (9th Cir. 1985); Capozza Tile Co. v. Joy, 223 F.Supp. 2d 307 (D. Me. 2002).

B. Smith v. Baltimore & Ohio R.R., 473 F.Supp. 572, 102 LRRM 2109 (D. Md. 1979). Fair representation actions may be maintained as class actions.

XI. Exhaustion Defenses to Duty of Fair Representation Claims.

A. The duty to exhaust contractual remedies.

1. Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965).

Before filing a Section 301 suit, employees must attempt to use the contractual grievance process.

2. Kuhn v. Letter Carriers, 528 F.2d 767, 91 LRRM 2177 (8th Cir. 1976); appeal after remand, 570 F.2d 757, 97 LRRM 2873 (8th Cir. 1978). An employee is obligated to exhaust his administrative remedies before bringing his action in court.

3. Vaca v. Sines, 386 U.S. 171, 64 LRRM 2369 (1967).

An employee need not exhaust contractual remedies, however, if the employer repudiates the grievance procedures or if the Union wrongfully refuses to process the employee's grievance.

4. Employees are also excused from exhaustion of contractual remedies if:
 - a. The grievance concerns matters in which the Union was involved, thereby violating its duty of fair representation, or there have been prior breaches of the duty of fair representation. See, Glover v. St. Louis - San Francisco Ry. Co., 393 U.S. 324, 70 LRRM 2097 (1969).

- b. The Union breached its duty of fair representation by failing to notify the employee of the events giving rise to the grievance. See, Pratt v. United Air Lines, 468 F.Supp. 508, 100 LRRM 2881 (N.D. Cal. 1978).
 - c. The Union delayed in processing the employee's grievance without explaining its reasons. See, Williams v. Pacific Maritime Ass'n, 617 F.2d 1321, 103 LRRM 2659 (9th Cir. 1980), cert. denied, 449 U.S. 1101, 106 LRRM 2137 (1981).
 - d. Any attempt to exhaust the contractual grievance machinery would be futile. See, Glover v. St. Louis-San Francisco Ry. Co., supra. Note, however, that exhaustion is not futile despite the hostility of the grievant's representatives, if he eventually has an opportunity to be heard before an impartial arbitrator. Ritza v. International Longshoremen's & Warehousemen's Union, 837 F.2d 365, 127 LRRM 2425 (9th Cir. 1988). A grievant must show futility at every step of the grievance process. Sosbe v. General Motors Corp., 830 F.2d 83, 126 LRRM 2556 (7th Cir. 1987).
 - e. Where exhaustion would impair an adequate remedy or available procedures could not provide an adequate remedy. See, Dorn v. Meyers Parking System, 395 F.Supp. 779, 89 LRRM 2619 (E.D. Pa. 1975); Lucas v. Philco-Ford Co., 380 F.Supp. 139, 87 LRRM 2176 (E.D. Pa. 1974).
 - f. If the alleged breach is in the negotiation of a contract, since a grievance cannot remedy this breach. See, Williams v. Pacific Maritime Ass'n, supra.
 - g. At the time she pursued her lawsuit, plaintiff was no longer employed, making her ineligible to use the grievance procedure. In addition, her union ignored requests for assistance. See Meridith v. Louisiana Federation of Teachers, 209 F.3d 398, 164 LRRM 2099 (5th Cir. 2000)
5. Hines v. Anchor Motor Freight, 424 U.S. 554, 91 LRRM 2481 (1996)
- Hybrid action for breach of duty and breach of contract is not necessarily barred because the union has processed the employee's grievance through the grievance-arbitration procedure, the contractual remedy has been exhausted and the arbitral forum rejected the grievance.
6. Employees must cooperate with the Union in the processing of grievances. See, for example:

- a. Ostrosky v. United Steelworkers, 171 F.Supp. 782, 43 LRRM 2744 (D. Md. 1959), aff'd per curiam, 273 F.2d 614, 45 LRRM 2486 (4th Cir. 1960), cert. denied, 363 U.S. 849 (1960).

The Union did not violate its duty of fair representation when it refused to press to arbitration the grievances of discharged employees, since the employees refused to give the Union information essential to the evaluation of the grievances.

- b. Hicks v. J.H. Routh Packing Co., 95 LRRM 2814 (N.D. Ohio 1977).

