

ORIGINS OF THE DUTY OF FAIR REPRESENTATION

The duty of fair representation arises from the union's status as exclusive bargaining representative. The Supreme Court has held that because the law gives the union exclusive authority to represent a bargaining unit, the union must exercise that power fairly on behalf of all the employees it represents.

Steele v Louisville and Nashville R.R. 323 U.S. 192, 202 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967)

NATURE OF THE DUTY OF FAIR REPRESENTATION

A union has “*a wide range of reasonableness*” in carrying out its collective bargaining functions, and this discretion is limited only by the requirement that the union act with “*complete good faith and honesty of purpose*”.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, (1976); *United Steelworkers v. Rawson*, 495 U.S. 362, 374 (1990)

BREACH OF THE DUTY OF FAIR REPRESENTATION

A union breaches its duty of fair representation if its conduct is *arbitrary, discriminatory, perfunctory or in bad faith*.

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

APPLICATION OF THE DUTY OF FAIR REPRESENTATION

The duty of fair representation applies to a union's contract administration, enforcement, and negotiation, as well as any other instances where a union *acts in a representative role*.

Air Line Pilots Association v. O'Neill, 499 U.S. 65, 77-78 (1991).

In the context of grievance handling the plaintiff must show arbitrary or bad faith conduct. A union's decision not to process a member's grievance based on discovery of facts adverse to the grievant is not a breach of the duty, but a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. Most Circuit courts will not find a breach of the duty when the union officer acted negligently or ineptly but in good faith; where the officer did not just get through the motions, but pursued what she/he thought was a proper and prudent strategy, and merely made a mistake. A union does not have a lawyer-like duty to provide "zealous" representation. The fact that the trained counsel would have avoided the error or pursued a different strategy is not enough.

United Steel Workers v. Rawson, 495 U.S. 362, 372-373 (1990) *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228 (3rd Cir. 1982), *citing and quoting Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967). *Bazarte v. United Transp. Union*, 429 F.2d 868 (3rd Cir.1970).

The duty also applies in the context of negotiations. This does not mean that the union is barred from making contracts or decisions that are adverse to some members of the unit, but those decisions may not be made arbitrarily, unfairly, or based on irrelevant considerations. Any judicial examination of a union's handling of negotiations "must be highly deferential recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities".

Steele v Louisville and Nashville R.R. 323 U.S. 192, 203 (1944); *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 77 (1991).

TO WHOM IS THE DUTY OF FAIR REPRESENTATION OWED

The duty of fair representation is owed to all individuals for whom the Union is the exclusive bargaining representative. This means that the Union owes a duty of fair representation to all members of the bargaining unit, *member and non-member alike*.

Vaca v. Sipes, 386 U.S. 171, 190 (1967)

DUTY OF FAIR REPRESENTATION CHECK LIST

This checklist contains various actions a union official can take to make the union less vulnerable to a lawsuit or unfair labor practice charge. As circumstances are different for every case, apply the list below accordingly to your discretion. It is not necessary that a union officer take all of these actions; but following these steps will make a duty of fair representation case less likely and make any case brought easier to defend.

1. Are you treating the grievant the way you would like to be treated?

A. Have you **listened carefully to everything the grievant wants to tell you?**

i. Have you asked questions to make sure you have a full picture?

ii. Have you taken notes?

a. Have you reviewed your notes with the grievant so you and the grievant know you didn't miss anything?

B. Have you interviewed any witnesses the grievant mentioned?

i. Have you taken notes?

a. Have you given the grievant, the opportunity to respond to other witnesses' statements?

ii. Have you gathered your evidence promptly, while people's memories are fresh and you still have time to do a good job?

a. Have you tried to see all sides of the events, so you can think with an open mind about what your employer might say or do?

C. Have you checked for any evidence and documents that might relate to what the grievant and other witnesses told you?

i. Have you checked employer manuals and policies?

ii. Have you sought personnel files?

iii. Have you obtained the employer's investigation reports and requested witness statements and other documents?

