Michigan Law Review

Volume 63 | Issue 6

1965

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In its 1962 *Miranda Fuel Co.* decision,[1] the National Labor Relations Board formulated a novel doctrine whereby it acquired

1. 140 N.L.R.B. 181 (1962), *enforcement denied*, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). See note 8 *infra* and accompanying text.

jurisdiction over unfair representation complaints filed by union members in good standing on the theory that a union which fails to represent all of its members fairly commits unfair labor practices in violation of sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act.[2] Formerly, unfair representation complaints filed by union members had been cognizable only by the courts,[3] since unfair representation was not considered an unfair labor practice and, consequently, was outside the jurisdiction of the NLRB.[4]

Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . or to refrain from any or all such activities." Since a labor organization is charged with the duty of acting as bargaining agent for all employees in the bargaining unit, nonunion as well as union workers,[5] arbitrarily inequitable treatment of unaffiliated workers constitutes the archetypal section 8(b)(1)(A) violation.[6] This form of unfair representation impinges on a worker's right to remain unaffiliated, but in *Miranda* the Board was presented with the allegedly unfair representation of a union member in good standing. Nevertheless, the Board,[7] having determined that the union had acted arbitrarily and unfairly in successfully urging the employer to reduce the seniority of the complainant, found a section 8(b)(1)(A) violation by interpreting the section 7 right to choose representatives as implicitly including the right of union employees to be represented fairly.

Section 8(b)(2) is violated when a union causes or attempts to cause an employer to discriminate against an employee in such a manner as to encourage or discourage union membership or partici-

2. 49 Stat. 449 (1935) (Wagner Act), as amended, 29 U.S.C. §§ 141-68 (1958) (Taft-Hartley Act).

3. The right to fair representation was judicially extracted from § 9(a) of the act. See Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Whitfield v. United Steelworkers, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); Syres v. Oil Workers, 223 F.2d 739 (5th Cir.), *rev'd*, 350 U.S. 892 (1955). *But cf.* Durandetti v. Chrysler Corp., 195 F. Supp. 653 (E.D. Mich. 1961). See generally Herring, *The "Fair Representation" Doctrine—An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964); Note, 112 U. PA. L. REV. 711 (1964).

4. National Labor Relations Act § 10, 49 Stat. 553 (1935), 29 U.S.C. § 160 (1958), provides that the NLRB shall have jurisdiction over unfair labor practices listed in § 8, 49 Stat. 552 (1935), 29 U.S.C. § 158 (1958), as amended, 29 U.S.C. § 158 (Supp. V, 1964), affecting commerce.

5. This obligation derives from § 9 of the NLRA, which provides that the statutory bargaining agent shall be the exclusive employee representative. See, *e.g.*, Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944); Hughes Tool Co. v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945).

6. See, *e.g.*, NLRB v. Gaynor News Co., 347 U.S. 17 (1954); Hughes Tool Co. v. NLRB, *supra* note 5.

7. Chairman McCulloch and Member Fanning dissented.

pation in union activities.[8] An employer is prohibited from so discriminating by section 8(a)(3). Although *Miranda* involved a union member in good standing, the Board, finding the union's action to be unjustified and arbitrary, held the successful insistence that the seniority of one of its members be reduced was an 8(b)(2) violation on the theory that this demonstration of the ability of the union to wield arbitrary power would force nonmembers, or members in poor standing, to take an active part in union affairs in order to avoid incurring union hostility.[9]

On review, however, the Court of Appeals for the Second Circuit refused to enforce the Board's decision in *Miranda*, Judge Friendly dissenting.[10] Judge Medina, writing the majority opinion, was joined by Judge Lumbard in determining that the union had not acted unfairly. The decision also considered and rejected the section 8(b)(2)-section 8(a)(3) reasoning.[11] Judge Medina alone considered, and rejected, the section 8(b)(1)(A) unfair representation rationale.

Nevertheless, the NLRB reiterated these theories in 1964 in *Hughes Tool Company*[12] in the context of racially-oriented discriminatory union *inaction*. The bargaining unit at Hughes Tool was divided between white and Negro employees into locals 1 and 2. At the time these locals were certified as joint bargaining agents,[13] a contract in force between the employer and the two locals provided that certain jobs, including apprenticeships, would be available to white employees only. When local 2, the Negro unit, refused to renew this discriminatory contract, local 1 did so unilaterally. Subsequently, a Negro member of local 2 applied for an apprenticeship but was rejected on the basis of race. The company refused to hear a grievance based on this refusal filed through local 2, which according to the contract had no responsibity in matters relating to apprenticeships. The complainant then sought the assistance of local 1 in processing the grievance but was summarily refused, and an unfair representation complaint against the union followed because of the denial of assistance by local 1.