An employee returning from medical leave of absence refused to provide his medical records for review by the employer and refused to produce an able-to-work slip from his treating physician. Although the employee submitted to a physical examination by the employer's doctor, the court held that the employee's refusal to furnish his medical records justified the Union's withdrawal of his grievance.

B. The duty to exhaust internal Union remedies.

1. Clayton v. Automobile Workers, 451 U.S. 679, 107 LRRM 2385 (1981).

A grievant has a duty to exhaust internal Union procedures before bringing a fair representation complaint against the Union. Three factors are relevant to determining whether the grievant is excused from the internal exhaustion requirement:

- a. Whether Union officials are so hostile that the employee cannot hope to obtain a fair hearing,
- b. Whether the internal procedures are inadequate to reactivate the employee's grievance and award him the full relief he seeks;
- c. Whether internal exhaustion would unreasonably delay an employee's opportunity to obtain judgment on the merits of his grievance.

Under the facts of the case, the grievant was excused from the internal exhaustion requirement, because by the time he had followed internal procedures, the time for his contractual grievance would have expired, and therefore he could not have obtained reinstatement even if he prevailed against the Union.

2. Plaintiff has the burden of alleging facts showing the intra-union procedures are inadequate under Clayton. See e.g. Talbot v. Robert

Matthews Distrib. Co., 961 F.2d 654, 140 LRRM 2228 (7th Cir. 1992);
Adkins v. Mine Workers, 941 F.2d 392, 138 LRRM 2070 (6th Cir. 1991)

3. Ritza v. Lonjzshoreinen (ILWU), 837 F.2d 365, 127 LRRM 2425 (9th Cir. 1988)

9th Circuit has held that objection to failure of plaintiff to exhaust internal union remedies must be raised by defendant in a motion to dismiss.

4. Courts differ as to whether the Union must inform its members of internal procedures:
 - a. The Union must prove that employees had access to knowledge of available remedies. See, e.g., Geddes v. Chrysler Corp., 608 F.2d 261, 102 LRRM 2756 (6th Cir. 1979).
 - b. The Union has no duty to publicize internal remedies, and plaintiff's attorney should have sought information about such procedures. Wiggins v. Chrysler Corp., 728 F.Supp. 463, 132 LRRM 2849 (N.D. Ohio 1989), affirmed, 905 F.2d 1539, 134 LRRM 2568 (1990), cert. denied, 498 U.S. 1013, 135 LRRM 3176 (1990).
 - c. The Union must show that procedures are adequate, not futile, and reasonable under the circumstances; the nature of the procedures and the method of making them known to employees are relevant. Johnson v. General Motors, 641 F.2d 1075, 106 LRRM 2688 (2^d Cir. 1981).
 - d. Allegations of ignorance and reliance on misleading statements by Union officials are insufficient to avoid the exhaustion defense. Oliver v. C & P Telephone Co., 124 LRRM 2555 (E.D. Va. 1986), aff'd, 850 F.2d 689 (4th Cir. 1988).

XII. Statute of Limitations,

- A. DelCostello v. Teamsters, 462 U.S. 151, 113 LRRM 2737 (1983).

The six month statute of limitations contained in Section 10(b) of the National Labor Relations Act applies to hybrid Section 301/fair representation suits by employees against their Employers and Unions, since hybrid suits bear a family resemblance to unfair labor practices.

- B. Several courts have held that employees cannot avoid the six month statute of limitations by bringing only the breach of contract action against the employer. See, e.g. Smith v. Masters, Mates & Pilots, 296 F.3d 380, 170 LRRM 2534 (5th Cir. 2002), cert. denied, 123 S.Ct. 691, 171 LRRM 2576 (2002) (granting Summary Judgment to employer on breach of contract action because the class

was time-barred from bringing suit against the Union for breach of the duty of fair representation). Compare with White v. White Rose Food, 237 F.3d 174, 166 LRRM 2281 (2d Cir. 2001) (Ct. held that the fact that suit was time-barred against the Union did not mean that they could not bring suit against the employer in a separate 301 action. However, employees still had to prove that the employer violated the collective bargaining agreement AND the union breached its duty of fair representation

