# Mid-America Labor Management Conference, July 14-17, 2013

# Duty of Fair Representation

Prepared by:
Christal J. Key, Field Attorney
Region 14 of the National
Labor Relations Board

**CONTENTS**

# I. Origins of the Duty

## A. No Explicit Statutory Requirement

1. There is no explicit statutory requirement imposing upon a union a duty of fair representation in the National Labor Relations Act (NLRA) or anywhere else.

    a. The courts created the duty as a corollary to the statutory principle of exclusive representation set forth in Section 9(a) of the Act. The courts have held that the power conferred upon a union as exclusive representative carries with it the duty to represent bargaining unit employees fairly.

    b. Section 9(a) provides that, once a union is recognized or certified as the representative of a group of workers, it is their exclusive representative. Employers and individual employees cannot bypass the exclusive representative and reach their own agreements.

        *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1944)

        National labor policy is predicated upon the principle of majority rule. A vote by a simple majority of the bargaining unit commits the non-consenting minority.

        See *Brooks v. NLRB*, 348 NLRB 96 (1954)

    c. The right of the exclusive representative reflects the collective empowerment of workers provided for by the NLRA. Duty of fair representation cases require the balancing of individual and collective interests.

## B. Early Supreme Court Actions

1. The Supreme Court first recognized the duty of fair representation in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), a Railway Labor Act (RLA) case in which an African-American railroad worker challenged a collective bargaining agreement that required a railroad to stop hiring African-Americans until whites made up the majority in each job category. Like the NLRA, the RLA mandates that the majority representative of the employees in the bargaining unit is the exclusive representative of those employees. The *Steele* Court held that implicit in the grant of exclusive representation is a duty of fair representation.

    a. The Court reasoned that the power conferred upon a union by the Railway Labor Act to act as an exclusive representative includes an obligation to represent workers fairly, without "hostile discrimination." The Court was willing to allow the Union to make distinctions based on ''differences relevant to the authorized purposes of the contract . . . such as differences

in seniority, the type of work performed, [and] the competence and skill with which it is performed,'' but found distinctions based on race to be "irrelevant and invidious."

b. The Supreme Court in *Steele* viewed a union as operating under constraints similar to that of a legislative representative, with power to mediate between competing claims, and finite bargaining leverage and resources.

2. Over the next 20 years, the Supreme Court expanded the scope of the duty of fair representation, applying the duty to cases that did not involve issues of race discrimination, to cases involving the Union's administration of the contract, and to cases arising under the NLRA. In the process, the Court changed the duty from a negative prohibition against racial discrimination to an affirmative standard of conduct for unions.

3. The Supreme Court first applied the fair representation principles developed under the Railway Labor Act to a case arising under the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). There, the Court held that the Union did not breach its duty of fair representation by agreeing to grant seniority credit for pre-employment military service. The Court set forth the standard that in negotiating a contract a union is entitled to exercise "[a] wide range of reasonableness" in agreeing to terms that may benefit one group of employees over another, as long as the Union acts in "complete good faith and honesty of purpose."

## C. Miranda Fuel

1. The Board announced the "novel, if not quite revolutionary" proposition that a breach of the duty of fair representation claim was an unfair labor practice in *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enf. denied,,* 326 F.2d 172 (2nd Cir. 1963).

   a. In *Miranda Fuel Co.*, an employee filed a charge against his union for causing a reduction of his seniority because of a leave of absence, in violation of the contract and under pressure from certain union employees. The Board held that the Union's action had no legitimate purpose and interfered with the employee's right to fair and impartial treatment.

   b. The Board reasoned that the Union's obligation to represent all employees fairly and impartially under Section 9 of the Act gave employees a right under Section 7 to fair representation. The Board concluded that Section 7 "gives employees the right be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." Therefore, a union's breach of the duty interferes with an employee's Section 7 rights in violation of Section 8(b)(1)(A).

   c. The Board also noted in *Miranda Fuel* that, while a union, as statutory bargaining representative, has obligations to employees

that employers do not, employer participation in a union's arbitrary action against an employee nevertheless violates section 8(a)(1).

