

CWA Occupational Safety and Fact Sheet #13

Duty of Fair Representation

The Occupational Safety and Health Act of 1970 (OSHAct) "guarantees workers the right to a safe and healthful workplace." This legal right should be enjoyed by all workers, union and nonunion, alike. Clearly, trade unions should be insisting that an employer meet its obligation under Section 5(a)(1) of the Act "to 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."

Unions have traditionally acted vigorously to ensure that their members enjoy a healthy, hazard-free, work setting. However, in recent years, concerns about the scope of the union's representative duties or potential legal liability have led, in some instances, to questions about the appropriate union role to be played in the workplace safety area. In some cases, unions have been hesitant to negotiate comprehensive occupational safety and health collective bargaining provisions or to develop active educational programs for fear that they will be held accountable for workplace injuries or other safety-related problems that are fundamentally the employer's responsibility. The purpose of this fact sheet is to explain the basic facts and legal issues concerning union liability and to provide a suggested course of action within the collective bargaining arena.

The Duty of Fair Representation

The duty of fair representation stems from the union's exclusive role as representative of all employees within the bargaining unit, whether or not they are actually members of the union. It was first recognized by the U.S. Supreme court in *Steele vs. Louisville & Nashville R. Co.*, a 1944 ruling which found that a union breached this duty when it engaged in racial discrimination against certain members of the bargaining unit. Later decisions such as *Vaca vs. Sipes* (1967) expanded upon the scope of the duty, explaining that it applies to a wide range of union activity such as collective bargaining negotiations, contract administration and grievance handling, but is violated only when the union's conduct towards a bargaining unit employee is "arbitrary, discriminatory, or in bad faith." Supreme Court and federal circuit court rulings continue to protect "negligent" conduct, but require that the challenged action be justified on a legitimate, nondiscriminatory basis. In short, unions enjoy a wide zone of "reasonableness" when engaged in their traditional role as employee representative.

Ensuring a Safe Workplace

The legal responsibility for creating and maintaining a safe working environment, as set forth in the OSHAct, falls on employers, not unions. However, when officials from the Occupational Safety and Health Administration (OSHA) inspect an employer's premises to determine whether there have been violations of the statute, union representatives are legally entitled to accompany them, and many frequently do so. Unions are also entitled to request safety and health information from the employer to facilitate full performance of their function as collective bargaining representatives. Whenever the contract contains language addressing workplace safety issues, the employer's obligation to provide data

for monitoring purposes may be even clearer. If the employer fails to provide health and safety data upon request, the union can go to the National Labor Relations Board to force it to do so.

Union-sponsored employee health surveys, the establishment of union safety and health committees, and periodic training for union staff and employees all contribute to a safer, healthier workplace for bargaining unit members. Regrettably, however, injuries and accidents still occur and when they do, issues of "fault" and accountability usually arise. In recent years, several legal suits have been brought by union-represented employees, or their survivors, trying to hold their unions liable for injuries, deaths, and/or diseases which occurred or were contracted at the workplace. Most of these lawsuits have focused on the union's negotiation and enforcement of contractual language covering occupational safety and health matters. The plaintiffs, who were suing their unions, alleged that the union had violated its contractual obligation to monitor work site safety and/or had been negligent in conducting workplace inspections or monitoring compliance with safety standards. Generally, as discussed below, the courts have ruled in favor of the union in such cases, finding that federal law imposes upon the union only a duty of good faith representation, not a general duty of due care.

The Applicable Legal Standards

Brough v. United Steelworkers of America (1971) was the first duty of fair representation case to address occupational safety and health issues. A member of the union was injured while operating an allegedly defective machine. He sought damages under a New Hampshire State common law principle that an employer's "safety advisors" are liable for negligent inspections of faulty machinery, arguing that the union's internal safety committee should be included in this category. The federal court ruled in favor of the union, holding that negligent failure to perform a duty implied by the contract does not constitute a breach of the duty of fair representation, and rejecting the argument that the union owed a general duty of due care to its members on a matter that was primarily the employer's responsibility.

