Duty of Fair Representation under Taft-Hartley, The

William P. Murphy
THE DUTY OF FAIR REPRESENTATION
UNDER TAFT-HARTLEY*

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The union's duty of fair representation had its genesis in 1944 in Steele v. L&N RR Co.¹ In that case under the Railway Labor Act the union had negotiated with the railroad a provision which would have eliminated certain job opportunities for Negroes. Although the Negroes were in the bargaining unit, they were excluded from the union. The Supreme Court held that the statute, which gave the union its power to act as exclusive bargaining representative for all of the employees in the unit, also imposed upon the union a corresponding duty "to exercise fairly the power conferred upon it, in behalf of all those for whom it acts, without hostile discrimination against them." The union's power had to be exercised "fairly, impartially, and in good faith." Although contract variations based on "differences relevant to the authorized purposes of the contract" are proper, "discriminations based on race alone are obviously irrelevant and invidious." The Court said that injunction and award of damages were appropriate remedies for breach of the duty of fair representation.

Steele was the first of a long line of cases involving racial discrimination among railway workers. One of the most important of these later cases was Conley v. Gibson,² decided in 1957. Here the Court stated that: "The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end . . . with the making of the agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement."

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1. 323 U.S. 192 (1944).
Since Section 9(a) of the NLRA also confers exclusive bargaining power, the duty of fair representation exists also under this statute. Indeed, the Supreme Court recognized this as early as 1944 in *Wallace Corp. v. NLRB,* decided the same day as *Steele,* and it has been so held in many subsequent cases. It has been held, out of both logic and necessity, that the duty extends not only to certified unions but also to those enjoying bargaining power by virtue of their majority status. It has been held in numerous lower court decisions, and recently recognized by the Supreme Court, that racial discrimination is not the only possible breach of the duty, but that reliance upon other "invidious and irrelevant" factors are also within its scope. Thus, it was held in one case that "it is not proper for a bargaining agent in representing all of his employees to draw distinctions among them which are based upon their political power within the union"; in another case that denial of a Coast Guard license was improperly used as a standard; in another that prior employment was an irrelevant factor; and in still others that geographical factors were discriminatory. It has also been held that the union may breach its duty by discriminating against an individual as well as against a group of employees.

What has been said up to now would indicate that the duty of fair representation is a potent doctrine which has afforded significant protection to employees against the misuse of union bargaining power. It is widely recognized, however, that the reality is to the contrary. Counterpoised to the duty is the wide latitude recognized in the union's exercise of its power. *Steele* itself noted that the union is not barred from making contracts which may have unfavorable effects on some members of the unit. The rationale was explicated by the Supreme Court in 1953 in *Ford Motor Co. v. Huffman.*

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to

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weigh the relative advantages and disadvantages of differing proposals. . . . 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.

The breadth of the union's bargaining power has made impossible the development of any generally applicable standards by which to determine whether it has breached its duty to represent fairly. The result is, as stated by the Sixth Circuit in 1962, that the answer "depends upon the facts of each case." In 1945, in Elgin, Joliet & Eastern Ry. v. Burley, the Supreme Court suggested that the union's power with respect to the administration of the contract might not be as broad as its power in negotiating the contract. The suggestion has not been reflected in the decisions of the lower courts, and in spite of the criticism of many commentators, the cases generally have upheld as wide a union power in administration as in negotiation.

In light of the broad scope of the union's power, the courts have been reluctant to equate distinctions with discriminations. In addition to the mere fact of different treatment, they have required that plaintiffs offer affirmative evidence of bad faith. As put by the Second Circuit in 1959: "it is not enough to prove that the union was wrong. . . . This duty was no more than to forbear from 'hostile discrimination.' The arbitrariness shown must be of the bad faith kind. . . . Something akin to factual malice is necessary." Or, as stated by the Ninth Circuit in 1962: "An essential element . . . necessary to raise a limitation upon a union's discretion . . . is a bad faith motive, an intent to hostilely discriminate. . . ." Racial discrimination reflected in the contract would doubtless meet this burden of proof. But when the alleged unfair representation is non-racial and involves the administration of the contract, the burden is a difficult one to carry. Thus, the cases in which

11. 325 U.S. 711 (1945).
13. Hardcastle v. Western Greyhound, 303 F.2d 182 (9th Cir. 1962).
courts have upheld a complaint as stating a cause of action are far more numerous than those holding that the union has violated its duty.

