THE
DUTY OF FAIR
REPRESENTATION
(The B.A.D. Lecture)

Arbitrator Sidney Moreland

By

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I. Introduction

The duty of fair representation is the term used to describe the duty a Union owes to all persons in the bargaining unit to which the Union is legally authorized to represent. Those specific duties owed to represented employees by their bargaining representative have evolved primarily through Court actions spanning a half-century.

The duty of fair representation inferred by the Railway Labor Act (RLA) the National Labor Relations Act (NLRA), and more directly expressed in the Federal Labor-Management Relations Act (FLMRA) has been enforced by the Courts and the respective federal agencies for many years now, even though the duty is not expressly mentioned in the RLA and the NLRA.

Collective bargaining creates a subordination of individual employee rights for the collective interests of all employees in the bargaining unit. The majority of the federal labor laws lack protection for individual rights while granting Unions extraordinary power to negotiate and administer agreements. The Courts took recognition of the absence of statutory protection for the individual rights of employees and moved to remedy the void by interpreting the statutes to imply a duty of fair representation by the Union owed the employees it represents.

The right to fair representation by the lawfully recognized bargaining representative extends to all employees in the defined bargaining unit, whether or not they have Union membership, and is applicable to nearly all functions undertaken by the Union in the course of their interactions with the employer on behalf of the employees. Common Union functions wherein the duty is owed include negotiating agreements, operating hiring halls or other facilities servicing the represented employees, enforcing agreements or other employee rights, and processing claims or grievances.

The duty begins post recognition, the legal process by which workers are allowed to organize and elect a Union to represent them as their bargaining representative. The right to organize and elect a bargaining representative is authorized pursuant to and governed by federal laws:

National Labor Relations Act (NLRA) (29 USC 151) (private parties)
enforced through
National Labor Relations Board (NLRB)

Railway Labor Act (RLA) (45 USC 151-188) (railroads & airlines)
enforced through
National Mediation Board (NMB)

Federal Labor-Management Relations Act (FLMRA) (5 USC 7114) (federal agencies)
enforced through
Federal Labor Relations Authority (FLRA)

The rights afforded employees contrast differently under the various federal statutory schemes enabling collective bargaining rights. For instance, private sector employees under the NLRA are entitled to collectively bargain expressly with respect to wages, hours, benefits, and working conditions and also allowed the right to take concerted actions, such as strikes.[1] By contrast, federal employees under the FLMRA are not entitled to bargain with respect to wages, hours, benefits, and job classification and are not allowed the right to strike. Employees under the RLA are also limited in the manner in which they may undertake concerted actions.

Once employees have undertaken their legal right to organize and elect a Union/bargaining representative, the procedure is certified by the appropriate Agency and the Union is then legally recognized as the bargaining representative and the Employer must negotiate an agreement with the Union designated officers. This collective bargaining, or negotiation, is the most basic of Union tasks whereby the duty of fair representation owed to the represented employees begins.

There are two basic categories of fair representation cases; the duty owed while the Union negotiates agreements for the bargaining unit (Section IV) and other Union activities while administering the agreement, such as grievance handling, etc. (Section III).

The evolving jurisprudence has extended the duty of fair representation to most Union duties, but perhaps the most effective manner of teaching the duty of fair representation is to focus upon Union actions and/or inactions that have been held to be improper. In this endeavor, the acronym **B.A.D.** summarizing prohibited representative conduct is appropriately prescribed:

Bad faith: Union shall never act or not act on a matter based upon a personal issue or matter between the affected employee(s) and the Union or others. May require a showing of fraud, dishonesty, or deceit. (*e.g.*, dislike of employee(s), retaliation, criticism of Union, coercion, conflict of interest, hostility, political differences, bribery, vengeance, employee is anti-Union, *etc.*)

Arbitrary: Union shall never act or not act on a matter arbitrarily, perfunctory, or without a reasonable and fair basis articulated in stated reasons. May require a showing of reckless disregard for the rights of the individual. (*e.g.*, negotiate only portions of an agreement, refusing to process claims/grievances in a disparate fashion, treating some duties with indifference, failure to perform ministerial acts, *etc.*)

Discrimination: Union shall never act or fail to act on a matter because of discrimination or prejudice towards the effected employee(s). May require a showing of invidious. (*e.g.*, discriminating on the basis of race, color, origin, gender, religion, sexual orientation, age, and/or membership status, *etc.*)

[1] The National Labor Relations Act of 1935 (NLRA) was amended in 1947 by the Labor Management Relations Act. Any reference herein to the NLRA is intended to include both acts.

The **B.A.D.** acronym is not to be over simplified in the course of providing fair representation to employees. There are multiple examples of bad faith, being arbitrary, and discriminating in the fulfillment of Union duties; perhaps too many to exhaustively discuss. However, the three B.A.D. categories represent a very good summarization of the three major areas of concern that have in fact manifested legally as discussed herein.

Conversely, the text of most cited cases herein reflect instances whereby Union negligence, honest mistakes, errors, and/or objectively making decisions to not pursue claims, grievances, or agreement provisions; will not constitute a breach of the duty of fair representation. It is my opinion that the scope of the duty continues to evolve.

II. Origin, Supreme Court Speaks

Steele Case (pronouncement of the duty of fair representation)

The earliest court action emanates from the Railway Labor Act, the federal law empowering railroad workers (later airline workers) to organize and collectively bargain. As mentioned earlier, the duty of fair representation is not stated in the Act, leaving the matter open for the Court inference.

Mr. Bester Steele was an African-American employee of the Louisville & Nashville Railroad working in a pool job as fireman. The Brotherhood of Locomotive Firemen & Enginemen was the bargaining representative, although blacks were not allowed membership.

The Union served notice to amend the collective bargaining agreement to prohibit black workers from being assigned or promoted into permanent positions. The Union undertook the negotiation of terms limiting the number of black firemen and their ability to be promoted without any notice to the black workers. More specifically, Steele was working in a passenger pool of six firemen (1 white, 5 black) when the pool was eliminated. The Union, acting under their collective bargaining agreement, moved to declare the jobs vacant and replaced them with four white Union members with less seniority than Steele.

Steele sued the Union for breach of their duty to represent him fairly because of his race. The Alabama Supreme Court found the Railway Labor Act did not require the Union to provide for the specific interests of minorities. The U.S. Supreme Court inferred otherwise, holding that the Union was required to represent all employees without discrimination as a consequence to the right to act as the statutory representative of a craft. Chief Justice Stone stated, in pertinent part:

"So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action…"

Chief Justice Harlan Stone

1. 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 (Union) the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them. It is important to recognize the Steele case's major importance by which the Courts *infer* that the RLA's grant of power to the Union as exclusive bargaining representative includes a duty of fair representation. It should be noted that the duty is not expressed by Congress in the statute itself and the duty is first recognized by the Steele Court. The Court subjects all Unions covered by the federal statutes to the newly defined duty of fair representation and provides a remedy.
   See also, Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 15 LRRM 715 (1944).

Huffman Case (Bad Faith and the Union's wide range of reasonableness)

Next, the Supreme Court weighed in and expanded the inference of the Union's duty of fair representation under the National Labor Relations Act in the Ford Motor/Huffman case eight years after the Steele decision.

Mr. Huffman began working for Ford in Louisville, Kentucky in September 1943. He was inducted into the military in November 1944 and served until July 1946. Within 30 days after his military service ended, Huffman was re-employed by Ford with a retroactive seniority date from September 1943, giving him seniority credit for his military service under the Selective Training and Service Act of 1940, which provided that trained and certified employees who leave employment for military duty and apply for their old job within 90 days after leaving the military shall be reinstated by the Company.

The Union negotiated into the collective bargaining agreement that *all* veterans

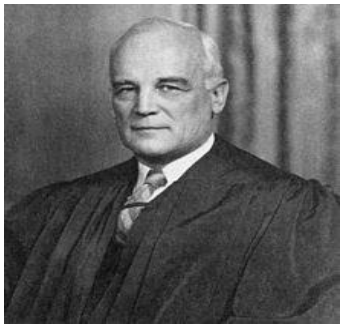
receive seniority credit even if the military service occurred prior to being employed at Ford. Huffman sued, alleging the Union, as certified bargaining representative was limited by statute from negotiating terms that undermined the seniority he was entitled to under the Selective Training and Service Act. Huffman alleged that he, and other veteran co-workers had suffered furloughs and layoffs at various times as a result of the collective bargaining provision negotiated by the Union, which diminished their seniority advantage under the Act.