Bryant vs. International Union, United Mine Workers of America, (1972) expanded upon the standard set in *Brough vs. United Steelworkers of America*. In *Bryant*, the survivors and estates of coal miners killed in a mine explosion filed a suit against the employer and the union for failure to ensure the employer was in compliance with the standards of the Federal Mine Safety Code. The court ruled in favor of the union, finding that the union had not failed to seek corrections of known violations. It also held that the collective bargaining agreement language was discretionary, providing only that the union "may," rather than "must" or "shall," inspect the mine area. Further, the court ruled that no duty of fair representation action could succeed without allegations of discriminatory, arbitrary, or bad faith behavior by the union, once it had actual knowledge of a safety violation.

In *Higley vs. Disston* (1976) an employee sought damages from his union because he was allegedly injured "as a result of the union-employer safety committee's negligent failure to discover and correct the condition leading to his injury." The Superior Court of

Washington's favorable decision for the union made two key points:

(1) The union was not guilty of discriminatory treatment of its members because it had dealt with the subject of safety inspections in an honest, non-arbitrary and good faith manner. The court emphasized that a union's introduction of safety and health provisions into the contract did not create a corresponding union obligation to make the safety inspections or to generally provide workers with a safe and healthy workplace.

(2) The court applied the rationale of *Bryant*, finding that a ruling against the union would be contrary to national labor policy since such action would simply discourage the union from negotiating similar discretionary language in future contracts, or from obtaining even more effective monitoring provisions.

Employers have also tried to hold unions accountable in court for failing to ensure safe working conditions. Those cases have fared no better than lawsuits brought by union members because the key issue concerns the union's accountability to the employees it represents. For example, in *House vs. Mine Safety Appliance Co.* (1976), a mining company sued a United Steelworkers of America local union to recover losses incurred due to a mining disaster, arguing that the union was negligent in policing safety standards. In ruling against the company, the Idaho court held that such a third party action to recover damages could only succeed if it could be demonstrated that union members would have the right to sue the union had they chose to do so. Since negligence was not grounds for holding a union liable for breach of their duty of fair representation obligation, the claim was dismissed.

In a landmark 1990 case, *United Steelworkers vs. Rawson*, the U.S. Supreme Court ruled that even where a union had assumed the duty of joint mine safety inspections under its contract with an employer, it was not liable under state or federal law for hazardous working conditions when employees were killed in a mining accident. The court held that federal labor law takes priority over any state law tort claim against the union for its alleged negligence in conducting joint safety inspections. In reversing the Idaho Supreme Court decision, the Court emphasized that the union's duty to inspect could only be found in the collective bargaining agreement, and that no state law claim existed independent of the contractual language.

The Court in *Rawson* also held that "mere negligence" was insufficient to state a claim for breach of the union's duty of fair representation. In particular, the court stated: "A labor union ... may assume a responsibility towards employees by accepting a duty of care through a contractual agreement, even if that contractual agreement is a collective bargaining contract to which only the union and the employer are signatories."

Further, the Court stated:

"If an employee claims that a union owes him a more far-reaching duty (other than fair representation), he must be able to point to language in the collective bargaining agreement specifically indicating intent to create obligations enforceable against the union by the individual employees."

Plaintiffs in other cases have argued that unions should be jointly liable for on-the-job

injuries based on language in their constitutions indicating the importance of job safety as a union goal. However, the courts have held that these statements of general union policy interests are not binding promises and do not give rise to claims against the union for failure to ensure employee safety at a particular work location. The courts have also rejected arguments that unions should be liable when they fail to take action (such as providing a steward at a particular work site) in a particular circumstance even though they have done so in the past.

These cases clearly establish the principle that, absent some illegal motive such as discrimination or bad faith, unions will not be held legally accountable for safety and health violations at the workplace if they have agreed to discretionary language policing workplace safety. The exception to this general principle occurs when the union has agreed to contractual language that transforms the union's role on matters of workplace safety into a mandatory or binding obligation.

