Unfair Representation as an Unfair Labor Practice

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

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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. Formerly, unfair representation complaints filed by union members had been cognizable only by the courts, since unfair representation was not considered an unfair labor practice and, consequently, was outside the jurisdiction of the NLRB.

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, arbitrarily inequitable treatment of unaffiliated workers constitutes the archetypal section 8(b)(1)(A) violation. 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, 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-

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 (6th Cir. 1945).
7. Chairman McCulloch and Member Fanning dissented.
pation in union activities. 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.

On review, however, the Court of Appeals for the Second Circuit refused to enforce the Board's decision in *Miranda*, Judge Friendly dissenting. 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. 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* 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, 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 1, 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 responsibility 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

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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.
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. 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) caused the employer to violate section 8(a)(5). 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 mem-
bers, as well as employers, and therefore failure to represent a mem-
ber constituted a refusal to bargain.

Valid criticism can certainly be advanced against each of the find-
ings of violation made by the Board in Hughes Tool. Because of the
legislative and administrative history of section 8 unfair labor prac-
tices, 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. 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, 245 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 57,
Int'l Bd. of Teamsters v. NLRB, 365 U.S. 667 (1961) (hiring hall arrangement not
illegal per se); NLRB v. Local 639, Int'l. Bd. of Teamsters, 352 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

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to section 8(a)(5), which requires employers to bargain with unions.\textsuperscript{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.\textsuperscript{23} 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,\textsuperscript{24} and, perhaps, even without resort to the Civil Rights Act it would constitute an illegal bargaining technique.\textsuperscript{28} The violation would not, however, stem from unfair representation. The \textit{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.\textsuperscript{29} That case, however, was concerned only with the fact that a union need not be certified to be a recognized bargaining agent\textsuperscript{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,\textsuperscript{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.\textsuperscript{32} Moreover, even if an employee were to bargain individually, he could not \textit{compel} an employer to meet with him.\textsuperscript{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 \textit{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

\begin{footnotes}
\footnote{25. NLRB v. Miranda Fuel Co., 326 F.2d 172, 178 (2d Cir. 1963).}
\footnote{26. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 486-88 (1960).}
\footnote{27. See notes 45-50 infra and accompanying text.}
\footnote{28. See NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); Sovem, \textit{ supra} note 21, at 589.}
\footnote{30. See also, \textit{e.g.}, International Ladies' Garment Workers v. NLRB, 366 U.S. 731 (1961).}
\footnote{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).}
\footnote{32. Cf. \textit{Federal Tel. & Radio Co.}, 107 N.L.R.B. 649 (1958).}
\footnote{33. See administrative rulings of the NLRB General Counsel: Case No. 418, \textit{L.R.R.M.} 1039 (1952); Case No. 317, \textit{L.R.R.M.} 1108 (1952); Case No. 255, \textit{L.R.R.M.} 1339 (1952).}
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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\(^4\) 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.\(^5\) 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.\(^6\) 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,\(^7\) 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.\(^8\) 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;\(^9\) in another instance the seniority of a member was reduced for failure to remit union dues;\(^10\) 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.\(^11\) 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-

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\(^4\) 347 U.S. 17 (1954).
\(^5\) Id. at 45.
\(^6\) Id. at 46.
\(^7\) Id. at 52.
\(^9\) Id. at 52.
\(^10\) Gaynor News Co. v. NLRB, supra note 37.
\(^12\) 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

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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).
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. 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 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.

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, but rather has expressly chosen to avoid federal interference in internal union affairs and to allow a wide range of discretion to bargaining agents. 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.

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. 2087 (1964).
52. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Union News Co. v. Hildreth, 295 F.2d 638 (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.