EUCLID SPECIALTY

The Prudent Choice

A Euclid Specialty Managers White Paper

The Duty of Fair Representation: Understanding the Obligation and Preventing the Claim

BY SCOTT R. GREEN, Esq.

SPECIAL THANKS TO RIVKIN RADLER LLP

RIVKIN RADLER LLP

ATTORNEYS AT LAW

March 23, 2016

Foreword

The underwriters at Euclid Specialty have dedicated our careers to serving the labor movement by providing quality insurance protection for labor leaders. Over the years, we have seen two trends in professional liability insurance for labor-related entities. The first is the collective bargaining exclusion in most non-profit insurance policies issued to labor entities, leaving labor leaders without coverage for their core professional responsibilities. The second is the need for better education in the insurance community as to the scope of the duty of fair representation for union leaders. Most of us have a good idea as to the professional responsibilities of doctors, lawyers, and other professionals, but the duty of fair representation remains more mysterious. We thus asked a prominent labor lawyer at Rivkin Radler to draft a white paper that explains the scope of the duty of fair representation and provides risk management advice as to how labor leaders can prevent and prepare for a fair representation claim. We hope that this white paper will be useful for our producer partners and their labor union clients.

The Duty of Fair Representation: Understanding the Obligation and Preventing the Claim

Introduction

Every labor organization necessarily draws its power from the support of its membership. In exchange, the labor organization represents their interests. This symbiotic and exclusive relationship gives rise to a legal obligation owed by the union to each individual member known as the "duty of fair representation" ("DFR"). When one or more members perceive that the DFR has not been honored, they can assert claims against the union in federal court or before the National Labor Relations Board ("NLRB"). Unions must strive to minimize these claims not only out of a natural and logical desire to limit legal liability, but because they can erode the union's status as the guardian of members' rights.

The DFR is broad and "[u]nder the doctrine, a union must represent fairly the interest[s] of all bargaining-unit members during the negotiation, administration and enforcement of collective bargaining agreements."[1] That duty extends to all persons within the bargaining unit, whether or not they are union members[2] and is intended to ensure fair treatment to all employees in a bargaining unit. Its objective is to ensure that unions and employers are sensitive to individual rights and interests of those not in the majority. Within a DFR suit, the central question is whether the union's acts or omissions are arbitrary, discriminatory or in bad faith.

Leadership within organized labor must understand this legal duty and its implications both as a means to avoid legal liability and to ensure that the goodwill that exists with its memberships remains strong. This white paper discusses the nature of DFR claims and provides practical recommendations to avoid and defend against them.

History and Evolution of DFR Claims

Neither the Railway Labor Act ("RLA")[3] nor the National Labor Relations Act ("NLRA")[4], the two major labor relations statutes in this country, has an express provision requiring "fair representation." However, under both of these statutes, unions act as the exclusive representative of their members for the purposes of collective bargaining.[5] That principle of exclusivity led to the recognition of the duty of fair representation.

Interestingly, the DFR was first used as a means of combating racial discrimination. The Supreme Court first recognized the duty in 1944 in *Steele v. Louisville & Nashville Railroad Co.*[6], a case

which arose under the RLA. In *Steele*, a black employee sought to set aside a collectively bargained seniority system which overtly discriminated against black workers who were also union members. The Court found inherent in the RLA a duty of bargaining representatives "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[7] There being no federal agency to enforce rights under the RLA, the Court concluded that this type of claim could be enforced in federal court by damages as well as by awarding appropriate injunctive relief.[8] At the time, the Court's recognition of the DFR was very progressive, considering that the decision preceded by two decades the passage of Title VII of the Civil Rights Act of 1964[9], which outlawed employment discrimination and, in particular, discrimination on account of race.

Subsequent decades yielded decisions that expanded and clarified the DFR. In 1967, the Supreme Court reached a critical decision in *Vaca v. Sipes*[10]. In *Vaca*, the Court recognized a cause of action for breach of the DFR under the NLRA because, like the RLA, the NLRA affords unions exclusive power to represent employees.[11] The DFR now formally applied to all unions covered by either of the major federal labor statutes. *Vaca* also established that unions breach their duty of fair representation when their conduct is "arbitrary, discriminatory, or in bad faith."[12] That tripartite standard has been repeatedly endorsed in subsequent Supreme Court decisions.[13] The *Vaca* Court also held that an employee may bring his or her claim before the NLRB or before a court and that state and federal courts have concurrent jurisdiction in duty of fair representation cases.[14] Vaca also indicated that a plaintiff must exhaust his administrative contractual remedies before proceeding with a claim in court that the union breached its duty of fair representation.[15]

The Supreme Court later held that a plaintiff could sue its employer for breach of contract, its union for breach of the duty of fair representation, or both[16]; that a plaintiff in such a suit has the right to a trial by jury; that damages must be apportioned according to the degree of fault[17]; that punitive damages are not available[18]; that the applicable statute of limitations is six months[19]; that the *Vaca* tripartite standard applies to all union activity[20]; that a union's mere negligence would not establish a breach of the duty[21]; and that a breach of the duty of fair representation would remove finality from any prior arbitration determination.[22]

As is evidenced above, the jurisprudence of DFR claims is well defined through a robust body of case law. Indeed, the standard of proof for an aggrieved member is high. However, the avenue for a member to bring a DFR claim is very wide, providing a number of options to a "would be" plaintiff. Particularly, there is no cost to file a charge with the NLRB and, assuming some grounds exists to believe that there has been a breach of the DFR, the NLRB will prosecute on behalf of the

member. These fights distract the union from its mission, are costly to defend and can damage the union's representation as an advocate of employee rights.

