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Unions' Duty of Fair Representation: Does It Exist and Who Should Enforce It

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UNIONS' DUTY OF FAIR REPRESENTATION: DOES IT EXIST AND WHO SHOULD ENFORCE IT?

I.

INTRODUCTION

Every employee who is represented by a union in his contractual relationship with his employer is involved in at least two and perhaps three associations. He is first of all, an employee; secondly, a represented member of the collective bargaining unit; and possibly, thirdly, a member of the union itself. As an employee, he is entitled to all the rights contained in section 7[1] of the Labor Management Relations Act.[2] This provision gives the employee the right either to join or refrain from joining a union free from pressure by either employer or union.[3] These rights are enforced against the employer through section 8(a) of the act, and against the union through section 8(b). Furthermore, if the employee decides to join the union, his voice in union government is assured by the provisions of the Labor Management Reporting and Disclosure Act.[4]

But as a mere represented employee in the context of the collective bargaining process, the employee's rights are neither expressly stated nor protected in any present statute. Thus, a union may enter into a contract which deprives an employee of his seniority rights, of his chances for wage increases, or even of his job through the implementation of automation. In none of these situations does the employee have *specific* statutory redress, unless he can show that the reason for the union's action was to penalize him for failing to join or to participate fully in union membership and activities.[5] There is a certain amount of merit in allowing a free union hand in this area; for a union, by its very nature, represents many diverse interests and must therefore exercise powers of judgment in deciding on whom the greater benefits of a particular contract negotiation or enforcement should be conferred. In exercising this power, discretion and flexibility are obvious necessities; yet common sense demands that some standards be imposed. While the union must be given power to negotiate with regard to seniority rights and wages, it should not be allowed to arbitrarily sacrifice the rights of one group for the benefit of another.

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1. 61 Stat. 136, 140 (1947), 29 U.S.C. § 157 (1958):
> 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. 61 Stat. 136 (1947), as amended, 73 Stat. 519 (1959), 29 U.S.C. §§ 141-97 (Supp. IV, 1963) (hereinafter cited as LMRA).

3. This does not include approved closed shop agreements.

4. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. IV, 1963) (hereinafter cited as LMRDA).

5. In other words, the employer must show a violation of § 7 of the LMRA.

This field of "personal" union conduct in the representational aspect of the collective bargaining process is in need of much clarification. It is the purpose of this comment to analyze this duty of representation and to trace its development from its origin to the present in the light of current statutes.

II.

ORIGIN OF THE GENERAL DUTY OF FAIR REPRESENTATION

When the question of external supervision of unions first arose, the guarantees now contained in section 7 of the LMRA or in the LMRDA were absent; in fact, the language of the only two statutes then in effect (the Railway Labor Act[6] and the National Labor Relations Act[7]) was conspicuously devoid of *all* checks on unions. Difficulties arose when the unions, acting under the guise of statutory authority, began to use their powers to adversely affect the interests of some of those they were representing.

The general problem of controlling the statutorily appointed labor representative was first met judicially in *Steel v. Louisville & N. R.R.*[8] In this case, which was considered in the light of the provisions of the RLA,[9] the defendant union had entered into an agreement whereby the jobs and job rights of Negroes, who were represented by the union although not members of it, were to be gradually eliminated. In striking down the discriminating agreement, the Supreme Court did not confine itself to a discussion of the RLA alone; rather, it stated that a Congressional grant of plenary powers to a statutory representative, without the imposition of a corresponding duty, would violate constitutional provisions.[10] The Court then found that the duty existed. As a general principle it stated ". . . the exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. . . ."[11] Thus the duty of fair representation was established by statutory construction. Though the factual considerations in *Steel* and its immediately related

6. 44 Stat. 577 (1926), as amended, 48 Stat. 926, 1185 (1934), as amended, 49 Stat. 1921 (1936), as amended, 54 Stat. 785, 786 (1940), as amended, 62 Stat. 991 (1948), as amended, 63 Stat. 107 (1949), 45 U.S.C. §§ 151-88 (1958) (hereinafter cited as RLA).

7. 49 Stat. 449 (1937), as amended, 61 Stat. 136 (1947), as amended, 73 Stat. 519 (1959), 29 U.S.C. §§ 141-97 (Supp. IV, 1963).