Other factors have contributed to prevent the duty of fair representation from being an efficacious doctrine. The psychological impediment against suing the union, the high costs of pursuing the claim through the courts, and the inadequacy of the relief available have discouraged frequent use of the doctrine. In the area of racial discrimination, where breach of the duty is most easily demonstrated, Professor Sovern has ascertained that: "The case reports reveal that Negroes have gone to court to redress unfair representation on an average of less than once a year since Steele was decided." A study published just this summer in the Maryland Law Review has demonstrated the inadequacy of the injunction remedy in the racial area of unfair representation. As to the remedy of damages, the study states that: "In the twenty years since the Steele decision, Negro plaintiffs have claimed upwards of $6,000,000 in compensatory and punitive damages. They have actually collected $2,802 of the former and $3,000 of the latter." Another inadequacy has been that where the unfair representation has resulted in discharge, the union is unable to provide the appropriate remedy of reinstatement.

The judicial cause of action, created in cases arising under the Railway Labor Act where no administrative remedy was available, was carried over to cases arising under the NLRA. There the Board has asserted since the Larus case in 1945 that a union which breached its duty of fair representation by discriminating against Negroes was subject to having its certification revoked. Aside from the fact that this was more a threat than a pattern of decision, such a remedy would in any event not amount to very much. It would certainly not be appropriate to invoke it against a union representing a large number of employees for a single breach of the duty. Furthermore, it would only affect certified unions, and with strong majority unions, loss of certification would not result in a loss of bargaining status. In 1962 in Pioneer Bus, the Board announced that a contract which reflected racial discrimination would not be a bar to representation proceedings, but again the rule is not a

serious deterrent. Beyond these limited approaches in the area of its jurisdiction in representation matters, the Board did not until very recently assume any responsibility for enforcing the union's duty of fair representation.

Professor Summers has said of the duty of fair representation that: "experience has shown that it gives almost no protection to the individual . . . it is almost without exception a form of words which holds the promise to the ear and breaks it to the heart." In short, it might be said that since its birth in 1944 the duty of fair representation has been very much like a boy trying to do a man's job. Recent events indicate, however, that by the time the duty reaches its majority, it may be in a position to play a significant role in protecting employees against unfair uses of union power.

A dramatic development occurred on December 19, 1962, when the Board handed down its second decision in the case of *Miranda Fuel Co.*, and brought the duty of fair representation within its unfair labor practice jurisdiction. Briefly, the facts in *Miranda* were as follows. The contract contained a provision authorizing leaves of absence without loss of seniority between April 15 and October 15, with the condition that any man failing to report back by October 15 should forfeit all seniority rights. Lopuch was a truck driver whose seniority was eleventh on a list of twenty-one. In early April 1957, he obtained company permission to leave at the close of business on Friday, April 12, to spend the summer on family business. He told the company he would return by October 12, but due to illness, did not return to work until October 30. Shortly after his return, the union demanded that Lopuch be reduced to the bottom of the seniority list for late return. On learning of his illness, the union abandoned this basis and instead demanded his reduction in seniority because of his early departure. The company reluctantly acquiesced in this demand.

