Catholic University Law Review

Volume 13 | Issue 2 Article 6

1964

The National Labor Relations Board and the Duty of Fair Representation: National Labor Relations Board v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir. 1963)

Gregory L. Hellrung

Comment / The National Labor Relations Board and the Duty of Fair Representation: *National Labor Relations Board v. Miranda Fuel Co.*, 326 F.2d 172 (2nd Cir. 1963)

MUCH CONTROVERSY WITHIN THE FIELD OF LABOR LAW has resulted from the recent attempt of the National Labor Relations Board to exercise jurisdiction over an area heretofore thought to be within the exclusive jurisdiction of the courts. The decision of the Labor Board in *Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181 (1962), promises to have many serious repercussions in the area of protection of employees' rights from encroachment by union action.

In the *Miranda Fuel* case, the NLRB for the first time exercised its unfair labor practice jurisdiction, under Section 10 of the National Labor Relations Act, as amended by the Labor Management Relations Act (hereinafter referred to as the Taft-Hartley Act)[1], in order to enforce the duty of a union to represent fairly and impartially both the union and nonunion members of the bargaining unit, for which the union is the exclusive bargaining representative in dealings with an employer.

Due to the numerous recent and exhaustive treatments of the general scope of the union's duty of fair representation by several scholars in the field of labor law[2], this comment will be treated as a supplement to that wide range of material. It will attempt to bring that material up-to-date with regard to the

[1] 49 Stat. 452 (1935), as amended, 29 U.S.C. §160 (1958).

[2] The following is a representative, but not exhaustive, list of leading articles which examine and discuss the union's duty of fair representation: Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 Yale L. J. 1327 (1958); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L. J. 457 (1962); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547 (1963); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963). For further references in this area, see the citations in the article by Professor Blumrosen, *supra*.

recent refusal of the Court of Appeals for the Second Circuit to enforce the Labor Board's order in *NLRB v. Miranda Fuel Co., Inc.*, 326 F.2d 172 (2nd Cir. 1963).

I. History of the Duty of Fair Representation

In order to present a rational critique of this decision, a brief discussion of the history of the duty of fair representation is essential.[3] In *Steele v. Louisville & Nashville R.R.*,[4] the Supreme Court held that a union has the duty to represent fairly and impartially all the employees for whom it is the bargaining agent. The *Steele* case arose under the Railway Labor Act,[5] and since that statute does not provide for administration by an agency capable of enforcing such a duty,[6] the case originated in the courts. Ever since the *Steele* decision, it has been assumed that the primary responsibility for enforcing and implementing this duty rested with the judiciary.

Since the duty of fair representation is based on the principle that the power wielded by the union under its right of exclusive representation is limited by a corresponding duty of fairness and impartiality which is inherent in the fiduciary relationship between the union and the employee whom it represents, such duty is implicit in the Taft-Hartley Act as well as in the Railway Labor Act.[7] However, in a leading case,[8] which involved the enforcement of this duty under the Taft-Hartley Act, the Supreme Court explicitly declined to face the question of the NLRB's jurisdiction over the area of fair representation.[9]

[3] For a more exhaustive and elaborate study of the history of the union's duty of fair representation, see authorities cited in note 2, *supra*.

[4] 323 U.S. 192 (1944).

[5] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1958).

[6] Although the Railway Labor Act (RLA) provides for the National Mediation Board (NMB), an administrative agency similar to the NLRB, its jurisdiction is strictly limited to the mediation of disputes and the conduction of representation proceedings. Nowhere in the RLA are there any provisions which delegate to the NMB power to remedy unfair labor practices.

[7] Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), *reversing* 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[8] Ford Motor Co. v. Huffman, *supra* note 7. For discussion with reference to the issue of NLRB preemption, see notes 50-53, *infra*.

[9] Footnote 4 of the *Huffman* opinion reads as follows:

"International also questions the jurisdiction of the District Court. International recognizes that one issue in the case is whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act . . . vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding is authority, committed an unfair labor practice." 345 U.S. at 331-332.

