

DUTY OF FAIR REPRESENTATION

The term “duty of fair representation” is one which a great many union members have heard but about which there may well be some confusion.

The first court decision which involved this subject was the Steel decision by the Supreme Court in 1994. In that case a union had been designated under the Railway Labor Act to represent a bargaining unit of railway firemen. Although there was a substantial black minority, the union excluded blacks from membership. The union proposed contract changes which eventually would have excluded blacks from firemen positions. The suit was brought by a black bargaining unit employee to have the agreement declared void.

The court decided that the union had to represent all employees in the bargaining unit fairly, even if they were not union members. The court went on to declare that the right to exclusive representation carried with it the duty to represent all employees fairly.

In the Supreme Court’s decision in Vaca vs. Sipes, which was a 1967 case, a union fails in its duty of fair presentation if it represents an employee arbitrarily, discriminatorily, or in bad faith. In the Vaca case a worker had been discharged because of poor health. He asserted he was about to do his job and filed a grievance. The union carried the grievance through the steps below arbitration and paid for a medical examination for the grievant. The union then attempted to persuade the employer to give the employee light work but the employer refused. At this time the union decided to drop the grievance.

A suit was commenced by the employee against the union alleging that the union had arbitrarily and capriciously dropped his grievance. This suit was in a state court and a jury awarded the employee \$10,000 in damages. The case was appealed to the State Supreme Court, which upheld the jury verdict. It was then appealed to the U.S. Supreme Court with the result previously stated.

The most important element of the Vaca decision is that a union does not have to take every grievance to arbitration. A union has the right to settle or to drop a grievance even though the grievance may have substance so long as its decision does not violate the union’s duty of fair representation.

The Supreme Court also stated in the Vaca case that a union can violate the duty if it perfunctory manner. The word “perfunctory” carries with it the meaning of acting in a superficial and careless manner without giving adequate consideration.

There was another Supreme Court decision, Hines vs. Anchor Motor Freight, Inc. This dealt with the perfunctory issue and concerned some drivers of Anchor Motor Freight, Inc. who had turned in expense vouchers for a motel room in an amount higher than that which the drivers paid for the rooms. The employer then discharged them. The drivers claimed that they had paid the amount shown on their expense vouchers and that the motel clerk must have changed the records and pocketed the money. The business agent of the union promised the driver that he would talk with the motel officials but he did not

do this. The union processed the drivers case through arbitration and the arbitration board upheld the discharged.

The employees sued the union for breach of fair representation. During the court proceedings the motel clerk confessed to having stolen the money and so the drivers were innocent, as they had maintained all along. The case went to the Supreme Court with the employer maintaining that the arbitration board's decision was final and binding even though the employees were found to be innocent.

The Supreme Court held that normally an arbitrator's decision, whether right or wrong, is final and binding on the employees. However, the court went on to say that the arbitrator's decision is not binding on the employees if the union violates its duty of fair representation while processing the case. In this instance the court said that the union had violated its duty because it had handled the grievance in a perfunctory manner by failing to investigate the employees defense that the motel clerk was guilty.

The Supreme Court in the Hines case is that it requires a union to investigate the merits when a grievance is filed. It is not enough to simply go through the motions. The union's decision whether to proceed or drop a grievance or to settle it has to be based on a consideration of the merits of the grievance and the advantages or disadvantages of proceeding. If a union gives a grievance actual consideration and does not handle it arbitrarily, discriminatorily or in bad faith with the employees, the union's decision, whether right or wrong, does not violate the duty of fair representation. Employees must be kept informed of the status of their grievance. Sometimes fair representation suits are filed because the employee does not know the union's efforts in his behalf. If a grievance is dropped, the employee should be told of the union's decision and the reasons for making that decision. The employee should be given an opportunity by the union to present additional evidence, if he has any, or further arguments in this behalf. By doing this, the union can avoid being accused of treating the grievance in an arbitrary or perfunctory way.

A union is not required to process every grievance that an employee believes shows that his contract rights have been violated. The contract language may be such that the grievance is obviously without merit, or a prior grievance may have been settled which answers the same issue. Unless it is a clear-cut instance of the contract language directly applying to the alleged grievance, the thing to do is to file a grievance for an employee, investigate the facts and then withdraw the grievance with notice to the employee if it lacks merit.