The Board's first decision in *Miranda* in 1959 held that the union had violated 8(b)(2) and the company 8(a)(3). These two unfair labor practices are related and an essential element of their joint violation is that the discrimination encourage or discourage membership in a union. Applying its *Pacific Intermountain Express* doctrine, the Board

held that the surrender to the union of the right to determine Lopuch's seniority was a per se violation of both sections. After the Supreme Court rejected the per se approach in its 1961 decision in Teamsters Local 357 decision,\(^{21}\) Miranda was remanded to the Board for reconsideration. Without any further hearing, the Board made a new decision on the original record. A three-member majority (Leedom, Rodgers and Brown) again found violations of 8(b)(2) and 8(a)(3), this time on the theory that the reduction of Lopuch's seniority had the foreseeable result of encouraging union membership, and since the reduction was not based on any legitimate employer or union purpose, this foreseeable result must have been the purpose within the meaning of the two sections. The Board went further, however, and now held for the first time that Section 7 includes the right of employees to be free from "unfair or irrelevant or invidious treatment" by the union which would violate the duty of fair representation derived from Section 9. A breach by the union of its Section 9 duty violates a Section 7 right and therefore violates Section 8(b)(1)(A) and, if the employer participates, he violates Section 8(a)(1). Lopuch's reduction was arbitrary and without legitimate purpose; it violated his right to fair and impartial treatment; therefore, Sections 8(b)(1)(A) and 8(a)(1) were violated. McCulloch and Fanning dissented from both of the majority holdings. The dissent noted that the Section 7 fair representation theory had not been advanced, argued or litigated in the case, and asserted that nothing in the legislative history of the Act or in Board or court authority supported such a result. It might also have noted that this important and controversial holding was completely unsupported by any discussion or argumentation but was merely stated in ipse dixit fashion as though it were self-evident.

On appeal, recognizing the importance of the case, the AFL-CIO, the UAW, the ACLU, and the NAACP submitted amicus briefs. Just a year ago today, the Second Circuit denied enforcement, but the court split three ways and a majority did not pass on the legitimacy of the Board's new brainchild.\(^{22}\) Only Judge Medina rejected what he called the "novel, if not quite revolutionary, theory"; he also rejected the 8(b)(2)-8(a)(3) holdings for the reason that the evidence did not support a finding of encouragement of union membership. Judge Lombard concurred in the latter view; he thought it was not necessary to decide

\(^{22}\) NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).
whether Section 7 incorporates the duty of fair representation since he thought the facts showed no breach of that duty. Judge Friendly took no position on the Section 7 point; he would have enforced the 8(b)(2)-8(a)(3) holdings, since he believed the evidence supported a finding of encouragement of union membership.

The Board did not seek Supreme Court review in *Miranda*, for a much better vehicle for establishing its theory was available. In August 1962 proceedings had been commenced against the Independent Metal Workers Union representing employees at Hughes Tool Company in Houston, Texas. The facts were as follows. Locals 1 and 2 of the Independent Metal Workers Union, certified as joint bargaining representatives, were racially segregated. The contract provided for Group I jobs open only to white employees, and Group II jobs open only to Negroes, with separate lines of progression and demotion that prevented transfer from one group to another. Local 2 wanted to negotiate for the elimination of the racial discrimination, but Local 1 did not agree. In December 1961 the company and Local 1, over the protest of Local 2, extended the contract. The company and Local 1 also agreed to create new apprenticeships in the plant, and in February 1962 they were posted for bids. Davis, a Negro employed since 1942 and treasurer of Local 2, bid for an apprenticeship. The company refused to include his name on the list of applicants, notwithstanding protest by Local 2's grievance committee. Davis' request to Group 2 to intercede for him was ignored. A charge was filed upon which complaint issued alleging violation of Section 8(b)(1)(A). Local 2 also filed a motion to rescind the 1961 certification. The two cases were consolidated.

In March 1963 the trial examiner rendered his decision recommending that Local 1 be decertified and holding that it had violated 8(b)(1)(A). Relying upon *Miranda*, the examiner held that the union's refusal to process Davis' grievance was to that extent a refusal to represent him, and this refusal violated Davis' Section 7 right to have the union represent him fairly. Although the complaint had alleged only a violation of 8(b)(1)(A) and that was all that had been argued, the examiner held, again relying upon *Miranda*, that the union had also violated 8(b)(2) since its failure to process the grievance was for an arbitrary or irrelevant reason or on the basis of an unfair classification and that union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status. Finally, for good measure, the examiner held that the union had also violated its Section 8(b)(3)
duty to bargain collectively. The reasoning here was that the duty to bargain is owed not only to employers, but also to employees, since the union has the duty to represent them fairly, and, since grievance processing is a part of bargaining, QED.

