NATIONAL LABOR RELATIONS BOARD

M-00634

OFFICE OF THE GENERAL COUNSEL

Washington, D. C. 20570

Mr. Vincent R. Sombrotto, President
National Association of Letter Carriers
of the United States of Ameriaca
100 Indiana Avenue, NW
Washington, DC 20001

Dear Mr. Sombrotto:

Attached hereto is a memorandum concerning a union's duty of fair representation under the Labor-Management Relations Act. The memorandum is intended to serve as a guideline for determining whether a complaint should issue in cases involving a charge that a union has failed to represent employees fairly. The memorandum sets forth my position on this matter and provides the rationale therefor.

Although the memorandum is being made public, I think that it is appropriate to bring it to your particular attention. Needless to say, the law of fair representation necessarily has a substantial impact on your organization and its constituent local bodies.

My own concern in this area is based on the tendency of some tribunals to define the duty of fair representation very broadly. For the reasons set forth in the memorandum, I believe that this tendency can have a deleterious impact on the health and stability of constructive collective bargaining relationships. Accordingly, I have sought to limit the scope of the duty to certain reasonably well-defined categories of violation. Absent unusual circumstances, we would dismiss the charges, absent withdrawal.

Of course, this memorandum will directly affect only the disposition of those cases coming before the NLRB. It will not directly affect fair representation cases coming before the NLRB. It will not directly affect fair representation claims that are made by individuals in private lawsuits. However, where such claims are made, your organization or its counsel may wish to bring this memorandum and/or its rationale to the court's attention, inasmuch as the memorandum represents the official view of the NLRB's General Counsel acting pursuant to his authority under Section 3(d) of the Act. Of course, any dismissal letters in a related NLRB case could also be cited to the court.

I trust that you will find the memorandum instructive and that you will view the positions taken therein as conducive to sound and constructive collective bargaining relationships.

Sincerely,

John S. Irving
General Counsel

Attachment

cc: General Counsel

OFFICE OF THE GENERAL COUNSEL

M-00634

MEMORANDUM 79-55 July 9,1979

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: John S. Irving, General Counsel

SUBJECT: Section 8(b)(1)(A) Cases Involving A Union's Duty Of Fair Representation

I. INTRODUCTION

It is now well settled that a union violates Section 8(b)(1)(A) of the Act by failing in its obligation to represent fairly the employees in the bargaining unit. This memorandum sets forth the circumstances under which a union will be considered to have breached this obligation.

Although, as indicated, the union's legal duty is clear, the parameters of this duty remain confusing and unclear. One index of this imprecision is the myriad of descriptive words used to define the obligation. In the landmark case of Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), the Supreme Court said that a union must represent employees "without hostile discrimination, fairly, impartially, and in good faith." In the later case of Ford Motor Company v. Hoffman, 345 U.S. 330, 338 (1953), the Court added to "good faith" the concept of "honesty of purpose." Still later in Humphrey v. Moore, 375 U.S. 335, 348 (1964), the Court indicated that a union would be considered guilty of a breach of the duty if there were "substantial evidence of fraud, deceitful action or dishonest conduct." In Vaca v. Sipes, 386 U.S. 171 (1967), the Court stated that a union would violate its obligation if it "arbitrarily ignored a meritorious grievance or processed it in a perfunctory manner." The Vaca case is also noteworthy in that it took cognizance of the Board's holding in Miranda Fuel Co., Inc., 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2nd Cir. 1963), that a breach of the duty of fair representation would constitute a violation of the NLRA. In the Miranda case itself, the Board used the words "unfair, irrelevant, or invidious."