The Court followed a similar analysis as the Steele case, holding that Unions granted representative rights by law, here pursuant to the National Labor Relations Act, were subject to Court review for purposes of enforcing a duty to fairly represent the covered employees.

While underscoring the Union's duty to fairly represent the employees as stated in Steele and adding the bad faith/good faith test, the Court sided with the Union on the facts, stating the Union's action in expanding seniority credit to all veterans to the detriment of Huffman, *et al*, was not a violation of the Union's duty to represent Huffman fairly. The Court said Union's are to be afforded a "wide range of reasonableness", subject always to good faith and honesty. We learn from Huffman that collective bargaining agreements may confer greater benefits to some members than others, and that such diverse treatment is not necessarily a violation of the Union's duty of fair representation.

Justice Burton wrote, in pertinent part:

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables… It is not necessary to define here the limits to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents…"



Justice Harold Burton

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

   The Supreme Court applied the fair representation analysis inferred initially under the RLA to a case arising under the NLRA. This case, like the previous RLA cases, dealt with a Union's power to negotiate a

contract. The Court applied the duty established in Steele and restated it as a duty of fair representation *"…subject always to complete good faith and honesty of purpose".* Hence, the bad faith test emerges with the Court expanding the duty of fair representation beyond discrimination, while counter balancing that expansion with the *"wide range of reasonableness"* standard. See also, Syres v. Oil Workers Int'l Union, 350 U.S. 892, 37 LRRM 2068 (1955).

Conley Case (duty of fair representation extends to post negotiation grievance handling)

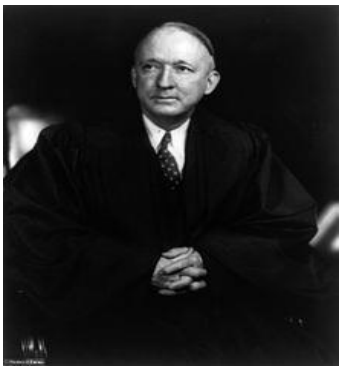
Next, the Supreme Court weighed in to further expand the duty of fair representation to Union activities conducted *after* the Union concluded negotiating the collective bargaining agreement.

In 1954, the Brotherhood of Railway and Steamship Clerks, Local 28 ("Union") entered into an agreement with Texas & New Orleans Railroad to discharge 45 African American employees and replace them with white workers with less or no seniority. Although some of the African Americans were re-hired, they returned to service with no retained seniority. Despite numerous pleas, the Union would not represent the African American workers in the matter. Mr. Conley, one of the African Americans sued the Union and Gibson (Union Officer) alleging the Union did not provide the same level of representation to African American members.

The Court dismissed Conley's suit on a procedural ground, which the Supreme Court overturned. While doing so, the high Court also dismissed the Union's assertion that since the National Railroad Adjustment Boards ("NRAB") had jurisdiction over grievances there should be no court review. Although the Conley case is primarily a holding that states that a suit will not be dismissed because of a deficient pleading, the case further underscores the federal Court's willingness to enforce the duty of fair representation after the collective bargaining agreement has been negotiated providing a grievance procedure and/or whenever necessary to bar discrimination by the Union representative.

Justice Black wrote, in pertinent part:

"It was error to dismiss the complaint for want of jurisdiction. Section 3 First (i) of the Railway Labor Act confers upon the Adjustment Board exclusive jurisdiction only over "disputes between an employee or group of employees and a carrier or carriers," whereas this is a suit by employees against their bargaining agent to enforce their statutory right not to be discriminated against by it in bargaining… The fact that, under the Railway Labor Act, aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract is no justification for the union's alleged discrimination in refusing to represent petitioners…"



Justice Hugo Black

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

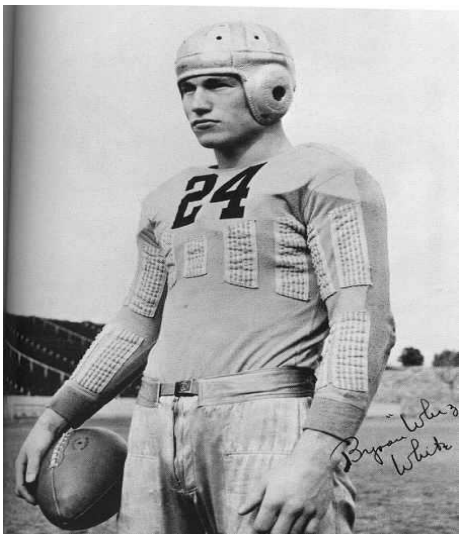
The Supreme Court, in a case involving a claim under the RLA against a Union for alleged racial discrimination in the application of a nondiscriminatory contract, held that the duty set out in Steele to represent all employees fairly did not come to an abrupt end with the making of the contract between 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, thereby expanding the duty of fair representation to all Union duties. Some scholars have noted that Conley also expanded the duty in a substantive manner by scrutinizing the manner in which agreements are administered by the Union, not merely by agreement language alone, which might only appear to be fair and impartial. See also, Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964).

Humphrey case (Arbitrary Union Conduct)

The Court's interpretations of the duty of fair representation continued after Conley and includes noteworthy decisions such as the 1964 case of Humphrey v. Moore where the Supreme Court opined that Union's were to be required broad discretion in grievance handling: *"Just as a Union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on not so frivolous disputes."* Humphrey reflects the Court's recognition of a Union's need for flexibility and discretion and the need for parameters for claims against Union's in the course of their activities.

Justice White wrote, in pertinent part:

"But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another… Just as a union must be free to sift out wholly frivolous grievances, which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes… As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination…"



Justice Byron "Whizzer" White

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

The Supreme Court found no breach of the duty of fair representation by the Union when it dovetailed seniority lists of 2 bargaining units after a merger of the 2 companies. The contract stated such seniority disputes shall be mutually agreed upon by the Employer and the Union and any controversy shall be submitted to the joint grievance committee and if unresolved to a higher Joint Conference Committee. The Joint Committee reached an agreement on how to merge the two seniority lists, which the Union agreed to. The merger resulted in the plaintiff losing his job under the seniority layoff order created. The plaintiff employee sued the Union for a breach of the duty alleging the Union President was deceiving, false, conniving, conspiring, and arbitrary; and since the Joint Committee's decision was the result of the Union's breach of the duty, then his layoff cannot be relied upon as valid under the collective bargaining agreement. The Court first addressed jurisdiction finding that it did not matter whether or not a breach of the duty of fair representation was also an unfair labor practice, because the claim alleged the layoff violated the contract constituting a NLRA 301 case, controlled by federal law even if brought in state court. The Court also found the Joint Committee, with its' equal number of Union votes, was empowered to make the seniority decision by the contract provisions. Even though the Union was representing two separate groups of workers, one favored over the other, the Court found no breach of the duty, stating: *"we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another."* The Court went on to address the due process complaint whereby the plaintiffs alleged they were deprived of a fair hearing by having inadequate representation at the Joint Committee hearing, stating: *"…employees made no request to continue the hearing until they could secure further representation and have not yet suggested what they could*

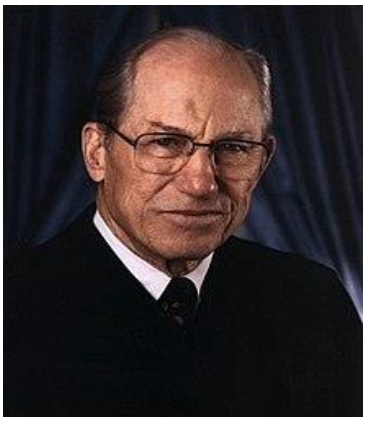
have added to the hearing by way of facts or theory if they had been differently represented. The trial court found it "idle speculation to assume that the result would have been different had the matter been differently presented." We agree."

Vaca Case (Arbitrary Union Conduct Prohibited, but no absolute right to arbitration)

The fourth most important case highlighted in this lecture represents the Court's pronouncement regarding the Union's discretion in grievance handling in Vaca v. Sipes, where the Court repeated the B.A.D. factors reiterating the arbitrary prohibition but also stating that an employee does not possess *"an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement"*. The Court added that the Union must not ignore an employee's meritorious grievance nor handle it in a perfunctory manner. The Vaca Court expanded the duty of fair representation but again cautioned that no employee has an absolute right to have a grievance taken all the way to arbitration. Vaca is a frequently cited case because of the broad range of issues covered therein. While those issues will be pointed out for other aspects of the duty of fair representation later in this lecture; we focus on it here wherein the arbitrary provision of the B.A.D. became the central focus of the Union's conduct.