The Board affirmed the trial examiner's decision on July 1, 1964.23 All five members agreed that the union had violated 8(b)(1)(A). Three members (Leedom, Brown and Jenkins who had succeeded Rodgers) based the holding on the Miranda Section 7 fair representation theory, from which McCulloch and Fanning dissented as they had in Miranda. By the same 3 to 2 division the examiner's 8(b)(2) and 8(b)(3) holdings were upheld. The majority opinion adds nothing to that of the examiner on the 8(b)(2) and 8(b)(3) violations, and not much more than that on the 8(b)(1)(A). The dissent protested against the procedural impropriety of making 8(b)(2) and 8(b)(3) findings in a proceeding where only 8(b)(1)(A) was in issue during the hearing, and thought that the vice was not cured by the examiner's advising the parties at the close of the hearing that he might pass on these issues and inviting them to brief the points. The dissent is most significant by reason of the strong argument advanced against the majority's Section 7 right of fair representation theory.

In September 1964 the Board again applied the Miranda theory.24 At Brownsville, Texas, the ILA maintained all white and all Negro locals. The contracts with employers' associations in the South Atlantic and Gulf Coast areas provided for dividing the work between the two locals on a 75-25 per cent basis. You can guess which got the short end. Arrangement was also made which precluded white and Negro gangs from working side by side in the same hatch. The same majority as in Hughes Tool (Leedom, Brown and Jenkins) found that the union had breached its duty of fair representation and had therefore violated 8(b)(1)(A), 8(b)(2) and 8(b)(3). The majority noted that the Second Circuit had denied enforcement in Miranda but declared "with due deference" their adherence until such time as the Supreme Court rules otherwise. The majority then went on to elaborate on the 8(b)(3) theory.

Because collective-bargaining agreements which discriminate invidiously are not lawful under the Act, the good-faith requirements of

23. Metal Workers Union (Hughes Tool Co.), 56 LRRM 1289 (1964).
24. Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n, Inc.), 57 LRRM 1083 (1964).
Section 8(d) necessarily protect employees from infringement of their rights; and both unions and employers are enjoined by the Act from entering into contractual terms which offend such rights. . . . Section 8(d) cannot mean that a union can be exercising good faith toward an employer while simultaneously acting in bad faith toward employees in regard to the same matters. . . . We conclude that when a statutory representative negotiates a contract in breach of the duty which it owes to employees to represent all of them fairly and without invidious discrimination, the representative cannot be said to have negotiated the sort of agreement envisioned by Section 8(d) nor to have bargained in good faith as to the employees it represents or toward the employer.24a

McCulloch and Fanning again dissented from the majority approach, although they found other reasons for concurring in the 8(b)(1)(A) and 8(b)(3) holdings.

Just a month ago, the Miranda-Hughes Tool theory was again applied by a majority of a three-member panel in a case in Chicago involving the Auto Workers.25 The employer absorbed a tool and die shop into his general maintenance department, and at the insistence of the union, the six tool and die employees were given a new seniority date for layoff and recall as of the date of the transfer, thus causing them to lose their tool and die seniority of from 15 to 21 years. This case had a reverse twist, for the tool and die department had long been lily-white, whereas the unit into which it was merged was mainly composed of Negro members and officers. Three members of the panel found violations of 8(b)(1)(A) and 8(b)(2), but for different reasons. Leedom and Jenkins relied on the Miranda-Hughes Tool doctrine. Leedom thought that the union had discriminated against the tool and die employees because they were white. Jenkins wouldn’t admit this, but instead thought that the union was trying to redress the seniority advantage which existed because tool and die had been all white for so long; he considered this to be an invidious, irrelevant and unfair consideration within the Miranda-Hughes Tool doctrine. McCulloch rested his holding on the premise that the union was motivated by union considerations and expressly noted his disagreement with Miranda and Hughes Tool. All three members held that by acquiescing in the union demand, the employer had violated 8(a)(1) and 8(a)(3).