The point need not be belabored further. The duty of fair representation has been described in all too many phrases, each of them somewhat vague and imprecise. The more important point is that this vast and confusing array of word-tests has had unfortunate consequences. Given the number of word-tests and the imprecision of each, a union can reasonably fear that a court or other tribunal could find any conduct that can somehow

be characterized as "unfair" to be in breach of the statutory obligation. And it is not surprising that some courts have confirmed these fears by imposing their own standards on union conduct, and finding that these standards have not been met. 1/

The absence of clear standards and the extremely broad approach taken by some courts have operated to adversely affect national labor policy in several important ways. First, unions have considered it prudent to process clearly nonmeritorious grievances all the way through the grievance procedure and on to arbitration, lest they be accused of breaching their duty to represent employees fairly. The result is that management and union officials spend needless hours discussing obviously nonmeritorious grievances, and mutual trust and constructive relationships between labor and management are seriously undermined. 2/ A further result is that arbitral channels become clogged when these grievances are not resolved to the employee's satisfaction. Second, a very large number of "unfair representation" charges are filed with the NLRB. Since 1968, the number of charges filed against unions alleging a violation of Section 8(b)(1) has increased by 170 percent. Many of these charges are based on little more than the fact that the employee feels he/she has been treated "unfairly". Although these charges lack merit, they nonetheless require investigation, analysis, a dimissal (absent withdrawal), and a review upon any appeal taken. 3/ The impact on NLRB's limited financial resources is obvious, especially since we estimate that, by 1980, unfair labor practice cases will be filed at the rate of over 800 per week. Third, a union and even an employer can become subject to substantial monetary damages if a court or other tribunal finds that the duty to represent fairly has been breached. It is clear that, at least for some employers and unions, such a monetary damage award can have a significant impact upon the viability of the enterprise or organization. 4/ Fourth, a union may very well be hardpressed to recruit stewards and officers who have legal and administrative expertise,

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1/ Associate Transport Inc., 209 NLRB 292, enfd. sub nom. Kesner v. NLRB, 532 F. 2d 1169 (7th Cir. 1976); De Arroyo v. Sindicato de Trabajadores, 425 F.2d 281 (1st Cir. 1970); Ruzicka v. General Motors Corp., 523 F.2d 306 (1st Cir. 1970); Milstead v. Teamsters, 99 LRRM 2150, 2153 (6th Cir. 1978; Smith v. Hussman Refrigerator Co., 100 LRRM 2238 (8th Cir. 1979).

2/ In the recent case of IBEW v. Foust, _____U.S. _____, 101 LRRM 2365 (1979), the Supreme Court recognized the value of granting to unions the discretion to "avoid [the] processing of frivolous claims."

3/ While this guideline memorandum cannot be a substitute for investigation of charges, I believe that an explication of what I perceive as the current standards will go a long way toward reducing some case intake and toward abbreviating some of the research and analysis undertaken in cases that are filed.

4/ Although the Supreme Court in IBEW v. Foust, supra, merely held that punitive damages could not be awarded in fair representation cases, the court clearly and repeatedly indicated that, in developing the doctrine of fair representation, due consideration should be given to the need to protect the financial viability of unions which act as collective bargaining agents for employees.

particularly if it must assure that no mistakes are made in the representation of employees. Although, as the Board has pointed out, the relationship between a union representative and an employee is not that of attorney and client, 5/ some courts have come close to imposing the strict fiduciary standards of the latter relationship. It is unrealistic to expect that rank and file employees who voluntarily serve as stewards will be able to meet such exacting standards.

Thus, a number of serious consequences flow from the vagueness, imprecision, and sheer number of word-tests used to define the scope of the obligation. This memorandum seeks to clarify the scope of the obligation, thereby minimizing these consequences. In attempting such a clarification, I shall not engage in the fruitless semantic exercise of trying to reconcile the various word-tests. Nor shall I add further confusion by adding new word-tests. Rather, I shall attempt to categorize, by fact-pattern, the various circumstances in which the duty to represent fairly can be said to have been breached. If the union's conduct falls within one of those categories, the Region should issue complaint, absent settlement. If the union's conduct does not fall within one of those categories, the Region should dismiss the charge, absent withdrawal, unless the case presents unusual circumstances not contemplated by this memorandum. 6/ In this latter regard, the mere fact that the union is inept, negligent, unwise, insensitive, or ineffectual, will not, standing alone, establish a breach of the duty. 7/

By narrowly defining the scope of the obligation, I am not leaving employees without means of redress where they are not satisfied with their representation. In the first place, there are instances, noted below, where the union's conduct will be considered violative, and we will vigorously prosecute these cases before the Board. Secondly, even where the union's conduct is not unlawful and is merely unsatisfactory to the employees, they are free, under the LMRDA, to remove the union's officers, and they are free, under the LMRA, to remove the union itself as the bargaining representative. As the Board has said, the relationship between the union and the represented employees is similar to the relationship between a legislator and a constituent. Beverly Manor, supra. If the employees are dissatisfied with their representation, there are democratic means of redress available to them.