However, the Labor Board itself, under the jurisdiction granted by Section 9 of Taft-Hartley[10] to conduct representation proceedings and to certify a union as an exclusive bargaining representative, has occasionally exercised *indirect* supervision to remedy a breach of a union's fiduciary duty.[11] But, the Board's decision in *Miranda* is the first determination, either administrative or judicial, on the precise issue of whether the NLRB has jurisdiction under Section 10 to *directly* enforce a union's duty of fair representation.

II. Miranda Fuel Company Case

A. *Statement of Facts*

Local 553, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America, for many years had been the exclusive bargaining representative of the truck drivers employed by Miranda Fuel Co., Inc., a retail distributor of fuel oil. The union and the company had entered into successive collective bargaining agreements covering the terms and conditions of employment of the company's truck drivers.

In April 1957, Michael Lopuch, a member of Local 553, had been employed by Miranda as a truck driver for approximately eight or nine years. He was in the eleventh position on the seniority list of twenty-one. Early in April, he

[10] 49 Stat. 453 (1935), as amended, 29 U.S.C. §159 (1958).

[11] From the power granted in Section 9, the Labor Board can exercise indirect control over the union's duty of fair representation in three ways: by decertification, by removal of the contract bar rule, and by setting aside a representation election.

Decertification. Where the union is guilty of a breach of the duty of fair representation and, as the exclusive representative of the employees, it enjoys the status of NLRB certification, the Board clearly has the power to revoke that certification. Carter Mfg. Co., 59 N.L.R.B. 804 (1944); A. O. Smith Corp., 119 N.L.R.B. 621 (1957); Pioneer Bus Co., 140 N.L.R.B. 54 (1962).

For discussion of the effectiveness of decertification as a remedy for the breach of a union's fiduciary duty, see generally Albert, *supra* note 2, at 558-563; Blumrosen, *supra* note 2, at 1477, n.112; Cox, *supra* note 2, at 175. See also Brief for the A.C.L.U. as Amicus Curiae, pp. 9-10, NLRB v. Miranda Fuel Company, 326 F.2d 172 (2nd Cir. 1963), for a discussion of the effectiveness of decertification in racial discrimination cases.

Cf. Sovern, *supra* note 2, at 594-608, where it is suggested that the Board could not only revoke certification already issued, but could also deny certification to petitioning unions on the basis of past breaches of their fiduciary duty to employees. It should be noted, however, that the NLRB has never availed itself of this remedy.

Removal of Contract Bar. The so-called "contract bar" rule—once a contract between the employer and the incumbent union has been signed, another union cannot petition the NLRB for certification for a period of three years or until the expiration of the existing contract whichever is shorter—will not be applied where the incumbent union has violated its duty of fair representation. Chesepeake-Camp Corp., 57 N.L.R.B. 1784 (1944); Pioneer Bus Co., 140 N.L.R.B. 54 (1962). See Albert, *supra* note 2, at 563-565.

Setting Election Aside. With regard to racial discrimination as a breach of the union's fiduciary duty, where either the employer or the union makes an exacerbated appeal to racial prejudice during a representation election, the NLRB will set that election aside and order a new election. Sewell Mfg. Co., 138 N.L.R.B. 66 (1962). See Albert, *supra* note 2, at 565-581. *But cf.* Allen-Morrison Sign Co., 138 N.L.R.B. 73 (1962).

spoke to his employer and told him that he wished to spend the summer in Ohio to do some work for his sister-in-law whose husband had just died.

The period from April 15 to October 15 was a slack season in the fuel oil business and was so designated in the collective bargaining contract, where special provision was made for employees to take leaves of absence during that period and not suffer the loss of seniority rights.[12]

Lopuch obtained permission from his employer to leave at the close of business on Friday, April 12, and he stated that he would return by October 12. In mid-October, however, he became ill and, as a result, he did not return to work until October 30. The illness was evidenced by a doctor's certificate and the late return was excused by the company.

Shortly after his return, the union at the urging of various of its members demanded that Miranda reduce Lopuch to the foot of the seniority list on the ground that his late return violated Section 8 of the contract. When the union discovered that Lopuch's failure to return to work on time was due to an excused illness, it abandoned the claim that he be dropped from seniority because of his *late* return. Instead, it insisted that he be reduced in seniority because he had left work *early,* before the April 15 date provided in the contract.