8. 323 U.S. 192, 65 S.Ct. 226 (1944).

9. The particular section of the act from which the general duty was derived was RLA § 2, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 152 (1958). "Fourth. . . . The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . ."

10. Steel v. Louisville & N. R.R., 323 U.S. 192, 198, 65 S.Ct. 226, 230 (1944). Here the Court refers specifically to the "equal protection" clause of the Fourteenth Amendment.

11. *Id.* at 202, 65 S.Ct. at 232.

cases,[12] with their Fourteenth Amendment aspects,[13] might have hastened the development of the duty, its origin was strictly statutory.

The fair representation problem was soon reopened in the context of the NLRA.[14] In *Wallace Corp. v. NLRB*,[15] an independent union which had been certified as a bargaining representative refused to admit members of a rival AFL union which had been defeated in a bid for certification. This would have meant dismissal of the AFL members in view of the closed shop agreement which the company dominated independent union had negotiated with the employer. After enforcing the NLRB's cease and desist order against the company with regard to the execution of the closed shop contract (on the basis of section 8(a)(3) of the NLRA), the Supreme Court stated, by way of dicta, that in view of its statutory position, the union had "the responsibility of representing all of the members of the bargaining unit fairly and impartially."[16] In terming the union the "agent" of the employees, the Court indicated that the duty announced was based primarily upon fiduciary principles. While the *Wallace* case was merely dicta with regard to the concept of a duty of fair representation, the existence of this duty was strongly restated in *Ford Motor Co. v. Huffman*.[17] There, the petitioner employee attacked the validity of a collective bargaining agreement entered into by his union which acquiesced in an employer's policy of granting seniority credits for military service both prior and subsequent to employment. In holding the agreement valid, the Supreme Court emphasized that in resolving differences between those it represents, the union is always subject "to complete good faith and honesty of purpose in the exercise of its discretion."[18]

The rationale of both lines of cases leads inevitably to the conclusion that there is a duty of fair representation and that it is statutory in origin. While the constitutional right of equal protection was mentioned in *Steel*, this was merely incidental to the essential basis of the decision; at best it was a catalyst for statutory construction.

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12. See, *e.g.*, Graham v. Brotherhood of Firemen, 338 U.S. 232, 70 S.Ct. 14 (1949); Tunstall v. Brotherhood of Firemen, 323 U.S. 210, 65 S.Ct. 235 (1944); Brotherhood of Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951).

13. The Fourteenth Amendment aspects referred to are those specifically involving the question of race. This problem has always been sui generis in the labor field insofar as it is one breach of the duty of fair representation which has been *consistently* enforced, despite the fact that it was not expressly provided for in the LMRA.

14. The particular provision involved was § 9(a), 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947), as amended, 73 Stat. 519, 29 U.S.C. § 159(a) (1958) and reads in part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes. . . ."

15. 323 U.S. 248, 65 S.Ct. 238 (1944).

16. *Id.* at 255, 65 S.Ct. at 242.

17. 345 U.S. 330, 73 S.Ct. 681 (1953). See Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

18. *Id.* at 338, 73 S.Ct. at 686.

III.

THE EFFECT OF THE LMRA UPON THE GENERAL DUTY OF FAIR REPRESENTATION

Once it has been established that a general implied statutory duty of fair representation exists, questions immediately arise as to its present status in the light of subsequent *express* statutory guarantees.[19] The original *Steel-Wallace* test provided that the union's duty of "acting fairly and impartially"[20] consisted primarily in refraining from all "hostile discrimination."[21] This general standard was the sole extent of supervision in all three of the employee's possible associations with the union. In 1947 however, section 8(b) of the LMRA was enacted,[22] the first specific legislative check placed upon a union. Unions were no longer allowed to show bias towards an employee because he was not a union member. Employees were protected *qua* employees from forced union affiliation. This partial regulation proved to be singularly unfortunate; for, while the establishment of statutory standards was undeniably beneficial, a resulting trend among both state and federal courts to abdicate their entire labor law jurisdiction to the NLRB caused great hardship. The courts in the post-LMRA period developed the attitude: "if it's in the LMRA, it's not in our jurisdiction; if it's not in the LMRA, it's not enforceable." Blind adherence to this second premise proved disastrous; typical of the end result was the case of *Jennings v. Jennings*.[23]