5/ Beverly Manor Convalescent Center, 229 NLRB 692 (1977).

6/ If the Region believes that the case does present unusual circumstances and wishes to issue complaint, the case should be submitted to the Division of Advice.

7/ Washington-Baltimore Newspaper Guild (CWA), 239 NLRB No. 175 (1979). Pacific Coast Utilities Service, Inc., 238 NLRB No. 82 (1978); Great Western Unfreight System, 209 NLRB 446 (1974).

II. SUBSTANTIVE GUIDELINES

A. Improper Motives or Fraud

It is clear that a union breaches its duty of fair representation if its actions are attributable to improper motives or fraud. With respect to improper motives, there are some cases in which the union's conduct is based on the Section 7 activities of the employees. For example, if the union refuses to process a grievance because of the employee's efforts to bring in another union, or the employee's intra-union political activities, or the employee's nonmembership in the union, such refusal would violate the Act. Pacific Coast Utilities Services, Inc., 238 NLRB No. 82 (1978); ITT Artic Services, 238 NLRB No. 14 (1978). Further, even if the union's conduct is not based on Section 7 considerations, such conduct would be unlawful if it is based on irrelevant or invidious considerations. For example, if the union refuses to process a grievance because of an employee's color or sex or because of personal animosity between the employee and the union's leadership, such conduct would be unlawful. Owens-Illinois, 240 NLRB No. 29 (1979).

In determining whether the union is motivated by improper motives, the Region's analysis would be similar to that in any other case where motive is a factor (e.g. 8(a)(3)). Thus, for example, where there is some evidence of improper motivation, but the union asserts that it refused to process a grievance because the grievance was not meritorious, the fact that the union made only a cursory inquiry into the merits of the grievance may undercut the union's defense. Accordingly, that fact is relevant to the Region's analysis. ITT, supra; Newport News Shipbuilding & Dry Dock Co., 236 NLRB No. 197 (1978). However, the fact, standing alone, would not establish the improper motive.

Fraud cases, like improper motive cases, involve intentional misconduct. If the union engages in fraud in its representation of unit employees, such conduct would be inconsistent with the duty to represent these employees fairly. Humphrey v. Moore, supra. However, it should be noted that proof of fraud in this connection requires evidence that the union intentionally mislead the employee as to a material fact concerning his/her employment, and that the employee reasonably relied thereon to his/her detriment.

B. Arbitrary Conduct

In this category of cases are those where the union's conduct is wholly arbitrary. That is, there is no basis upon which the union's conduct can be explained. Thus, for example, the union would violate Section 8(b)(1)(A) if it refused to process a grievance without any inquiry or with such a perfunctory or cursory inquiry that it is tantamount to no

inquiry at all. Beverly Manor Convalescent Center, supra; P & L Cedar Products, 224 NLRB 244 (1976). Similarily, if there is a contract or an internal union policy which clearly and unambiguously supports the employee's position, and the union, without explanation, refuses to support the employee, such conduct would be arbitrary and therefore violative of Section 8(b)(1)(A). Miranda Fuel Co., supra; U. S. Postal Service, 240 NLRB No. 178 (1979). 8/ M-00634

Notwithstanding the above, it must be emphasized that the union's inquiry into the facts concerning the grievance need not be the kind of exhaustive inquiry that one would expect from a skilled investigator. Jelco Inc., 238 NLRB No. 202 (1978); Plumbers Local 195 (Stone & Webster Engineering Corp.), 240 NLRB No. 61 (1979). Further, the mere fact that the union's investigation reaches a conclusion that is later shown to be erroneous does not establish a violation. Similarly, if a contract provision supports the employee under one interpretation, and the union reasonably gives the contract another interpretation, the fact that the union's interpretation may be "wrong" (as others might see it) does not establish the violation. Washington-Baltimore Newspaper Guild (CWA), supra. So long as the union makes some inquiry into the facts and/or so long as the union's contract interpretation has some basis in reason, the union's refusal to process the grievance will not be considered arbitrary.