The employer, who did not think that Lopuch's early departure would cause any loss in seniority when he gave permission for Lopuch to leave on April 12, was reluctant to agree to this request. However, he ultimately acquiesced in the union's demand and Lopuch was dropped to the bottom of the seniority list.

Upon unfair labor practice charges filed by Michael Lopuch with the National Labor Relations Board, the General Counsel issued a complaint alleging that the company had violated Sections 8 (a) (1) and 8 (a) (3) of the Taft-Hartley Act,[13] and that the union had violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act.[14]

B. *Decision of the NLRB*

The history of the litigation in this case is somewhat complex. The original decision of the NLRB went up through the Second Circuit to the Supreme

[12] Section 8 of the collective bargaining agreement between Local 553 and Miranda Fuel Company reads as follows:

"During the slack season, April 15 to October 15, any employee who according to seniority would not have steady employment shall be entitled to a leave of absence and maintain his full seniority rights during that period. Any man so described must report to the Shop Steward not later than 8 A.M. on October 15 and sign the seniority roster in order to protect his seniority, and the Employer agrees to accept the certification of said Shop Steward as to availability of such men when called by the Employer. If October 15 falls on Saturday or Sunday, the reporting date shall be the next work day. Any man failing to report as above specified shall forfeit all seniority rights."

[13] 49 Stat. 452 (1935), as amended, 29 U.S.C. §§158 (a) (1) (3) (1958).

[14] 61 Stat. 141 (1947), as amended, 29 U.S.C. §§158 (b) (1) (A) and (b) (2) (1958).

Court.[15] However, for the purpose of this comment, only the Labor Board's supplemental decision on remand will be considered.[16]

In the supplemental *Miranda Fuel Co.* case, by a three-member majority,[17] the NLRB found that, by its failure to represent Lopuch fairly and impartially, thereby causing his loss of seniority rights, Local 553 had committed an unfair labor practice in violation of Section 8 (b) (1) (A) of the Taft-Hartley Act.[18] Citing *Peerless Tool and Engineering Co.*,[19] the majority opinion stated:

> [t]he privilege of acting as an exclusive bargaining representative derives from Section 9 of the Act, and a union which would occupy this statutory status must assume "the responsibility to act as a genuine representative of all the employees in the bargaining unit."[20]

Following this statement with a discussion of the *Steele* case, *supra*, and the line of decisions which impose upon the union the duty of fair representation,[21] the majority then concluded that Section 7 of the Act[22]

[15] The first NLRB decision was based on the theory of *Pacific Intermountain Express*, 107 N.L.R.B. 837 (1954), *enforced* 228 F.2d 170 (8th Cir. 1956), that any delegation of unilateral control over hiring practices from the employer to the union was a *per se* violation of the Act. Miranda Fuel Company, 125 N.L.R.B. 454 (1959).

That decision was enforced by the Second Circuit on the sole ground that since the contract did not specify loss of seniority for an early departure (*i.e.*, leaving before April 15), the action of the union "constituted a delegation of power over seniority rights which improperly encouraged union membership and discriminated against the employee." The Court of Appeals rejected the Board's broad ground of decision on the basis that the authority to determine seniority rights, vested in the shop steward by the contract, involved only administrative or ministerial duties and was not an improper delegation of authority to the union. NLRB v. Miranda Fuel Co., 284 F.2d 861 (2nd Cir. 1960).

The union petitioned for certiorari and the Labor Board acquiesced. The Supreme Court, after deciding another issue not relevant here, remanded the case to the Board, 366 U.S. 763 (1961), for disposition in light of its decision in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961), in which the Supreme Court had held exclusive hiring hall agreements, which are the most severe type of delegation to the union of control over hiring practices, are not unlawful *per se*.

The supplemental decision of the NLRB with which this comment is concerned is the Labor Board's response to this remand.

[16] Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied* 326 F.2d 172 (2nd Cir. 1963). For other articles discussing the supplemental NLRB decision, see Albert, *supra* note 2, at 587-592; Blumrosen, *supra* note 2, at 1504-1523. Also, see Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, 16 N.Y.U. CONF. LAB. 3 (1963).

[17] Members Rodgers, Leedom, and Brown.