In *Jennings*, a union had negotiated a retroactive compensation agreement with the employer for past underpayment of wages, and subsequently refused to divide the compensation payments according to the personal inequities suffered. In an action for equitable distribution brought by some of the aggrieved minority members of the union, the court ruled that: "In the absence of collusion or discrimination amounting to fraud . . . resort to the intervention of a court of equity can not be had against the legal action of a majority, no matter how mistaken nor [*sic*] oppressive from a minority viewpoint such majority action may be."[24] Since there was no violation of an LMRA provision, the aggrieved members were entirely without a remedy.

Moreover, in the *Trailmobile*[25] litigation, a union's activities, since they were not found to violate the specifics of the union's rules,

19. The LMRA and the LMRDA are the relevant statutes.
20. Wallace Corp. v. NLRB, 323 U.S. 248, 255, 65 S.Ct. 238, 242 (1944).
21. Steel v. Louisville & N. R.R., 323 U.S. 192, 203, 65 S.Ct. 226, 232 (1944).
22. 61 Stat. 136, 141 (1947), as amended, 73 Stat. 519 (1959), 29 U.S.C. § 158(b) (Supp. IV, 1963). Under these provisions, the union is forbidden, *inter alia*, to:
    1. 8(b)(1)—infringe upon those rights granted the represented employee in § 7.
    2. 8(b)(2)—cause an employer to discriminate against an employee.
    3. 8(b)(5)—require excessive initiation or membership fees.
23. 91 N.E.2d 899 (Ohio App. 1949).
24. *Id.* at 902.
25. Trailer Co. of America, 51 N.L.R.B. 1106 (1943), *objection overruled and CIO certified*, 53 N.L.R.B. 1248 (1943); Hess v. Trailer Co. of America, 31 Ohio Op.

which in turn did not violate the provisions of the LMRA, were held not to be subject to NLRB supervision or regulation. In this series of cases, the Trailer Company of America absorbed its wholly owned subsidiary, Highland Body Company. In the consolidation of production facilities which followed, the more numerous employees of Trailer, in accordance with union procedures, succeeded in depriving the Highland employees of their seniority rights. All efforts on the part of the minority to correct this situation were in vain, with neither the courts nor the NLRB considering themselves authorized to give a remedy.

There is a twofold difficulty here—one of substance and one of strict jurisdiction. *Jennings* was an example of the latter, as was *Hess v. Trailer Co. of America.*[26] In each of these cases confusion as to *who* should provide the appropriate remedy caused the failure to grant relief. In *Britt v. Trailmobile Co.*,[27] the problem was one of substance. There the court applied the standards involved in the duty of fair representation, yet failed to grant a remedy. In analyzing the reasons for this twofold problem, it is more expedient to consider the jurisdictional question first.

The original duty of fair representation was statutory; furthermore it covered all three aspects of the union-employee relationship. The LMRA and the LMRDA are but fractional guarantees. They are limited specifications of, not replacements for, the duty of fair representation. The recognition of this fact is the key to the problem presented in *Jennings v. Jennings.*[28] Precisely stated, the question is: who should enforce the residual duty of fair representation in the area of collective bargaining representation?

The traditional remedy for breach of the duty of fair representation had been in the courts, where all of the early landmark cases under discussion had been initiated. This was a practical necessity, since there were at that time no administrative agencies established which could directly control labor unions,[29] at least to the extent of formally

566 (Hamilton Co. C.P. 1944), *aff'd*, 31 Ohio Law Rep. 51 (1945); Trailmobile Co. v. Whirls, 331 U.S. 40, 67 S.Ct. 982 (1947), decided on the basis of § 8 of the Selective Training and Service Act, 54 Stat. 890, as amended, 58 Stat. 798 (1944); Britt v. Trailmobile Co., 179 F.2d 569 (6th Cir.), *cert. denied*, 340 U.S. 820, 71 S.Ct. 52 (1950).

26. 17 Ohio Supp. 39, 31 Ohio Op. 566 (Hamilton Co. C.P. 1944), *aff'd*, 31 Ohio Law Rep. 51 (1945). Here the court's decision was quite similar to *Jennings* in that it was based upon jurisdictional grounds.

