WORKPLACE SAFETY AND HEALTH: RECENT DEVELOPMENTS IN UNION LIABILITY

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Law and Policy Series: No. 1
June, 1980

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INTRODUCTION

It has been a little over one decade since Congress enacted the 1970 Occupational Safety and Health Act (OSHA). This legislation arose out of an unrelenting crisis - an epidemic of injury, illness and death in America's workplaces. The enactment of this legislation, together with the Federal Coal Mine Safety and Health Act of 1969, signaled official recognition of a problem already well known in the industrial world.

The OSH Act signaled a new approach to the problem of workplace hazards. For the first time, a comprehensive federal law intended to prevent workplace injuries and illnesses, as opposed to compensating those already injured or ill. Under the common law an employer was often legally liable for the work-related injuries of employees. With the passage of worker's compensation legislation employers again were recognized as being primarily responsible for those injuries and illnesses arising "out of and incidental to . . . employment." Likewise, under the OSH Act, it is the employer who must,

> "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[1]

And while employees have a duty to comply with OSHA regulations, the standards are primarily geared towards, and enforceable only against, employers.[2] At no point does the OSH Act explicitly or implicitly require an employee's union to insure or to seek safe and healthful working conditions. Further, for OSHA purposes, the safety and health obligations of employers are non-delegable and cannot be contractually assumed by other employers or unions.[3]

Organized labor has influenced, and has been influenced by, the OSH Act. Although health and safety issues had been considered "mandatory" subjects of bargaining under the NLRA prior to 1970[4], widespread union activity on these issues was lacking. However, since 1970 a significant number of bargaining agreements have incorporated specific health and safety

clauses. These provisions establish among other things, 1) labor-management safety and health committees, 2) workplace safety and health practices, and 3) limit workplace exposure to hazardous work.

As unions began to bargain for the right to influence and, at times, control workplace safety and health practices, they were subjected to greater legal scrutiny. Since the early 1970's, numerous lawsuits have been brought against unions by union members, employers and 3rd party manufacturers. These cases generally involve allegations that the union (particularly those that have negotiated safety and health provisions) inadequately utilized its power to secure safer and more healthful working conditions. Consequently, the fear of costly and time consuming litigation hangs over many unions. In some instances it has caused unions to rethink or withdraw from more active negotiations on health and safety issues. This paper will look at the cases which have been brought against unions and assess the strengths and weaknesses of such cases. We will analyze the cases that have arisen under labor law's duty of fair representation (DFR) as well as those brought under various common law negligence theories (e.g., breach of contract, tort actions). Finally, we will discuss some ways unions can minimize their legal risks without deterring their interests in promoting healthier and safer work environments.

I. DUTY OF FAIR REPRESENTATION

A. Origins of the Duty

Federal labor law vests a great deal of authority in the recognized bargaining representative - the union. Unions have the right to exclusively represent, and bargain for, their membership. With this grant of authority comes some resulting difficulties. Unions often represent bargaining units which are large in size and complicated by occasional conflicts between the membership, specific unit members and management. Because of the diversity of functions, as well as the possibility that some members' interests may be wrongfully overlooked, the Supreme Court has interpreted both section 9(a) of the NLRA[5] and section 2[6] of the Railway Labor Act to establish a union duty of fair representation (commencing when the union becomes the exclusive bargaining representative of its unit members).

This doctrine was not specifically enumerated in the various labor legislation. In establishing, or reading into the legislation this duty, the Supreme Court in Steele v. Louisiana & N.R. Co., stated:

> "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their (the unit members') interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed."[7]

The Court compared the similar functions of a legislature and a union - particularly the duty of representatives to non-discriminatorily represent their constituencies.

In Steele, a case involving a union's attempt to eliminate current and future jobs for black workers within the bargaining unit, the Court held that unless unions are held to a duty of fair representation, those in disfavor with the majority will be denied "equal representation." Thus, unions now have the duty to fairly represent all employees in the unit for

which it is the representative. This duty applies both in contract negotiations as well as the evaluation and processing of grievances.[8]

B. How DFR Suits are Brought

Under present case law, suits for the breach of the DFR can be brought in both state and federal courts, on an implied cause of action under the exclusive representation provision of the appropriate labor law.[9] Many courts have also entertained such suits under section 301 of the Labor Management Reform Act (LMRA) which affords employees a right to sue for breach of a union-management contract. Additionally, the NLRB can independently and concurrently determine whether a union committed an unfair labor practice by breaching its duty of fair representation.

