TWO AREAS OF LABOR LAW TO BE REASSESSED: THE DUTY OF FAIR REPRESENTATION AND THE NLRB'S REMEDIAL POLICIES

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INTRODUCTION

There are two areas of labor relations law, the duty of fair representation and the National Labor Relations Board's remedial policies, which, in my judgment, are about to undergo that process lawyers are fond of calling "elucidating litigation." These two areas may very likely have a significant impact on that NLRB's caseload which, since 1970, has increased by eighty percent. Of course, a certain caution must accompany a Board Member's crystal ball gazing – not only a caution which seeks to avoid even the appearance of prejudgment, but a caution which recognizes that judgment itself must be susceptible to continuing reevaluation. With this perspective in mind, I will discuss each of these areas in turn.

BREACH OF THE DUTY OF FAIR REPRESENTATION: UNION DISCRIMINATION

Union discrimination against members or prospective members of its bargaining unit is an aspect of the doctrine of the duty of fair representation. The basic principle of this doctrine, enunciated in *Vaca v. Sipes,*[1] is that a union breaches its duty of fair representation, "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Even though every unit member that is unhappy with a union's conduct sees his or her gripe as fitting within that standard, what must be remembered in fair representation cases, in my judgment, is that the critical inquiry is unrelated to the specific union action under attack. The issue, under the *Vaca* standard, is not whether the union should have acted differently but, instead, whether the decision not to act differently was reached in good faith.

There probably will not be much movement in the years ahead to elaborate upon the *Vaca* standard. The duty of fair representation involves an effort to determine what rights are, or should be, retained by individuals who either have chosen to unionize or, short of that, are subject to unionization by virtue of majority rule principles. Strict guidelines governing that kind of inquiry should not be expected; more importantly, strict guidelines might well upset the equality of bargaining power that is fundamental to the statutory scheme of things.

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1. 386 U.S. 171 (1967).

What can be expected is final resolution of two particular questions which arise out of the doctrine: first, whether the Board can properly refrain from resolving allegations of union racial and sex descrimination in precertification representation proceedings – my view is that it can – and, second, whether all breaches of the duty of fair representation can be remedied under the unfair labor practice provisions of the statute – my position has been that not all such breaches can.

Refraining from Resolving Precertification Allegations

The duty of fair representation, as its very name implies, derives from a union's Section 9(a)[2] exclusive representative status. For about half of the life of the Board, the duty of fair representation was considered exclusively within Section 9 proceedings and more importantly, exclusively in the context of an already certified representative. It was not until 1962, in *Miranda Fuel,*[3] that the Board concluded that a breach of this duty was remediable under Section 8(b)'s unfair labor practice provisions.[4] *Miranda Fuel* asserted that because a union owed employees a duty to represent them fairly, that duty had to be "read into" the Section 7 right of employees "to bargain collectively through representatives of their own choosing," and a union's breach of its fair representation duty therefore constituted the infringement of a Section 7 right and an unfair labor practice.

In 1964, *Hughes Tool II*[5] added a constitutional gloss to such inquiries. *Hughes* was a combined representation and unfair labor practice case. In the representation case, the Board held that its rescission of the union's certification was mandated by a constitutional proscription against the Board "render[ing] aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative." Former Chairman McCulloch and I agreed that the certification should be revoked, but considered it unnecessary and possibly inappropriate to couch the issue in terms of constitutional limitations on the Board's role under Section 9. The contracts negotiated by the certified union in *Hughes Tool II* were patently discriminatory and violated the duty of fair representation under Section 9.

It was a short jump from *Hughes Tool II* to the so-called *Handy Andy* line of cases. Challenges to election petitions on the ground that the union seeking representation discriminated, either on the basis of race, sex or national origin against employees, represented two-fold shift away from the Board's initial approach to unfair representation inquiries. First, the union challenged was not yet certified. Second, the challenge was being raised by an *employer,* as opposed to an individual member of the unit or union. *Hughes Tool II*'s constitutional approach was a logical invitation to such a dramatic shift.