- C. Courts differ on whether the Section 10(b) Statute of Limitations applies to nonhybrid situation where only the employer OR the union is being sued, but not both. Compare Jones v. General Elec. Co., 87 F.3d 209, 152 LRRM 2599 (7th Cir. 1996) (6 month statute of limitations does not apply to nonhybrid situations) with United Paperworkers Int’l, Local # 395 v. ITT Ravonier. Inc., 931 F.2d 832, 137 LRRM 2614 (11 Cir. 1991) (6 month statute does apply to nonhybrid situations)
- D. Most Circuits have applied DelCostello retroactively. See, e.g., Zemonick v. Consolidated Coal Co., 796 F.2d 1546, 123 LRRM 2788 (4th Cir. 1986), cert. denied, 479 U.S. 1018, 124 LRRM 3192 (1986); Smith v. General Motors Corp., 747 F.2d 372, 117 LRRM 2941 (6th Cir. 1984) (bane); Landahl v. PPG Industries, Inc., 746 F.2d 1312, 117 LRRM 3037 (7th Cir. 1984).
- E. Fitz v. Communication Workers, 132 LRRM 2186 (D. D.C. 1989), aff’d, 135 LRRM 2872 (D.C. Cir. 1990).

The 10(b) six month limitations period also applies to a hybrid fair representation/Section 8(a)(3) unfair labor practice action concerning fees charged to non-Union members.

- F. Courts take different positions regarding when the six month period commences:
 - 1. On the day the actual injury occurs. See, Barrett v. Ebasco Constructors, Inc., 868 F.2d 170, 130 LRRM 3133 (5th Cir. 1989); Price v. Southern Pacific Transp Co., 586 F.2d 750, 100 LRRM 2671 (9th Cir. 1978) (disapproved on other grounds).
 - 2. On the date of the last action by the Union or the date on which damages become fixed and relatively certain. See, Archer v. Airline Pilots Ass’n, 609 F.2d 934, 102 LRRM 2827 (9th Cir. 1979), cert. denied, 446 U.S. 953 (1980).
 - 3. At the time the Union makes its decision on the grievance or when the plaintiff discovers or “in the exercise of reasonable diligence should have discovered” that no further action would be taken. Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239, 135 LRRM 2217 (7th Cir. 1990).
 - 4. At the time the Union makes its decision not to pursue the grievance, even if the employee makes repeated requests that the Union continue the grievance, since the employee should have known that his requests would

- be futile. Vadino v. A. Valet/ Eng'rs, 903 F.2d 253, 134 LRRM 2341 (3d Cir. 1990).
5. At the time the arbitrator issues his unfavorable decision, if the Union represented the employee throughout the grievance and arbitration process. Ghartey v. St. John's Queens Hospital, 869 F.2d 160, 130 LRRM 2816 (2d Cir. 1989).
 6. The determination of the accrual date is an objective one: "the asserted actual knowledge of the plaintiffs is not determinative if they did not act as reasonable persons and, in effect, closed their eyes to evident and objective facts concerning the accrual of their right to sue." Chrysler Workers Assn. v. Chrysler Corp., 834 F.2d 573, 579, 126 LRRM 3223 (6th Cir. 1987), cert. denied, 486 U.S. 1033 (1988); Noble v. Chrysler Motors Corp., 32 F.3d 997, 1000, 147 LRRM 2068 (6th Cir. 1994).
 7. A cause of action for breach of a union's duty of fair representation accrues when a party should reasonably have known of the union's alleged breach. Aarsold v. Greyhound Lines, Inc., 724 F.2d 72, 73, 115 LRRM 2374, (8th Cir. 1983), cert. denied, 467 U.S. 1253, 116 LRRM 2720 (1984).
- G. However, courts appear to be in agreement that the "continuing violation" theory cannot be utilized to create a new accrual date once an action has ripened in the first instance. See e.g. Strassberg v. New York Hotel & Motel Trades Council Local 6, 31 Fed Appx. 15, 17 (2d. Cir. 2002), cert. denied 123 S.Ct. 193 (2002); Devitt v. Potter, 234 F.Supp.2d 1034, 171 LRRM 2395 (D.N.D. 2002)
- H. The six month limitations period maybe tolled:
1. Pending exhaustion of internal union remedies. Galindo v. Stoodly Co., 793 F.2d 1502, 123 LRRM 2705 (9th Cir. 1986). Note, however, if the employee takes steps that are not required, such as filing a motion for reconsideration, the statute of limitations may not be tolled. Williams v. Chrysler Corp., 991 F. Supp. 383, 157 LRRM 2437 (D. Del. 1998)
 2. For fraud. Franco v. American Gas Ass'n, 135 LRRM 2612 (C.D. Cal. 1987), aff'd, 902 F.2d 39, 135 LRRM 2640 (9th Cir. 1990), cert. denied, 498 U.S. 897, 135 LRRM 2640 (1990).
 3. Where the Union kept open the possibility of going to arbitration. Andrews v. Children's Hosp. of Philadelphia, 147 LRRM 2572 (E.D. Pa 1994).
 4. For service in the armed forces. Section 10(b).
- I. However, the statute of limitations may not be tolled:

1. By the filing of unfair labor practice charges, since the courts and the Board provide parallel and distinct avenues of relief. Arriaga-Zavas v. Ladies Garment Workers, 835 F.2d 11, 127 LRRM 2031(1st Cir. 1987), cert. denied, 486 U.S. 1033, 128 LRRM 2567 (1988).
 2. For mental incapacity. Franco v. American Gas Ass'n, supra.
 3. Where Union member fails to follow formal appeal procedures in the Union Constitution. Austin v. General Motors Corp., 152 LRRM 3041 (W.D.N.Y. 1995)
 4. Where employee inexcusably wastes time in pursuing his or her grievance. Herrera v. Auto Workers, 858 F. Supp. 1529, 1541, 151 LRRM 2395, 2404 (D. Kan. 1994), aff'd, 73 F.3d 1056, 151 LRRM 2408 (10th Cir. 1996)
- J. Courts take differing views on whether in hybrid Section 301/fair representation claim, claim is not time-barred after it is removed to federal court when employee initially filed in State Court within the 6 month statute of limitations. Compare Prazak v. Bricklayers Local 1, 233 F.3d 1149, 165 LRRM 2853 (9th Cir. 2000) (claim not time-barred) with Cannon v. Kroger, 832 F.2d 303, 126 LRRM 2968 (4th Cir. 1987) (Court found “statute of limitations applicable to ‘hybrid’ actions runs until the action is properly commenced under the dictates of the Federal Rule of Civil Procedure.”)

XIII. Right to Jury Trial on Duty of Fair Representation Claims.

- A. Chauffeurs, Teamsters, & Helpers. Local No. 391 v. Terry, 494 U.S. 558, 133 LRRM 2793 (1990).

Union members have a right to a jury trial under the Seventh Amendment on their fair representation claim, where they seek only monetary damages. The test for whether a jury trial is required is as follows:

1. Nature of issues involved - a fair representation action resembles an equitable action by a beneficiary against a trustee for breach of fiduciary duty, but a hybrid Section 301 claim involves a legal question of the breach of a contract (which breach must be shown in order to prevail against the Union even if the plaintiff does not sue the Employer);
 2. Remedy sought (the more important of the two prongs) - The backpay damages sought are legal, not restitutionary, in nature.
- B. Brownlee v. Yellow Freight Systems. Inc., 921 F.2d 745, 136 LRRM 2017 (8th Cir. 1990).

A discharged employee was entitled to a jury trial in a hybrid Section 301/fair representation suit against his Employer and Union even though the employee

requested equitable as well as legal relief. The jury must decide the questions of breach of contract, breach of the duty of fair representation, and the amount of monetary damages. Then the judge decides whether equitable relief such as reinstatement is appropriate.

- C. Deringer v. Columbia Transportation, 866 F.2d 859, 130 LRRM 2451 (6th Cir. 1989).

No jury trial is permitted in a fair representation action in which the plaintiff sought only equitable relief. If the judge decides that the Union breached its duty, then the plaintiff is entitled to a jury trial on his Section 301 claim against the Employer. It is unclear whether this decision survives Terry, supra.

XIV. The Employer May Not Rely on the Finality of an Arbitrator's Decision if the Union Has Breached its Duty of Fair Representation.

- A. The Supreme Court has held that an Employer may not rely on the finality of an arbitrator's decision (the "finality rule") if the Union has breached its duty of fair representation, inasmuch as the breach relieves the employees of the express or implied requirement that disputes be settled through contractual grievance procedures. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 91 LRRM 2481 (1976).
- B. Employees are not entitled to relitigate their discharges merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause. The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employees' representation by the Union has been dishonest, in bad faith, or discriminatory, for in that event error and injustice of the grossest sort would multiply. Hines v. Anchor Motor Freight, Inc., supra.