C. What Constitutes a Breach of the DFR?

Although the courts vary in determining what constitutes a breach of the DFR it is widely accepted that a breach occurs when the union's conduct towards a bargaining unit employee is "arbitrary, discriminatory, or in bad faith."[10] This does not emply a duty to process all grievances or to negotiate equal working conditions for all unit employees. The union has a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion".

Numerous cases now hold that unions breach the DFR by bargaining for discriminatory contract provisions or by ignoring or failing to evaluate carefully, the basis of a grievance, or by handling the grievance in a perfunctory or discriminatory with, or without, bad faith. The courts still maintain that union negligence, alone, does not constitute a breach of the DFR.

D. Breach of the DFR Over Safety and Health Issues

1. Contract Negotiation

From a DFR perspective, a union generally has considerable flexibility in negotiating contract language. However, a union cannot use its power to bargain away those rights which, by law, are guaranteed to individual employees. Thus it is a breach of the union's DFR to encourage or bargain for discrimination based on race, sex, or union membership. From an occupational health perspective it is arguable that a union's bargaining away of workers' OSHA rights might constitute a breach of the DFR. Further, if a union willfully allowed certain employees to be exposed to health hazards because of race, sex, or union membership status, then the DFR may be breached. Thus, when unions fail to identify and seek resolution of health hazards predominantly affecting a specific work population (e.g., women, minority workers, ethnic groups, etc.) a breach may occur. However, without a showing of discrimination it appears doubtful that a breach of the DFR will be found in the failure to bargain for health and safety improvements.

2. Non-Enforcement of Bargaining Agreement Health and Safety Provisions

Many unions have negotiated for specific health and safety language[11] which, for example, establishes joint labor-management safety and health committees with the right to inspect working conditions and make appropriate recommendations. Other provisions might allow a union the power to withdraw workers from hazardous job assignments. A union's non-enforcement of such provisions, or inadequate enforcement, can result in lawsuits alleging breach of the DFR. Traditionally, these cases have arisen out of accidents or workplace disasters. The DFR cases brought by workers or their survivors seek to recover those consequential damages which workers' compensation benefits do not adequately cover. The DFR suit against

the union is often times the worker's only available cause of action due to the employer's protected status under the exclusive remedy provisions of most state workers' compensation laws. Further, some employers or manufacturers who are sued can join a union as a defendant if it can be shown that the unit member would have had a cause of action against the union either for the breach of the DFR or under common law theories of negligence.

The first DFR case involving occupational health and safety was Brough v. United Steelworkers of America.[12] In that case the Steelworkers were sued by a member who was injured while operating an allegedly faulty machine. The suit contended that the union ineffectively and negligently performed its role as a "safety advisor" to the employer. The employee alleged that the union breached its DFR and also sought tort damages under a New Hampshire state common law principle that an employer's "safety advisors" are liable for negligent inspections of faulty machinery. The Federal court dismissed the suit in favor of the union on the DFR count and stated that federal labor law imposes upon the union only a duty of good faith representation, not a general duty of due care. However, the state court claim for negligence under the common law was remanded to state courts. The union impleaded the Company and settled for $10,000 in order to avoid further litigation. This general standard was followed and expanded in Bryant v. International Union, UMW of America.[13]

The Bryant case was brought by the survivors and estates of coal miners killed in a mine explosion against both the employer and the union for failure to ensure the company's compliance with the standards of the Federal Mine Safety Code. The collective bargaining agreement provided 1) that the union safety committee "may" inspect any "mine development or equipment used in producing coal" and may remove any workers from an area it deems unsafe.

The decision, written by 1st Circuit Court Judge Celebrezze, held that: 1) the union did not fail to seek correction of any known violations; and 2) the bargaining agreement provided only that the union "may", rather than "shall", or "must", inspect the mine area and therefore the union had no duty to inspect. The Court added that without allegations of discriminatory, arbitrary, or bad faith behavior by the union (upon knowledge of a violation) no DFR action could prevail. Further, and most importantly, the court expressed its doubt that the contract necessarily makes the union financially responsible for failing to demand correction of Code violations, even in situations where such violations have been reported by federal mine inspectors. The court looked at the nature and purpose of bargaining agreements:

> "It would be a mistake of vast proportion to read every power granted the union by management as creating a corollary contract right in the employee as against the union. Such interpretation of collective bargaining agreements would simply deter unions from engaging in the unfettered give and take negotiation which lies at the heart of the collective bargaining agreement."[14]

In what has become the main policy reason against allowing union liability, Judge Celebrezze noted that by allowing liability the courts would deter unions from including safety and health provisions in future contracts. The 1st Circuit recognized that such a development would obstruct the goals of national labor policy.