[18] Section 8 (b) provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7...."

[19] 111 N.L.R.B. 853 (1955), *enforced* 231 F.2d 298 (7th Cir. 1956), *cert. den.* 352 U.S. 833 (1956).

[20] 140 N.L.R.B. at 184.

[21] Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945); Ford Motor Co. v. Huffman, *supra* note 7; Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

[22] 49 Stat. 452 (1935), as amended, 29 U.S.C. §157 (1958).

> gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section (b) (1) (A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.[23]

The majority of the Board also concluded that Miranda had committed an unfair labor practice in violation of Section 8 (a) (1) of Taft-Hartley.[24] Reasoning that even though an employer does not have the statutory obligations which are imposed on the union under Section 9, the Board still held

> [t]o the extent, however, that an employer participates in such union's arbitrary action against an employee, the employer himself violates Section 8 (a) (1) of the Act. This would obtain, for example, where, for arbitrary or irrelevant reasons, a statutory bargaining representative attempts to cause an employee's discharge and the employer then becomes party to such violation of Section 7 rights by acceding to the union's efforts.[25]

Thus the majority takes the difficult position of holding that while Miranda's action taken alone would not violate the Act, yet for the sole reason that such lawful action resulted from acquiescing in the union's demands, it was unlawful and constituted a violation of Section 8(a) (1).

Section 7 provides as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

[23] 140 N.L.R.B. at 185.

In attaining this result, the majority, instead of relying upon legislative history or other authority to support their conclusion, appear to be satisfied merely in citing two law review articles—one by Cox, *supra* note 2, the other by Wellington, *supra* note 2.

This lack of a substantial basis, grounded either in the legislative history of Taft-Hartley or in some judicial or NLRB authority, when coupled with the fact that this is the first instance in the fifteen years since 8 (b) (1) (A) was enacted that the Labor Board has attempted to exercise jurisdiction in this area, provides strong ammunition for dissenting Chairman McCulloch and Member Fanning's attack.

One of the major objections to citing Cox and Wellington as authority is that their argument for Board jurisdiction is likewise not grounded on legislative history or other authority. They appear merely to present conjectural theories of how such jurisdiction might be sustained. For an elaboration of this point as well as an excellent rebuttal to the conclusion of the Board majority, see Professor Sovern, *supra* note 2, at 590-594. *But c.f.*, Sovern, *supra* note 16, at 10-18.

[24] Section 8 (a) provides as follows:

"It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

[25] 140 N.L.R.B. at 185-186.

Chairman McCulloch and Member Fanning, dissenting, sum up the majority opinion by saying that it

> proceeds upon the premise that Section 9 imposes upon a bargaining representative the duty to represent all the employees in the bargaining unit fairly and impartially; that this duty must be read into the rights guaranteed by Section 7 of the Act so that any default in the performance of the Section 9 duty is an infringement upon a Section 7 right; and that any such infringement trenches upon the prohibitions of Sections 8 (b) (1) (A) and 8 (a) (1) which insulate Section 7 rights against union or employer intrusion.[26]

They dissent on the grounds that this theory was not argued, advanced, or litigated in the instant case; that the facts do not warrant a finding that the union's action against Lopuch was an arbitrary or invidious discrimination; that there is "nothing in the exhaustive legislative history of the Act or in Board or court authority" to substantiate the majority's position; and, finally, that the courts over many years have furnished an adequate remedy with which Congress has indicated no dissatisfaction. They conclude that the majority position advocates an "unwarranted extension of Board authority."[27]

Almost as an afterthought, the Labor Board majority also found that Local 553 had violated Section 8 (b) (2)[28] and that Miranda Fuel had violated Section 8 (a) (3)[29] on the alternate ground that they discriminated against Lopuch. On this point, it should be noted that the NLRB has often exercised its Section 10 jurisdiction to remedy acts of discrimination against an employee where there was proof that such discrimination was for the purpose of encouraging or discouraging his membership in a union. Although an overt act of discrimination on the part of the union clearly implies a breach of its fiduciary duty to the employee, the opposite is not always true. The jurisdiction exercised by the Labor Board to remedy discrimination is certainly much narrower than that needed to remedy *any* breach of a union's duty of fair representation. In *Miranda,* the Board majority found *both* a breach of fiduciary duty *and* discrimination. In this context, the NLRB's finding of violations of 8 (b) (2) and 8 (a) (3) is an exercise of its "narrow" jurisdiction to remedy discrimination, and not of the "broad" jurisdiction needed to remedy a breach of the union's duty of fair representation.