24a. Id at 1085-86.
25. Automobile Workers Union (Maremont Corp.), 57 LRRM 1298 (1964).
The main thrust of the Board dissenters McCulloch and Fanning is that the majority theory does not reflect the intent of Congress. Sections 7 and 9(a) have been in the statute since 1935. But the Wagner Act did not make any union conduct unlawful and the duty of fair representation was not judicially recognized until 1944. Although the Steele and Wallace cases were well known, the legislative history of the 1947 amendments contains no mention of the duty. And although there had been further decisions and articles by 1959, Congress again ignored the duty of fair representation, although it did amend the unfair labor practice section and it did enact a Bill of Rights of union members.

On policy grounds, the dissenters argue that, under the majority doctrine,

Inevitably, the Board will have to sit in judgment on the substantive matters of collective bargaining, the very thing the Supreme Court has said the Board must not do, and in which it has no special experience or competence. . . . Miranda means that the Board is embarking on a wholly new field of activity for which it has had no preparation, and which is likely seriously to interfere with its present activities that are already more than enough to keep it fully occupied.25a

To these arguments of the dissent the following might be added. Congress did in 1947 enact 8(b)(2). At the very least this section prohibits a union from causing an employer to discriminate against an employee because he is not a member of the union. Such conduct would clearly violate the duty of fair representation, and under the Board theory would violate 8(b)(1)(A) as an interference with the Section 7 right to be fairly represented. If the Board's theory is correct, then 8(b)(2) is reduced to surplusage so far as discrimination against non-union employees is concerned.

It might also be pointed out that the power now assumed by the Board was in 1952 expressly repudiated. In an amicus brief filed in Ford Motor Co. v. Huffman, the Board discussed the matter at some length and concluded that its unfair labor practice jurisdiction did not extend to the duty of fair representation. This brief expressly considered and rejected Sections 8(b)(1)(A) and 8(b)(3) as appropriate for dealing with the subject. The only administrative remedy claimed by the Board was through the certification power.

In 1957, when Professor Cox published his article on fair represen-

25a. Supra note 23 at 1299-1300.
tion, he considered the possibility of enforcing it through unfair labor practice proceedings. His discussion makes no reference to 8(b)(1)(A), but he does argue that breach of the duty should be a violation of the 8(b)(3) duty to bargain collectively, as that is defined in Section 8(d). In April 1962, eight months before *Miranda* was decided, Professor Sovern published a much-cited article, "The National Labor Relations Act and Racial Discrimination." I think it is fair to say that in this article Professor Sovern was advancing every tenable construction possible under the NLRA which could be used against racial discrimination. "Unhappily," he wrote, "section 7 says nothing about the right to be represented fairly." He called attention in a note to the position taken by the Board in its brief in the *Huffman* case, but offered no disagreement with it. He did, however, take issue with Cox on the 8(b)(3) position, stating that "The duty to bargain collectively probably does not include the duty to represent fairly."

In June of 1963, in an article in Michigan Law Review, Professor Blumrosen strongly defended *Miranda* as a case which should evoke warm support from anyone interested in maximizing individual rights in the collective bargaining process. He finds no reason to doubt that the Board has the statutory power to enforce the duty of fair representation. He argues that the statute was written in broad language to permit the Board to come to grips with a variety of attempted limitations on employee rights. "To confine NLRB to the consideration of problems explicit at the time of formulation of the national labor policy [that is, in 1935] would not be consistent with previous decisions of the Supreme Court which have stressed the breadth of power vested in the Board." On the practical side, Blumrosen argues that "The concomitants of administration—the power to investigate, to urge informal settlement and to provide an expeditious hearing, and the expertise of the personnel involved—all suggest that the NLRB is equipped to handle these problems more speedily and more fairly than are the courts." To which might be added that the Board also pays the expenses of litigation.