Preventing DFR Claims

DFR claim avoidance begins with a correct understanding of the relationship between the union, the member and the collective bargaining agreement. Consciously or unconsciously labor leaders sometimes adopt the mindset that the collective bargaining agreement swallows individual member rights, that only the union has contract rights, and that the union "owns the grievance." The background and context provided above is designed to steer labor leaders away from these incorrect notions. In fact, it is the union that is the trustee of each individual member's contract rights. If this philosophy can filter down to every policy and procedure adopted by the union in its dealings with membership, the union has placed itself in a strong position to avoid claims.

However, the proper mindset, policies and procedures must translate into correct action by union leaders. Case law has illustrated the types of actions and omissions that frequently give rise to DFR claims. While claims can arise in response to virtually any union act or omission, claims are generally confined to three general circumstances: arbitration, grievance processing and contract negotiation. Moving from theory to practical application, we shed some light on what gives rise to claims in these situations.

1. Grievance Arbitration

Usually DFR issues concern whether a union is required to arbitrate a particular grievance. The *Vaca* Court told us that the fact that a union initially grieved a matter does not bind it to arbitrate the case, and a union clearly is not obligated to arbitrate a grievance on the demand of an aggrieved employee. Indeed a union also need not arbitrate a case in which the chances of winning are slight[23], and, generally, courts will not second guess a union's considered judgment that a grievance will not succeed at arbitration.[24] Nevertheless, unions should be sensitive to the following situations:

- Arbitrating a grievance in a perfunctory way that is merely going through the motions, involving no real effort to put forward a position;
- Declining to initiate grievance procedures based on an employee's membership status in the union;
- Refusing to arbitrate a grievance based on the potential grievant' s disloyalty to the union or personal animosity;

- Inadequately investigating a grievance by overlooking critical facts or witnesses;
- Refusing to permit a nonmember to attend a union meeting at which his pending grievance is to be discussed and a determination made regarding whether to proceed, or failing to provide employees access to their grievance files and charging unreasonable copying costs; and
- Failing to disclose critical information to union officers voting on whether to take employee's grievance to arbitration.

Additionally, unions must be sure to obtain all relevant facts, interview important witnesses, engage the grievant, consider the relevant contract language and past practices to establish a reasoned basis for proceeding or declining to proceed with arbitration. Some unions find it helpful to communicate a tentative decision to a member and offer the member the opportunity to make an appeal to the union's executive board about why the issue should be arbitrated. Finally, be consistent--in cases that have no merit do not proceed out of fear of threatened litigation by a disappointed potential grievant. By doing so, you may establish an unhelpful track record.

2. Contract Negotiations

In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), the Supreme Court said it best:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, always subject to complete good faith and honesty of purpose in the exercise of its discretion.

Contract negotiations create winners and losers among the membership. Courts have found that unions have breached the duty of fair representation in contract negotiations in the following situations:

- Failure to disclose material information: union deliberately failed to inform workers in the bargaining unit that the employer was threatening to abolish their jobs if the union persisted in its wage demands during negotiations.[25]
- Misrepresentation: when a union "induced" employees to join wildcat strike, and then employer fired members, strikers could sue for breach of DFR based on the union's alleged misrepresentation of strike repercussions.[26]

- Refusal to ratify: former employees sued a union for breaching its DFR when it failed to ratify an amendment to a settlement agreement under procedures set forth in the union's constitution. The federal appellate court found no breach because the constitution did not specifically require ratification of all contracts, but merely provided the procedure to do so.[27]

Here, the keys to claim avoidance are honesty, fair dealing and transparency. Union leadership should create a strong negotiating committee that will witness and participate in negotiations at the highest levels. Contract negotiations can, and inevitably will, create winners and losers. The process involves very difficult choices and the relevant considerations must be communicated back to membership in a way that properly honors their individual rights under the contact. Again, as a general rule, DFR claims will not also result so long as the union acted in good faith.

3. Grievance Processing

Most collective bargaining agreements provide time limitation for filing and processing grievances and submitting them to arbitration. Generally, if a union ignores a grievance and allows the time period to lapse, a violation of the DFR occurs if the grievance has merit. Therefore, the directive is simple: stay organized, attentive and file grievances on time, *every time*.

Conclusion

DFR claims are, by and large, avoidable. In carrying out union business, in every context, consider the rights of the individual member under the collective bargaining agreement and safeguard those rights. Implement policies and procedures at all levels that reflect this premise. Lastly, be mindful of the pitfall scenarios discussed above.