Justice White wrote, in pertinent part:

"Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement… In providing for a grievance and arbitration procedure, which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement… It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by LMRA 203 (d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration… There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith…"



Justice Byron White

5. Vaca v. Sipes 386 U.S. 171,190, 64 LRRM 2369, 2376 (U.S.S.Ct.1967);

In Vaca, the Supreme Court dealt with a Missouri case where the Union chose not to advance a grievance to arbitration. The employee (Owens) filed suit in state court alleging the Company (Swift) violated the collective bargaining agreement by discharging him and that the Union (Nat'l Brotherhood of Packinghouse Workers) violated the duty of fair representation by *"arbitrarily"* refusing to take his grievance to arbitration. A state court jury found for the plaintiff employee, awarding $7,000. in compensatory and $3,300. in punitive damages. The state court Judge set aside the verdict ruling that the matter was an unfair labor practice case under the NLRA and the NLRB had exclusive jurisdiction. The Supreme Court took up 3 different issues: 1) jurisdiction/pre-emption; 2) Union's liability; and 3) relief awarded by the state court, particularly the damages. The Supreme Court rejected the NLRB exclusive jurisdiction argument allowing state court jurisdiction, but ruled that federal law (NLRA) controlled and was not applied. The Court undertook an extensive reasoning on pre-emption of remedies outside of the NLRB and underscored the duty of fair representation's importance and the need for retained federal Court jurisdiction. The Court further discussed the interplay between breach of contract by an employer and the affect a Union's breach of duty of fair representation may have upon the contract breach, and/or whether the exhaustion of contract remedies is an adequate defense if/when caused by the Employer or by the Union. The Court reiterated the B.A.D. factors and stated they were *"grounded in federal statutes"*. The Court found no breach of the duty of fair representation by the Union not taking Owens' case to arbitration, explaining the need for Union discretion and stating *"if a Union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced."* Bad faith and arbitrary factors were both applied; neither were found to have been breached by the Union; and the Court concluded by stating that even had the grievance been meritorious, it still would not have proven the

Union acted arbitrarily or in bad faith. Finally, the Court also addressed damages in a breach of duty case, stating an order to compel arbitration should not be the exclusive, and addressing the apportionment of damages between an Employer and a Union by stating: "…*damages 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. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper."*

In 1971, in Motor Coach Employees v. Lockridge the Court described the standard by which duty of fair representation claims would be scrutinized, stating: *"There must be substantial evidence of fraud, deceitful action, or dishonest conduct."* While the Court quoted from Humphrey and Vaca, it is arguable whether or not the Court intended to lessen the B.A.D. factors, or whether they were expounding upon the bad faith factor. Certainly, the bad faith element was expanded in my opinion, but the burden of proof requiring substantial evidence of bad faith reflects the Court's continued concern about the potential harm from unrestricted claims for a breach of the duty.

Five years later, the Court further clarified the B.A.D. standard and expounded upon the arbitrary prohibition in Hines v. Anchor Motor Freight by allowing the Unions *"mere errors in judgment"* but prohibiting Union representation which results in the employee left *"without jobs and without a fair opportunity to secure an adequate remedy"*. Arguably, the Court imposed a due process standard when assessing the Union's handling of the lost grievance mandating *"an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract"* in their justification for reversing the arbitration decision as a result of the Union's breach of the duty of fair representation. The Hines Court emphasizes the Union's duty to ensure the employee with due process in instances requiring enforcement of the collective bargaining agreement against an employer.

For an understanding of the history of the duty of fair representation, it is essential to recognize the Court's initial inference of the duty and their subsequent willingness to accept jurisdiction, enforce it, and establish the scope of the duty in future cases.

III. Federal Agency Enforcement

The federal agencies responsible for enforcement of the three primary labor laws, have followed the Courts' lead in administrative proceedings by inferring the lawfully granted power to represent employees infers with it the duty of fair representation, wherever the statutes lack express language.

National Labor Relations Board (NLRB)

The NLRB, in their oversight of the NLRA, cites the Act (29 USC 151-169) and follows the Court's judicially created inference of a duty of fair representation stemming from the statutory authority of power granted to the representative (Union) and the resulting subordination of the employees' individual rights. Here the NLRA like the RLA, falls short of expressing a duty of fair representation, stating in pertinent part in

Section 9(a): *"…Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment…"*

See Miranda Fuel Co. 140 NLRB 181, also 326 F.2d 172 (2d Circ.1963), where the NLRB first used its jurisdiction over unfair labor practice (ULP) charges in Section 8 of the NLRA to enforce the duty of fair representation. The Board found that unfair representation by a Union is prohibited by Section 7 of the NLRA, stating that Section 7 *"gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment…"* As a result, jurisdiction over Union activity became concurrent with the NLRB and the Courts, thus the aggrieved employee may bring a complaint in either forum.

Most recently, the NLRB General Counsel issued an internal directive guiding the agency's prosecution of cases against Unions for the breach of the duty of fair representation requiring the Union to offer additional evidence (a "reasonable excuse" or "meaningful explanation") when asserting "mere negligence" as a defense, and if the Union fails to do so, the negligent conduct will be considered "arbitrary" and elevated to "gross negligence". See NLRB GC Memo 19-05

More recent NLRB decisions concerning the duty of fair representation:

United Nurses and Allied Professionals (Kent Hospital) and Jeanette Geary 367 NLRB 94 (2019); (Breach of duty of fair representation by Union not providing non-Union dues paying member with an audit verification letter proving the amounts spent on lobbying activities, since Beck objectors' dues cannot be spent on such activities. The Board went further and found the Union unlawfully charged lobbying costs to the Beck objectors because such non-representational activities are not so related to the Union's representational duties as to justify compelled financial support from dues paid by non-Union member objectors)

Although the NLRB bases the decision as an unfair labor practice/breach of the duty of fair representation/Section 8(b)(1)(a) violation; it avoids a discussion about the B.A.D. factors and/or which factor may have been violated by the Union's failure to provide sufficient audit verification information. Instead, the NLRB cited its' own holding in California Saw & Knife Works 320 NLRB 224 (1995) which identified the information a Union must provide to Beck objectors emanating from the Supreme Court's pronouncement in Chicago Teacher's Union v. Hudson 475 U.S. 292 (1986) which stated that *"basic considerations of fairness…dictate that the potential objectors be given sufficient information to gauge the propriety of the Union's fee"*. Despite the Hudson case being a public sector case involving First Amendment rights not applicable to the NLRA, the NLRB followed the D.C. Circuit Court of Appeals holding in Abrams v. Communication Workers 59 F.3d 1373 (D.C. Circuit 1995) which stated, *"Although in Hudson the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in basic considerations of fairness, as well as concern for the First Amendment rights at stake."*

It should be noted that the Hudson case was not a case about the duty of fair representation, but rather about the scrutiny of a Union created procedure, wherein the duty was not raised. The 1995 case of Abrams v. C.W.A., *supra*, did not depart from the B.A.D. factors, it merely held the Union's own constitution requiring non-member

objectors to exhaust their objections through mandatory arbitration, which they did not contract for, thereby *"limiting the choice of forum for the challenge*"; violated the duty of fair representation under the arbitrary standard.

U.S.W. International Union (Trimas Corporation dba Cequent Towing Products & Individual 357 NLRB 48 (2011); (Breach of the duty by Union's arbitrary decision to require non-Union members seeking objector status under Beck to assert their objector status annually.)

Steamfitters Local No. 342 of the Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada and Joe Jacoby 336 NLRB 44; (No breach of the duty by Union's negligent failure to refer employee to a job in the proper order.)

Teamsters Local No. 579 and Brandon M. Jones 350 NLRB 87 (2007); (Breach of the duty by Union's failure to provide data relating to the Union's expenditure of funds collected under a union-security provision for Union activities unrelated to collective bargaining, contract administration, or grievance adjustment over the objection of dues paying non-Union member employees) See Communication Workers v. Beck 487 U.S. 735 (1988), for the Supreme Court's imposed obligations, known as "Beck obligations"; and Chicago Teacher's Union v. Hudson 475 U.S. 292 (1986) wherein the "basic considerations of fairness" standard evolved as a duty of fair representation issue when weighing how much information the Union is obligated to provide to Beck objectors. The NLRB further stated the Union's long established wide range of reasonableness does not extend to conduct that contravenes Hudson and denies essential information to non-Union member Beck objectors. See United Nurses and Allied Professionals (Kent Hospital) and Jeanette Geary 367 NLRB 94 (2019), *supra*, where the Beck information debate continues under the duty of fair representation heading.