*Miranda* was also defended in June 1963 before the New York University Annual Conference on Labor by Professor Sovern. His argument

29. Supra note 14.
essentially is that on policy grounds the result in *Miranda* is desirable, and should be upheld if a plausible construction can be devised to support it, and if it is not contrary to the intent of Congress. The plausible, or at least ingenious, construction which had not occurred to him the year before was now provided. I will not summarize it because my time is running and also because I am not sure I understand it. As to the intent of Congress, while Sovern concedes there is no evidence that Congress intended any such result, neither is there any evidence that Congress did not intend it. In fact, Congressional intent is non-existent, and therefore may be disregarded as a factor. In short, the strongest argument in support of the Board's *Miranda* theory is the policy argument that the duty of the union and the right of the individual are clear, the judicial remedy is highly inadequate, whereas an administrative remedy can give meaningful enforcement and protection.

One of the current crop of racial discrimination cases poses a question concerning the duty of fair representation which has never been resolved; namely, does the union have an obligation to resist, on behalf of the employees it represents, discrimination imposed by the employer? In a dictum in a 1956 Fifth Circuit case, Judge Brown stated that the union had an obligation “fully and earnestly to bargain to prevent and where necessary remove, discrimination.” In his 1957 article Professor Cox asserted that the duty of fair representation does not impose upon unions “the affirmative obligation of making reasonable efforts to abolish racial discrimination.” Professor Sovern in his 1962 article argues that the union does have, at least in certain situations, a duty to resist employer discrimination.

In a case in Alabama involving the Rubber Workers, the employer maintained racially segregated restrooms, showers and luncheon facilities, and limited use of the plant golf course to whites. Negro employees urged the union to seek elimination of the segregation. The union refused, and in fact said it would resist any such change. The complaint alleged that the union's refusal was a denial of fair representation and violated 8(b)(1)(A) and 8(b)(3). Last spring the trial examiner refused to so hold. He confined *Miranda* to the situation where the union takes affirmative action against employees. The 8(b)(3) duty, he said, was one owed primarily to the employer and it would be stretching the act

unduly to hold that a union which refused to seek the eradication of employer-imposed segregation had refused to bargain collectively. The Board has not yet decided the case.\textsuperscript{31}

All of the cases in which the Board has found racial discrimination to be an unfair labor practice should be evaluated in light of the Civil Rights Act of 1964.\textsuperscript{32} This statute became law on July 2, one day after the Board's decision in \textit{Hughes Tool}. Title VII, which does not become effective until July, 1965, deals with equal employment opportunity. Among other things, Title VII identifies certain employer and union unlawful employment practices, which are set forth in your manual. As I read Section 703, it seems clear that the language is broad enough to embrace, and I think was so intended, every instance of racial discrimination in employment as far as the commerce power can reach it. Section 703 subsumes the duty of fair representation not only when race or color are involved, but also religion, sex and national origin. It goes further than the duty of fair representation in that it prohibits denial of union membership for the stated reasons. The remedy provided is federal or state administrative conciliation, backed up by civil action in the federal district courts.

The judicial remedy is stronger in several respects than that we discussed earlier in fair representation cases. The courts are authorized not only to enjoin the respondent but also to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay," payable by the employer or the union, as the case may be. I am sure you will note the similarity between this language and that of Section 10(c) of the NLRB specifying the remedial power of the Board. The court is also authorized to award attorney's fees. Finally, the action may be brought by the Attorney General if he has reasonable cause to believe that a pattern or practice of violation exists.

It seems anomalous that Congress, having refused for so many years to enact a fair employment practices act, should finally, after months of consideration, enact such a statute specifying in great detail the remedial procedures to be followed, then to find that the Board, applying language

\textsuperscript{31} The Board's decision was handed down on December 16, 1964, five days after this paper was given. The Board held that the union had violated sections 8(b)(1)(A), 8(b)(2) and 8(b)(3). \textit{Rubber Workers Union (Business League of Gadsden)}, 57 LRRM 1535 (1964).