### D. Vaca v. Snipes

1. In *Vaca v. Sipes*, 386 US 171 (1967), the Supreme Court applied the Union's duty of fair representation in the context of grievance-handling. It held that a breach of the duty occurs when the Union's conduct in representation is "arbitrary, discriminatory or in bad faith."

    a. In *Vaca*, an employee sued his union when it failed to arbitrate a grievance over whether he should be terminated because he was medically unfit to work. The Union withdrew the grievance because of conflicting medical opinions.

    b. The Court rejected the argument that an employee has a right to arbitrate his grievance. The Court wrote that such a right would discourage grievance settlements. Further allowing a union discretion to settle or withdraw grievances helps eliminate frivolous claims. A union is able to conserve resources and it improves its credibility. Thus, improving a union's ability to represent employees. In addition, the Court reasoned that giving unions broad authority to determine which grievances to arbitrate promotes consistency in the handling of grievances.

## II. Application of the Duty in Handling Grievances and Negotiating Contracts

### A. Grievance Handling

1. Overview

    a. The most common charge alleging a breach of the duty of fair representation involves whether a union violated the Act by failing to process a grievance. However there is no legal requirement that a union process every grievance.

    b. A union retains broad discretion in handling grievances and a violation turns on whether the Union exercised its discretion invidiously, discriminatorily, arbitrarily, or in bad faith.

        *Vaca v. Sipes,* 386 U.S. 171 (1967)

    c. Although overt hostility is a factor, a union can also violate its duty of fair representation by acting in an arbitrary manner rather than being invidious or discriminatory to the Charging Party.

2. Examples of unlawful motivation

    a. Refusing to process a grievance because Charging Party is not a union member.

*American Postal Workers Union*, 328 NLRB 281, 282 (1999)

b. Refusing to process a grievance because of intra-union activity**.**

*Local 1640, American Federation of State, County and Municipal Employees, AFL-CIO (Children's Home of Detroit),* 344 NLRB 441, 445-446 (2005)

c. Refusing to process a grievance based on discriminatory considerations such as age, race, religion or sex.

*Independent Metal Workers Local 1 (Hughes Tools),* 147 NLRB 1573, 1575 (1964)

d. Refusing to process a grievance for filing previous Board charges.

*Steelworkers Local 3029 (Gardner-Denver),* 250 NLRB 813, 818 (1980)

e. Refusing to process a grievance because that individual supported a rival union.

*AFGE Local 888, (Bayley-Seton Hospital),* 308 NLRB 646 (1992)

f. Refusing to process a grievance because of personal animosity.

*Auto Workers Local 417 (Falcon Industries*) 245 NLRB 527, 535 (1980)

3. Examples of proper discretion

a. Refusing to process a grievance after good faith evaluation of the merits of the grievance.

*Hotel & Restaurant Employees Local 64 (HLJ Management),* 278 NLRB 773, fn.3 (1976)

b. Refusing to process a grievance based on a reasonable interpretation of contract provisions.

*Local 2250, UAW (General Motors Corp.),* 297 NLRB 31, 32 (1989)

c. Withdrawing a grievance after an inability to locate the grievant.

*Hotel & Restaurant Employees Local 26 (Copley Plaza),* 297 NLRB 261 (1989)

d. Allowing membership to vote on whether to proceed to arbitration after presenting facts.

*Transit Union Division 822*, 305 NLRB 946, 951 (1991)

4. Examples of negligence

a. The Board has held that a union's mere negligence in the handling of a grievance is insufficient to constitute arbitrary conduct and does not violate

a union's duty of fair representation. Thus, mere negligent failure to process a grievance in a timely manner is not a violation of the Act.

*Teamsters Local 692 (Great Western Unifreight*), 209 NLRB 446 (1974)

b. Failing to respond by to telephone calls and being insensitive is mere negligence.

*Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504, 508 (1979)

5. Perfunctory handling

a. Perfunctory handling is unlawful

i. While mere negligence is not violative of the Act, perfunctory handling of a grievance is not mere negligence and constitutes arbitrary conduct which is unlawful.

b. Examples

i. A union conducting little or no investigation on a discharge.