27. 179 F.2d 569 (6th Cir. 1950), *cert. denied*, 340 U.S. 820, 71 S.Ct. 52 (1950). Here, the court refused to grant the remedy even though it applied the *Steel* doctrine. Situations such as this, in which the courts refuse or are unable to find a breach of duty where seemingly one should have been found, make evident the advantages of administrative handling of disciplinary standards.

28. 91 N.E.2d 899 (Ohio App. 1949).

29. The RLA provided no administrative remedy for breaches of the duty of fair representation except possibly in cases involving the misapplication of a collective bargaining agreement. There the employee might be able to present his cause before the Railway Adjustment Board. RLA § 3, 48 Stat. 1189 (1934), 45 U.S.C. § 153 (1958). The NLRA was able to control unions as to unfair labor practices only with

policing unfair labor practices. In the primary area, the NLRA and its amendments,[30] no administrative machinery was made available until the passage of the LMRA in 1947. However, the NLRB was active in supervising discriminatory conduct on the part of unions, whenever it could obtain subsidiary jurisdiction. In fact, the NLRB was most anxious, even before the LMRA, to establish a general jurisdictional beachhead for itself in the field of labor-employee relations.

In *Larus & Brother*,[31] a CIO union, after defeating an AFL competitor in its struggle for the position of exclusive bargaining agent, established a separate union for Negro workers. The NLRB stated it was the union's duty to act as the "general representative of all the employees of the bargaining unit."[32] This strong language, however, was never activated since the contract involved had expired during the course of legislation. The NLRB nevertheless indicated that decertification would result if such an incident[33] occurred in the future.

This action by the NLRB marked the first time that it had so broadly construed its jurisdiction. While the advance was merely dicta and not immediately used as precedent,[34] its thesis was reaffirmed in dicta in *Hughes Tool Co.*[35] Neither one of these cases went so far as to claim jurisdiction over all breaches of the duty of fair representation for the NLRB, yet they indicated a definite trend in that direction.[36]

This trend towards NLRB assumption of the enforcement of the general duty was not founded solely on the aspirations of the NLRB. Both state and federal courts very definitely demonstrated their approval of the extension of the Board's powers. In *Holman v. Industrial Stamping & Mfg. Co.*,[37] a United States District Court, upon facts which were almost identical to those in the *Trailmobile* litigation, dismissed the plaintiff's action for lack of jurisdiction,

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regard to those union activities which became so involved with those of an employer as to fall under the provisions of § 158(a) of the act; see, *e.g.*, Wallace Corp. v. NLRB, 323 U.S. 248, 65 S.Ct. 238 (1944).

30. At this point, it will be necessary to omit further treatment of the RLA. It has been considered jointly with its NLRA counterparts because of their basic similarity, and at times, identity. With the establishment of the NLRB as an administrative agency in the union-employee field, the two branch into distinct entities, incapable of being grouped together as has been done thus far. The remainder of the comment will consider exclusively the NLRA and the LMRA.

31. 62 N.L.R.B. 1075 (1945). See also Veneer Products, Inc., 81 N.L.R.B. 492 (1949); Southwestern Portland Cement Co., 61 N.L.R.B. 1217 (1945).

32. 62 N.L.R.B. 1075, 1082 (1945).

33. "Incident" includes any action which would be a violation of the union's status as "general representative."

34. The LMRA was passed in the interim, undoubtedly necessitating a period of readjustment.

35. 104 N.L.R.B. 318, *enforced*, 147 F.2d 69 (5th Cir. 1945).

36. In Peerless Tool & Engineering Co., 111 N.L.R.B. 853 (1955), a union refused to accept employees' dues or to process their grievances until they paid an assessment (strike tax). In extremely strong dictum, the Board indicated that any union threats against an employee would constitute a breach of the duty of fair representation and become subject to the NLRB's jurisdiction as unfair labor practices.