\textsuperscript{32} Public Law 88-352; 78 Stat. 241.
which admittedly was never intended to cover the problem area, is now offering its own different remedy in many of the same situations dealt with specifically by Congress. Notwithstanding the anomaly, the general counsel of the NAACP, one of the principal groups advocating the Civil Rights Acts, hailed the Board’s decision in *Hughes Tool* as “a most significant breakthrough . . . of almost revolutionary proportions,” adding that NLRB procedures “would be easier, less costly to the individual, and more widely applicable than the fair employment provisions of the Civil Rights Act.” One has to acknowledge respect for the Board. It is not a small thing to make an act of Congress obsolete a year and a day before it becomes effective.

Another development of significance in the area of fair representation is the decision of the Supreme Court last January in the case of *Humphrey v. Moore*.

That case involved the Teamsters Union and two auto transport companies. Both companies transported Ford cars and Ford ultimately had need for only one of them. The two companies then worked out a new territorial arrangement under which Company X took the area in question. The employees of both companies were represented by the same union. Since X did not need all of the employees of both companies a question arose as to the proper allocation of jobs among present employees. Ultimately it was agreed that the seniority of the two sets of employees would be integrated. It turned out that Company Y was the older company so that X ended up with a work force constituted largely of Y’s men. The individuals who had formerly been employed by X then protested that the union and the company had exceeded their contractual powers in making such an agreement, and that in any event the union had unfairly discriminated against some of its members. The Supreme Court denied both allegations. I should like to call attention to several points of interest in connection with the *Humphrey* case.

First, there is the implication that an alleged breach of the union’s duty of fair representation states a cause of action under Section 301. Justice Goldberg addressed himself to this in his dissent, denying such jurisdiction on the ground that the duty of fair representation is “derived not from the collective bargaining contract but implied from the union’s rights and responsibilities conferred by federal labor statutes.” And so it has always been assumed. Two causes of action were stated in *Humphrey*,

33. 56 LRR ANALYSIS 37 (July 6, 1964).
34. 375 U.S. 355 (1964).
one for breach of Section 5 of the contract and the other for breach of
the duty of fair representation. *Humphrey* might be interpreted to mean
that where a cause of action otherwise is alleged under 301, then the fair
representation issue may also be litigated, in the nature of ancillary juris-
diction. Or *Humphrey* might be interpreted to mean that 301 includes
the fair representation claim when it is alleged that such unfair represen-
tation has resulted in a breach of the contract. But the validity of
these interpretations is substantially vitiated by a footnote to the Court’s
opinion which stated that “Even in the absence of Section 5, however, it
would be necessary to deal with the alleged breach of the union’s duty of
fair representation.” The test situation will be when an individual employee
seeks to bring a 301 action against the union without alleging any other
contract breach and without joining the employer. Justice White’s opinion
is sufficiently opaque, and I suppose intentionally so, that the Court has
not boxed itself in.

One may ask at this point what difference it makes whether the
court has jurisdiction of the unfair representation claim under 301 or,
as it always has in the past, under the rationale of *Steele* and its progeny.
The answer, I think, may be found in the preemption doctrine. In *Steele*
the Court gave judicial relief because there was no administrative remedy
under the Railway Labor Act, and the result was followed under the
NLRA. If the duty of fair representation is derived solely from the NLRA,
and if the Board’s *Miranda-Hughes Tool* doctrine is upheld, then arguably
the Board’s jurisdiction would be exclusive under the rule of the *Garmon*
case. On the other hand, if the duty to represent fairly can be derived
from the contract, the courts would retain their 301 jurisdiction. Here is
the way Justice White put it in *Humphrey*:

> Although there are differing views on whether a violation of the
duty of fair representation is an unfair labor practice under the
Labor Management Relations Act, it is not necessary for us to
resolve that difference here. Even if it is, or arguably may be,
an unfair labor practice, the complaint here alleged that Moore’s
discharge would violate the contract and was therefore within the
cognizance of federal and state courts, *Smith v. Evening News
Association*, subject, of course, to the applicable federal law.