*Service Employees Local 579 (Convacare of Decatur).* 229 NLRB 692 (1977)

ii. Relying solely on an employer's investigation of a grievance.

*Newport News Shipbuilding & Dry Dock,* 236 NLRB 1470 (1978), 1471, enf. granted in part 631 F. 2d 263 (4th Cir. 1980)

iii. Failing to inform a grievant of the time of a grievance hearing and failing to explain a lack of notification.

*Local 307, National Postal Mail Handlers Union, (USPS),* 338 NLRB 1154 (2003)

iv. Purposely misinforming a grievant of the status of the grievance after a commitment to seek arbitration.

*Union of Security Personnel of Hospitals (The Church Charity Foundation of Long Island, Inc.)*, 267 NLRB 974, 979-980 (1983)

v. Assuring a grievant that the Union is processing a grievance to arbitration but then abandoning the grievance without explanation.

*Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 996 (1986)

vi. Depositing proceeds from arbitration in a union treasury rather than distributing it to claimants.

*Mine Workers District 5 (Pennsylvania Mines)*, 317 NLRB 663, 664 (1995); *APWU, Local 735* (USPS), 342 NLRB 545 (2004)

## B. Contract Negotiations

1. In *Airline Pilots v. O'Neill*, 499 U.S. 65 (1991), the Court made clear that the same standard – that a union breaches its duty of fair representation if its actions are either arbitrary, discriminatory or in bad faith – applies in the context of contract negotiation as in grievance handling.

    a. In *Airline Pilots v. O'Neill*, striking pilots alleged that their union breached its duty of fair representation by settling their strike on terms less favorable than those that would have applied had they returned to work unconditionally. The Court held that the Union's decision must be assessed in the light of both the factual and legal landscape at the time of the decision. Viewed in that light, the Court found the settlement to be well within the range of reasonableness because it eliminated uncertainty about the rights of the strikers caused by pending litigation when the settlement was reached.

2. Mergers and consolidation of bargaining units, as well as layoffs, require unions to accommodate competing interests. In such situations, differential treatment, in and of itself, is not a breach of the duty of fair representation. However, the Union cannot ignore the interests of a group for reasons that are arbitrary, discriminatory, or in bad faith.

    a. Compare *Riser Foods*, 309 NLRB 635 (1992) (Union could negotiate endtailing employees of a newly purchased plant because it did not owe a duty to employees that it did not represent) with *Teamsters Local 42 (J. W. Daly)*, 281 NLRB 974, 976 (1986), enf'd, 825 F.2d 608 (1st Cir. 1987) (Union could not agree to endtail employees of a newly merged site based on their lesser numbers and a shorter length of union membership); *Barton Brands, Ltd.*, 213 NLRB 640 (1974), rev'd in part and remanded, 529 F.2d 793 (7th Cir. 1976) (Union breached its duty of fair representation by elevating the seniority of a group of employees in order to assist a union official's political ambition) and *Red Ball Motor Freight*, 157 NLRB 1237 (1966), enf'd sub nom. *Teamsters Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967) (Union could not negotiate endtailing a smaller group at a newly-consolidated unit merely for the political motive of enhancing the Union's chances of winning a representation election between the two different unions representing the larger and smaller groups at the new facility).

    b. The Board held that a union acted unfairly by determining the bumping rights of a particular employee by holding a vote among those at risk of being bumped when their interests were in conflict with the employees whose bumping rights they were voting on.

*Teamsters Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616 (1975), *enf'd*, 545 F.2d 1173 (9th Cir. 1976)

3. The duty of fair representation applies to a union's communications with its members concerning negotiations

    a. Compare *Teamsters Local 469 (Coastal Tank Lines)*, 290 NLRB 44 (1988) (arbitrary failure to inform drivers for 10 years that the Union had negotiated away their pension coverage violated the Act) *and Teamsters Local 860 (The Emporium*), 236 NLRB 844 (1978), *enforced*, 652 F.2d 1022 (D.C. Cir. 1981) (Union breached its duty of fair representation by intentionally failing to warn employees that pursuit of their wage demands could jeopardize their jobs) *with Western Conference of Teamsters (California Cartage Co.),* 251 NLRB 331 (1980) *(*Union's failure to adequately and fully explain the ramifications of a proposal was not unlawful where it did not amount to intentional and willful misleading of employees).