Other courts have been sensitive to another policy concern inherent in allowing union liability - a shifting of health and safety responsibility from the employer to the union.[15] Such a development would be in conflict with the well established common and statutory law developments which make the employer responsible for assuring workplace health and safety. A Pennsylvania court has determined that Congress did not attempt to alter the employer's responsibility for health and safety:

> "By imposing on it (the union) the duty of fair representation, Congress sought to prevent it from neglecting the wishes of the minority 'electorate.' Congress did not seek to make the union responsible for its members' working conditions."[16]

Both state and federal courts have unanimously failed to find that a union has breached its DFR when it had negligently enforced, or failed to enforce, a safety and health clause. A negligent failure to insure safe working conditions, even when the union has the power to remove employees from any hazardous condition, will not breach the DFR.[17] Likewise, it has been ruled that in the absence of an employee complaint, a union safety committee, established to monitor safety conditions and to make appropriate recommendations, does not breach its DFR when it is aware of a disconnected safety switch and does not seek to correct it.[18] Neither will a union's failure to search out and discover workplace health hazards constitute a violation of the DFR standard. Nor will a union breach its DFR to an injured member if it negligently referred to the worksite the violence-prone individual who maliciously attacked the injured member.[19]

Although negligence alone does not constitute a breach of the DFR, a negligent act may be termed "arbitrary" conduct. Under Ruzicka v. U.A.W.[20] an "arbitrary" action stemming from unintentional negligence constituted a breach of the DFR. In Ruzicka a union representative forgot to process a grievance within the appropriate time limit. The "negligent" action was deemed intolerable because the union was on notice that its member wanted to continue his grievance to the next stage of processing. Ruzicka, however, does not mean that failure to enforce the union's inspection right is a breach of the DFR. Ruzicka can be distinguished from those health and safety cases previously discussed on the grounds that it involved procedural negligence which is most easily preventable.

The Bryant case can also be distinguished because the specific concern with promoting union flexibility in enforcing the contract generally is quite different from unacceptable inaction on a specific member's grievance.

3. Breach of the DFR in Evaluating or Processing a Health and Safety Grievance

A union owes its unit members a duty of fair representation such that it will not refuse to process grievances arbitrarily, discriminatorily, or in bad faith. In health and safety grievances the same standard applies. A union can evaluate a meritorious grievance and decide not to proceed with it for numerous reasons. The union can refuse to process a grievance further because, in its good faith opinion, the grievance has little chance of further success. For example, in Powell v. Globe Industries, Inc.,[21] the union refused to take a grievance to arbitration. The union reasoned that the company's offer to reinstate the grievant, without backpay, was the best possible settlement. The grievant alleged employer retaliation for OSHA-related activities and refused to settle. The court held that the union was motivated by a proper concern, that if the reinstatement offer were rejected, the grievant could be left jobless, if he lost the arbitration.

It is doubtful that a union could aribtrarily or perfunctorily refuse to grieve matters arising under a particular clause in the agreement solely because it has decided not to enforce that section. Professor Summers has suggested that such a decision would constitute an undemocratic nullification of the contract.

> "The union's refusal to enforce a clear provision in the collective agreement cuts at the very root of its duty of fair representation. The union as representative of the employees owes to them the duty an agent owes to his principal. How can an agent authorized to make a contract on behalf of his principal, make the contract and then deprive his principal of its benefits."[22]

Professor Summers' point is an imporant one in the occupational health and safety arena. It suggests that a union could not refuse to assert its contractual health and safety rights because of its leadership's non-interest in pursuing them.

The Summers' proposal would not, however, change the results in cases such as Bryant and House where the union's non-exercise of its enforcement power did not breach its DFR. The distinction is simple - a union can choose not to enforce a contractual provision as long as its unit members have not sought to enforce that section.