[26] *Id.* at 199.
[27] *Id.* at 202. Also, see note 23, *supra.*
[28] Section 8 (b) provides as follows:
"It shall be an unfair labor practice for a labor organization or its agents— . . .
(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . ."
[29] Section 8 (a) provides as follows:
"It shall be an unfair labor practice for an employer— . . .
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

Although such a finding was unnecessary and merely cumulative, since the remedy under 8(b) (2) and 8 (a) (3) is or can be identical to that relief granted under 8 (b) (1) (A) and 8 (a) (1), nevertheless the majority held that

> a statutory bargaining representative and an employer also respectively violate Section 8 (b) (2) and 8 (a) (3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee. Here a question is whether such action may be said to "encourage membership in any labor organization," which finding is a necessary element of a violation of Section 8 (a) (3) and 8 (b) (2).[30]

Since the conduct of Local 553 and Miranda, in reducing Lopuch's seniority, had no legitimate employer or union purpose, the majority found that such conduct had the "foreseeable result" of encouraging union membership—i.e., to encourage other members of Local 553 to conform to the union's concept of acceptable conduct. Once again Miranda's violation of Taft-Hartley is derivative—it flows from acceding in Local 553's unlawful conduct.[31]

The dissenters, McCulloch and Fanning, state that the majority's position with regard to 8 (b) (2) and 8 (a) (3) is based upon the unarticulated premise that

> any "arbitrary" action taken by a union which affects an employee's employment status is, by definition, to encourage union membership and hence violative of Section 8 (b) (2). A corollary is that employer acquiescence in the union's action, without more, violates Section 8 (a) (3).[32]

They base their dissent on three Supreme Court cases[33] which severely limit the doctrine of "foreseeability" as a substitute for actual proof of unlawful discriminatory motivation. Finding that actual proof of union motivation is lacking in this case, they conclude that

> [d]oubts or suspicions, even when based on healthy skepticism, may not be substituted for proof of unlawful discrimination. No other proof is cited. We conclude, therefore, that the record will not support a finding of violation of Section 8 (b) (2) or 8 (a) (3) of the Act.[34]

C. *Decision of the Second Circuit*

After handing down its supplemental decision in *Miranda Fuel,* the NLRB once again petitioned the Court of Appeals for the Second Circuit to enforce

[30] 140 N.L.R.B. at 186.

[31] For an extensive discussion of the enforcement of the union's duty of fair representation under the guise of finding "discrimination" in violation of 8 (b) (2) and 8 (a) (3), see Professor Sovern, *supra* note 2, at 567-576 and 587-588; Sovern, *supra* note 16, at 14-17.

[32] 140 N.L.R.B. at 193.

[33] Local 357, International Brotherhood of Teamsters v. NLRB, *supra* note 15; Radio Officers Union v. NLRB, *supra* note 21; NLRB v. News Syndicate Co., 365 U.S. 695 (1961).

[34] 140 N.L.R.B. at 198-199.

its order to reinstate Lopuch's seniority rights as of April 15, 1957. However, this time, by a divided decision, the Court of Appeals denied the Labor Board's petition. *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (1963). In so doing, the three-judge panel split three ways.

Judge Medina, writing the opinion of the court, rejected as "wholly erroneous" the Board majority's theory, that an "unfair or irrelevant or invidious" treatment of an employee is a breach of the union bargaining agent's duty of fair representation and constitutes an unfair labor practice in violation of 8 (a) (1) and 8 (b) (1) (A), on the grounds that there is an adequate remedy in the courts for such a breach, and that there was no showing of Congressional intent "to read into Section 7 and Section 8 the duty of fair representation implicit in Section 9."[35]

On the issue of the alleged violations of Section 8 (b) (2) and 8 (a) (3), he determined that the specific legal question

> whether any sort of discrimination against an employee, affecting the terms and conditions of his employment, can constitute an unfair labor practice under Section 8, even if wholly unrelated to any union considerations[36]

should be answered in the negative, holding, under *NLRB v. Local 294, International Brotherhood of Teamsters*,[37] that in order to constitute an unfair labor practice, the discriminating treatment must be deliberately designed to encourage union membership. Refusing to enforce the Board's order, he found no proof of such discrimination in this case.