XV. Remedies for Breach of the Duty of Fair Representation.

- A. Purpose of Unfair Representation

Electrical Workers v. Foust, 442 U.S. 42, 101 LRRM 2365 (1979)

The Supreme Court held that the "fundamental purpose of fair representation suits is to compensate for injuries caused by violation of employee rights."

- B. Apportionment of damages.

1. Bowen v. U.S. Postal Service, 459 U.S. 212, 112 LRRM 2281 (1983).

The Supreme Court affirmed the principle announced in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), that liability in hybrid Section

301/fair representation cases must be apportioned between the Employer and the Union according to their respective fault:

“[D]amages attributable solely to the employer’s breach of contract should not be charged to the union, but increases if any in those damages caused by the union’s refusal to process the grievance should not be charged to the employer.”

112 LRRM at 2284, citing Vaca, 386 U.S. at 197-98. The trial court had instructed the jury that it could apportion damages based on the hypothetical date on which an arbitrator would have reinstated the grievant had the Union taken the case to arbitration, assessing damages prior to that date to the Employer and damages after that date to the Union. Because neither party appealed the trial court’s jury instruction regarding the manner of apportionment, the Supreme Court found no need to evaluate this method. The Court noted that the Employer would remain secondarily liable for any portion of the judgment against the Union which it could not pay.

Justices White, Blackmun, Marshall, and Rehnquist dissented from this holding, arguing that Unions should be liable for backpay only if the Employer cannot pay the judgment or if the Union induced the Employer to breach the contract. The dissenters particularly objected to the trial court’s method of apportioning damages based on a hypothetical arbitration date. Given the long delays inherent in litigation as compared to arbitration, the Justices felt, the Union would be forced to bear the brunt of the Employer’s breach of contract. Moreover, unlike the Employer, the Union could not terminate its liability by reinstating the grievant.

2. Two Circuits have approved of the hypothetical date method of apportioning damages between the Employer and the Union. See, Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 121 LRRM 2801 (7th Cir. 1986), cert. denied, 477 U.S. 908; Platemakers’ Union No. 4 v. NLRB, 794 F.2d 420, 122 LRRM 3000 (9th Cir. 1986) (dicta).
3. One court chose instead to make the Employer solely liable “until such time as the union’s breach can be said to have affected damages,” and to impose a 50-50 percentage fault liability after that point. Byrne v. Buffalo Creek R.R., 123 LRRM 2431, 2436-37 (W.D.N.Y. 1985). The 10th Circuit also followed the percentage apportionment method, finding that the hypothetical date method was too speculative and would cause the Union to bear a majority of the backpay award even though it was not the primary wrongdoer. Aguinaga v. Food & Commercial Workers, 993 F.2d 1480, 143 LRRM 2412 (10th Cir. 1993), cert. denied, 510 U.S. 1072, 145 LRRM 2320 (1994)

C. Punitive damages.

1. Electrical Workers v. Foust, 442 U.S. 42, 101 LRRM 2365 (1979).

The Supreme Court held that an award of punitive damages for a Union's breach of the duty of fair representation in processing an employee's grievance was prohibited by the Railway Labor Act. The Court majority stated:

“Because general labor policy disfavors punishment, and the adverse consequences of punitive damage awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance.”

101 LRRM at 2369.

D. Damages for mental distress.

1. Baskin v. Hawley, 807 F.2d 1120, 124 LRRM 2152 (2d Cir. 1986).

Damages for intentional infliction of emotional distress are available for breach of the duty of fair representation only if a Union has engaged in outrageous conduct.

E. Attorneys fees.

1. Emmanuel v. Omaha Carpenters, 560 F.2d 382, 95 LRRM 3320 (8th Cir. 1977) (disapproved on other grounds).

The court awarded attorneys fees to the grievant against the Union, where the grievant acted as a private attorney general and performed a service for fellow Union members.

2. Steelworkers Local 15063, 281 NLRB 1275, 124 LRRM 1368 (1986).
The NLRB required a Union to pay the legal fees of a charging party.

3. Bennett v. Glass & Pottery Workers Local 66, 958 F.2d 1429, 139 LRRM 2943 (7th Cir. 1992)

Court awarded attorney's fees to prevailing plaintiff in fair representation case and assessed fees to both Union and employer, finding each participated in the other's breach. However, court admitted that the general rule in hybrid 301 cases is to limit fees to expenditures in pursuing a claim against the employer.