However, a union handling a health and safety grievance which involves the interpretation of technical or scientific data may breach the DFR by failing to seek out expert witnesses on behalf of its grievants. A recent district court decision has held that the United Transportation Union violated the DFR by providing incompetent non-expert representation for a member seeking reinstatement after surgery. The court reasoned that the union was guilty of "perfunctory representation" for failing to supply expert representation.[23] Thus, a union may have a duty to not only enforce meritorious health and safety grievances but to also provide "expert representation".

Ironically, we have come full circle in our discussion. While a union may be obligated to grieve all meritorious claims and supply expensive expert representation, it might still successfully argue that such costly grievances cannot be afforded by the union budget.

II. NEGLIGENCE ACTIONS UNDER COMMON LAW

In numerous cases plaintiffs who could not prevail under the DFR standards have brought common law tort actions against unions. In the area of occupational health and safety most of these cases have alleged that the

union breached its duty of care to its membership by negligently enforcing or failing to enforce relevant health and safety provisions or by failing to discover or warn employees about health and safety hazards.

While negligence alone is not sufficient to show a union's breach of its DFR, it will support a cause of action under many state tort laws. However, the doctrine of federal preemption, which we shall examine later, has precluded most DFR cases from being brought as tort claims.

The landmark negligence case arising out of a union's health and safety duty is Helton v. Hake.[24] In Helton, an ironworker was electrocuted while working near non-insulated high tension wires. The union was sued in tort for failing to comply with its obligation, under the bargaining agreement, to insure that work not be performed around high tension lines until the safety of the employees could be assured. Significantly, the Iron Workers contract provided that the union steward shall see that the working rules' provisions are complied with and that the employer is not held responsible for the performance of those functions by the steward. The Missouri Court of Appeals held that under the preceding contractual language the union chose

> "to go far beyond a mere advisory status or representative capacity in the processing of grievances. Rather, it has taken over for itself a managerial function, namely the full independent right to enforce safety requirements."[25]

The court then held that once the union assumed the affirmative duty of insuring a safe workplace it could be liable in tort for a failure to perform that duty.

In finding the union and the steward liable, the Helton court relied heavily on the contract language expressly stating that the union had sole responsibility for assuring workplace safety. At no point did the court consider whether the union's assumption of the employer's duty to provide a safe and healthful workplace was consistent with public policy. It is arguable that the employer cannot legally delegate the responsibility to

assure workplace health and safety. In OSHA enforcement cases the Occupational Safety and Health Review Commission (OSHRC) and the courts have consistently held that employers cannot contractually escape their primary responsibilities held under the OSH Act.[26]

Subsequent to the Helton decision, the Idaho Supreme Court has held that survivors of a mining disaster may bring negligence actions against the union for failure to adequately function as an accident prevention representative.[27] The Idaho Court followed Helton and rejected the federal preemption analyses offered by many of the courts deciding similar cases.

Few other health and safety cases against unions have been successful under a common law negligence action. The only other reported case, Nivins v. Sievers Hauling Corp.,[28] involved an action brought by an employer against a union with whom he had contracted to supply construction workers. The agreement required that competent employees be referred by the union to the employer. The court found the union had an express duty to provide competent workers. Thus, when the union breached that obligation and an injury subsequently occurred, the union was held liable for the resulting damages. Because this case was brought by the employer, and not a unit member, no DFR questions arose.

III. FEDERAL LABOR LAW PREEMPTION OF STATE COMMON LAW REMEDIES

As a general rule, the relationships between most private sector labor unions, union members and employers are governed solely by federal law. Traditionally, federal preemption has been found when the activity the state seeks to regulate is arguably protected or prohibited by the NLRA. Therefore, federal labor law will pre-empt inconsistent provisions of state law. The U.S. Supreme Court has emphasized the need for a uniform national labor policy:

> "The course of events that eventuated in the enactment of a comprehensive national labor law . . . reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good."[29]

However, the states are not totally precluded from regulating behavior which is peripheral to the policies sought to be promoted by the federal law, particularly when the regulated conduct is traditionally a matter of deeply rooted local concern.

While a breach of the DFR is an unfair labor practice, a union's negligence in the non-enforcement of a general contractual provision (absent a grievant) does not constitute a violation of its DFR. Therefore, union negligence of this sort is not prohibited or protected. Yet, a number of courts have held that a union's only duty to its members is subsumed under the DFR. These courts have held that any claim arising out of any duty allegedly owed by the union to an employee must be governed by federal labor law's DFR standards.