2. 29 U.S.C. § 159 (1976):
   (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
3. Miranda Fuel Co., 140 N.R.L.B. 181 (1962), *enf. denied,* 326 F.2d 172 (2d Cir. 1963).
4. 29 U.S.C. § 158(b) (1976).
5. Independent Metal Workers, Local 1 (Hughes Tool Co.), 147 N.L.R.B. 1536 (1964).

The Board's initial response to such challenges was to continue to follow the *Hughes Tool II* approach. But *Bekins Moving & Storage*[6] which reaffirmed *Hughes Tool II,* was short-lived. In *Handy Andy*[7] and *Bell & Howell*[8] a new Board majority adopted the dissenting opinion of Member Penello in *Bekins* and held that the Board would investigate allegations of union discrimination only in post-certification proceedings exclusive of summary judgment certification-test cases. The conclusion flowed from the view that certification itself was not only a facially neutral act falling short of the kinds of governmental action posing potential constitutional problems, but also an act mandated by statute in those situations where a fair election resulted in a majority vote for representation. *Bell & Howell* has been enforced by the D. C. Circuit Court of Appeals, but the process of elucidating litigation in this area will continue.

Impact of Future Litigation

The *Handy Andy* and *Bell & Howell* litigation may leave its mark on the second unfair representation question alluded to earlier; whether all breaches of the duty of fair representation are remediable under the unfair labor practice provisions of the statute. My basic difficulty with *Miranda Fuel* and its "irrelevant, invidious, or unfair" standard has been that it permits too broad an intrusion into internal union affairs and frequently transforms the Board into an instrument for policies far broader than those committed by statute to it. But the *Handy Andy* cases, while emphasizing the Board's traditional statutory responsibility—the speedy resolution of questions concerning representation—also indicated a procedural preference for the resolution of allegations of discrimination in unfair labor practice proceedings. Those strains tug *Miranda Fuel* in different directions. Given the increasing frequency with which fair representation issues arise at the Board, some movement can be expected in one direction or the other in the years ahead and that will be an interesting development to follow.

FUTURE BOARD REMEDIAL POLICIES

It is important to note that when I came to the Board in 1957, 62% of all charges filed against labor organizations were filed by individuals as opposed to employers or other labor organizations. Last fiscal year the figure was over 82%.

There are, no doubt, a variety of factors that account for the fact that the Board's unfair labor practice caseload increases at a rate between six and eight percent every year. From one standpoint, an increase in caseload is not undesirable, for it implies an increasing awareness of the protections the Act affords. There are, however, less desirable factors at work. The Board receives far too many discriminatory discharge cases; such cases constitute well over half of all charges filed against employers. This is made more significant in light of the fact that charges filed against employers constitute over two thirds

6. Bekins Moving & Storage Co., 211 N.L.R.B. 138 (1974).
7. Handy Andy, Inc., 228 N.L.R.B. 447 (1977).
8. Bell & Howell Co., 220 N.L.R.B. 881 (1975), *enforced,* 100 L.R.R.M. 2192 (1979). *See also,* 230 N.L.R.B. 420 (1977).

of all charges filed. There were over 8,000 employer refusal to bargain charges filed last fiscal year. Most of these charges did not have any merit, but unfortunately a sizeable number of them did. Section 8(a)(3)[9] and Section 8(a)(5)[10] complaints constituted a percentage of all complaints comparable to the percentage of charges they represented.