The duty of fair representation applies also to negotiation. For example, a union while negotiating a contract frequently must make decisions that favor some bargaining unit employees over others. Maybe is it a decision whether to press for more salary, thus helping the younger fire fighters, or for higher pension benefits which would be greater concern to the older fire fighters. In this matter, as long as the union weights the advantages and disadvantages the relative impact and makes a choice that is based on reason, its duty is fulfilled.

A union cannot treat an employee arbitrarily or in bad faith on the job because of internal union political considerations. All employees are entitled to the same treatment. A union cannot charge a fee to a non-union employee for processing his grievances if other bargaining unit employees are not subject to the same charge.

If a union is found by a court to have violated its duty of fair representation in processing a grievance, such an employee is entitled only to recover the actual losses caused by the union's violation of its duty. This was stated by the Supreme Court in Electrical Workers vs. Foust.

It is obviously to the advantage of a union to avoid the possibility of being sued for breach of the duty of fair representation. Court costs are substantial, even if the union wins. Of course, there is no way to prevent an employee from filing a suit but there are things that can be done which will reduce the possibility.

1. All union officers and shop stewards should know that the standards are for fair representation and the duty it imposes.
2. All union officers and shop stewards must be especially aware of the time limits in the contract for filing a grievance and for taking it through the several steps of the grievance procedure. This is particularly important because of recent cases in which decisions have been made that a union violates the duty of fair representation if a grievance is lost because of the negligent failure by the union to act in a timely fashion. The union must be certain that all newly elected or appointed officials receive training in processing grievances and thorough instruction in the duty of fair representation.
3. Because of the fact that most duty of fair representation suits involve claims that the union did not act properly with respect to an employee's grievance, it is of vital importance that good records be kept about every grievance. Such a record would include the name of every employee who files a grievance, the date it is filed, and the action taken at every step. There should be a calendar marked with the final date on which action must be taken on each step of the grievance procedure.

A file should be made for each employee who files a grievance and in this file should be placed all documents relating to that grievance. Also in the file should be placed written notes of every action taken in connection with the grievance. If, for example, a telephone call is made on behalf of the grievant, a note should be put in the file as to the date of the call, who was spoken to, and a summary of what was said.

4. The grievance procedure should include a requirement that the grievant must file a written appeal within a specified short period after being notified of the union's decision not to process the grievance further. The notification by the union should be mailed with a return receipt requested, so that it will later have proof that the notice was received by the employee. This notice should inform the employee of the union's decision and of the employee's right to appeal. The notice should also clearly state the final date by which the employee may file a written appeal as well as the address to which it must be sent. Such appeals should be to the Grievance Committee or to a Membership Meeting as the case may be.

Duty of Fair Representation

Ohio Revised Code 4117.11 (B)

IT IS AN UNFAIR LABOR PRACTICE FOR AN EMPLOYEE ORGANIZATION, ITS AGENTS, OR REPRESENTATIVES, OR PUBLIC EMPLOYEES TO:

6. FAIL TO FAIRLY REPRESENT ALL PUBLIC EMPLOYEES IN A BARGAINING UNIT;

Bureau of National Affairs, Inc.,
On The Line, September 25, 1986

Union's Safety Liability At Issue

A Union may be held liable for its alleged failure to police contract provisions on worker safety, the Idaho Supreme Court rules. Reversing a decision handed down in February, the court holds that the children and heirs of four mine workers who died in a 1972 fire at a Kellogg, Idaho, mine are entitled to proceed with a negligence suit against the United Steelworkers.

Rejecting the union's argument that the suit is preempted by federal labor law, the court says that the Taft Act does not "immunize" labor unions from being sued for their negligent acts and that a union's Taft Act Fair representation duty "does not displace those duties created by state law that prohibit a person or corporation from engaging in tortuous conduct resulting in death or injury." The court also rejects the argument that the union's role under the contract's safety provisions was merely that of a "Good Samaritan." Rather, the union's agreement to police safety issued in the mine, the court says, was a substantial part of the consideration offered by the union in exchange for the workers' agreement to join the union and pay dues. Emphasizing that the union can be held legally responsible for those safety functions for which it took on responsibility, the court adds that the union could be held liable for failing to use due care in carrying out its duties on the parties' contractually-created joint safety committee. (Dawson v. United Steelworkers, Idaho SupCt, No. 15338, Sept. 4, 1986.