The presence of two locals within one bargaining unit opened

8. See, *e.g.*, Radio Officers v. NLRB, 347 U.S. 17, 52 (1954).

9. 140 N.L.R.B. 181, 186-88 (1962).

10. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

11. The court determined that § 8(b)(2) could not be violated unless the discrimination sought by the union would constitute a violation of § 8(a)(3) if the employer had acted on his own initiative. This reasoning may not encompass all situations. See notes 34-36 *infra* and accompanying text.

12. Metal Workers, 56 L.R.R.M. 1289 (1964).

13. Apparently this segregated unit had been so certified by the NLRB, because in the course of its decision the Board expressly overruled previous decisions insofar as they held that unions which practice racial segregation may obtain or retain certification. *Id.* at 1294.

two avenues of approach to the case. If the two locals were viewed as separate entities, then the refusal of local 1 to process complainant's grievance on the ground that only members of local 1 were eligible for apprenticeships constituted a refusal to represent a *nonmember* employee in its bargaining unit. The two members of the Board who had dissented in *Miranda* chose this approach to find a section 8(b)(1)(A) violation in *Hughes Tool.* The Board majority, on the other hand, did not recognize the validity of the division of the bargaining unit along racial lines.[14] In their view, rather, the case presented an instance of internal union discrimination in violation of section 8(b)(1)(A) under the *Miranda* unfair representation theory. The majority then broadened the section 8(b)(2) theory of *Miranda.* While *Miranda* condemned certain union action (insistence upon decreasing the seniority of a member), *Hughes Tool* held that union *inaction* (the refusal to process a meritorious grievance)[15] caused the employer to violate section 8(a)(3).[16] Finally, the Board also added a section 8(b)(3) union refusal to bargain violation to the list of unfair labor practices which may arise from unfair representation. The Board reasoned that the duty to bargain imposed on unions by that section ran in favor of individual members, as well as employers, and therefore failure to represent a member constituted a refusal to bargain.

Valid criticism can certainly be advanced against each of the findings of violation made by the Board in *Hughes Tool.* Because of the legislative and administrative history of section 8(b)(1)(A), it is unlikely that the courts will uphold the broad reading given that section by the Board when it fashioned the *Miranda* doctrine as reiterated in *Hughes Tool.*[17] Initially, there is no indication that Congress intended to include unfair representation within the ambit of section 8 unfair labor practices. On the contrary, specific proposals

14. See note 13 *supra.*

15. Not all grievances need be pressed by the union, but the exercise of discretion must not be totally arbitrary. Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962); Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959).

16. Although the language of the opinion leaves some doubt as to whether, for purposes of finding a § 8(b)(2) violation, the majority viewed the locals separately or as comprising a single unit, a more recent decision indicates that the existence of two locals was immaterial. Rubber Workers Union, 57 L.R.R.M. 1535 (1964).

17. The Courts have construed § 8(b)(1)(A) broadly so as to include a wide range of conduct. Communications Workers v. NLRB, 362 U.S. 479 (1960); Radio Officers v. NLRB, 347 U.S. 17 (1954); NLRB v. United Packinghouse Workers, 274 F.2d 816 (5th Cir. 1960); NLRB v. International Ass'n of Woodworkers, 243 F.2d 745 (5th Cir. 1957). See also Central Mass. Joint Bd., 123 N.L.R.B. 590 (1959). However, the courts have also defined limits for the provisions of that section. NLRB v. News Syndicate Co., 365 U.S. 695 (1961) (preferential hiring of union men); Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961) (hiring hall arrangement not illegal *per se*); NLRB v. Local 639, Intl. Bhd. of Teamsters, 362 U.S. 274 (1960) (minority union picketing for recognition of exclusive bargaining agent).