4. A union does not violate its duty of fair representation merely by negotiating union security agreements that track the language of Section 8(a)(3) without fully explaining in contract their rights under *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963) or *Communications Workers v. Beck,* 487 U.S. 735 (1988). *Marquez v. Screen Actors Guild*, 525 U.S. 33, (1998).

    *See,* OM 98-99 "Member in Good Standing" and "Member" Union Security Clauses after *Marque*z, dated December 11, 1998

5. Contract ratification

    a. A union is not obligated to obtain ratification of any collective bargaining agreement that it negotiates on behalf of employees it represents.

        *North Country Motors*, 146 NLRB 671, 674 (1964). *Teamsters Local 287, (Granite Rock Co.),* 347 NLRB No. 32 (2006)

    b. Employee ratification is a prerequisite for contract acceptance only when both the employer and the Union agree that it is a condition precedent to a binding contract.

        *Beatrice/Hunt-Wesson*, 302 NLRB 224 fn. 1 (1991)

        Because ratification is a permissive subject of bargaining, an employer cannot demand that unions seek membership ratification of a contract.

        See *Longshoremen (ILA) Local 1575*, 332 NLRB 1336 (2000)

6. The Board has entered broad orders requiring unions who breached the duty of fair representation in connection with contract negotiations to cease and desist from improper conduct and to make the charging party whole.

a. To remedy a seniority system based solely on union membership in violation of 8(b)(1)(A), the Board ordered a union to cease and desist giving effect to the system or a similar system, and to make employees whole by restoring their seniority.

*Glass Bottle Blowers Association of the United States and Canada, Local 149, AFL-CIO (Anchor Hocking Corporation)*, 255 NLRB 715 (1982)

b. It has ordered a union to pay backpay to employees who lost wages because the union, during negotiations, intentionally misled employees by failing to inform them that their wage demands put their jobs at risks.

*Teamsters Local 860 (The Emporium*), *supra*

c. Where both the employer and the union commit unfair labor practices involving a breach of the duty by the union and a violation of Section 8(b)(2), the Board has held the employer and the union jointly and severally liable for any loss of earnings resulting from their violations.

*Olympic Steamship Co.,* 233 NLRB 1178 (1977)

d. In a case where the Union ignored the interests of bargaining unit members in a certified unit to such an egregious extent that the Board found that the Union had effectively disclaimed interest in representing them, the Board ordered the revocation of the Union's certification.

*Teamsters Local 671 (Airborne Freight)*, 199 NLRB 994 (1972)

## III. Application of the Duty in Operating Hiring Halls

### A. There are two types of Hiring Halls, exclusive and non-exclusive.

- **An exclusive Hiring Hall** is one in which the employer is obligated to use the union's Hiring Hall exclusively as the first source of job applicants, before hiring employees directly. This type of Hiring Hall is created by agreement of the parties, either written or oral.
- **A non-exclusive Hiring Hall** is one in which, as the name suggests, the employer is free to obtain applicant referrals from the union or hire employees directly without going through the Hiring Hall. Applicants are free to solicit work directly from the employer.

### B. Key Cases Addressing Hiring Halls

a. *Mountain Pacific Chapter,* 119 NLRB 883 (1958)

In *Mountain Pacific Chapter,* the Board decided that Hiring Hall agreements were illegal unless they contained three specific safeguards.

- The selection of applicants for referral to jobs would be without discrimination on the basis of union membership.

- The employer retained the right to reject any job applicant referred by the union.
- The parties to the collective bargaining agreement would post notices to applicants containing all the provisions relating to the functioning of the Hiring Hall.

*b. Teamsters Local 357 v. N.L.R.B.,* 363 U.S. 667 (1961)

The Supreme Court reviewed the Board's standards for Hiring Halls in *Teamsters Local 357 v. NLRB*:

- The Court agreed that a Hiring Hall encouraged union membership, much in the same way that a collective bargaining agreement that provides for improved wages encourages union membership.
- However, the Court found that the only encouragement or discouragement of union activity that is prohibited by the Act is that which is accomplished by discrimination.
- The Court held that where Congress "has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther" to regulate the encouragement of union activity in a Hiring Hall context. In effect, this decision required that evidence of discriminatory conduct must be present in order to find a violation.