THE DUTY OF FAIR REPRESENTATION

The following standards “for measuring the individual employee’s rights under the collective bargaining agreement and the union’s duty to represent the employee in enforcing the agreement” have been suggested by Clyde W. Summers in “The Individual Employee’s Rights Under the Collective Agreement: What Constitutes Fair Representation?” The Duty of Fair Representation, ed. Jean T. McKelvey, New York: Cornell University, 1977, pp. 82-83:

First, the individual employee has a right to have clear and unquestioned terms of the collective bargaining agreement which have been made for his benefit followed and enforced until the agreement is properly amended. For the union to refuse to follow or enforce the rules and standards that it has established on behalf of those it represents is arbitrary and constitutes a violation of its fiduciary obligation.

Second, the individual employee has no right to insist on any particular interpretation of an ambiguous provision in a collective agreement, for the union must be free to settle a grievance in accordance with any reasonable interpretation thereof. The individual has a right, however, that ambiguous provisions be applied consistently and that the provision mean the same when applied to him as when applied to other employees. Settlement of similar grievances on different terms is discriminatory and violates the union’s duty to represent all employees equally.

Third, the union has no duty to carry every grievance to arbitration, it can sift out grievances that are trivial or lacking in merit. But the individual’s right to equal treatment includes equal access to the grievance procedure and arbitration for similar grievances of equal merit.

Fourth, settlement of grievances for improper motives such as personal hostility, political opposition, or racial prejudice constitutes bad faith regardless of the merit of the grievance. The union thereby violates its duty to represent fairly refusing to process the grievance for those motives even though the employer may not have violated the agreement.

Fifth, the individual employee has a right to have his grievance decided on its own merits. The union violates its duty to represent fairly when it trades an individual’s meritorious grievance for the benefit of another individual or of the group. Majority vote does not necessarily validate grievance settlements, but may instead make the settlement suspect as based on political power and not on merit.

Sixth, the union can make good-faith judgments in determining the merits of a grievance, but it owes the employees it represents the duty to use reasonable care and diligence both in investigating grievances in order to make that judgment and in processing and presenting grievances in their behalf.

GRIEVANCE HANDLING: GUIDELINES FOR COMPLIANCE
WITH THE DUTY OF FAIR REPRESENTATION

1. Establish and maintain an efficient system of recording grievances when filed and for monitoring the process.
 - Note well all contractual time limitations; review and observe them!
 - Note well all procedural requirements stated in contract' observe them!
 - Maintain a record of the dates when successive steps were completed
 - Agreements to waive or extend time limits should be in writing
2. AT each step of the procedure the denominated union representative (field representative; steward) should engage in a full investigation of all the facts.
 - Consult the grievant; allow her/him the opportunity to furnish her/his "version" of the case and relevant facts
 - Request and review all information necessary to the proper investigation of the matter
 - Make a full presentation of the grievant's position
 - Process it through the initial stages to obtain the employer's position and information on which it relies
 - Reasonable requests for investigation of factual circumstances made by the grievant should be complied with if they can be reasonably expected to disclose facts to support the grievance.
3. Good faith effort should be made to favorably resolve the grievance before arbitration, unless clearly without merit.
4. Whenever a grievance is settled prior to arbitration, the settlement should be recorded in writing. Some indication of the grievant's knowledge and approval should also be made in writing (initial the settlement, letter approving settlement, etc.)
5. If a determination is made to drop a grievance prior to arbitration, send a memo or letter to grievant stating that the grievance has been discontinued, explaining in general terms the reason for it.
 - Do not simply allow the grievance to lapse
 - Avoid any situation in which a charge of negligent or arbitrary abandonment could be raised
6. The decision not to pursue a case to arbitration must be based on a full and fair consideration of all relevant circumstances.
 - DFR does not require taking all cases to arbitration
 - But: decision not to arbitrate must be a reasoned one
 - Notify grievant in writing with general statement of reasons
 - Consider: likelihood of success, availability of witnesses, difficulty of proof, relative value of benefits v. costs; possibility of unfavorable precedent

7. Establish some type of internal procedure for appeal by grievant of decision to abandon grievance.
 - Procedure to enable appeal from decision of representative of grievance committee to, e.g., local union executive board
 - “Appellate body” (may be a designated intermediate subcommittee) should review all facts and circumstances
 - Be aware of the contractual time limitations of the grievance procedure in scheduling appeal hearings
8. Fully apprise all union representatives involved in grievance handling of the conduct requirements described above, as their actions can bind the union.
9. Recognize the above eight items as the “guidelines” which they are – a “fail-safe” check list is not possible because of the variety of factual contexts in which these types of inquiries will arise. Follow a reasonable, consistent policy of thorough investigation of grievances; keep the grievant informed of the progress, including any decision not to pursue the grievance further.