Communications Workers of America Local No. 4309 and Sanda Ilias 359 NLRB 131 (2013); (Breach of duty by Union's arbitrary decision to require non-Union members seeking objector status under Beck to assert their objector status annually.)

National Mediation Board (NMB)

The NMB, in their oversight of the RLA does not currently have an unfair labor practice mechanism for adjudicating complaints concerning a Union's breach of the duty of fair representation. Such complaints in the RLA sector are heard by the Courts.

Federal Labor Relations Authority (FLRA)

The FLRA, in their oversight of the FLMRA, cites 5 USC 7114(a)(1) for enforcement of the duty of fair representation in federal employment, which by comparison to the NLRA and the RLA, provides significantly more statutory guidance by stating: *"A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."* (underlined emphasis added)

See, 28 FLRA 908, Ft. Bragg Assoc. of Educators, NEA; and 55 FLRA 601, NATCA, MEBA/AFL-CIO; and 49 FLRA 738, NFFE Local 1827; and 66 FLRA 467,

NATCA; and 36 FLRA 776, Antilles Consolidated Education Association; and 53 FLRA 1789, AFGE Local 1345, et al;

While most FLRA cases seem to involve complaints against the Union by non-members alleging discriminatory and/or arbitrary Union behavior towards the non-members; the duty does not apply when the Union does not have exclusive representational authority, such as class action pay disputes where the nonmembers could file suit themselves or in adverse action complaints where the employee may appeal to the Merit Systems Protection Board (MSPB) on their own.

More recent FLRA decisions concerning the duty of fair representation:

N.F.F.E. and Henry Thompson 24 FLRA 320 (1986); (No breach of the duty of fair representation by the Union by failing to show up for a scheduled grievance meeting.)

A.F.G.E. Local 3529 and Jerry Cyncynatus 31 FLRA 1208 (1988); (No breach of the duty by Union who negligently failed to timely file grievance.)

A.F.G.E. Local 3282 and Lenda D. Spivey 61 FLRA 80 (2005); (Breach of duty of fair representation by Union's arbitrary failure to provide grievants with any explanation of how a monetary settlement was to be divided among the 19 employees involved in the grievance. The "failure to explain" why some grievants received payment and others did not was "arbitrary" and a violation of the duty; however the back pay was denied the grievants, since there is no evidence that those 12 grievants would have received monetary awards if the Union had explained to them the reasons for the settlement.)

A.F.G.E. Local 1164 and Karen Harrington Emery Case No. BN-CO-50066 (1996); (No breach of the duty by the Union by alleged discrimination of non-membership of employee who sought a hardship transfer and while speaking with the Union she was asked whether or not she was a member.)

A.F.G.E. Local 3354 and Opal Lang 58 FLRA 48 (2002); (Breach of duty by Union discriminating against non-members in the handling of settlement funds where the Union processed and paid all 38 claims by Union members and did not pay 30 claims by non-members.)

A.F.G.E. Local 1945 and Sam Cash Case No. 4-CO-10025 (1993); (Breach of duty of fair representation by Union misleading grievant into believing the Union would arbitrate his grievance. Union conduct was arbitrary, deceptive, deliberate, and intentional. Union was ordered to seek a waiver of the CBA and attempt to arbitrate the case and provide grievant with outside legal counsel.)

IV. Determining a Breach of the Duty of Fair Representation

Must Serve Interests of All

With Honesty and Good Faith

Without Hostility or Discrimination

Without Arbitrary Conduct

In continuing our lecture on the duty of fair representation, we examine the multiple instances whereby the Courts and/or federal agencies have analyzed factual

findings to determine whether or not a breach of the duty of fair representation has occurred. The Cases below are categorized by issue, bearing in mind our basic B.A.D. prohibitory acronym and without regard for whether the case involves Union negotiation duties or contract administration duties.

Bad Faith, Arbitrary, or Discrimination Prohibited

Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (U.S.S.Ct.1964); (Union was part of a Joint Committee that merged seniority lists. Moore sued the Company and Union alleging the Union violated the duty of fair representation and dishonesty. The Court found the Committee was authorized to make the decision per the CBA and that the Union members were adequately represented at the Committee hearing and were not denied a fair hearing. The Court found no breach of the duty and applied the B.A.D. factors in scrutinizing the Union's statutory authority to represent all members, which 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.)

Vaca v. Sipes, 386 U.S. 171,190, 64 LRRM 2369, 2376 (U.S.S.Ct.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."* The Court further found that the Union did not breach the duty *"merely because it settles a grievance short of arbitration"*. Best example of the B.A.D. standard and the beginning of the arbitrary prohibition. The Court reiterated the Union's needed discretion in grievance handling, but insists the Union cannot ignore a grievance with merit nor handle it perfunctorily. Here, the Supreme Court also assumed that a breach of the duty of fair representation is an unfair labor practice prohibited by section 8(b) of the NLRA subject to both NLRB jurisdiction and/or Court review.)

Arbitrary

Air Line Pilots Assoc. v. O'Neill, 499 U.S. 65, 67 (U.S.S.Ct.1991) (The Court's analysis added strength to the arbitrary factor where the Union negotiated the end of a strike settlement with Continental Airlines wherein some striking pilots lost seniority and return to work rights in the settlement. This case also extends the B.A.D. standard from the Vaca case to a Union's negotiating capacity. The Court found no breach of the duty stating that the 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."*)

Peterson v. Kennedy, N.F.L. Players Association, et al 771 F.2d 1244 (9th Circ., 1985);
(Court found Union was in error but not arbitrary when it provided player with incorrect advice on whether to file an injury or non-injury grievance, resulting in the grievance prescribing before it was filed. No violation of the duty of fair representation.)

Ruzicka v. General Motors Corp., *et al*., 649 F.2d 1207, 107

LRRM 2726 (6th Cir.1981);
(The Court discussed the arbitrary element of B.A.D., *discussed in greater detail below*.)

Discrimination

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

Conley v. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957), *supra*;

Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Circ. 1974); (Court found Union breached the duty of fair representation when it discriminated against passenger-relations agents because they were not Union members.)

Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 99 LRRM 2198 (1st Cir. 1978); (Union breached the duty of fair representation by refusing to process the grievance citing Segarra's history of animus toward the Union and his non-membership status. Good example of discrimination because of anti-Union activities and non-member status.)

Mere Allegations of Negligence Not Arbitrary

United Steelworkers of America v. Rawson, 495 U.S. 362,134 LRRM 2153 (U.S.S.Ct.1990).
(The Court found that the wrongful death claims by survivors of a mine fire brought in state Court was pre-empted by Section 301 of the Labor Management Relations Act (counterpart of NLRA) since it could not be described as independent of the CBA. The CBA stated that mine safety inspections were to be conducted by the Union. The suit against the Union alleged negligence by the Union for failing to conduct the inspections. The Court held that mere negligence, even in the enforcement of a CBA, does not state a claim for breach of the duty of fair representation, which is a purposely-limited check on the arbitrary exercise of Union power. If a member claims that a Union owes him a more far-reaching duty, he must be able to point to language in the CBA specifically indicating an intent to create obligations enforceable against the Union by the individual employee(s). *"Mere allegations of negligence by a Union do not state a claim for breach of the duty of fair representation"*.)

Negligence Allowed

In the following cases, multiple Appeals Courts state that a Union's negligence does not constitute a breach of the duty of fair representation:

Stevens v. Teamsters Local 600, 794 F.2d 376, 122 LRRM 3040 (8th Cir. 1986); (Union accused of losing Stevens' termination grievance.)

Dober v. Roadway Express, 707 F.2d 292,122 LRRM 2594 (7th Cir. 1983); (Union changed Dober's representative before the hearing and the new Rep. did not interview Dober before his hearing.)

Harris v. Schwerman Trucking Co., 668 F.2d 1204, 109 LRRM 3135 (11th Cir. 1982); (Harris alleged Union was inept, ineffective, and perfunctory while handling his failed grievance.)

Riley v. Letter Carriers Local 380, 668 F.2d 224, 109 LRRM 2772 (3d Cir. 1981); (Union mistakenly believed the USPS would honor its agreement to hold Riley's grievance in abeyance, despite the USPS's letters to the Union stating the grievance was denied and later barring its' appeal. Union's failure to seek enforcement of the abeyance agreement and respond to the USPS's letters constitutes, at most, negligence.)