Two other noteworthy points appear in Judge Medina's opinion. First, he rejected an argument that the union's conduct was arguably a violation of Section 8(b) (3).[38] Secondly, he rejected an argument that it would be in the

[35] 326 F.2d at 176. See note 23, *supra*.

[36] *Id.* at 175.

[37] 317 F.2d. 746 (2nd Cir. 1963). See Note, 13 CATHOLIC U. L. REV. (1964).

[38] 61 Stat. 141 (1947), as amended, 29 U.S.C. §158 (b) (3) (1958).
Section 8 (b) provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents— . . .
(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a) . . . ."

See Brief for the A.C.L.U. as Amicus Curiae, *supra* note 11, at 6-7, wherein it is argued that

"the union's duty to bargain collectively is owed to the employees as well as to the employer and includes the duty to represent the employee fairly. Section 8 (b) (3) was designed to assure that a union be held guilty of an unfair labor practice when it fails to perform its duty in this regard."

See Cox, *supra* note 2, at 172-173; Trial Examiner Frederick U. Reel's Report in the case of Independent Metal Workers Union and Hughes Tool Co., N.L.R.B. Cases Nos. 23-CB-429 and 23-RC-1758, presently pending before the Labor Board.

However, after citing Professor Sovern, Judge Medina held

"that the duty of the union to bargain as set forth in 8 (b) (3) is merely the counterpart of the employer's duty to bargain, expressed in Section 8 (a) (5), and does not in this context impose an additional duty of fair representation," 326 F.2d at 178.

For Professor Sovern's comments on the applicability of 8 (b) (3), see note 2, *supra* at 588-590.

public interest for the Labor Board to exercise jurisdiction to remedy breaches of the union's duty of fair representation, in order to channel racial discrimination cases to the NLRB, rather than leave them for decision by the courts.[39] To this second argument, he countered that such matters of policy must be settled and determined by the Congress. He pointed out, however, that were such a position to be sustained, the NLRB would be inundated with charges of that character.

Judge Lumbard, in a concurring opinion, agreed with Judge Medina's disposition of the alleged 8 (b) (2) and 8 (a) (3) (discrimination) violations in the light of the *Local 294* case. However, with regard to the alleged 8 (b) (1) (A) and 8(a) (1) (duty of fair representation) violations, he refused to enforce the NLRB's decision *solely* on the ground that

> the evidence upon which the Board relies is insufficient to support its conclusion that the union took "hostile action, for irrelevant, unfair or invidious reasons" against Lopuch.[40]

He considered it unnecessary to decide that part of the case on the questions of law involved. Judge Medina had also alluded to the "meager facts" in the record to support the Board's finding.[41]

Dissenting Judge Friendly would have sustained the Labor Board's decision against Local 553 and Miranda on the alternate grounds of discrimination under 8 (b) (2) and 8 (a) (3). For this reason, he did not consider the primary grounds of the Board's decision based on the duty of fair representation compelled by 8 (a) (1) and 8 (b) (1) (A). Distinguishing the *Local 294* case, he found that the Union's conduct "was not in good faith but rather was an arbitrary exercise of power,"[42] and that the Board "could fairly conclude that action like that of the union here might tend to cause union members to be 'good' members rather than 'bad, or indifferent members.' "[43] Thus both Judge Lumbard's concurring opinion and Judge Friendly's dissent do not ac-

[39] Brief for the A.C.L.U. as Amicus Curiae, *supra* note 11; Brief for the N.A.A.C.P. as Amicus Curiae, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir. 1963).

See also, Brief for the United Automobile, Aerospace & Agricultural Implement Workers of America (AFL-CIO) as Amicus Curiae, pp. 3-18, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir. 1963), wherein it is argued that

"while racially discriminatory bargaining representation constitutes an unfair labor practice, discrimination against individual or minority workers in the absence of any racial taint is a ground for judicial rather than labor board jurisdiction."