2. **Have you checked your collective bargaining agreement?**
 - A. Have you made sure you're meeting all the deadlines for processing a grievance?
 - i. Do you have a system of reminders from the start of a grievance on your calendar or computer?
 - B. Have you reviewed the entire collective bargaining agreement for any provisions that might apply to the grievance?
 - i. Have you checked for resolved grievances under the collective bargaining agreement and arbitral decisions?
 - ii. Have you checked past practices?
 - iii. Have you talked with:
 - a. an international union representative,
 - b. local union officers and staff, and
 - c. bargaining unit representatives and members?
3. **Have you checked applicable laws or asked a union representative or counsel about them?**
4. **Are you focusing on the merits of the grievance?**
 - A. Have you avoided basing your judgment on the grievant's race, gender, ethnic background, religion, politics, previous grievances, or other factors not relevant to *this* grievance?
 - B. If the grievant is not a member of the union, have you treated him or her just as you would a member?
 - C. Have you applied consistent standards to this grievance as to other similar grievances?
 - D. Are you comfortable that you could explain the reasons for your evaluation of the grievance in public?

- B.** If a grievance involves a conflict between two bargaining unit members, have you thought about the possibility of arranging for separate representation for each?

SUBSTANTIVE GUIDELINES APPLIED BY THE NLRB

The following is largely a summarization of a memorandum dated July 9, 1979, from the Office of the General Counsel of the National Labor Relations Board regarding Section 8(b)(1)(A) cases involving a union's duty of fair representation.

Improper Motives or Fraud may result in an unfair labor practice charge

1. Examples: If the union refuses to process a grievance because of

the employee's efforts to bring in another union, or

the employee's intra-union political activities, or

the employee's nonmembership in the union

the employee's race or gender

personal animosity between the employee and the union's leadership

Pacific Coast Utilities Services, Inc., 238 NLRB 599 (1978); ESI, Inc., 296 NLRB 1319 (1989); Owens-Illinois, 240 NLRB 324 (1979).

2. Where there is some evidence of improper motivation, but the union asserts that it refused to process a grievance because the grievance was not meritorious, the fact the union made only a cursory inquiry into the merits of the grievance may undercut the union's defense.

Accordingly, that fact is relevant to the Region's analysis.

However, the fact, standing alone, would not establish the improper motive.

Newport News Shipbuilding & Dry Dock Co., 236 NLRB 1470 (1978).

3. Involves intentional misconduct

Humphrey v. Moore, 375 U.S. 335 (1964).

4. Proof of fraud requires evidence that the union intentionally mislead the employee as to a material fact concerning his/her employment, and that the employee reasonably relied thereon to his/her detriment.

Arbitrary Conduct

Arbitrary conduct is when there is no basis upon which the union's conduct can be explained.

So long as the union makes some inquiry into the facts and/or so long as the union's contract interpretation has some basis in reason, the union's refusal to process the grievance will not be considered arbitrary.

1. Example: Refusing to process a grievance without any inquiry or with such a perfunctory or cursory inquiry that it is tantamount to no inquiry at all.

Beverly Manor Convalescent Center, 229 NLRB 692 (1977)

2. Example: If there is a contract or an internal union policy which clearly and unambiguously supports the employee's position, and the union, without explanation, refuses to support the employee

Miranda Fuel Co., 140 NLRB 181 (1962); U.S. Postal Service, 240 NLRB No. 178 (1979).

3. Example: if the union had an employment-related rule which had no objective standards at all, so that the implementation of the rule is left wholly to the unfettered discretion of union officialdom, and the employees are left in the dark about how the rule will be implemented.

See Boilermakers Local 667, 242 NLRB No. 167 (1979).

4. Union's inquiry into the facts concerning the grievance need not be the kind of exhaustive inquiry that one would expect from a skilled investigator.

Jelco Inc., 238 NLRB No. 202 (1978); Plumbers Local 195 (Stone & Webster Engineering Corp.), 240 NLRB No. 61 (1979).

5. Mere fact that the union's investigation reaches a conclusion that is later shown to be erroneous does not establish a violation.

6. If a contract provision supports the employee under one interpretation, and the union reasonably gives the contract another interpretation, the fact that the union's interpretation may be "wrong" (as others might see it) does not establish a violation.