to that end were rejected during consideration of the Taft-Hartley Act and the Landrum-Griffin Act, and when presented in separate bills prior to the Civil Rights Act of 1964.[18] In addition, because the Taft-Hartley Act both added section 8(b)(1)(A) to the NLRA and amended section 7 to include as a protected right the option to refrain from participating in any activity protected by that section, the proscription of 8(b)(1)(A) on unions was apparently simply a counterpart to the existing section 8(a)(1) of the Wagner Act, which imposes the same hands-off limitation on employers. Moreover, if the duty of fairness is read into the other section 7 rights as the Board read it into the right of employees to choose their own representatives, much of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act is redundant,[19] with the result that, although that act specifically designated the courts to hear complaints arising under it,[20] the Board will be given almost concurrent jurisdiction. Many commentators have agreed that the Board's interpretation of section 8(b)(1)(A) is unwarranted,[21] and prior to *Miranda* the Board's General Counsel had expressed the same belief in refusing to present unfair representation cases to the Board.[22] A bill recently introduced in Congress by Representative Griffin also appears to assume that unfair representation is not presently an unfair labor practice. This bill, entitled "Employee Civil Rights Act of 1965,"[23] was prompted by current enthusiasm for repeal of legislation enabling states to pass right to work laws and is intended to guarantee that workers who are required to join a union as a condition of employment will not be discriminated against by that union on the basis of race. It provides specifically that it is to be an unfair labor practice for a union to represent unfairly its members because of racial considerations.[24]

Second, the position that unfair representation constitutes a refusal to bargain by the union is subject to similar objection since it seems clear that section 8(b)(3) was designed only as a counterpart

18. See generally Note, 112 U. PA. L. REV. 711, 721 (1964).

19. LMRDA (Bill of Rights), §§ 101-05, 73 Stat. 522-23 (1959), 29 U.S.C. §§ 411-15 (Supp. V, 1964). See generally Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547, 588-89 (1963).

20. 73 Stat. 523 (1959), 29 U.S.C. § 412 (Supp. V. 1964).

21. Albert, *supra* note 19, at 549-52; Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 153 (1957); Herring, *supra* note 3; Maloney, *Racial and Religious Discrimination in Employment and the Role of the NLRB*, 21 MD. L. REV. 219, 230-31 (1961); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 590-94 (1962). *But see* Sovern, *Race Discrimination and the NLRA*, N.Y.U. 16TH ANN. CONFERENCE ON LABOR 3 (1963).

22. Case No. K-311, 37 L.R.R.M. 1457 (1956); Case No. 1047, 35 L.R.R.M. 1130 (1954); see also Brief for the NLRB as Amicus Curiae, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

23. Employee Civil Rights Act of 1965, H.R. 4350, 89th Cong., 1st Sess. (1965).

24. *Ibid.* See 111 CONG. REC. 1993 (Feb. 4, 1965).

to section 8(a)(5), which requires employers to bargain with unions.[25] Both sections should be read in conjunction with section 8(d), which defines "to bargain collectively" as the mutual obligation of employers and unions to meet in good faith to work out differences.[26] Presumably, union insistence upon discriminatory conditions in a collective bargaining agreement would violate the union's duty to bargain since it would be a demand for violation of the Civil Rights Act of 1964,[27] and, perhaps, even without resort to the Civil Rights Act it would constitute an illegal bargaining technique.[28] The violation would not, however, stem from unfair representation. The *Hughes Tool* trial examiner, whose opinion was adopted by the Board, arrived at his finding of an 8(b)(3) duty running to individual members by analogizing to a case which he felt established an employer's duty under section 8(a)(5) to bargain with individuals as well as the union.[29] That case, however, was concerned only with the fact that a union need not be certified to be a recognized bargaining agent[30] and does not support the examiner's position. Indeed, there are severe limitations on the ability of an individual to bargain with his employer,[31] and an employer's willingness to bargain with an individual employee in the face of these limitations may itself constitute an unfair labor practice.[32] Moreover, even if an employee were to bargain individually, he could not *compel* an employer to meet with him.[33]

Finally, the Board's contention that a union attempt to cause an employer to discriminate against a union member in good standing violates section 8(b)(2) is unlikely to weather judicial review, despite its apparent logic. The Board recognized in *Miranda* that the union's conduct would violate section 8(b)(2) only if the action taken by the employer at the union's urging violated section 8(a)(3). The Board also recognized that an employer's motive to encourage

25. NLRB v. Miranda Fuel Co., 326 F.2d 172, 178 (2d Cir. 1963).

26. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 486-88 (1960).