4. Aguinaga v. Food & Commercial Workers, 993 F.2d 1480, 143 LRRM 2412 (10th Cir. 1993), cert. denied, 510 U.S. 1072, 145 LRRM 2320 (1994)

Attorneys fees are not available when the benefits received by plaintiffs and the entire union membership are not common, or at least not proportional

5. IBEW, Local 724, 327 NLRB 730, 160 LRRM 1177 (1999)

The make-whole remedy may include allowing the grievant to be represented by an attorney of his or her own choosing at the subsequent arbitration with the union bearing the expense

6. Cote v. James River Corp., 761 F.2d 60, 119 LRRM 2798 (1st Cir. 1985)

Attorneys' fees awarded to union defendant when plaintiffs continued to litigate despite being informed that their claim was untimely under DelCostello.

7. Higdon v. Entenmann's Sales Co., 170 LRRM 3234, 2002 WL 1821666 (N.D. Ill. 2002)

Court awarded attorneys' fees to plaintiff in hybrid 301 suit but "limited to the amount he actually expended in prosecuting the case."

8. Higbee v. Sim J. Harris Co., 131 LRRM 2801 (S.D. Cal. 1989).

The court awarded attorney fees to Unions against the plaintiff and his attorney under Rule 11 of the Federal Rules of Civil Procedure, where the plaintiff's conspiracy theory was not well grounded in law or in fact.

F. Equitable Relief

1. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 15 LRRM 708 (1944).

The Norris-LaGuardia Act does not preclude a court from enjoining Unions against breaching their duty of fair representation.

2. Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 74 LRRM 2028 (1st Cir.), cert. denied, 400 U.S. 877 (1970).

The Norris-LaGuardia Act does not bar reinstatement.

3. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

Courts can issue injunctions requiring arbitration upon a showing that the Union has breached its duty of fair representation, and can retain jurisdiction to award relief against the Union on the fair representation

claim, even if the Employer prevails at arbitration. Courts need not defer to arbitration, however, if resolution of the fair representation claim also resolves most of the arbitration dispute. Instead, courts may decide the underlying claim and provide a remedy directly.

4. Melanson v. John J. Duane Co., 605 F.2d 31, 102 LRRM 2597 (1st Cir. 1979).

Courts can issue injunctions staying arbitration pending resolution of fair representation claims regarding the adequacy of a Union's pre-arbitration conduct.

5. Higdon v. Entenmann's Sales Co., 170 LRRM 3234, 2002 WL 1821666 (N.D. Ill. 2002)

Court granted, *inter alia*, an injunction prohibiting further violations of the collective bargaining agreement by the employer and the union. The court reasoned that the same individuals who discharged the employee remained in positions of power at the employer and the union. The injunction provides the employee with "the legal protection he won at trial."

6. Iron Workers Local Union 377, 326 NLRB No. 54, 159 LRRM 1097 (1998)

Board will not require union to make grievant whole for losses allegedly suffered from mishandling a grievance unless general counsel affirmatively pleads for make-whole remedy and shows that the union breached its duty of fair representation **and** grievant would have prevailed at arbitration had there been no breach. Once general counsel establishes that union acted unlawfully, Board will normally issue an order directing union to properly pursue the grievance. If the union is unable to secure resolution, general counsel must show that the grievant would have prevailed absent the breach.

7. The Board also provides equitable relief in fair representation cases, including:
 - a. Orders to cease and desist in the breach of the duty and orders to make the charging party whole. See, e.g., Longshoremen Local 1367, 148 NLRB 897, 57 LRRM 1083 (1964), enf d, 368 F.2d 1010, 63 LRRM 2559 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).
 - b. Orders to process or arbitrate grievances. See, e.g., Local 12, Rubber Workers, 150 NLRB 312, 57 LRRM 1535 (1964), enf d, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

- c. Revocation of Union certification. See Teamsters Local 671, 199 NLRB 994, 81 LRRM 1454 (1972).
- d. The union was ordered to take the discharge grievance to arbitration and, if necessary, to file a Section 301 action against the employer to compel arbitration; but, the Board Order to pay back wages if the grievance could not be arbitrated was improper because it had not been determined by any tribunal that the employees were discharged in breach of their contract. San Francisco Pressmen v. NLRB, 794 F.2d 420, 122 LRRM 3000 (9th Cir. 1986), enf'g in part, 267 NLRB 451 (1983).

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