The types of charges filed, the kinds of complaints issued, and the forms that the Board's remedial actions have taken lend support to the proposition that the case spiral is at least partly the result of remedial deficiency. The Board's authority to remedy unfair labor practices, of course, is a broad one, entitled to great deference by the reviewing courts.[11] This authority is subject to the one basic limitation that the remedy not be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[12] Board remedies are just that: *remedial.* They cannot amount to punishment of the wrongdoer[13] but, instead, are designed to eliminate the effects of the unfair labor practice and, to the extent possible, restore the status quo ante. It has been questioned whether the status quo ante is, in certain circumstances, enough. The status quo ante of a refusal to bargain is the obligation to bargain; a remedy for the unlawful refusal cannot compensate employees for the benefits that might have flowed from collective bargaining had the bargaining occurred when it should have. It is not fruitful to focus on perceived remedial infirmities inherent in the statute because that is a matter outside the Board's control. It is fair to state, however, that the Board has not exhausted the remedial potential open to it. The authority to remedy unfair labor practices, typically thought of as emanating from Section 10(c),[14] which requires us to order a violator "to take such affirmative action . . . as will effectuate the policies of (the) Act," exists alongside the Board's Section 10(a)[15] authority to "prevent any person from engaging in any unfair labor practice." Remedies designed to deter violations need not run afoul of the requirement that our remedies be nonpunitive. The Board's expanded remedies in recent *J. P. Stevens*[16] cases are an example of that. For example, the Board, to remedy the employer's violations of Sections 8(a)(1) and (3), has ordered the company to give the union access to company bulletin boards where employee notices are posted and to turn over to the union a list of employee names and addresses.

In all likelihood, the future will see further exploration in one particular remedial area: litigation expenses. To some, the cost of undertaking litigation expenses may be a cheap price to pay for delaying effective bargaining over an appreciable time.

9. 29 U.S.C. § 158(a)(3): It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any other term or condition of employment to encourage or discourage membership in any labor organization.
10. 29 U.S.C. § 158(a)(5): It shall be an unfair labor practice for any employer to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
11. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, n. 32 (1969).
12. Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943).
13. *See* Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).
14. 29 U.S.C. 160(c) (1976).
15. 29 U.S.C. 160(a) (1976).
16. *See* J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir. 1967), *cert. denied,* 389 U.S. 1005 (1967); J.P. Stevens & Co., Textile Workers Union v. NLRB, 388 F.2d 896 (2d Cir. 1968); J.P. Stevens & Co. v. NLRB, 417 F.2d 533 (5th Cir. 1970). *See also* J.P. Stevens & Co. Inc., 239 N.L.R.B. 95 (1978); J.P. Stevens & Co. Inc., 244 N.L.R.B. 82 (1979); J.P.Stevens & Co. Inc., 247 N.L.R.B. 44 (1980).

The Board has occasionally awarded a charging party reasonable litigation fees, but, with one exception, all such awards were designed to reimburse the charging party for legal fees incurred not in connection with the Board's proceedings, but, rather, in connection with non-Board litigation caused by a respondent's unlawful activity. For example, in *Baptist Memorial Hospital*[17] the Board found that because an employee's arrest and conviction were the direct result of the employer's unfair labor practice, it was appropriate to order the respondent to pay the employee's court fine and to reimburse the employee for attorney's fees incurred in connection with the arrest and conviction. On the other hand, if the focus is on reimbursement for attorney's fees incurred in connection with Board litigation, the only case in which such expenses were awarded other than the *J. P. Stevens* cases – is the famous *Tiidee Products* case.[18] *Tiidee* itself was the result of a D. C. Circuit Court of Appeals decision enforcing a refusal to bargain finding but remanding the case to the Board for further consideration of the extraordinary remedies requested by the charging party and viewed by the court as justifiable in light of the respondent's "clear and flagrant" violation of its statutory duty to bargain.