27. See notes 43-50 *infra* and accompanying text.

28. See NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); Sovern, *supra* note 21, at 589.

29. Louisville Ref. Co., 4 N.L.R.B. 844, 860-61, *enforced*, NLRB v. Louisville Ref. Co., 102 F.2d 678 (6th Cir. 1939).

30. See also, *e.g.*, International Ladies' Garment Workers v. NLRB, 366 U.S. 731 (1961).

31. Two provisos to § 9(a), 29 U.S.C. § 159(a) (1958), permit an employee to take his grievances directly to the employer only if the bargaining agent has first had an opportunity to present the grievance, and then only if the terms of the collective bargaining contract permit such direct bargaining. See J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

32. *Cf.* Federal Tel. & Radio Co., 107 N.L.R.B. 649 (1953).

33. See administrative rulings of the NLRB General Counsel: Case No. 418, 31 L.R.R.M. 1039 (1952); Case No. 317, 30 L.R.R.M. 1103 (1952); Case No. 255, 29 L.R.R.M. 1339 (1952).

or discourage union membership is requisite to a section 8(a)(3) unfair labor practice. Further, it was established by the United States Supreme Court in *Radio Officers v. NLRB*[34] that this motive may be inferred where, in the absence of a valid business reason for the inequitable treatment, the circumstances indicate that the foreseeable result of the employer's discrimination will be to influence union membership.[35] The Supreme Court also stated that any arbitrary treatment of employees at the urging of the union would naturally tend to have that effect, since it would demonstrate the power of the union.[36] *Radio Officers*, therefore, established that an act, which if done by the employer on his own initiative might not violate section 8(a)(3), may become a violation simply because the employer had acquiesced in an arbitrary union demand. In *Miranda* the Board found as a fact that the union's demand was unjustifiable, and reasoned that the employer's acquiescence brought the case within *Radio Officers*.

The nature of this inference made by the Board, however, differs from that drawn in *Radio Officers*. In that case and companion cases,[37] it was patently clear that the union was urging discrimination in order to coerce employees to join the union or to perform supposed obligations of membership.[38] The effects of the urged inequities were also easily ascertainable since in one instance the union obtained a higher pay scale for union workers than for other employees;[39] in another instance the seniority of a member was reduced for failure to remit union dues;[40] and in the third case the union successfully sought the discharge of a member who allegedly had not complied with certain union rules and procedures.[41] Since the various employers had no reasonable business purpose for discriminating, and since they were, or should have been, aware of the union's illegal purpose in making the demand and its obvious impact on the workers, they were deemed to have intended the foreseeable consequences of their conduct. In effect, the clearly culpable union motive was imputed to the employer. In *Miranda*, however, not only is the illegal coercive effect of inequitable treatment of a union member in good standing conceptually speculative, but also the Board had to indulge in drawing an inference from an inference by first inferring a culpable union motive and then inferring that the employer was aware of that motive. The courts, at least, have generally been un-

34. 347 U.S. 17 (1954).
35. *Id.* at 45.
36. *Id.* at 52.
37. NLRB v. International Bhd. of Teamsters, 347 U.S. 17 (1954); Gaynor News Co. v. NLRB, 347 U.S. 17 (1954).
38. *Id.* at 52.
39. Gaynor News Co. v. NLRB, *supra* note 37.
40. NLRB v. International Bhd. of Teamsters, 347 U.S. 17 (1954).
41. Radio Officers v. NLRB, 347 U.S. 17 (1954).

willing to find a section 8(a)(3) violation by inference unless the inequitable treatment is reasonably likely to coerce union membership and there is no other reasonable conclusion but that it was intended to do so.[42] No such finding can be confidently asserted in *Hughes Tool.* Finally, in a case such as *Hughes Tool,* where the employer has taken no action violative in itself of section 8(a)(3) *and the union has urged nothing,* there is certainly no justifiable basis for finding an 8(b)(2) infraction.