[40] 326 F.2d at 180.

[41] It is suggested that the Labor Board, in *Miranda,* chose a poor fact situation in which to expound a new theory for the extension of its jurisdiction to include enforcement of the union's fiduciary duty to the employees. Here, an *individual* was unfairly treated; the unfair treatment involved a *debatable* construction of a contract provision; and there was *no* real *public interest* involved. It is suggested that a more convincing case would have been one in which a minority *group,* rather than one individual, was being *clearly discriminated against* on the "irrelevant" *basis of race.*

[42] 326 F.2d at 182.

[43] *Id.* at 183.

tually or ultimately reach the crucial questions of law involved in the Board's decision—i.e., whether, through 8 (b) (1) (A) and 8 (a) (1), the NLRB has jurisdiction to remedy a breach of the union's duty of fair representation.

III. Conclusions

The National Labor Relations Board has decided not to file a petition for *certiorari* with the Supreme Court in the *Miranda Fuel* case. It would appear that the reason for this is the fact that *Miranda* provides a poor factual basis to substantiate the Board majority's theory for extending its jurisdiction to cover a breach of the union's fiduciary duty.[44]

This does not mean, however that the Labor Board will acquiesce in the decision of the Second Circuit. On the contrary, there are presently pending before the NLRB two cases[45] which involve a much stronger set of facts—racial discrimination against a minority of employees. It is suggested that when the Labor Board decides these cases, they will be based on the same rationale as the Board decision in *Miranda*.[46] It is likely that these cases will go up to Courts of Appeals other than the Second Circuit. Hence, it may develop that a "conflict of the circuits" will result and form the basis for the grant of *certiorari* and the rendering of final decision by the Supreme Court.

What are the ramifications of the Board's decision in *Miranda* to exercise jurisdiction over a union's breach of the duty of fair representation? What effect will the opinion of the Second Circuit have to limit the Board's jurisdiction in this area?

The second question is the easier to answer. In all probability, due to the anticipated refusal of the NLRB to acquiesce in it, and for the reason that only one judge on the Circuit Panel actually reached the main issue, the overall effect of the Second Circuit's decision may be expected to be slight.

On the other hand, the first question is somewhat harder to answer in this limited comment. While it may be expected to have many ramifications, at least two have already developed—an attempt to channel racial discrimination cases to the NLRB, and a confusion as to the effect of the *Miranda* decision on the doctrine of NLRB preemption.

With regard to the former, certainly if the Board's theory is accepted and it begins to exercise its Section 10 jurisdiction to enforce the union's fiduciary duty, the forecast of Judge Medina that the NLRB will be inundated with racial discrimination cases will in all likelyhood come true. However, whether this will result may depend in large part upon whether Congress passes a

[44] See note 41, *supra*.

[45] Independent Metal Workers Union and Hughes Tool Co., N.L.R.B. Cases Nos. 23-CB-429 and 23-RC-1758; International Longshoremen's Assn., AFL-CIO, and Galveston Maritime Assn., Inc., N.L.R.B. Case No. 23-CB-476.

[46] See Trial Examiner Frederick U. Reel's Report in Hughes Tool Co., *supra* note 45; Trial Examiner Thomas N. Kessel's Report in Galveston Maritime Assn., *supra* note 45.

"Fair Employment Practices" Act.[47] If Congress passes such legislation, it would seem that as a practical result the racial discrimination cases would be brought before the proposed Equal Employment Opportunity Commission.[48] If this happens, the effect of *Miranda* in this area would be substantially limited.