Washington-Baltimore Newspaper Guild (CWA), 239 NLRB No. 175 (1979).

Gross Negligence

There could be cases where the negligence was so gross as to constitute a reckless disregard of the interests of the unit employee.

Certain Circuits have indicated that gross negligence may violate Section 8(b)(2)(A).

1. It is well established that mere negligence will not establish a breach of the duty of fair representation.

Great Western Unifreight System, 209 NLRB 446 (1974).

2. Example: failing to notify an employee that her grievance would not be taken to arbitration, thereby leading her to reject a settlement offer she otherwise would have accepted.

Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978); see also Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975).

Union's Conduct After It Has Decided To Grieve on Behalf of the Employee

1. There is some indication in the decided cases that a union may have the higher responsibility of an advocate once it decides to process a grievance on the employee's behalf.

Jelco Inc., 238 NLRB No. 202 (1978); Associated Transport Inc., 209 NLRB 292, enfd. sub nom. Kesner v. NLRB, 532 F.2d 1169 (7th Cir. 1976); Owens-Illinois, 240 NLRB 324 (1979).

2. However, the cases in which a violation has been found involve improper motives or arbitrary conduct, as these terms are used above.

Owens-Illinois, 240 NLRB 324 (1979).

3. The mere fact that the union has invoked the grievance machinery does not mean that it is statutorily precluded from thereafter settling the grievance or acquiescing in the employer's position.

With respect to settlements, the union can consider the costs of further processing the grievance and decide to accept less than that which the employee seeks.

See UAW, Local 122 (Chrysler Corporation), 239 NLRB No. 151 (1978).

Adapted From Materials from the George Meany Center for Labor Studies

Questionnaire on the Duty of Fair Representation

TRUE/FALSE

1. The union is legally obligated to represent members only. _____
2. Unions win most duty of fair representation lawsuits. _____
3. A union may not agree to a contract provision that benefits one group of workers more than another group. _____
4. A union has a duty to inform members, prior to a strike vote, that they could lose their jobs as a result of the strike. _____
5. As long as the union processes a grievance through the steps of the procedure, a court will not examine how good a job the union does in its representation. _____
6. A union representative should keep a written record on every grievance case. _____
7. If a grievance is filed late (beyond the contractual time limits), this violates the union's duty of fair representation. _____
8. The law gives an individual employee the right to have his/her grievance taken to arbitration. _____
9. A union may refuse to arbitrate a case based on the potential cost of an arbitration. _____
10. A court may not review the thoroughness of the union's preparation and presentation of an arbitration case. _____
11. If one or more employees have conflicting claims (like in a promotion dispute), the union must take a neutral position and not favor a particular employee. _____
12. If a union loses a duty of fair representation suit, it is the employer who must pay back wages to the wronged employee. _____
13. A duty of fair representation suit must be started (a complaint filed with the court) within six months. _____

HYPOTHETICALS FOR DISCUSSION

1. John is a distribution clerk in the bargaining unit. But, John refuses to become a member of the Union. In fact, John is a stool pigeon for management. John frequently reports to management on the activities of the Union.

John often times talks bad about the Union and tries to convince other employees that they do not need to be member of the Union. John has been a thorn in your side since the day you became President of the Local Union.

One day the Postal Service, despite John's pro-management actions, changed John's schedule in violation of the collective bargaining agreement in a manner that cut his hours. John comes running to you demanding that you need to take action in response to management's conduct.

What, if anything, should you do for John? Why? Do you have any legal obligation to John?

2. Carl, Al and Sue bid on a best qualified position in the Maintenance Craft. Under the National Agreement, the position in question was to be filled by the best qualified applicant. The Postal Service awarded the position to Sue.

Sue received the highest score but only has three years of seniority. Carl has thirty years of seniority but received the lowest score, 35 points lower than Sue. Al has ten years of seniority and scored only four points lower than Sue on the Postal Service's rating. Carl and Al want you to file grievances.

What, if anything, should you do for Carl and Al? Why? Do you have any legal obligation to Carl and Al?