Isolated instances of unfair representation such as that alleged in *Miranda* have not elicited public concern and, indeed, no similar case has been heard; but several subsequent racial discrimination cases have come before the Board.[43] Wholesale discrimination against a significant proportion of the labor force on racial grounds has prompted specific congressional response in the form of Title VII of the Civil Rights Act of 1964,[44] which imposes the duty of fair employment practice on both employers and labor organizations. The act forbids labor organizations to discriminate, to limit employment opportunities, or to affect adversely the employment status of any member on the basis of race, color, religion, sex, or national origin, or to attempt to cause an employer so to discriminate. In order to insure effective enforcement, the act also affords grievants the same advantages of flexibility and minimal cost which NLRB hearings have over normal court proceedings,[45] subject to the provision that appropriate state and local authorities shall be accorded the opportunity to act before the commencement of federal action.[46] A Fair Employment Opportunity Commission has been established with powers to investigate, to seek settlement through conciliation, and to file complaints with the offending organization either on the Commission's own initiative or on behalf of a complaining party. If efforts to achieve an amicable settlement fail, an aggrieved person may file suit in federal court, with the aid of appointed counsel and without cost in appropriate circumstances.[47] The remedies available

42. See NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); International Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961) (Harlan, J., concurring); NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1964), *vacated,* 85 Sup. Ct. 613 (1965), Comment, 32 U. CHI. L. REV. 124 (1964).

43. Rubber Workers, 57 L.R.R.M. 1535 (1964); Automobile Workers, 57 L.R.R.M. 1298 (1964); Locals 1367 & 1368 Int'l Longshoremen's Ass'n, 57 L.R.R.M. 1083 (1964).

44. 78 Stat. 241 (1964).

45. See, *e.g.,* Blumrosen, *The Worker and Three Phases of Unionism,* 61 MICH. L. REV. 1435, 1514 (1962); Herring, *supra* note 3, at 162-63.

46. This provision, although laudable as an attempt to preserve state remedial procedures, has the drawback of delaying the implementation of Title VII actions in the instances where they are most needed—where state and local authorities are ineffective.

47. However, because of the limited circumstances in which costs are recoverable, the heavy financial burden on the plaintiff makes a Board remedy preferable in this respect. Robert L. Carter, General Counsel of NAACP, N.Y. Times, July 3, 1964, p. 1, col. 6. On the other hand, the Attorney General may be permitted to intervene in private actions upon certification that they involve matters of general

through the courts are the same as those available through the NLRB: injunction and appropriate affirmative relief, including reinstatement with or without back pay, and the Commission is empowered to sue for enforcement where necessary.

The Civil Rights Act has specifically designated the federal courts as the proper forum to hear Title VII actions and it is unlikely that concurrent jurisdiction in the Board was contemplated.[48] Moreover, no court action may be instituted until the state fair employment agencies have been afforded an opportunity to remedy the alleged discrimination. This endeavor to preserve the efficacy of state fair employment practice laws will be seriously jeopardized if the NLRB is permitted to assume jurisdiction of unfair representation complaints, since the *Garmon* rule[49] establishes, as a constitutional pre-emption principle, that a case involving conduct "arguably" protected or prohibited by the NLRA must initially be heard by the NLRB to the exclusion of state courts and state law.[50]

The Civil Rights Act will not, of course, encompass a *Miranda* situation. Congress, however, has not acted to make the terms of collective bargaining agreements reviewable by the Board,[51] but rather has expressly chosen to avoid federal interference in internal union affairs and to allow a wide range of discretion to bargaining agents.[52] Therefore, whether the alleged unfair representation of a union member in good standing results from affirmative union action or from union inaction, or whether the discrimination springs from racism or from personal animosity, the Board's usurpation of the legislative function should not stand.

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public importance, or he may bring his own suit when he has reason to believe that rights guaranteed under Title VII are being violated without redress.

48. *Contra*, Rubber Workers, 57 L.R.R.M. 1535 (1964).

49. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

50. Because of the holding in *Hughes Tool*, a New York court has applied the *Garmon* rule in holding that a state court no longer has jurisdiction over unfair representation cases. Goni-Moral v. Marley, 58 L.R.R.M. 2037 (1964).

51. See NLRB v. Insurance Agents, 361 U.S. 477, 486-88 (1960).

52. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961). That the injection of the NLRB more directly into the bargaining process on the *Hughes Tool* theory will tend to restrict the bargaining agent's discretion is evident from the decision in Rubber Workers, 57 L.R.R.M. 1535 (1964), wherein the Board found that the union had exceeded its discretionary privilege not only in refusing to discuss better job opportunity for Negroes, but also in refusing to process a grievance relating to segregated washrooms.