No measure will eliminate the possibility of the DFR claim. However, the steps and considerations outlined here will go a long way to ensure that claims will be defensible under the "arbitrary, discriminatory, or in bad faith" standard. More broadly, the union will enjoy a stronger bond with its membership, the very source of its power, and avoid distracting and costly litigation.

About the Author

Scott R. Green, Esq. Partner, Rivkin Radler LLP

Scott R. Green handles all aspects of labor and employment litigation.

Scott represents organized labor on the local and international levels in all contexts including collective bargaining, arbitration and in federal court litigation. He also represents welfare and pension plans as well as their boards of trustees and plan administrators in matters concerning ERISA compliance, fiduciary duty and prohibited transactions, challenges to plan denials of claims for benefits, challenges to investment decisions, and delinquent employer contribution and collection claims.

Scott is a member of the Religious & Non-Profit Committee of the Claims and Litigation Management Alliance.

About Euclid Specialty Managers, LLC

Euclid Specialty is a leading provider of professional liability insurance for labor affinity risks, including a Labor Professional Liability Insurance policy especially tailored for labor unions. Euclid is also well known for its fiduciary liability insurance program for multiemployer, governmental and other non-profit employee benefit funds. Euclid Specialty is part of the Euclid Program Managers family of underwriting companies that write over $75 million in professional liability premium for several leading program insurance companies. Professional liability brokers come to Euclid Specialty to protect their employee benefit plan clients, because our underwriters and claims professionals are all experienced and focused experts in the fiduciary liability and labor affinity niche. For more information, contact John O'Brien at jobrien@euclidspecialty.com or 440-714-5832.

The information contained in this white paper is provided for informational purposes only. It is not offered as and does not constitute legal advice or legal opinion. You should not act or rely on any information contained here without first seeking the advice of an attorney.

---

[1] *IBEW v. Foust*, 442 U.S. 42 (1979).

[2] *Smith v. Sheet Metal Workers*, 500 F.2d 741 (5th Cir. 1974).

[3] 45 U.S.C. §§151-169 (2000). The Railway Labor Act of 1926, as amended, is one of the first federal statutes that recognized the obligation of certain private employers, called carriers in the railroad and airline industry, and their unions to collectively bargain. *See Airline Pilots Ass'n v. Pan American Airways Corp.*, 405 F.3d 25, 33 n.4 (1st Cir. 2005).

[4] 29 U.S.C. §§151-169 (2006). The National Labor Relations Act of 1935, as amended, regulates labor-management relations in most of the private-sector workforce. Among the important provisions of this statute, it created the National Labor Relations Board which recognized in 1962 that a breach of the duty of fair representation is an unfair labor practice. *See generally The Developing Labor Law*, *supra* note 1, at 27-30.

[5] Under Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159 and Section 2, ninth of the Railway Labor Act, 45 U.S.C. § 152, unions are the exclusive representative of certified labor organizations. *Beck v. United Food & Commercial Workers Union Local 99*, 506 F.3d 874 (9th Cir. 2007); *Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985); *see also* Mitchell H. Rubinstein, Is a Full Labor Relations Evidentiary Privilege Developing?, 29 Berkeley J. Emp. & Lab. L. 221, 237 (2008) ("Under the NLRA and analogous state public sector labor relations statutes, unions are the exclusive representatives of employees.").

[6] 323 U.S. 192 (1944).
[7] 323 U.S. at 203
[8] 323 U.S. at 207
[9] 42 U.S.C. § 2000e-2 (2006).
[10] 386 U.S. 171 (1967).
[11] See Id. at 186
[12] See Id. at 190.
[13] . *See, e.g., Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1996).
[14] 386 U.S. at 178-83.
[15] *Id.* at 185.
[16] *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). As a practical matter, in hybrid duty of fair representation lawsuits, plaintiffs sue employers and unions simultaneously. Although an employee may have a claim against the union because of the way a grievance was handled, it is the employer who took the action against the employee in the first place. Additionally, if reinstatement is sought, unions obviously cannot award this remedy.
[17] *Teamsters Local 391 v. Terry*, 494 U.S. 558, 561 (1990).
[18] *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 51-52 (1979).
[19] *DelCostello*, 462 U.S. at 169.
[20] *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991).
[21] *United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990).
[22] *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 555 (1976).
[23] *Williams v. Sea-Land Corp.*, 844 F.2d 17 (1st Cir. 1988)
[24] *Wilder v. GL Bus Lines*, 164 LRRM 2906 (2000), *aff'd in relevant part*, 258 F.3d 126, 168 LRRM 2203 (2d Cir. 2001)
[25] *Warehouse Union Local 680 v. NLRB*, 652 F.2d 1022 (D.C. Cir.1981).
[26] *Alicea v. Suffeld Poultry, Inc.*, 902 F.2d 125, 133 (1st Cir. 1990).
[27] *White v. White Rose Food*, 237 F.3d 174 (2d Cir. 2001).