Beyond Negligence Required

In the following cases, several Appeals Courts vary on what is required to prove a breach of the duty of fair representation *beyond* negligence.

Ruzicka v. General Motors Corp., *et al*., 649 F.2d 1207, 107 LRRM 2726 (6th Cir.1981); (The Union failed to timely invoke arbitration of Ruzicka's termination grievance despite being given two time extensions by the Company to do so. The Court followed the B.A.D. standards from Vaca and added that the negligent handling of a grievance without regard for the merits was a clear example of arbitrary and perfunctory handling of the grievance and a breach of the duty of fair representation. The Court characterized the Union's arbitrary failure to act as *"more than ordinary negligence"* and added that the type of arbitrary conduct needed to prove a breach of duty is conduct *"intended to harm"* the employee or conduct reflecting *"reckless disregard for the rights of the individual employee"*. The Court stressed the Union's lack of investigation and evaluation of the merits were arbitrary and Union's *"unexplained failure"* to make any decision contributed to the breach of the duty.)

"Intentional misconduct"

Hoffman v. Lonza, Inc., 658 F.2d 519,108 LRRM 2311 (7th Cir. 1981); (The Court found no breach of the duty by the Union after the Union failed to appeal Hoffman's grievance within 5 days per the CBA. The Court discussed the possibility of collusive suits by a Union and a Union member seeking the same objective (i.e., reinstatement and back pay) and cautioned against allowing an employee to recover the relief being sought from the Employer merely because the Union "forgot" to follow a grievance procedure. The Court disagreed with the Ruzicka (6th Circuit) case where a breach of the duty was found, *supra*. In Hoffman, the Court stated *"an action for failure to fairly represent cannot be based solely on an allegation that a Union unintentionally failed to file a notice that would permit a grievance to proceed to arbitration"* and *"mere negligence cannot rise to the level of misconduct necessary to support an action for breach of the Union's duty of fair representation"*. The intentional misconduct rule.)

Adams v. Budd Co., 846 F.2d 428, 128 LRRM 2387 (7th Cir. 1988), cert. denied, 488 U.S. 1008, 130 LRRM 2192 (1989); (Union refused to arbitrate Adam's grievance against Company because it believed there was no contract violation. Union's actions *"perfunctory though they may have been, do not come close to the level of intentional*

misconduct" required by the Hoffman decision. The Court, relying on the intentional misconduct rule, found no breach of the duty of fair representation.)

"Intentional conduct and wholly unreasonable conduct"

Ooley v. Schwitzer Div., Household Mfg. Inc., 961 F.2d 1293, 1302 (7th Cir. 1992); (Union negotiated away employees' creep rights when it negotiated a Plant Closure agreement with the Company. The plaintiff members alleged a breach of the duty of fair representation. The Union filed a class grievance on behalf of the affected employees, but later dropped the grievance; one reason being that to win the grievance would bolster the allegations of unfair representation by the Grievants. The Court concluded this intentional conduct was an example of bad faith, however the Court concluded the grievance had no merit. Therefore, the Union's dropping of the grievance *"could not have harmed the Grievants."* Hence, a good example of bad faith, but no breach of the duty of fair representation.)

"Irrational or unreasonable Employee must show actual harm"

Garcia v. Zenith Electronics, 58 F.3d 1171, 149 LRRM 2740 (7th Cir. 1995); (Union not irrational or unreasonable, nor was Garcia harmed by the legal representation the Union provided. Garcia alleged Union attorney only talked to him the day of the arbitration, advised him not to testify, failed to view videotape evidence, refused to call any witnesses, and refused to allow him to choose his own attorney. The Court doubted that the Arbitrator's decision would have been different had the Union pursued all of the steps Garcia complained about, including a different legal strategy.)

"Gross negligence, gross deficiency, or reckless disregard"

Linton v. United Parcel Service, 15 F.3d 1365, 145 LRRM 2403, 2409 (6th Cir. 1994); (Union acted arbitrarily by not advancing grievance after Linton was offered resignation in lieu of termination. Union's decision not to advance the grievance was an unprecedented departure from the Union's past practice. This was not a case of Union negligence or poor judgment, but an example of the Union acting arbitrary.)

Smith v. Steelworkers, Local 7898, 834 F.2d 93, 126 LRRM 3232 (4th Cir. 1987); (Union refused to advance Smith's grievance because it was untimely and involved a seniority issue affecting other employees that had been settled. Union's acquiescence based on the reliance of NLRB advice may have been a mistake, but not a violation of the duty of fair representation.)

Arbitrary Standards

Harris v. Schwerman Trucking, 668 F.2d 1204, 109 LRRM 3135 (11th Cir. 1982); (Harris alleged his termination grievance was handled perfunctorily by the Teamsters. The issue was whether or not the Union's handling was "so perfunctory" as to breach the duty of fair representation.

The Court stated: *"A claim that a Union acted perfunctory requires a demonstration that the Union ignored the grievance, inexplicably failed to take some required step, or gave the grievance merely cursory attention."* No breach of the duty.)

White v. Arco/Polymers, Inc., 720 F.2d 1391, 115 LRRM 2332 (5th Cir. 1983); (Court found the Union did not breach its' duty of fair representation by dropping White's termination grievance after Step III when Union agreed with the Company that White was a probationary employee not entitled to the just cause provision of the CBA.)

NLRB v. Postal Workers, 618 F.2d 1249;103 LRRM 3045 (8th Cir. 1980); (Court found Union breached duty of fair representation by arbitrarily revoking Union's assent to employee's request for a shift change leading to her termination by the Employer. Union and Employer had a side agreement to mutually approve shift changes to try and curtail overtime and fill vacancies. Ms. Berry got Union approval to change shifts. The Employer complained and the Union revoked Berry's approval based solely upon the Union officer's personal view that her re-assignment should have only been for one day. The NLRB and Court considered Union's action arbitrary.)

"When Union unable to articulate rational explanation for conduct"

NLRB v. Teamsters Local 282, 740 F.2d 141, 116 LRRM 3292 (2d Cir. 1984); (Court found Union committed unfair labor practice by breaching its' duty of fair representation when the Union failed to communicate the results of an arbitration award that affected seniority rights of some of the members following a merger of two concrete companies. Both companies (Transit Mix and Colonial) had bargaining agreements with the same Teamsters Local and the merger gave seniority preference to the Transit drivers. The Court upheld the NLRB's finding that the *"Union was under an obligation to effectively communicate the terms of the arbitration award to all affected employees, that it did not satisfy this obligation by merely making an oral announcement of the award's terms one morning at shape-ups, and that it breached its statutory duty of fair representation."*)

"Arbitrarily ignoring a meritorious grievance"

Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 99 LRRM 2198 (1st Cir. 1978); (Union breached the duty of fair representation by refusing to process the grievance citing Segarra's history of animus toward the Union and his non-membership status. The Court however, rejected back pay and emotional injury damages attributed to the Union since the Union was not responsible for the discharge. The Court found Segarra had exhausted, or attempted to exhaust his remedies under the CBA grievance procedures despite the Union's refusal to assist and by "arbitrarily ignoring a meritorious grievance".)

"Must consider merits of the employee's grievance when determining rational conduct"

Gregg v. Teamsters, Local 150, 699 F.2d 1015,112 LRRM 2924 (9th Cir. 1983); (Breach of the duty by Union's withdrawing grievance from arbitration seeking severance pay from Employer. Court found Union acted arbitrarily and awarded monetary damages from the Union to each of the four grievants in the amount of severance pay they would have received. Court looked at Union's conduct, such as the suggestion and the decision to withdraw grievances on same day; without careful consideration; and that relying on an attorney's opinion does not exonerate the Union.)

"Must not avoid making an informed decision. Must consider merits of individual claims/grievances before abandoning"

Banks v. Bethlehem Steel Corp., 870 F.2d 1438 (9th Cir. 1989); (Breach of duty by Union's arbitrary decision to not enquire whether or not any witnesses to the fight were available, when in fact there was a Union member witness that would have exonerated the grievant Banks. Union's witness policy for the sake of Union harmony was arbitrary and failed to protect the interests of all of those it represents. "The needs of the many do not always outweigh the needs of the few, or the one." The Court also found the Union's conduct was in bad faith because the Union officer admitted he wanted to settle as many cases as possible; there was strong disagreement within the Union; the grievant's unblemished 12-year work record; the Union's refusal to work with the grievant's own hired attorney; and the strength of the case (meritorious). The Court also compared the Union negotiated settlement ($3,000. plus change of termination status to "quit voluntarily") against return to work and $90,000. in back pay he would have been eligible for.)