3. Betty is a window clerk in the bargaining unit. Betty was terminated for allegedly stealing money from her cash drawer. Betty insists that she is innocent.

The problem is that Betty was the only one in her area of the facility at the time. There are no other suspects, and there are no witnesses to vouch that

Betty did not steal. Prior to arbitration, the Postal Service offers to return Betty to work with no back pay.

You believe that there is a good chance that you will lose the arbitration. When you tell Betty about the settlement offer, she tells you that although she really wants her job back, she does not want to settle the grievance unless the Postal Service offers her the back pay she believes she is owed.

What, if anything, should you do for Betty? Why? Do you have any legal obligation to arbitrate the case because Betty does not want to accept the settlement?

4. The Union filed a grievance on behalf of Sam, a Tractor-Trailer Operator who was wrongfully denied overtime.

You are the Union representative for the grievance, and somehow, you missed the deadline for appealing the grievance to Step 2.

What, if anything, should you do? Why? Have you violated any legal obligation to Sam?

5. Tammy and Robert are two FSM clerks who work next to each other in the same facility. Tammy comes to you and says that Robert is sexually harassing her on the workroom floor and asks you for help.

What, if anything, should you do? Why? What legal obligations do you have to Tammy? What legal obligations do you have to Robert?

6. Fred is a custodian with a back condition called scoliosis that results in pain in his back when he lifts over twenty pounds. Fred's position requires him to perform lifts of over twenty pounds several times a day.

After two months on the job, an office job in the facility, with no lifting, gets posted. Fred bids for the job. You discover that Gina has also submitted a bid for the job.

Gina has more seniority than Fred, but Gina has no medical condition that prevents her from lifting over twenty pounds. The National Agreement states that all positions are to be filled based on seniority.

What, if anything, should you do? Why? What legal obligations do you have to Fred? What legal obligations do you have to Gina?

7. Dennis was given a seven day suspension for excessive absences. During your Step 2 investigation you meet with Dennis. At that meeting Dennis insists that you introduce the 25 EEO charges that he has filed against the Postal Service the past five years.

What should you do? Why? What legal obligations do you have to Dennis?

8. Employee Jane Doe complains to both her union steward and local union president on a number of occasions over a period of a year and a half about numerous sexually offensive remarks and conduct committed by male co-workers on the job.

On each of these occasions, Employee Doe demands that the local union file a grievance to remedy what she believes is a sexually hostile work environment. On several occasions, Employee Doe and other female employees are subjected to sexually suggestive remarks by both the union steward and the local union president.

The Union Employee Doe and takes no other action to remedy Employee Doe's complaints.

What will be the result if Employee Doe files an NLRB DFR charge, or a Federal court DFR lawsuit claiming that the local union breached its duty of fair representation by failing to file a grievance protesting sexual harassment of Employee Doe and other female employees?

9. Employee George asks Employee Janet for a date and Janet refuses. Employee George repeats his request for a date over a period of six months, and on each occasion Employee Janet refuses. Both employees are in the bargaining unit.

Employee George then begins to make explicit sexual remarks to Employee Janet in the presence of other bargaining unit employees. Employee Janet reports Employee George's conduct to management, and Employee George is fired.

Employee George asks the local union to file a grievance on his behalf. What should the local union do?

Employee Janet used to be in the letter carrier craft, and is only a member of the APWU bargaining unit because of a light duty assignment. Does this change what the local union should do?

If the local union files a grievance on behalf of Employee George, what would be the result if Employee Janet filed a Federal court lawsuit or an NLRB DFR charge alleging a breach in the duty of fair representation based upon the conduct by the local union?

- 10.** Employee Jones is removed from his job with the Postal Service after an extended illness, and continuous resulting absences caused by injuries to his feet while serving with the military in Vietnam.

Employee Jones decides not to go to arbitration under the National Agreement, but rather files an appeal with the Merit Systems Protection Board. Employee Jones designates the Union as his representative on the Appeal form he submits to the MSPB. He does this without the Union's knowledge or approval.

Employee Jones comes to the Union and demands that the Union represent him at his upcoming MSPB hearing. The Union refuses, stating its policy not to represent employees at MSPB hearings.