In House v. Mine Safety Appliance Co.,[30] the survivors of miners killed in the 1972 Sunshine Mine disaster sued the mining company. The employer filed a third party complaint against the union alleging that the union committed a common law tort by negligently performing its assumed duty of preventing unsafe conditions. The federal district court held that any claim of negligence arising under the enforcement of duties assumed in a bargaining agreement must be governed by the DFR and not state common law. The court concluded that a common law negligence suit alleging the union's breach of its safety duty was "inextricably intertwined and embodied in the union's duty of fair representation."[31] Thus, the court held that the common law action was preempted. Other courts have also held that tort claims alleging a union's inadequate protection of workplace health and safety pose

a significant potential of interference with federal labor law.[32] These courts have therefore found federal preemption of such state claims.

A few courts have not specifically held that the federal law preempts state law. However, a number of those courts have either declined to rule on the merits of the negligence issue or found that the unions had not breached any common law duty to the employee.

Two recent significant cases, Helton v. Hake and Dunbar v. United Steelworkers of America, now allow common law negligence actions regardless of the preemption doctrine. In Helton the court held that the contractual language created a mandatory duty in the union - to seek out and correct health and safety hazards. Helton sought to distinguish both House and Bryant by showing that the union did not fail to exercise a permissive right to inspect the workplace. To the contrary, the court held that under the bargaining agreement the union took over the managerial function of the employer to provide a safe and healthful workplace and thus assumed consequential common law duties arising from that contract. The language in Bryant declaring that all contract provisions are not enforceable against the union was held to apply only when the union has a non-mandatory duty.

The Dunbar court did not seek to base its decision on the distinction between mandatory and permissive functions. Its holding was much broader. In deciding that a common law action for wrongful death is not preempted by federal law, the court emphasized that the NLRB does not hear such cases per se. Under the Dunbar analysis a union could potentially be liable for any "duty" to insure workplace safety and health regardless of whether that duty is mandatory or permissive.

The Dunbar and Helton courts determined that the negligent enforcement of a bargaining agreement could not constitute a breach of the DFR. These courts went on to find that a common law cause of action would not create

a conflict between state and federal law because the common law duty is "peripheral" to the intent of the DFR.

The cases show distinct disagreement as to whether common law negligence actions will actually interfere with the goals and purposes of the NLRA in regards to improvement of working conditions. Successful wrongful death suits may directly deter unions from bargaining on at least some types of health and safety provisions. If the Dunbar case is followed in other jurisdictions unions may well be deterred from establishing health and safety committees or from taking an active role in hazards identification and controls. Such consequences could retard the federal policy of promoting workplace cooperation and improvement. To impose more stringent standards would arguably serve to undermine union efforts to supplement and make more effective the workplace health and safety protections accorded by the OSH Act.

IV. HOW TO AVOID UNION LIABILITY

Unions can act to significantly lessen the chances of ever being embroiled in litigation arising out of either a breach of the DFR or of a common law duty for the negligent performance of their health and safety functions. This section will look at various methods by which unions can insulate themselves from liability - both through careful drafting of their health and safety contract provisions as well as through careful and thorough exercise of their contractual prerogatives to encourage workplace health and safety. In addition, this section will consider a few of the legislative developments which may significantly alter and prevent union liability for union health and safety activities.

A. The Contractual Language

The major case holding a union liable for its negligent performance of its health and safty function, Helton v. Hake, based its holding on the fact that:

> "the union has chosen to go far beyond a mere advisory status or representative capacity in the processing of grievances. Rather it has taken over for itself a managerial function, namely the full independent right to enforce safety requirements. With its demand for and successful acquisition of that management right, it must also accept the concomitant responsibility."[33]

The court based its opinion on the fact that the Ironworkers had the unilateral power to enforce the health and safety provisions, and to therefore remove workers from hazardous work areas. This unilateral power, which is seldom found in bargaining agreement provisions at present, establishes far greater union control over workplace conditions. The Helton court, recognizing this fact, held that unions can contractually assume a duty of care to its members when it begins to exercise control over workplace conditions.