V. Grievance Handling and Administering Bargaining Agreements

The following cases offer a cursory glimpse of various scenarios and allegations of the breach of the duty of fair representation in grievance handling and while administering a collective bargaining agreement (non-negotiation).

No Absolute Right to Arbitration

Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967);
(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. It is noted that an employee need not exhaust CBA remedies before asserting a claim for breach of the duty of fair representation, when the Union wrongfully refuses to process the employee's grievance.)

Good Faith, Non-Arbitrary Decision On Merits of the Grievance

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 provisions of the CBA, Union must, in good faith and in a non-arbitrary manner, make decisions based upon the merits of particular grievances.)

Bad Faith, Arbitrary, Discrimination

Landry v. Cooper/T. Smith Stevedoring Co., 880 F.2d 846, 132 LRRM 2248 (5th Cir. 1989);
(Failure by a 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.")
Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 293 (1st Cir. 1970);
(Union breached duty of fair representation by arbitrary and perfunctory handling of the dismissal grievance of six telephone workers. Union believed their NLRB filing against the Employer for elimination of the jobs in violation of the CBA would adequately resolve the grievances without the need for processing the grievances. Case against the Union was dismissed because of statute of limitations.)

Bad Faith Requirements

Mock v. T.G.&Y Stores Co., 971 F2d 522, 531 (10th Circ. 1992);
(A violation of bad faith requires a showing of fraud, deceitful action, or dishonest action.)

Must Cite Reason for Not Pursuing Grievance

Teamsters Local 315, 217 NLRB 616, 617, 89 LRRM 1049, 1051 (1975), enf'd, 545 F.2d 1173, 93 LRRM 2747 (9th Cir. 1976);
(Union may refuse to pursue a grievance "for a multitude of reasons, but it may not do so without a reason".)

Proof of a Thoughtful Analysis of Grievance

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.)

Lack of Union Funds Confer With International Union

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

Non-Meritorious Grievance

Self v. Teamsters Local 61, 620 F.2d 439,104 LRRM 2125 (4th Cir. 1980);
(Whenever a Union member's grievance is unmeritorious, then inadequate handling of the grievance by the Union is not actionable for a breach of the duty of fair representation.)

Materially Deficient Grievance Handling

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 in claim for a breach of the duty of fair representation. The grievant must instead show that the Union's handling of the grievance itself was *"materially deficient."*)

Discrimination Against Non-Union Members

Machinists Local 697, 223 NLRB 832, 91 LRRM 1529 (1976);
(A Union breaches the duty of fair representation if it discriminates against non-Union members in the pursuit of grievances.)

Seniority Based Grievance Handling

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

Conflict of Interests Between Grievant and Union Rep

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 of fair representation unless the representative has a personal stake in the outcome that is contrary to the Grievants' interest.)

Consolidated Grievances and Conflict Between Grievants

Phillips v. Lenox Hill Hospital, 673 F.Supp. 1207, 127 LRRM 2871 (S.D.N.Y. 1987);
(Union did not breach 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.)

Union Remains Neutral In Conflict Between Bargaining Units

Taylor v. Ford Motor Co., 866 F.2d 895, 130 LRRM 2513 (6th Cir. 1989);
(International Union was not liable for breach of the duty of fair representation when it took a neutral position in the arbitration of a dispute over seniority between two bargaining units within the same local Union.)

Union Fails To Call Witness

Banks v. Bethlehem Steel Corp., 870 F.2d 1438, 130 LRRM 3005 (9th Cir. 1989);
Barr v. United, Parcel Service, 868 F.2d 36,130 LRRM 2593 (2d Cir. 1989), cert. denied, 493 U.S. 975 (1989);
(Courts differ as to whether a Union can be held liable for failure to call witnesses at grievance or arbitration proceedings.)
Compare:

Banks case (Union breached duty of fair representation when it failed to call any employee witnesses in a case involving a fight with a coworker)
Barr case (Union's failure to call employee witnesses was a tactical error at most.)

Mistakes, Poor Tactics, Failure To Present Specific Arguments

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, and/or failure(s) to present specific arguments are not enough to support a claim of a breach of duty of fair representation.)

Performing Ministerial Acts

Zuniga v. United Can Co., 812 F.2d 443, 124 LRRM 2888 (9th Cir. 1987);
(Union breaches duty of fair representation if it fails to perform ministerial acts on a Grievant's behalf.)

Arbitrary Failure To Provide Grievance Forms

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.)

Failure To Notify Grievant When Dropping Grievance

Willets v. Ford Motor Co., 583 F.2d 852, 99 LRRM 2399 (6th Cir. 1978);
(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.)

Bad Faith Retaliation Against Union Member Who Criticized Union

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 the 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.)

Mere Negligence By Union Hiring Hall

Steamfitters Local 342, 329 NLRB 688 (1999), *decision on remand*, 336 NLRB 549, 168 LRRM 1256 (2001);
(Union does not violate the duty of fair representation if they are merely negligent in operating referral halls. No breach of the duty of fair representation 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 Union for errors in operating Union hiring halls.)

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 the NLRB's reliance on the very deferential standard for union action in O'Neill case was inappropriate when applied in the context of an exclusive Union hiring hall. The Court found 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 reasoned that when Union has control over workers' livelihood, it has an added responsibility.)

Negligence by Legal Malpractice of Union Attorney

Peterson v. Kennedy, N.F.L. Players Association, 771 F.2d 1244 (9th Circ., 1985);
(Court held negligence is insufficient to support a breach of the duty of fair representation against the Union, restating the B.A.D. standard, and concluding that negligence is the essence of a malpractice action.)

VI. During Contract Negotiation

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 stated: *"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, the Union's decision to settle rather then give up was certainly not illogical".)*

Marquez v. Screen Actors Guild, Inc., 119 S. Ct. 292, 159 LRRM 2539 (1998);
(Union did not violate duty of fair representation when it negotiated a union security clause mirroring the language from 8(a)(3) of the NLRA. 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.)

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);
(Union breached the duty of fair representation when it refused to consider an alternative bargaining position because it wanted to advance its interest in winning a representation election. Good example of bad faith by Union basing their bargaining position on improper motives without regard to the rights of the employees represented.)

Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944);
(Union breached duty of fair representation by unlawful discrimination. Landmark example of intentional discrimination.)

Ekas v. Carling National Breweries, 602 F.2d 664, 101 LRRM 3100 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980);
(Union did not breach duty of fair representation during merger negotiations. Unions given wide discretion in negotiating mergers or consolidations of bargaining units, as long as they do not arbitrarily ignore the interest of any group.)

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);
(Union did not breach duty of fair representation during negotiation where concessions were made with the Employer. Neither bad faith nor arbitrariness is demonstrated by proving that the Union "swapped" a concession on another issue if the swap was motivated by a good faith balancing of the burden to the individual and the benefit to others in the Union.)

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

(Union breached duty of fair representation by its' refusal to allow non-Union members to have input in their working conditions. Good example of discrimination based upon non-Union membership by the Union during negotiations.)

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)
(Breach of duty. Union has duty of "honest disclosure")
Knoll v. Phoenix Steel Corp., 325 F.Supp. 666, 77 LRRM 2038 (E.D. Pa. 1971), aff'd, 465 F.2d 1128, 81 LRRM 2143 (3d Cir. 1972), cert. denied, 409 U.S. 1126 (1973);
(No breach of duty by Union's failure to inform membership of negotiation details.)

Conrad v. Machinists, 338 F.3d 908, 172 LRRM 3262 (8 Cir. 2003);
(Union did not breach the duty of fair representation by not negotiating every possible contract term when negotiating a collective bargaining agreement.)

Lewis v. Tuscan Dairy Farms, 25 F.3d 1138, 146 LRRM 2601 (2d Cir. 1994);
(Union breached duty of fair representation when Union President told employees that seniority would be dovetailed if plant purchased after secretly agreeing with

new purchaser that the seniority lists would not be dovetailed. President's actions violated bylaws, which required membership ratification and approval of contract modification. Good example of bad faith dishonesty and disregard for the rights of the employees as expressed in Union By-Laws.)

Rakestraw v. United Airlines, 981 F.2d 1524, 142 LRRM 2054 (7 Cir. 1992), reh'g denied, 989 F.2d 944, 142 LRRM 3006 (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.

White v. White Rose Food, 237 F.3d 174, 166 LRRM 2281 (2d. Cir. 2001) (No breach of duty of fair representation by Union not undertaking a membership ratification vote. Union not required under the NLRA 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.)