37. 142 F. Supp. 215 (E.D. Mich. 1956); see also, Holman v. Industrial Stamping & Mfg. Co., 344 Mich. 235, 74 N.W.2d 322 (1955).

stating: "Congress has vested jurisdiction to determine what activities are unfair labor practices within the NLRA, as amended, in the NLRB and not in the United States District Courts."[38] By granting the Board the right to define "unfair labor practice," the court attempted to vest total control in the Board. Additional judicial encouragement soon followed. In *Amazon Cotton Mill Co. v. Textile Worker's Union*,[39] where an employer refused to bargain collectively, and the union sued for an injunction to force him to do so, the court stated that: ". . . a remedy in the courts not expressly given is not to be inferred; and especially is this true where Congress has worked out elaborate administrative machinery for dealing with *the whole field of labor relationships*, a matter requiring specialized skill and experience. . . ."[40] (Emphasis added.) The *Amazon* case was the optimum of judicial encouragement for Board jurisdiction. The court impliedly abdicated its labor law jurisdiction with regard to the union's duty of fair representation to all members of its bargaining unit. With such support, justified or not, it was merely a matter of time before the NLRB attempted to make the transition from *Larus* and the LMRA to general jurisdiction. This step was finally taken in *Miranda Fuel Co.*[41]

IV.

MIRANDA, THE NLRB, AND THE GENERAL DUTY OF FAIR REPRESENTATION

In *Miranda* the NLRB for the first time expressly took jurisdiction over all breaches of the duty of fair representation, claiming the right to term such breaches unfair labor practices, and to deal with them accordingly. In this case, the plaintiff employee was a ranking member on the defendant employer's seniority list. The collective bargaining agreement provided that all employees without sufficient seniority to have steady work during the slack season (April 15 to October 15) would be entitled to a leave of absence. Petitioner employee, though he had sufficient seniority to guarantee work during this period, obtained a leave of absence from his employer on April 12. Due to subsequent personal illness, he did not return to work until October 30. His fellow union members thereupon pressured the union to have the employer drop the petitioner from his previous seniority rating; both the union and the employer acquiesced.[42] The NLRB

38. Holman v. Industrial Stamping & Mfg. Co., *supra* note 37, at 218.

39. 167 F.2d 183 (4th Cir. 1948).

40. *Id.* at 187. Even the Supreme Court by its silence, *seemed* to encourage such an interpretation of the Board's power. See Syres v. Oil Workers Int'l Union, 350 U.S. 892, 76 S.Ct. 152, *reversing* 223 F.2d 739 (5th Cir. 1955).

41. 140 N.L.R.B. 181 (1962).

42. The direct infringement upon petitioner's rights by the union is the subject considered here. The union's forcing of the employer to discharge the employee (petitioner) brings up points which are outside the scope of this comment—the undue delegation of employer's rights to the union and the § 8(b)(2) provision of the LMRA.

then found that the union's activities were violations of the rights granted the employee by section 7 of the LMRA[43] and were therefore unfair labor practices under section 8(b)(1)(A).[44]

The rationale advanced by the Board in arriving at its decision in *Miranda*, while logically simple, is legally unsound. Its basic premise is derived from section 9(a) of the LMRA which provides for exclusive representation by one certified union of one duly apportioned bargaining unit.[45] Analyzing this grant of power, the Board reaffirmed the general duty of fair representation which must fall upon a union so empowered.[46] The Board next pointed to section 7 of the LMRA which gives every employee the right to bargain collectively through representatives of their own choosing. At this point there is nothing controversial nor anything illogical with what the Board has said. The same cannot be said, however, for its conclusion that section 7 must be read in the context of section 9, thus prohibiting any and all discrimination against bargaining unit members. By classifying the general duty of fair representation as an implied section 7 guarantee, the Board implicitly gained jurisdiction over its enforcement through the provisions of section 8(b)(1)(A). This cannot be accepted.

Section 7 deals exclusively with prohibiting union discrimination based on membership grounds. While it is true that section 9(a) is the source of the general implied duty of fair representation,[47] to read it in its entirety into section 7 is to change completely the limited guarantees contained in the latter. A general right cannot be read by implication into a provision deliberately designed for limited purposes. By equating the union's express duty of non-discrimination on the basis of union membership with the union's duty of fair representation in the bargaining aspects of its relationship with its represented employees, the *Miranda* case overlooks the very basic distinction which the LMRA makes. If the act itself had been intended to encompass the entire field of the union-employee relationship, it could have easily done so. By doing on its own initiative what Congress has refrained from doing, the NLRB has usurped a legislative function.