While some unions may not seek contractual independent control, others may perceive such power as essential in order to adequately protect unit members. Therefore, the response to the Helton case is not to retreat from negotiating for the unilateral power to change working conditions. However, the union may retain the same powers and influence over workplace conditions by negotiating clauses which give them the permissive power to exercise control. Thus, in Helton the clause providing that the union steward "shall see that the provisions of these working rules are complied with," could have read the union steward "may require that the provisions of these working rules are complied with." The permissive power would then have paralleled the union's authority in Bryant v. United Steelworkers of America. In that case, the court pointed out that a union does not assume a duty to enforce all of its contract rights. In addition, the court noted that the bargaining agreement stated that the union "may inspect any mine." The court further held that "the use of the permissive 'may' rather than the obligatory language in the clause clearly negatives the possibility that any duty was to be created."[34]

Aside from changing the nature of the union's duty from mandatory to permissive, other contractual provisions may seek to protect the union. A union should seek to have the contract reiterate the employer's exclusive duty to provide a safe and healthful workplace. This approach reinforces the main employer obligation under the federal OSHAct of 1970. Also, the contract should contain a clause which states that the union, by negotiating for, and establishing, its powers on health and safety matters, does not assume any of the employer's exclusive duty.

Further, unions can negotiate language which provides that the international union, local unions, union safety committees, union officers, employees and agents will not be liable for any work-connected injuries, disabilities, or diseases. Such language intends two distinct results: 1) to insulate the union from lawsuits from its unit members and their survivors, and 2) to insulate the union from third-party lawsuits brought by employers or manufacturers.

While such clauses may sound attractive to a cautious union, they may be in part, both deceptive and against public policy. If the bargaining agreement is perceived as a contract between the employer and the union for the benefit of the members under a third party beneficiary theory, then these employees are not necessarily bound by any contract clause insulating the union from lawsuits brought by unit members.[35] In addition, the courts are not inclined to uphold such disclaimers if, in their opinion, injustice will result.

However, the employer's waiver of any legal action resulting out of alleged union negligence (third-party actions) may likely be upheld by the courts. The legal doctrine of assumption of risk allows the contractual parties to contract to specifically agree in advance that one of them will not be liable for the consequences of conduct which would otherwise be

negligent.[36] It is likely that the agreement exempting a union from all liability arising under its health and safety functions would be valid because: 1) it is a waiver of liability for only one area of the unions' function; 2) health and safety concerns are generally the responsibility of the employer and; 3) an agreement between two parties which affords the traditionally weaker one an advantage must be presumed to be the product not of coercion but of free and open negotiations between the parties.

Some unions have also attempted to bargain for indemnification clauses which provide that the employer will compensate the union for any damages, settlements and legal fees arising out of the union's negligent performance of its health and safety functions. While such clauses may be difficult to attain at the bargaining table, they do serve to lawfully insulate the union from its negligent performance of its health and safety powers. Such agreements have been approved by the courts,[37] and are common amongst manufacturers.

B. Preventing Liability by Exercising Health and Safety Authority

A union should not merely seek to negotiate protective contractual provisions. Lawsuits over a union's negligent performance of its health and safety functions may be prevented not only by contractual language, but more important, by diligent and concerned enforcement of explicit and implied powers. A union can show its good faith efforts through 1) effective health and safety educational efforts geared towards its officers, representatives, and unit members; 2) timely and effective exercise of inspection rights, committee membership rights; 3) a willingness to consult the employer and outside agencies such as OSHA and the National Institute for Occupational Safety and Health (NIOSH) on workplace conditions which the union or its membership perceives as dangerous; 4) by soliciting, supporting, and prioritizing the health and safety protests of unit

members when those objections have merit under the contract; 5) by exercising diligence and careful analysis on health and safety grievances; 6) through a willingness to consult outside experts when safety and health problems are of a technical or specialized nature; and 7) effectively utilizing union rights of access to illness and injury data; as well as medical and industrial hygience information.

C. Legislative Proposals to Limit Liability

Finally, as the courts in Bryant and House suggested, there are some compelling policy reasons why unions should not be held liable for their health and safety activities. This reason is simple and straight forward - if widespread liability is attached to negligent performance of these functions unions may well respond by refusing to negotiate for further health and safety powers.

The policy concerns voiced in Bryant and House have prompted some significant legislative developments which seek to address the problem of union liability. One pertinent example is a provision already incorporated in the Michigan workers' compensation statutes which exempts unions, their officers, agents, and committee members from liability for union activity, or lack of activity, in health and safety matters.[38] While the Michigan law is significant, it does not address these concerns for more than an individual state approach.

There is some national movement towards legally insulating union health and safety activities. Interestingly, it is the Schweiker bill (SB 2153), the proposal aimed at reducing OSHA's presence in the workplace, which promotes some protection for the health and safety activities of committee members. While the Schweiker bill protects the committees and their members from liability, it is unlike the Michigan workers' compensation provision in one very significant way - it does not expressly apply its protections to unions.