On remand the Board declined to grant most of the extraordinary remedies requested, but did award the charging party its litigation expenses. The Board's basic policy in this area is set forth in *Heck's Inc.*[19] where, in declining to award the charging party attorney's fees generated by the respondent's refusal to bargain, the Board alluded to the general American rule that a prevailing litigant is not ordinarily entitled to its attorney's fees. The Board did note that the participation of a charging party in Board proceedings can serve public interests but that whatever protection of such interests might result from the charging party's litigation was only incidental to its efforts to vindicate its own personal interests. *Tiidee* acknowledged that the public interest can override, however, the general principle barring recovery of attorney's fees by a prevailing litigant and it can do this when the litigation can fairly be characterized as "frivolous." Frivolous litigation, the Board said, must be discouraged in order to effectuate the Act's fundamental aim of maintaining industrial peace through good-faith collective bargaining. This aim requires that meritorious cases be given the speediest possible resolution by the Board and courts. The reimbursement of both the charging party and the Board included reasonable counsel fees, salaries, witness fees, transcript and record costs and travel expenses, per diem. In short, it was a truly extraordinary remedy.

There are substantial policy questions, as well as practical considerations at work in an expanded application of such remedy. Expanded use of the remedy can fairly be expected to have some deterrent effect on recalcitrants who invoke Board processes for any delay that may inhere in them. What inhibiting effect, if any, will it have on litigation motivated by loftier concerns?

17. Baptist Memorial Hospital, 299 N.L.R.B. 45 (1977). *See also* United Parcel Service, 203 N.L.R.B. 799 (1973), *enf'd and remanded,* 509 F.2d 1075 (9th Cir. 1975), *cert. denied,* 421 U.S. 976 (1975), *modified,* 220 N.L.R.B. 35 (1975).
18. Tiidee Products, Inc., 194 N.L.R.B. 1234 (1977). *See also* the Board's original decision in *Tiidee* at 174 N.L.R.B. 705 (1969), *enf'd and remanded,* 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 950 (1970).
19. 191 N.L.R.B. 886 (1971). This discussion was supplemented to the Heck's Inc. decision at 172 N.L.R.B. 2231 (1968) and the refusal to award attorney fees found in it was upheld by the Supreme Court. *See* NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1 (1973). However, the Board specifically left open the question "whether the Board's broad powers under § 10(c) . . . include the power to order reimbursement of litigation expenses." *See* 417 U.S. at n.9.

While the remedy cannot fairly be characterized as "punitive," is the public interest underpinning it served only by application of a "frivolous" defense standard? The Board decisions which contrast "frivolous" defenses with "debatable" ones[20] sometimes make difficult distinctions. If the remedy is to be employed in the recognition that the public interest is served by weeding out litigation, sparked solely by the knowledge there is delay in Board proceedings, should a different standard be employed—one which perhaps provides clearer guidance but more assuredly acknowledges that litigation instituted to delay a day of reckoning should be discouraged *even though* it might raise, along the way, "debatable" points? By the same token, a more expansive use of the *Tiidee* remedy, if it is to be undertaken at all, must be coupled with relatively clear limitations upon its employment in order to guard against the possibility that it will be applied more out of a sense of administrative convenience than with due regard for the industrial system envisioned by the Act's drafters.

The Act presumes continuing adversarial roles for labor and management. The fashioning of remedies which have the ancillary effect of dissuading parties from coming to the agency whose basic mission is to keep those adversaries within peaceful bounds may be difficult to defend as a truly "remedial" course of action. The *Tiidee* remedy is not, obviously, the only area likely to undergo some reevaluation in the years ahead. Although reimbursement for costs incident to an organizational campaign can be looked upon, by some, as a loss more collateral to an unfair labor practice than litigation expenses, there doubtlessly will be occasions for the Board also to reevaluate its approach in that area.

Current American litigiousness obviously affects the Board and it is a fact of labor-management life that there are some who are not unhappy about the level of delay that can accompany Board decisionmaking. There are those who are not the least bit reticent about adding to it for the sole purpose of neutralizing statutory principles and guarantees. Remedial policy is a logical area in which to consider antidotes, and for that reason, Board remedies can be expected to undergo at least some rethinking in the future.

20. *See, e.g.*, Winn-Dixie Stores, Inc., 224 N.L.R.B. 1418, 1421 (1976).