C. Gross Negligence

It is well established that mere negligence will not establish a breach of the duty of fair representation. Great Western Unifreight System, supra. Conceivably, however, there could be cases where the negligence was so gross as to constitute a reckless disregard of the interests of the unit employee. While I am not bound by circuit court precedent in exercising my Section 3(d) discretion, it is noteworthy that the Sixth and Ninth Circuits have indicated that gross negligence may violate Section 8(b)(1)(A). 9/ For example, in Robesky, supra, the

8/ It would also be arbitrary for the union to have an employment-related rule which has no objective standards at all, so that the implementation of the rule is left wholly to the unfettered discretion of union officialdom, and the employees are left in the dark about how the rule will be implemented. See Boilermakers Local 667, 242 NLRB No. 167 (1979).

9/ Ruzicka v. General Motors Corp., 523 F. 2d 306 (6th Cir. 1975); Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978).

court held that a union breached its duty of fair representation by failing to notify an employee that her grievance would not be taken to arbitration, thereby leading her to reject a settlement offer she otherwise would have accepted. It was the court's view that, while a simple negligence was not enough to constitute a breach of the union's duty, acts of omission by union officials not intended to harm employees, sometimes may be so egregious, so far short of minimum standards of fairness to the employee, or so unrelated to legitimate union interests as to be unlawful.

In some situations it is admittedly difficult to draw a line between negligence and gross negligence. Such lines can only be drawn after an examination of actual cases. In order to be better able to draw that line and to assure a uniform approach to these cases, Regional Directors should submit such cases for advice when they believe that the union's action amounts to gross negligence.

D. Union's Conduct After It Has Decided To Grieve on Behalf of the Employee

Because of the way the law had developed, a special word should be added for cases in which the union has chosen to process a grievance for an employee and then undercuts the position of the employee in the grievance procedure. There is some indication in the decided cases that a union may have the higher responsibility of an advocate once it decides to process a grievance on the employee's behalf. Jelco Inc., supra; Associated Transport Inc., supra; Owens-Illinois, supra. However, the cases in which a violation has been found involve improper motives or arbitrary conduct, as these terms are used above. Owens-Illinois, supra. Therefore, if the union conduct is improperly motivated (as in "A" above) or if there is no reason at all for the union's conduct (see "B" above), such conduct will be considered to be in breach of the duty of fair representation. 10/ However, the mere fact that the union has invoked the grievance machinery does not mean that it is statutorily precluded from thereafter settling the grievance or acquiescing in the employer's position. With respect to settlements, the union can consider the costs of further processing the grievance and decide to accept less than that which the employee seeks. Such action would be well within the "wide range of reasonableness . . . allowed a statutory bargaining representative in serving the unit it

10/ In addition, there may be cases where the grievance procedures are wholly inconsistent with the most elementary concepts of a fair and impartial hearing. For example if the grievant's interests are clearly adverse to the union official designated to represent him/her, or if the grievance is presented to a committee whose "union" members have interests clearly adverse to him/her, it may well be that the grievant is denied a fair hearing and that the union responsible therefor has failed to represent the grievant fairly.

represents . . . ." Ford v. Hoffman, 345 U.S. 330 (1953). See also IBEW v. Foust, supra, at pp. 9-10 of slip op. If the employer produces evidence which substantially undermines the employee's case, the union may reassess the grievance and would be privileged to withdraw it. UAW, Local 122 (Chrysler Corporation), 239 NLRB No. 151 (1978).

III. CONCLUSION

As noted, supra, this memorandum is intended to furnish guidance to the Regions, interested parties, and the public at large. It sets forth the approach that I will take, under my Section 3(d) authority, to cases involving an alleged breach of the duty of fair representation. I believe that this approach is a practical one. It is based on the realization that conflicting claims among unit employees are not always reconcilable, that union grievance handlers are often not sophisticated labor law experts, that union officials can make good-faith mistakes, and that mere poor judgement can be corrected at the ballot box.

J. S. I.

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