What will be the outcome of an NLRB charge or DFR lawsuit against the Union?

- 11.** Postal Service Employee Johnson is not a member of the APWU. In fact, Johnson just came into the APWU bargaining unit on light duty from the Letter Carrier Craft, but has recently been made a full-time clerk. The APWU Local has published Johnson's name in its newspaper as a non-member. Johnson is not sure

whether, as an employee on light duty, he has a right to sign the overtime desired list.

He poses this question to Supervisor Scott, who does not know the answer but promises to find the answer and inform Employee Johnson. Supervisor Scott informs Employee Johnson, only after the ODL is closed for the quarter, that, yes, Employee Johnson has a right to sign.

The APWU Local files a grievance for Employee Johnson which is denied at Step 1. At the Step 2 meeting, the Postal Service representative offers to settle the grievance by paying Johnson for the loss of overtime work for the two week period the current ODL has been in effect, and to place Johnson's name on the current ODL.

The Union representative agrees to the payment of two weeks overtime, but refuses to allow Johnson's name to be placed on the current ODL, since it has already closed for the quarter.

The APWU representative remarks that "Putting his name on the ODL at this point would violate the rights of dues-paying APWU members, and Johnson is a non-member. I won't agree to do that."

What result if Johnson files an NLRB DFR charge or a DFR lawsuit?

12. Postal Employee P was employed as a Truck Driver in a Postal facility in New Jersey when, at the request of the Postal Inspection Service, he agreed to be transferred to a Postal facility in Wichita, Kansas as a Mailhandler.

The Inspection Service intended to use Employee P to infiltrate a suspected drug ring in the Postal facility in Wichita, Kansas. Neither Employee P, the Postal Inspection Service nor the Postal Service notified the APWU of these facts.

Employee P kept his APWU membership current, and continued to have Union dues deducted from his paychecks and submitted to the APWU. In addition, Employee P obtained a Mailhandlers Union membership, and had dues checked off to the Mailhandlers.

Before Employee P was transferred, the Postal Inspection Service promised him that once the assignment in Wichita, Kansas had been brought to a

successful conclusion he would be transferred back to his old position in Bellmawr, New Jersey. This fact was also never disclosed to the APWU.

When the "undercover" assignment had been concluded, Employee P demanded that the Postal Service return him to his prior position in Bellmawr, New Jersey, and the Postal Service refused to do so. Employee P then goes to an APWU Steward in Wichita, Kansas and demands that a grievance be filed to return him to his position as a truck driver in Bellmawr, New Jersey.

The APWU Local in Wichita refuses to file a grievance for Employee P, claiming that he is not a member of the APWU bargaining unit.

What would be the result if Employee P filed an NLRB DFR charge or a DFR lawsuit against the APWU?

13. Postal Employee D was issued an emergency suspension and a Notice of Removal when the Postal Service accused him of having threatened and physically assaulted a female postal supervisor on the job. The Local Union filed a grievance on Employee D's behalf and that grievance was processed to arbitration.

During the course of the arbitration hearing, two employee witnesses testified that they observed D both verbally and physically assault the female supervisor in question. In addition, the female supervisor testified consistently with the two employee witnesses against Employee D.

Employee D testified under oath and denied either verbally or physically assaulting the supervisor. The Arbitrator credited the testimony of the supervisor and the two employee witnesses, and discredited Employee D. Based upon these credibility resolutions, the Arbitrator denied the grievance finding that the Postal Service had "just cause" to remove Employee D.

After the Arbitrator's Award is issued, Employee D demands that the Union file a federal court action seeking to overturn the Arbitrator's Award. The Union refuses.

What will be the result if Employee D files an NLRB duty of fair representation unfair labor practice charge or a DFR lawsuit because of the Union's refusal to seek to overturn the Arbitrator's Award?

14. Employee V is physically accosted on the workroom floor by Supervisor Johnson. Employee V does not resist Supervisor Johnson physically, but rather rolls up into a ball on the floor and yells, "Please stop, please stop hitting me." Four fellow employees observed Supervisor Johnson attack Employee V and are willing to testify to Employee V's version of the facts.