## C. Exclusive Hiring Halls

1. Characteristics of exclusive Hiring Halls

- Exclusive Hiring Hall can be established in three ways:
  - By written agreement (normally through contract language)
  - By oral agreement
  - By the practice or the course of conduct of the parties

*Hoisting and Portable Engineers Local 302 (West Coast Steel Works),* 144 NLRB 1449 (1963)

2. Obligations of Union

When an exclusive Hiring Hall exists, the union has a number of obligations to ensure non-discriminatory referrals.

- **Use objective criteria.** The union is required to use objective criteria in referring applicants for employment.
  - These criteria need not be written: While there must be objective criteria, the criteria used and the rules of the Hiring Hall do not need to be written.

*Plumbers Local 619 (Bechtel Power)*, 268 NLRB 766 (1984)

- In recent decisions, the courts and the Board have held that in operating an exclusive hall, a union owes a "heightened duty of fair representation" to all applicants using the Hiring Hall.

  *Jacoby v. NLRB*, 233 F.3d 611, 616 (D.C. Cir. 2000)
  *Plumbers & Pipefitters Local Union No 32 v. NLRB*, 50 F.3d 29, 33-34 (D.C. Cir. 1995).

- On the other hand, the District of Columbia Circuit affirmed the Board's decision that a one-time inadvertent error of failing to refer an applicant in the proper order from its exclusive hiring hall was not a violation of the duty of fair representation nor Section 8(b)(1)(A) and 8(b)(2).

  *Jacoby v. N.L.R.B.*, 325 F.3d 301, *enforcing Steamfitters Local Union Plumbers Local 342 (Contra Costa Electric), 336 NLRB 549 (2001)*.

- **Provide adequate notice of the Hiring Hall procedures**: While the rules and criteria used for referral do not have to be written, there are Board cases holding that the union is required to provide applicants with adequate notice of the Hiring Hall procedures.

  - Thus, in one case the Board found that the Union's failure to notify employees of an existing rule that disqualified them for referral was "arbitrary, and a breach of the union's duty to keep Hiring Hall applicants informed about matters critical to their employment status."

- **Provide timely notice of rule changes**: If a union decides to change the rules used in referrals from the Hiring Hall, it must give timely notice to all users of the hall.

  - Here again, there is no requirement that the rules be written; but from what has been mentioned above, the union's Hiring Hall must have objective procedures and the union must make them known to applicants.

- **Provide information regarding referrals**: Unions are required to provide applicants with information regarding referrals from the Hiring Hall by allowing the applicants to make direct inspection of the records.

  - In this way, the applicant can monitor his/her place on the list and the union's referral practices, including any discrepancies in referrals.

  - Upon the request of an applicant, the union must provide to them, or allow them to copy, information from the referral list, including such information as names, addresses, phone numbers, and dates of layoff for the applicants on the list.

**3.** Non-Discrimination in Referrals

- **Prohibition from discriminating in referrals**: As part of its obligation to operate the Hiring Hall in a non-discriminatory manner, a union is

prohibited from discriminating in referrals or making threats to fail to refer properly. Among the bases upon which unions unlawfully discriminate in the operation of Hiring Halls are:

- An applicant's lack of union membership, or the applicant's intra-union activity,
- The status of an applicant as a traveler from a different local union who attempts to work in the union's geographic area,
- The failure of an applicant to pay dues in a different local than the one from which referral is sought,
- The applicant's failure to sign a dues check off authorization,
- The applicant's failure to pay an unpaid fine to the union, or
- The applicant filed a charge with the Board or engaged in other protected activity.

- **Allowable fees**: While the union must make the services of an exclusive Hiring Hall available to all, including non-members, it can charge a fee for the use of services of the Hiring Hall.
  - Union can't charge a fee where it provides no real service.