Longshoreman (ILA) Local 1575, 332 NLRB No. 139, 165 LRRM 1377 (2000); (No breach of duty of fair representation by Union not undertaking a membership ratification vote. The Union was not required to request a vote of its membership to ratify the contract by law, contract, constitution, or by-laws.)

National Football League Players Association (Cincinnati Bengals), 09-CB-065431 (2011); (No ruling of breach of duty of fair representation by Union when entering into agreement with N.F.L. exempting first-time offenders from League discipline for conduct during a lockout, but exempted 8 players who were repeat offenders, leading to discipline of Benson. Benson withdrew his unfair labor practice/breach of duty of fair representation complaint prior to any NLRB ruling after losing his grievance at arbitration. See, National Football Players Association v. NLRB, 503 F2d 12 (8th Circ.1974), where the Courts affirmed the NFL's broad discipline authority and unilateral right to impose rules over conduct detrimental to the League; and Holmes v. N.F.L. , 939 F. Supp 517 (N.D. Tex. 1996), where the Court denied the player's due process complaint against the NFL Commissioner being appointed Arbitrator by the collective bargaining agreement. This series of cases cumulatively underscore the Union's broad latitude in negotiating agreements as well as giving broad deference to agreements. It should be noted that Benson's conduct (arrest) occurred during a period when the Union was de-certified.)

VII. Pre-emption Issues

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

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 for the NLRB 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.)

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.)

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 duty of fair representation claim.)

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.)

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.)

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 NLRA/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.)

Electrical Workers v. Hechler, 481 U.S. 851, 125 LRRM 2353 (1987);
(Section 301 of the NLRA 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.)

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.)

Andrews v. Louisville and Nashville R. Co., 406 U.S. 320, 324, 80 LRRM 2240 (1972); (The Court stated the Railway Labor Act pre-empts state law claims which turn on interpretation of collective bargaining agreements.)

Griffin v. Air Line Pilots Assn., 32 F.3d 1079, 146 LRRM 3092 (7th Cir. 1994). (Court stated the Railway Labor Act pre-empts state law claims for alleged tortious interference with employment).

United Steelworkers of America v. Rawson, 495 U.S. 362, 134 LRRM 2153 (1990); (The duty of fair representation does not pre-empt another federal law (NLRA Section 301) in a suit by members against their Union, if the Union 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.)

VIII. Proper Parties to a Fair Representation Claim

The jurisprudence broadly states only the collective bargaining representative is a proper defendant in a fair representation proceeding. Stated differently, the following parties are not held to be proper defendants;

International Union/Regional Union
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);
(Courts held that International or Regional Union is not a proper party in a suit for a breach of the duty of fair representation, unless the Local Union was acting at its direction.)

International Union's Duty to Its' Locals
Hospital & Health Care Employees Local 1199 DC v. Hospital & Health Care Employees, 533 F.2d 1205, 91 LRRM 2817 (D.C. Cir. 1976);
(Court held that the International Union may owe a duty of fair representation to

its member Locals.)

Union Representatives/Grievance Panel Members
Shropshire v. Teamsters Local 957, 102 LRRM 2751 (S.D. Ohio 1979);
(Court held that Union representatives on Joint Employer-Union Grievance Panels, or the Panels themselves are not proper defendants in a claim for a breach of the duty of fair representation.)

Union Attorneys
Patterson v. N.F.L. Players Association, et al, 771 F2d 1244 (9th Circ., 1985);
(Court held that Union attorneys could not be sued individually. California lacked personal jurisdiction over one of the two attorneys (Kennedy), but the Court also reasoned the attorneys were working on behalf of the Union and not the plaintiff.)

Union Members Individually and Other Unions
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);
(Courts held that neither Individual Union members nor any Union other than the exclusive bargaining agent can be sued for breach of duty of fair representation.)

Union Officers Individually

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);
(Courts held that Union officers may not be individually liable for breach of the Union's duty of fair representation.)

Class Action Claims for Breach of Duty
B. Smith v. Baltimore & Ohio R.R., 473 F.Supp. 572, 102 LRRM 2109 (D. Md. 1979).
(Court held that duty of fair representation claims may be maintained as a class action.)

Widow of Grievant
Bergin v. Teamsters Local 77, 114 EDA 2017, Pa. Super. Ct. (2017);
(Court held widow of deceased Union member/Grievant could not bring a claim for a breach of the duty of fair representation, stating that because the duty applies to all Union activities, an employee's remedy for Union's failure to pursue grievance properly is an action against the Union for breach of its' duty of fair representation, which does not extend to persons who are not employees of the bargaining unit.)

IX. Statute of Limitations

Six Months

DelCostello v. Teamsters, 462 U.S. 151, 113 LRRM 2737 (1983);
(Supreme Court stated the six-month statute of limitations contained in Section 10(b) of the National Labor Relations Act applies to hybrid Section 301/fair representation lawsuits by employees against their Employers and Unions, since hybrid suits bear resemblance to unfair labor practices. Most Circuits have applied DelCostello retroactively.)

Peterson v. Kennedy & N.F.L. Players Association, 771 F.2d 1244 (9th Circ., 1985);
(Court held that state lawsuits asserting the state's statute of limitations for hybrid lawsuits claims for a breach of the duty of fair representation and malpractice against individually named Union attorneys are not immune from the 6-month limitation of DelCostello. The Court dismissed the claims against the Union attorneys for insufficient evidence and Patterson's failure to prove a breach of the duty applying the B.A.D. standards.)

Smith v. Masters, Mates & Pilots, 296 F.3d 380, 170 LRRM 2534 (Cir. 2002), cert. denied, 123 S.Ct. 691, 171 LRRM 2576 (2002);
(Court held that employees cannot avoid the six month statute of limitations by bringing only the breach of contract action against the employer. Court granted 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).

White v. White Rose Food, 237 F.3d 174, 166 LRRM 2281 (2d Cir. 2001)
(Court stated that the fact that the suit was time-barred against the Union did not mean that they could not bring suit against the employer in a separate NLRA 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.)

Jones v. General Elec. Co., 87 F.3d 209, 152 LRRM 2599 (7th Circ., 1996);
(NLRA Section 10(b)'s six-month statute of limitations does not apply to non-hybrid situations where only the Union or only the Employer is being charged. The Court dismissed suit anyway because it was filed beyond Indiana's two-year statute of limitations also.)

Six Months Not Extended by Additional Cause of Action

Chrysler Workers Assn. v. Chrysler Corp., 834 F.2d 573, 579, 126 LRRM 3223 (6th Cir. 1987), cert. denied, 486 U.S. 1033 (1988);
(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." Duty of fair representation suit against Union dismissed because it was inextricably interdependent upon the plaintiffs' claim against the Employer.)

Noble v. Chrysler Motors Corp., 32 F.3d 997, 1000, 147 LRRM 2068 (6th Cir. 1994);
(Another example of a hybrid suit (Employer sued for breach of CBA and Union sued for breach of duty of fair representation) where the Courts dismissed the suit applying the 6-month statute of limitations under NLRA 10(b). The Court reasoned that the plaintiffs should have known of the Union's inactivity to pursue their grievance, which standing alone did not constitute an unfair labor practice when viewed with conduct occurring outside the limitations period. The Court also noted the plaintiffs had not proven a continuing violation by the Union.)

Six Months From Time Should Have Known
Shapiro v. Cook United, 762 F2d 49 (6th Circ. 1985);
(Court held that a claim under NLRA 10(b) accrues when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.)

Aarsvold 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);
(Court held that the 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. Plaintiff unsuccessfully asserted that his claim was tolled by his pending claim at the NLRB.)

Continuing Violation Theory
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);
(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.)

Devitt v. Potter, 234 F.Supp.2d 1034, 171 LRRM 2395 (D.N.D. 2002);
(The Court found the plaintiffs' suits were filed past the 6-month statute of limitations period using the dates upon which they filed ULP charges, reasoning they should reasonably have known of the Union's breach of the duty of fair representation since the allegations against the Employer and Union involve the same incidents.)

Six Months Interrupted by Arbitration
Galindo v. Stoody Co., 793 F.2d 1502, 123 LRRM 2705 (9th Cir. 1986);
(The Court reasoned that the 6-month limitation was tolled while he was seeking remedy through the grievance and arbitration procedures and the claim did not accrue until plaintiff learned of the Arbitrator's decision.)