Another aspect of *Humphrey* which is of passing interest is the express
repuadiation by the Court of the view expressed by the Kentucky Court

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35a. *Supra* note 34 at 344.
of Appeals in that case, and in another case by the Wisconsin Supreme Court. Under that view, a union automatically breaches its duty when it represents two groups of employees having antagonistic interests. Certainly this view was not compatible with the realities of the bargaining process, and the Court rejected it largely on the basis of its Huffman decision.

The Court did add at this point a discussion of considerable potential importance. It considered the question whether the losing group of employees was deprived of a fair hearing by having inadequate representation at the hearing which led to the settlement. The facts showed that three stewards representing the losing group went to the hearing at union expense and were given every opportunity to state their position. Justice White said that the losing group "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." In the Steele case the Supreme Court stated that as part of its duty to represent fairly, "the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action." In Humphrey, the Court seems to be suggesting that the same is generally true where there are divergent group interests within the bargaining unit, and logically, the point could be extended to an individual interest. The significance lies in the historically demonstrated fact that in any legal context unjust substantive results are less likely to ensue when fair and open procedures are followed. It is worth noting that Justice Goldberg rejected the idea that what he called "trial-type hearing standards" should be applied so as to hinder the employer and the union.

In my few remaining minutes I should like to make a few remarks by way of summary evaluation.

1. Unfair representation by unions has occurred principally because of non-membership in the union and because of race. The former has been prohibited since 1947 by 8(b)(2) and Congress in the Civil Rights Act of 1964 has provided a meaningful remedy for the latter. It may also be anticipated that the prohibition against exclusion of Negroes from union membership will reduce the frequency of racial discrimination.

2. Aside from non-membership and race, the formulation of standards and the identification of unfair representation present problems of such complexity and difficulty that a strong practical case can be made for use of the administrative process for their resolution. But conceding the desirability of the policy result, I have serious doubt as to the propriety of the Board’s assumption of power in *Miranda* and *Hughes Tool* and also the legal logic upon which those cases rest. We all know, however, that ours is an age in which increasingly policy becomes law through the instrument of administrative and judicial power. We know that the willingness of agencies and courts to use their power creatively is affected largely by the fact that there are no ready answers to many of the tough problems which come before these tribunals. Whatever may be said of many of our agency members and federal judges and especially our Supreme Court justices, they are not bashful in the use of their power. Professor Sovern, taking his cue from Shakespeare’s “Tempest” called his paper last year “The Brave New World of Miranda.” With the NLRB and the federal courts in mind, what Miranda said is not inappropriate. “O brave new world, that has such people in it.” And so, although it seems strained and far-fetched to me, I am not prepared to predict that the *Miranda-Hughes Tool* doctrine will not eventually be upheld.

3. If it is upheld, it seems doubtful to me that the preemption doctrine will be applied. I think the Civil Rights Act and the *Humphrey* case point in the other direction. Indeed, I think it might be argued that the Civil Rights Act has preempted the matter so as to make its remedies and procedures exclusive where the unfair representation is based on race, color, religion, sex or national origin.

4. But whether the remedy is judicial or administrative or both, in my judgment the duty of fair representation is not an adequate protection of the interests of the individual employee under a collective bargaining contract. The fair representation doctrine can do no more than protect the individual against the bad faith exercise of power. I think what the individual needs and what the law should provide, at least in some instances, is an opportunity to have his claimed right under the contract determined on its merits, even when the union and the employer are acting in admitted good faith.

5. Finally, I think we should keep in mind that we are talking about a problem which is not important because of any quantitative factor. We would all admit, I think, that in the overwhelming majority of instances the union represents the employees fairly and honestly, with results that
are usually acceptable to the employees involved. It is not the frequency of cases in which an individual employee's rights are violated which makes the problem important. Rather, it is the qualitative value which our law attaches to the individual human being and his rights in a society which through so many forces, some impersonal and some surely personal, increasingly threatens to submerge the individual. Whether the importance of the individual and his rights can survive in the automated, overpopulated society of the future is doubtful no matter how strong a fight we put up. But if no effort is made the result is certain. It is in this perspective that we lawyers should consider the problem which is common both to Mr. Dunau's topic and to mine.\[^{37}\]


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