The distinction which the NLRB overlooks had been previously spotlighted in the case of *Durandetti v. Chrysler Corp.*[48] In this case the plaintiff employee sued both the union and his employer in a federal district court to enforce his seniority rights, alleging that the union's administration of his cause was so conducted as to be a viola-

43. 61 Stat. 136, 140 (1947), 29 U.S.C. § 157 (Supp. IV, 1963).

44. This provision is used to protect employees' § 7 rights against union interference

45. The unit generally consists of one craft, one plant, or one division of an employer company.

46. See Wallace Corp. v. NLRB, 323 U.S. 248, 65 S.Ct. 238 (1944); see also Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681 (1953), which as earlier mentioned, read the general duty of fair representation into § 9(a) of the NLRA.

47. This is the section from which *Wallace* and *Huffman* have derived the general duty of fair representation.

48. 195 F. Supp. 653 (E.D. Mich. 1961).

tion of the former's duty of fair representation. In dismissing the action for lack of jurisdiction, since the plaintiffs had failed to exhaust their intra-union remedies, the district court stated that while it is true that some activities included under the original duty of fair representation lay within the exclusive jurisdiction of the NLRB,[49] where a union, exercising its wide range of discretion, bases its conduct upon considerations which are "irrelevant" or "arbitrary," the district court will then have jurisdiction over the discrimination.[50] Section 7 provides no stepping stone to a general duty; it is not a residual power source. It is strictly limited to those acts of union discrimination which are based on some facet of union membership.

Moreover, in *Local 1976 United Bhd. of Carpenters v. NLRB*,[51] the Supreme Court emphasized that, considering its origin, the LMRA must not be broadly construed. Noting that it was the end product of much debate and compromise between the forces of labor and management, the Court stressed that, especially in situations of compromise, it should be wary of finding by construction that which it cannot find expressly in the act.

While the Supreme Court has not yet considered the *Miranda* rationale, a recent Court of Appeals case indicates that it will not be upheld. In the *NLRB v. Local 294, Teamsters*,[52] a union caused an employer to fire the plaintiff employee because he was "no good" and a "trouble maker." The Second Circuit held that although the union's actions were discriminatory and breaches of the duty of fair representation, since they were not shown to be on considerations of union membership, they were not to be included under the NLRB's jurisdiction.

The general duty of fair representation cannot be read into the LMRA as was done in *Miranda*. Such an interpretation would be beyond the express provisions of the LMRA and contrary to the general background of its legislative history. If any change is to come, it will have to be from Congress.[53]

V.

STATUTORY REFORM

The general sentiment on the part of the lower courts, as well as the attitude of the NLRB, suggests that there are convincing reasons to place the NLRB over the general scope of the union-employee

49. *Id.* at 655. Here the court referred to the specific provisions of the LMRA, which although express statutory guarantees themselves, are still part of, that is, evolved from, the general duty of fair representation.

50. Durandetti v. Chrysler Corp., 195 F. Supp. 653, 655 (E.D. Mich. 1961).

51. 357 U.S. 93, 78 S.Ct. 1011 (1958).

52. 317 F.2d 746 (2d Cir. 1963).

53. The Second Circuit has very recently ruled in NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963), that discrimination for reasons wholly unrelated to union membership and loyalty does not constitute an unfair labor practice. Despite the strong arguments of NAACP and the American Civil Liberties Union as amici curiae the Court stated that "matters of policy [such as this] must be settled by the Congress." *Id.* at 176. The end result of this decision is to establish, a fortiori, the need for new legislation in the fair representation area.

relationship. This is the substantive problem mentioned in connection with the case of *Britt v. Trailmobile Co.*[54] While the abstract principle that the union should so act as to give the greatest good to the greatest number of people stands unchallenged, the case for having the NLRB administer this standard is less clear. The general arguments which have been raised on behalf of NLRB action can be broken down into three major contentions.[55] First, because discrimination, by its very nature involves the limitations of the rights of a minority, the discriminators have a decided advantage in maintaining their position of superiority. By the very fact that those discriminated against are fewer in number, and almost without exception less able financially, they will be handicapped in their struggle to maintain their rights in necessarily prolonged court litigation. Therefore, since courts are prohibitively expensive, a more feasible and economical remedial body such as the NLRB must be granted jurisdiction. Second, since the standards of conduct in the field of labor relations are vague at best, it would be decidedly advantageous to allow an agency with a wealth of factual background and precedent to handle the cases. Third, the benefits to be accrued from the handling of all labor issues by one body would be extremely conducive to the streamlining of the often rag-tag processes which present procedure forces upon us.[56]