Six Months Interrupted by Internal Union Remedies
Williams v. Chrysler Corp., 991 F. Supp. 383, 157 LRRM 2437 (D. Del. 1998);
(Court held that the 6-month limitation may be tolled pending the exhaustion of internal union remedies. 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.)

Tort Prescriptive Period of 1 Year Applied
Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 293 (1st Cir. 1970);
(Union breached duty of fair representation by arbitrary and perfunctory handling of the dismissal grievance of telephone workers. Union believed their NLRB filing against the Employer for elimination of the jobs in violation of the CBA would adequately resolve the grievances without the need for processing the grievances. Case against the Union was dismissed because of statute of limitations of one year applicable to a tort suit in Puerto Rico, which the Court determined the hybrid suit against both Company and Union to be.)

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

Injunction
Steele v. Louisville & Nashville R.R., 323 U.S. 192,15 LRRM 708 (1944);
(Norris-LaGuardia Act does not preclude a court from enjoining Unions against breaching their duty of fair representation.)

Reinstatement and Back Pay
Rosa Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 74 LRRM 2028 (1st Cir.), cert. denied, 400 U.S. 877 (1970)
(Norris-LaGuardia Act does not preclude reinstatement/back pay as a result of the Union's breach of the duty of fair representation.)

Injunction and Remand Back to Arbitration and Retain Jurisdiction
Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) (The Courts may issue an injunction requiring arbitration upon a showing that the Union has breached its duty of fair representation, and may retain jurisdiction to award relief against the Union on the fair representation claim, even if the employer prevails. 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.)

Injunction Staying Arbitration
Melanson v. John J. Duane Co., 605 F.2d 31, 102 LRRM 2597 (1st Cir. 1979)
(The Courts may issue an injunction staying the arbitration pending resolution of fair representation claims regarding the adequacy of a Union's pre-arbitration conduct.)

Injunction Prohibiting Further CBA Violations
Higdon v. Entenmann's Sales Co., 170 LRRM 3234, 2002 WL 1821666 (N.D. Ill. 2002)
(Court granted 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

with the Company and Union. The injunction provides the employee with *"the legal protection he won at trial."*)

Make Whole Remedy
Iron Workers Local Union 377, 326 NLRB No. 54, 159 LRRM 1097 (1998) (NLRB 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, the 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.)

Cease and Desist and Make Whole
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) (Cease and desist in the breach of the duty of fair representation and make the charging party whole.)

Mandate Grievance Process/Arbitration
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)
(NLRB orders Union to process and/or arbitrate grievances.)

Revoke Union's Certification
(Revocation of Union certification. See Teamsters Local 671, 199 NLRB 994, 81 LRRM 1454 (1972)

Compel Arbitration
San Francisco Pressmen v. NLRB, 794 F.2d 420, 122 LRRM 3000 (9th Cir. 1986), enf'g in part, 267 NLRB 451 (1983)
(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.)

Emotional Injury
Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 99 LRRM 2198 (1st Cir. 1978); (Union breached the duty of fair representation by refusing to process the grievance citing Segarra's history of animus toward the Union and his non-membership status. The Court however, rejected back pay and emotional injury damages attributed to the Union since the Union was not responsible for the discharge. The Court stated "compensation for mental distress in the context of labor disputes is warranted only in the exceptional case of extreme misconduct.)
Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 293 (1st Cir. 1970); (Union breached duty of fair representation by arbitrary and perfunctory handling

of the dismissal grievance of telephone workers. Union believed their NLRB filing against the Employer for elimination of the jobs in violation of the CBA would adequately resolve the grievances without the need for processing the grievances. Case against the Union was dismissed because of statute of limitations and the Court found Union was also not responsible for the dismissals, therefore all damages assessed against the Employer.)

Punitive Damages
Foust v. IBEW, 572 F.2d 710, 97 LRRM 3040 (10th Cir. 1978), reversed for unrelated reasons, 442 U.S. 42, 101 LRRM 2365 (1979);
(Union breached duty of fair representation and discharged railroad worker was awarded actual and punitive damages. Supreme Court held that punitive damages are not permitted under the RLA for Union's breach of duty. Court further stated: *"The fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights. To permit punitive damages, which, by definition, provide monetary relief in excess of actual loss, could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has struck in the unfair representation area."*)

XI. Exhaustion Defenses to Duty of Fair Representation Claims

Must Exhaust Contract Grievance Procedure First
Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965);
(Employees must attempt to use the contractual grievance process before filing a Section 301 suit.)

Must Exhaust Administrative Remedies First
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);
(Employees must exhaust administrative remedies before bringing action in court.)

Employees are also excused from exhaustion of contractual remedies if:

Glover v. St. Louis - San Francisco Ry. Co., 393 U.S. 324, 70 LRRM 2097 (1969);
(Employees excused from exhausting CBA remedies when 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.)

Pratt v. United Air Lines, 468 F.Supp. 508, 100 LRRM 2881 (N.D. Cal. 1978);
(Employees excused from exhausting CBA remedies when the Union breached its duty of fair representation by failing to notify the employee of events giving rise to the grievance.)

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);
(The Union delayed in processing the employee's grievance without explaining its reasons.)

Glover v. St. Louis-San Francisco Ry. Co., *supra*
(Any attempt to exhaust the contractual grievance machinery would be futile. Note, however, that exhaustion is *not* futile despite the hostility of the grievant's representatives, if Grievant 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.)
Also, Sosbe v. General Motors Corp., 830 F.2d 83, 126 LRRM 2556 (7th Cir. 1987);

Dorn v. Meyers Parking System, 395 F.Supp. 779, 89 LRRM 2619 (E.D. Pa. 1975);
(Where exhaustion would impair an adequate remedy or available procedures could not provide an adequate remedy.)
Also, Lucas v. Philco-Ford Co., 380 F.Supp. 139, 87 LRRM 2176 (E.D. Pa. 1974);

Williams v. Pacific Maritime Ass'n, supra,
(If the alleged breach is in the negotiation of a contract, since a grievance cannot remedy this breach.)

Meridith v. Louisiana Federation of Teachers, 209 F.3d 398, 164 LRRM 2099 (5 Cir. 2000);
(At the time she pursued her lawsuit, plaintiff was no longer employed, making her ineligible to use the grievance procedure. In addition, the Union ignored her requests for assistance.)

Hines v. Anchor Motor Freight, 424 U.S. 554, 91 LRRM 2481 (1996);
(Hybrid action for breach of duty and a breach of contract is not necessarily barred because 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.)

Employees must cooperate with the Union in the processing of grievances. See, for example:

Ostrofsky 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);
(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.)

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 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 Union's withdrawal of his grievance.)

Must Exhaust Internal Union Remedies

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 breach of the duty of fair representation complaint against Union. 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.
Three factors are relevant to determining whether the grievant is excused from the internal exhaustion requirement: 1) Whether Union officials are so hostile that the employee cannot hope to obtain a fair hearing; 2) Whether the internal procedures are inadequate to reactivate the employee's grievance and award him the frill relief he seeks; and 3) Whether internal exhaustion would unreasonably delay an employee's opportunity to obtain judgment on the merits of his grievance.

Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 140 LRRM 2228 (7Cir. 1992);
(Plaintiff has the burden of alleging facts showing the intra-union procedures are inadequate under Clavton.) See Adkins v. Mine Workers, 941 F.2d 392, 138 LRRM 2070 (6 Cir. 1991);

Ritza v. Lonjzshoreinen (ILWU), 837 F.2d 365, 127 LRRM 2425 (9 Cir. 1988);
(Union must raise the objection of Grievant's failure to exhaust internal Union remedies in motion to dismiss.)

Courts differ as to whether the Union must inform its members of internal procedures:

Geddes v. Chrysler Corp., 608 F.2d 261, 102 LRRM 2756 (6th Cir. 1979);
(Union must prove that employees had access to knowledge of available remedies.)

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).
(Union has no duty to publicize internal remedies, and plaintiff's attorney should have sought information about such procedures.)

Johnson v. General Motors, 641 F.2d 1075, 106 LRRM 2688 (2d Cir. 1981);
(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 deemed relevant.)

Oliver v. C & P Telephone Co., 124 LRRM 2555 (E.D. Va. 1986), aff'd, 850 F.2d 689 (4th Cir. 1988);
(Allegations of ignorance and reliance on misleading statements by Union officials are insufficient to avoid the exhaustion defense.)

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

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 91 LRRM 2481 (1976);
(Supreme Court has held that an Employer may not rely on the finality of an arbitrator's decision ("finality rule") if 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.

"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.")

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