> "Notwithstanding any other provision of law, no claim of liability for an occupational illness or injury may be asserted against any advisory safety committee or provider of consultation services against any member or employee of such committee or consultant based on any activity, relationship, or breach of duty within the scope of functions of such committee, consultant, or individual required or authorized pursuant to this section."[39]

While unions are not specifically exempted, they may likely be considered a "provider of consultation services", although the opposite argument could be made. Nevertheless, the Schweiker bill recognizes that when workplace committees assume a greater role in promoting workplace health and safety they must be protected legally. The reasons for such protections likely include the fact that these committees are voluntary compliance efforts and that participation in them should not be deterred by the threat of liability.

Further, proposed federal legislation has also provided specifically for union non-liability. The Williams-Javits National Workers' Compensation Standards bill provides that the proposed federal workers' compensation remedy,

> ". . . shall constitute the employee's exclusive remedy against the employer, the employer's insurer or any collective bargaining agent of the employer's employees . . . for any illness, injury, or death arising out of and in the course of his or her employment."[40]

This provision is the fiarly typical exclusive remedy provision found in most compensation laws and thus the Williams-Javits bill parallels the Michigan Workers' Compensation law.

V. CONCLUSION

As organized labor bargains over the health and safety concerns of its membership, it must bear in mind that it may be exposing itself to potential legal liability. By far, the unions' greatest vulnerability does not arise under the DFR standards of federal labor law. Rather the possibility of a lawsuit alleging a union's breach of state tort law looms as

the most significant legal threat. The preemption doctrine has been used to limit the state court actions but in a few cases this approach has been rejected. It is those cases, Helton v. Hake and Dunbar v. United Steelworkers of America, which make unions apprehensive.

The threat of liability can be minimized without sacrificing union influence or authority over workplace health and safety practices. Through careful drafting of contract provisions as well as through adequate and informed enforcement, unions can effectively limit the possibility of liability for health and safety activities. Further, various legislative proposals may offer unions the legal protection which they seek.

Union liability for its health and safety practices is a relatively recent phenomenon. It is likely that it will attract increased attention as unions assert more influence over the issues and as public awareness of occupational hazards increase. While the threat of liability can cause unions to be more diligent in health and safety matters, it can also cause unions to withold from further involvement in this crucial area. For this reason unions argue they should be free of the legal web of common law negligence when they become involved in the health and safety arena. This is the policy issue that the courts, the Congress, and individual state legislatures must begin to resolve.

REFERENCES

1. O.S.H. Act § 5(a)(1), 29 U.S.C. § 654(a)(1).

2. See O.S.H. Act § 5(b), 29 U.S.C. § 654(b); § 5(a)(2), 29 U.S.C. 654(a)(2); § 2(b)(3), 29 U.S.C. § 651(b)(3).

3. See Howard Electric Co., 6 O.S.H.C. 1518, 1521 (O.S.H.R.C. 1978); Frohlick Crane Service Inc.

4. NLRB v. Gulf Power, 384 F. 2d 822 (5th Cir. 1967).

5. 29 U.S.C. § 159(a). See Ford Motor Co. v. Huffman, 345 US 330 (1953). This was the first case in which the Supreme Court held a duty of fair representation to arise under § 9(a) of the NLRA.

6. 45 USC § 152. See Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).

7. Steele v. Louisville & N.R. Co., supra at 202.

8. Vaca v. Sipes, 386 U.S. 171 (1967).

9. See e.g., § 9(a) of the NLRA, 29 U.S.C. § 159(a); 29 U.S.C. § 1337. The Federal duty of fair representation standards are applied in both the state and federal courts. Textile-Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1959); Teamsters Local 174 v. Lucas Flower Co.

10. Vaca v. Sipes, supra at 207.

11. Major Collective Bargaining Agreements: Safety and Health Provisions. U.S. Department of Labor, Bureau of Labor Statistics 1976, Bulletin 1425-16; Characteristics of Construction Agreements 1972-73. U.S. Department of Labor, Bureau of Labor Statistics 1975, Bulletin 1819.

12. 437 F. 2d 748 (1st Cir. 1971).

13. 467 F. 2d 1 (1st Cir. 1972).

14. Id., at 5.

15. House v. Mine Safety Appliance Co., supra at 946; Brooks v. New Jersey Manufacturers Insurance Co., 405 A.2d 466 (N.J. Super. Ct. 1977).