The validity of the second and third of these points is self-evident. Certainly the advantages of experience and uniformity enhance the possibility of a streamlined administration of the mutual rights and obligations of unions and employees. The first point is nevertheless open to the possibility of flooding the Board with trivial claims. The danger involved here would seem to be minimal, however, when considered in its full context. For although access to remedy will be made easier, it will still not be made free. It will still cost a plaintiff to prosecute his claim, and it is doubtful whether money will be expended in great amounts simply for the satisfaction of harassing a union. The people involved in plaintiffs' actions on the whole, simply do not have the financial resources to carry out such a program, even if

54. 179 F.2d 569 (6th Cir. 1950), *cert. denied*, 340 U.S. 820, 71 S.Ct. 52 (1950). The reasons for this proposed change are not to be found in any distinction as to the enforcement of remedies. The NLRB can, of course, "decertify" an offending union. But this power of decertification is already a wide one; furthermore, it is generally inapplicable in the area of personal union discrimination because of its disproportion to the offenses involved. It would be inconceivable for the NLRB to decertify, for example, the United Automobile Workers Union because it had treated one or two of its represented employees "arbitrarily" or "unfairly."

The NLRB may also issue "cease and desist" orders and force the rehiring and compensation of an improperly discharged employee. But the courts may either issue injunctions or grant damages—the NLRB's remedies with different labels. The reasons for NLRB jurisdiction are not here; rather they lie more in the processes preliminary to the actual administration of these remedies, in particular, to the practicality of these prior procedures.

55. For an excellent discussion of the general availability of this change, see Cox, *supra* note 17, at 172-73.

56. For a contrary view, see Note, *Duty of Union to Minority Groups in the Bargaining Unit*, 65 HARV. L. REV. 490, 502 (1951).

they so desired. The danger of sincere but misguided claims is one which must be born in justice to the obligations owed to employees. It would seem, therefore, that the definite benefits to be derived from all three of the considerations proposed more than outweigh the potential harm to be suffered as an incidental subsidiary of the first.

To guarantee fully the complete comprehension and implementation of this policy, more than a mere amendment to section 7 is necessary. The duties which are enunciated in section 7 are extremely valuable as far as they extend; what is needed is an additional provision in section 8(b) of the LMRA itself, making any arbitrary union action in the context of the collective bargaining function an unfair labor practice and subject to the jurisdiction of the NLRB. Such a provision could well read as follows:

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents:

> (8) *when either negotiating or enforcing a collective bargaining agreement, to act with regard to or discriminate against any members of its bargaining unit upon considerations which are either arbitrary or unfair; Provided, that nothing in this section shall be construed as limiting or affecting in any manner those guarantees granted in section 7 as enforced through section 8(b)(1)(A).*

The main clause, of course, incorporates the purpose of the amendment; the proviso is necessary since it is both sound and logical to leave intact those guarantees which have been shown to be of benefit to the employee. The purpose of this proposed section is not to remove those certain rights heretofore recognized and replace them with a general standard (that is, regress to *Steel* and *Wallace*), but rather to give the NLRB, the functionally qualified body, power to enforce unified standards in that area not covered specifically by the present LMRA.

VI.

CONCLUSION

The general union duty of fair representation, as interpreted through *Steel*, *Wallace* and *Huffman*, is statutorily based; it was not, however, repealed by subsequent express legislation which instead merely specified that portion of the general duty which dealt with the prevention of membership based discrimination. The enforcement of the residual general duty in the area of collective bargaining today cannot be carried on by the NLRB, since the LMRA does not expressly convey, nor should the courts construe, such an extensive jurisdiction. Yet for reasons of availability, uniformity and justice, a general residual power should be legislatively granted to the NLRB.

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