



NLRB

National Labor Relations Board

The Duty of Fair Representation

Section 8(b)(1)(A)

“It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed under section 7 [of the National Labor Relations Act]

Duty of Fair Representation

Breached only when a union's conduct toward a member of the collective bargaining unit is **arbitrary, discriminatory, or in bad faith.**

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

Three terms to remember:

- Arbitrary
- Discriminatory
- Bad faith

Duty of Fair Representation

- All **unit** employees are entitled to representation without hostile discrimination; representation that is fair, impartial, and in good faith
-- not just those that are Union members --
- A union violates its duty of fair representation if it *tells* employees it will not represent nonmembers – even if it *does* represent nonmembers.

Duty of Fair Representation

Only legitimate employment-related differences can be used to distinguish one group from another, **NOT**

- Race, gender, national origin
- Membership status
- Protected, concerted activity, including internal union politics
- Personal animosity
- Filing a charge or petition
- Other “irrelevant or invidious” reasons

Grievance Processing

- No absolute right for an employee to have his/her grievance taken to arbitration.
- Broad discretion to dispose of grievance short of arbitration.
- Question is whether the union exercised its discretion in bad faith or in discriminatory or arbitrary (perfunctory) manner.

Examples of Bad Faith

(unlawful motivation)

Refusing to process a grievance because of:

- Intra union activity (including supporting a rival slate of officers)
- Discriminatory reasons such as age, race, religion or sex
- Prior Board charges against union
- Support for rival union
- Personal animosity

Examples of Good Faith

Refusing to process a grievance because of:

- Good faith evaluation of merits
- Reasonable interpretation of contract provision
- Inability to locate grievant
- Membership vote on whether to take grievance to arbitration after presentation of facts

Duty of Fair Representation

Negligence:

- Failing to process grievance in a timely manner
- Poor judgment in accepting employer's version of facts
- Misinforming employee as to interpretation of contract

Negligence alone is insufficient to constitute arbitrary conduct - **HOWEVER...**

Duty of Fair Representation

Perfunctory or careless grievance handling = arbitrary conduct:

- Conducting little or no investigation on a discharge
- Relying solely upon employer's explanation
- Failing to inform a grievant of the time of the grievance hearing and failing to explain a lack of notification
- Deliberately misinforming grievant as to status of grievance

Duty of Fair Representation

Perfunctory or careless grievance handling = arbitrary conduct (*continued*):

- Assuring a grievant that the Union is processing grievance to arbitration and then abandoning grievance without explanation and without informing grievant
- Refusing to provide grievant a copy of his/her grievance (or other relevant documents, like the collective bargaining agreement, benefits plan, etc.) upon request

Determining whether a union has been arbitrary:

- What is the totality of circumstances?
- Is there is a reason for the action taken?
- Was the union negligent or inept? Did it exercise poor judgment?
- Was the grievance processing perfunctory?
(Was the union just going through the motions?)
- Did Union explain its reason for abandoning grievance?

Taking a Case to Arbitration

Once union takes grievance to arbitration, it becomes obligated to present grievance in its most favorable light. However,

- Grievant has no special right to dictate to the Union what arguments to make or what witnesses to call; and
- The Union is not obligated to advocate the grievance with the expertise of a trial lawyer.

Remedies!

- Cease and desist
- Notice posting/publishing/reading
- Reinstate grievance and process, if able
- “Make whole” relief
 - Union liable for backpay if Labor Board attorney establishes that union breached its duty of fair representation *and* that grievant would have prevailed in the grievance-arbitration process.
 - If union can establish the grievance was without merit, no make whole relief.

Contract Negotiations

Duty of fair representation applies in contract negotiations and union breaches this duty if conduct is arbitrary, discriminatory or in bad faith.

--Airline Pilots v. O'Neill, 449 U.S. 65 (1991)

Contract Negotiations

- Failure to carry out negotiations fairly and in good faith will violate a union's fiduciary duty to employees.
- Union 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."

Contract Negotiations -- Challenges

- Different classifications in bargaining unit
- Layoff/Recall
- Merger and consolidation of bargaining units

Contract Negotiations -- Challenges

- Duty applies to communications with employees regarding negotiations
- Obligation not to act arbitrarily, discriminatorily or in bad faith.
- However, failure to adequately and fully explain ramifications of proposal was not unlawful where it did not amount to intentional and willful misleading of employees.

Contract Ratification

A union is not obligated to obtain ratification of any collective bargaining agreement UNLESS both the Employer and the Union agreed that employee ratification is a condition precedent to a binding contract.