    *Spector Freight,* 248 NLRB 260 (1980).
  - The fees charged to non-members cannot be excessive but must be related to the union's costs of running the Hiring Hall.
  - An exclusive hiring hall is not a form of union security and thus is legal even in right-to-work states.

    *NLRB v. Tom Joyce Floors, Inc.,* 353 F.2d 768, 60 LRRM 2434 (9th Cir. 1965).

**D. Exceptions to referral in order of registration**

There are some lawful exceptions to the prohibition of referring out of order on the Hiring Hall list.

- **Length of Service and Qualifications**: Under Section 8(f)(4), unions and employers may make Hiring Hall agreements that grant priority in dispatch based on length of service in the geographic area, the industry, the employer and/or the applicant's qualifications.
- **Length of service in the geographic area**: this may be coextensive with union's geographic jurisdiction.
- **Length of service in the industry**: "Industry" may be defined as the parties choose, as long as it's not the "unionized" segment of the industry. This may be coextensive with the union's traditional work jurisdiction.
- **Length of service with the employer**: In the building and construction industry, the term "the employer" is interpreted to mean all

employers, collectively, who have a common hiring hall scheme, even if the contracts are grossly different in other respects. See *Interstate Electric*, 227 NLRB 1996 (1977).

- **Qualifications**: Parties to a collective bargaining agreement may set differing qualifications for different positions. They may also define how qualifications are demonstrated, such as having passed an apprenticeship, or taken a test (written or practical). Membership in the union cannot constitute or prove any qualification. The union may require an applicant at a hiring hall to take an examination, but then must make that test regularly available to applicants.

  *Local 367, IBEW (Penn-Del-Jersey Chapter of NECA),* 230 NLRB 86 (1977).

- **Order of referral list**: Unions often have different books or lists, with different priorities in referral, based upon length of service and/or qualifications. The union first refers all applicants from the highest priority list before referring applicants from the list that is next in priority order.

- **Requested by employer**: Another exception to the general rule allows referring an individual ahead of others due to a specific request, by name, from an employer.

- **Referral of a steward**: Another exception is the right of a union to refer a steward to a job out of the order of registration.

- **Applicants who have engaged in misconduct**: Unions can also refuse to refer applicants who have engaged in misconduct. For example, if an employee has had past incidents of being insubordinate with an employer or has proven unreliable, the union can refuse to refer the employee to that employer.

## 4. Non-exclusive Hiring Halls

### 1. The Board's rules for non-exclusive Hiring Halls are different than those applied to exclusive Hiring Halls.

- When there is a non-exclusive Hiring Hall, employees are free, by definition, to obtain their own employment directly.

- As a result, the Board does not apply the duty of fair representation to non-exclusive Hiring Halls.

### 2. The non-exclusive Hiring Hall is treated more as a service that the union provides to its members and the union is free to discriminate against non-members in referrals. The Union may restrict usage to members only, or to those who are paid-up members.

*Local 889 Laborers' (Anthony Ferrante & Sons, Inc.),* 251 NLRB 1579 (1980)

*Local 60, Ironworkers (Gouverneur Ironworks Inc.)*, 149 NLRB 316 (1967)

3. **While the union can discriminate against non-members, even for reasons of lack of union membership, the same is not true of its treatment of members.**

   - Since the Hiring Hall is made available as a service to members, the union cannot unlawfully discriminate among its members with respect to referral because of a member's protected activities.

   Thus, while the union is not required to operate the hall using the same objective criteria as those required in an exclusive Hiring Hall setting, it cannot discriminate in the order of referral because of a member's protected activities.

4. **The union is not required to provide information regarding referrals to the applicants using the service.**

   - An exception to that general rule is when the information is being withheld from an applicant because he/she engaged in protected activity or filed a charge with the Board.
   - In that case, it is the motive behind the refusal to provide the referral information that is controlling with respect to disclosure.

## IV. Application of Duty in Enforcing of Union Security Clauses

### A. What is a union-security obligation?

**1.** Proviso to Section 8(a)(3) of the Act allows employers and unions to enter into union-security agreements requiring all employees in a particular bargaining unit to become "members" on or after the 30th day following hire. A union clause requiring "membership in good standing" is not unlawful.