The Postal Service issues a Notice of Removal to both Employee V and Supervisor Johnson. Within one week after Supervisor Johnson receives his Notice of Removal, the Postal Service rescinds it, and brings Supervisor Johnson back to work. The Postal Service does not, however, return Employee V to his job.

Employee V, two days after having received the Notice of Removal, goes to Union Steward Kelly to file a grievance. Kelly takes down the facts given him by Employee V and promises to file a grievance. Instead, however, Union Steward Kelly goes on vacation for two weeks and fails to file a grievance until one month following Employee V's receipt of the Notice of Removal.

The Postal Service's response to the grievance is that it is untimely and it is therefore denied.

What would be the result if Employee V files an unfair labor practice charge against the Union or a DFR lawsuit claiming a failure in the duty of fair representation based on Union Steward Johnson's conduct?

SETTLEMENT HYPOTHETICALS FOR DISCUSSION

1. The local union has received a \$17 million settlement of casuals in lieu of grievances covering the time period from 1996 to 2005. The Postal Service has agreed to pay the \$17 million directly to employees deemed eligible by the local union. There were no restrictions placed on how the local union would determine who was eligible to receive settlement money. Also, the local union did not receive any of the money to distribute. Rather, the Postal Service retained the settlement money and distributed it directly to the individuals deemed eligible by the local union.
 - A. The local union president decides that she will determine who will receive the settlement money herself. She decides that every current union member

of the bargaining unit will receive an equal share of the settlement. Is this a good way to distribute the settlement? Why or why not?

- i. Can she give herself and her steward a bigger share because they worked on the grievance?
- ii. What if she decides to give the settlement money in equal amounts to members of the bargaining unit, whether they are a member of the union or not?
 - i. Are we forgetting anyone?
- iii. What are other ways to decide who is eligible to receive settlement money besides the local union president deciding by herself?

B. The local union has decided to appoint a committee to determine who is eligible to receive settlement money, and how much each person will receive. The committee has decided to have the Postal Service make an initial payment of \$16 million, and leave the remaining \$1 million on hold for at least four (4) months after the initial payment so that it can be used to pay any other eligible individuals who were inadvertently “missed” during the first payment. After the initial payment, five (5) families/estates of deceased former employees claimed that they should have been included in the settlement. The local union decides not to include them in the settlement. Is that a breach of the union’s DFR?

- i. What if the Postal Service had told the union that it would keep the money if a settlement check to an employee was returned unclaimed?

2. The local union has received a \$5 million settlement. The local union submitted an initial settlement list of employees that were owed payment pursuant to the settlement that included approximately 1000 employees, to the Postal Service.

The local union then learned that 20 employees were mistakenly left off of the initial list. Upon becoming aware of this mistake, the local union submitted a supplemental list to the Postal Service.

However, the Postal Service has taken the position that all employees on the initial settlement list were paid and all the settlement funds distributed, and thus, have fulfilled their arbitration award obligation, despite the local union's claim that 20 employees were inadvertently left off the list.

What could have been done differently here?

3. The local union has received a \$2 million arbitration award in a Casual in Lieu of Class Action. The local union has come up with a list of employees that had worked during the relevant time period, and thus eligible to receive settlement monies. Five (5) of those employees were now supervisors. Should the local union take them off the list?

A. What about persons who are no longer employed?

4. The local union was awarded \$2 million in an arbitration award to be divided amongst the APWU Clerk Craft employees. The union determined that the time period covered by the award constituted 15 quarters within the Postal Service calendar. Thus, the union divided the \$2 million granted by the arbitrator by 25.

The number obtained as a result of that calculation was then divided by the number of people employed in APWU Clerk Craft positions. Equal amounts were granted to each of those people who were employed for each full quarter.

The union decided not to disburse any money to those employees who, at the time of the arbitrator's award, had voluntarily resigned from their positions from the Postal Service, or were discharged without grieving their discharge.

Accordingly, checks were disbursed, using the aforementioned formula to bargaining unit employees in the Clerk Craft at the time of the arbitrator's award, or who had pursued a grievance after having been discharged.

Has the union breached its duty of fair representation?