However, it should be noted that apart from cases involving racial discrimination, the Board's position in *Miranda* will greatly expand its jurisdiction and channel into it a substantial quantity of non-race cases, heretofore brought exclusively in the courts.[49]

Aside from the public policy aspects of extending the NLRB's jurisdiction, the Board's theory in *Miranda* may have a substantial effect within the field of labor law, as a result of the doctrine of NLRB preemption. The Supreme Court has ruled[50] that courts must defer to the exclusive competence of the NLRB in those cases where the subject matter is "arguably subject" to either the protections of Section 7 or the prohibitions of Section 8 of the Taft-Hartley Act. However, in light of the fact that the courts have been exercising jurisdiction to enforce the union's duty of fair representation for the past twenty years,[51] it would seem that their jurisdiction would at least remain concurrent with that exercised by the NLRB. Yet, the contrary has been argued,[52] and at least one recent case has held otherwise.[53]

[47] See generally, Albert, *supra* note 2. Also, see The Civil Rights Act of 1963, H.R. 7152, 88th Cong., 2d Sess. 701-718 (1964), as passed by the House of Representatives and presently pending before the Senate.

[48] *Ibid.*

[49] See Brief for the AFL-CIO as Amicus Curiae, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir. 1963), wherein it is suggested that the assumption of jurisdiction over alleged breaches of the union's duty of fair representation would result in the NLRB policing the substantive bargaining arrangements between unions and employers. The Labor Board, as a public agency acting in the public interest, was not intended to adjudicate private interests. Yet, the Board would be flooded with every grievance brought by a dissatisfied employee—what would in actuality be the private complaints of individuals. As a result, this vast new influx of cases concerning employees' *individual* rights would interfere with the proper function of the NLRB, which is to protect the employees' *collective* rights. Also, see Brief for the United Automobile, Aerospace & Agricultural Implement Workers of America (AFL-CIO) as Amicus Curiae, *supra* note 39.

[50] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

[51] The *Steele* case, *supra* note 4, was decided in 1944.

[52] See Cox, *supra* note 2, at 172; Blumrosen, *supra* note 2, at 1504, n. 191; Sovern, *supra* note 16, at 18, n. 47.

Also, see Brief for Petitioners, pp. 50-54, Humphrey v. Moore, —— U.S. ——, 84 S. Ct. 363 (1964), wherein it was argued that, by reason of the NLRB's exercise of jurisdiction in *Miranda*, the enforcement of the union's duty of fair representation was preempted at least to the extent of excluding state law and state courts.

In the *Moore* case, however, the Supreme Court, as in the case of *Ford Motor Co. v. Huffman*, *supra* notes 7-9, refused to specifically decide this issue, stating

"Although there are differing views on whether a violation of the duty of fair representation in an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and

In conclusion, the National Labor Relations Board in *Miranda Fuel* has attempted to extend its unfair labor practice jurisdiction under Section 10 of the Taft-Hartley Act to include the enforcement of the union's duty of fair representation. The decision of the Court of Appeals for the Second Circuit will have little effect in curtailing the Board's position. Whether public policy favors such an extension of the Labor Board's jurisdiction and whether such a policy determination should be made by Congress or by the judiciary are highly important issues. One thing is certain: The NLRB in the *Miranda Fuel* case has opened a "Pandora's box," out of which debate, controversy, and litigation will flow until this problem is finally resolved by the Supreme Court of the United States.

GREGORY L. HELLRUNG

---

was therefore within the cognizance of federal and state courts, . . . subject of course to the applicable federal law." 84 S.Ct. at 369.
This might indicate that the Supreme Court would hold that the jurisdiction of the NLRB would be concurrent with that of the courts, but, as noted in the quotation from the *Moore* case, the Supreme Court has not decided that issue to date.

[53] Stanley B. Stout v. Construction and General Laborers District Council of Chicago and Vicinity, Civil No. 63-C-494, N.D. Ill., Dec. 31, 1963. Federal District Judge Bernard M. Decker accepted the argument of the defendant that on the basis of the Trial Examiner's Report in *Hughes Tool Co., supra* notes 45-46, and the *Garmon* case, *supra* note 50, the primary and exclusive jurisdiction over an alleged breach of a union's duty of fair representation was vested in the NLRB. As a result, he dismissed the plaintiff's case for lack of jurisdiction over the subject matter. In the light of a twenty year history of the federal courts' exercise of jurisdiction in this area, when coupled with the statement of the Supreme Court in *Humphrey v. Moore, supra* note 52, it would appear that Judge Decker's interpretation of the *Garmon* case and its application to the Board's *Miranda Fuel* Doctrine is overly strict and probably will not be followed.