**2.** In *NLRB v. General Motors Corporation*, the Supreme Court held that the term "member" requires only the payment of periodic dues and fees as opposed to full membership. Since the Court noted that "the membership that is required has been whittled down to its financial core," individuals choosing that approach are often referred to as "financial core members."

**3.** No employee has to be a member of a union in order to maintain a job, but all employees subject to a union security obligation can be required to pay union dues and fees.

**4.** In *Communications Workers of America (CWA) v. Beck*, the Supreme Court held that employees who are required to pay union dues and fees pursuant to a union security clause may only be charged for representational activities; that is, costs related to collective bargaining, contract administration, and grievance adjustment.

### B. Enforcement of Union Security Clauses

- Before Unions can ask employers to discharge employees for failure to pay dues, it must first inform the employees of the amount of dues owed, the method used to calculate that amount, and the date by which the dues are to be paid.

  *Philadelphia Sheraton Corp.,* 136 NLRB 888, 896 (1962), enfd. 320 F.2d 254 (3d Cir. 1963); and *Service Employees International Union,* 358 NLRB No. 18 (2012)

- Unions must provide an employee with notice of his/her *General Motors* and *Beck* rights prior to seeking the employee's discharge for the non-payment of dues and fees.

## V. Application of Duty in Handing Internal Union Affairs

### A. Purely an internal union affairs do not come within the Duty

**1.** In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), the Supreme Court made it clear the duty of fair representation does not reach unions' discipline of members affecting only their status as members. It upheld a union's right to fine members who crossed a picket line and went to work during an authorized strike, the Court specifically noted that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 395 U.S. at 195. The Court thus embraced the view of the Board, as set forth in *Minneapolis Star & Tribune Co.*, 108 NLRB 727, 738 (1954) that Section 8(b)(1)(A) reaches only the external enforcement of union rules, impacting the employment relationship, and not their purely internal enforcement

**2.** The duty of fair representation stems from a union's exclusive representative status for the employees of an employer. Thus, the duty is relevant only at such times as the union is acting in this representative capacity or otherwise affects the members' employment status.

*Elevator Constructors Local 8,* 243 NLRB 53, 54 (1979)

**3.** The duty of fair representation only limits a union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

*Office Employees Local 251, AFL-CIO (Sandia Corp.),* 331 NLRB 1417, 1418 (2000)

a. Thus, the duty does not apply in the following circumstances:

- Disciplining and fining a member for crossing a picket line.

  *Retail Clerks (Roswil, Inc.), 226 NLRB 80, 89 (1976).*

- A union's conduct during ratification votes for collective bargaining agreements

  *International Longshoreman's Ass'n, Local 1575* 332 NLRB 1336 (2000)

- Expelling a member from office and barring him from holding office, where the conduct resulting in expulsion involved the member's conduct during a union meeting.
- Disciplining members for opposing the policies of the local president, where there was no impact on the employment relationship of the members who were disciplined.

  *Office Employees Local 251, AFL-CIO (Sandia Corp.),* 331 NLRB 1417, 1418 (2000)

- Expelling a member because he solicited other unions to sign a contract to perform the work currently being performed by his union.

  *Local 324, International Union Of Operating Engineers, AFL-CIO (Hydro Excavating, LLC)* 353 NLRB No. 85 (2009)

b. The duty does apply in the following circumstances:

- Reducing a member's opportunity for overtime work because he refused to participate in a concerted refusal to work overtime. The Union would have been free to impose internal union discipline, but it was not free to take action which had an impact on his employment. Here reducing his overtime opportunity created a "nexus with the employer-employee relationship."

  *International Brotherhood Of Electrical Workers, (Verizon), 350 NLRB 258* (2007)

- Disciplining an employee for complying with employer's instruction to work on a composite crew with members of another union.

  *Elevator Constructors (Otis Elevator Co.)*, 349 NLRB No. 55 (March 22, 2007)

- Disciplining an employee for reporting misconduct by another employee

  *Carpenters District Council of San Diego (Hopeman Bros.)*, 272 NLRB 584, 588 (1984)