16. Carollo v. Forty-Eight Insulation, Inc., 381, A. 2d 990 (Pa. Super. Ct. 1977).

17. Helton v. Hake, 386 F. Supp. 1027, 1032 (W.D.Mo. 1974).

18. Brooks v. N.J. Manufacturers Ins. Co., 405 A. 2d 466 (N.J. Super. Ct. App. Div. 1979).

19. Hartsfield v. Seafarer's International Union, 422 F. Supp. 264, 269-270 (D.C. Ga. 1977).

20. 523 F. 2d 306 (6th Cir. 1975).

21. Powell v. Globe Industries, Inc., 431 F. Supp. 1096 (N.D. Ohio 1977).

22. Summers, "The Individual Employee's Rights Under the Collective Bargaining Agreement: What Constitutes Fair Representation?", 126 U.Pa. L. Rev. 251 (1977) (hereinafter cited as Summers).

23. Curtis v. United Transportation Union, 102 LRRM 2961 (E.D. Ark. 1979).

24. Supra, Helton v. Hake, 564 S.W. 2d 313 (Mo. C.A. 1978), cert. den. 439 U.S. 959 (1978).

25. Id., at 321.

26. See Howard Electric Co., 6 O.S.H.C. 1518, 1521 (O.S.H.R.C. 1978); A.J. McNulty and Co., 4 O.S.H.C. 1097, 1101 (O.S.H.R.C. 1976); Frohlick Crane Service, Inc.

27. Dunbar v. United Steelworkers of America, 602 P. 2d 21 (Supreme Ct. Idaho 1979).

28. 424 F. Supp. 82 (D.N.J. 1976).

29. Amalgamated Association of Street, Electrical Railway and Motor Coach Employees of America v. Lockridge, 703 U.S. 286 (1971).

30. House v. Mine Safety Appliance Co., 417 F. Supp. 939 (D. Idaho 1976).

31. Id., at 945.

32. Carrollo v. Forty-Eight Insulation Inc., 381 A. 2d 990 (Pa. Super. Ct. 1977), Farmer v. General Refractories Company, No. G.D. 77-24854 (Ct. Common Pleas., Allegheny Co., Pa. 1979).

33. Helton v. Hake, supra at 321.

34. Bryant v. International Union, United Mine Workers of America, supra at 5.

35. See Feller, "A General Theory of the Collective Bargaining Agreement", 61 Calif. L. Rev. 663, 773-805 (1973).

36. See Prosser, Law of Torts, 4th Ed. (1971) at 442.

37. Prosser, Law of Torts, 4th Ed. (1971) at 310.

38. MCLA § 418.827(8).

39. S. 2153, 96th Cong., 1st Sess. (1979) § 4(A)(4).

40. S. 420, 96th Cong., 1st Sess. (1979) § 10(a).

3. A full report of the study including recommendations for controlling observed hazards, if appropriate, is sent to the employer; representative of the employees; and OSHA (or State).

4. The results must be posted at the site of the hazard for 30 days, or the affected employees must be notified by mail by NIOSH.

Limitations of NIOSH

1. NIOSH cannot issue citations or levy fines.

2. A study can be conducted only where there is a problem due to a chemical substance. NIOSH does not deal with physical agents (e.g., noise, guarding, trenches, etc.)

When to Request an Evaluation

There are certain situations when it is an advantage to contact NIOSH.

1. If OSHA or State inspections have determined that levels of exposure are below standards but employees are experiencing health problems, NIOSH can recommend changes in present standards. Whereas OSHA must treat exposure to a number of toxic substances as additive, NIOSH is bound by no such restriction.

2. Where the primary evidence of a health problem is the symptomatology of workers, NIOSH can conduct medical exams as well as take samples.

3. Where no standards exist, NIOSH can recommend new standards (currently, all dusts without established TLV's are treated as nuisance dusts).

4. Where management has been responsive to union safety requests, NIOSH surveys offer them a chance to abate a hazardous condition without the threat of immediate penalties. OSHA has been generous in all owing time to abate in such cases before conducting their own inspections.

5. Although this procedure may slow down correction of hazardous conditions in some cases (OSHA cannot cite using NIOSH data) the data accumulated from such a study is valuable evidence against the employer in proving lack of "good faith" and "willful" violations.

Information

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November 2, 1973
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