Two cases illustrate the situation where the courts find that the union has accepted possible accountability for safety compliance. In *Helton vs. Hake* (1978), the widow of an ironworker who was electrocuted while hanging angle irons near a high tension line sued a local of the International Association of Bridge, Structural, and Ornamental Ironworkers, as well as the union steward, arguing that the union had contractually agreed to take over the employer's safety function. The collective bargaining agreement provided that no work was to be done in the area of high tension lines until the power was shut off or other safety measures were taken, and obligated the union steward to "see that the working rules provisions are complied with." In addition, the contract also provided that this duty to ensure the safety of the worksite was exclusively the union's, explicitly stating that the employer was not to be held responsible for the performance of those functions by the steward. In light of such specific language, the Missouri court ruled that the union had 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 fully independent right to enforce safety requirements."

In *Dunbar v. United Steelworkers* (1979), the court refused to dismiss wrongful death claims against the union because the mine inspection contract language used the obligatory term "shall inspect" instead of the discretionary term "may inspect."

Thus, in the unique circumstance where the union actually assumes an affirmative contractual duty of ensuring a safe workplace, it can potentially be held liable for a breach of the duty of fair representation. However, most union contracts wisely avoid taking on such binding obligations. In addition, courts being asked to determine union liability for workplace accidents or injuries will generally consider OSHA enforcement cases decided by the Occupational Safety and Health Review Commission, as well as the many court decisions which have consistently held that employers cannot legally delegate away their OSHA responsibility of providing workers with a safe and healthful workplace. (Even under common law negligence theory, it is the employer, not the union, which owes a duty of care to employees to guarantee that their workplace is safe.) Thus, only in circumstances where bad faith or discrimination can be shown, or where the

union has affirmatively and explicitly agreed to accept responsibility for ensuring safety standards, along with or instead of the employer, is it likely that a union will be found liable for the consequences of hazardous or dangerous working conditions.

Until there is a change in the basic legal standards governing duty of fair representation claims, it is likely that the principles discussed above will continue to apply to cases involving safety and health monitoring or compliance activity by unions. In general, however, unions should try to play an active oversight role in the workplace- not undertaking or replacing the employer's duty of care, but letting the employer (and the employees) know that safety and health are key issues for all concerned. A vocal and active union voice in this area can only increase employee support for and involvement in the union.

Key Standards for Collective Bargaining:

- Negotiate language giving the Union permissive power to exercise control on matters of employee safety and health. For example, the union "may" (not "shall" or "must") inspect all workplaces. Use of permissive language such as "may," rather than obligatory language such as "shall" or "must," negates any inference that the union is obligated to perform a function that would otherwise be the employer's and eliminates the argument that any contractual duty of fair representation was created.
- Negotiate protective provisions that clearly emphasize the employer's responsibility for ensuring a safe and healthful workplace, while maintaining the issue as a subject for bargaining and other union activity. An example of such a protective clause is the duty of care set forth in the General Duty Clause, Section 5(a)(1) of the OSHAct which obligates the employer to "furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm."
- Negotiate contractual language obligating the employer to furnish the union with periodic reports about specific areas of concern, and/or to afford the union periodic inspection opportunities, of either work sites generally or particular locations with known hazardous conditions, and/or of equipment, tools or other means of performing the job that have safety and health implications.
- Negotiate contractual language obligating the employer to train workers about particular hazards or dangerous conditions. Include a role for the union in this training that is advisory and discretionary, but nonetheless keeps the union's representatives involved in the process.

The union should also take employee complaints about workplace safety and health very seriously regardless of any defenses it might have to duty of fair representation claims. The grievance process may provide an effective avenue for raising such issues, along with complaints to outside agencies. The more pressure that is placed on an employer to comply with acceptable safety and health standards of care, the less likely accidents, injuries, or illnesses are to occur. Ultimately, aggressive expressions of union concern about these issues will benefit every employee, and can also serve as an example for

organizing and mobilizing in other settings.

What Can You Do?

All members should make sure that their employer is maintaining a safe and healthful workplace. The key to making the workplace safe for all CWA members is strong, active local safety and health committees. The committee can identify dangerous conditions at the workplace and discuss them with management. If the employer refuses to cooperate, the committee can request an OSHA inspection. The committee should always coordinate its activities through the local officers, the CWA Representative, and negotiated safety and health committees. In addition, CWA members may obtain information and assistance by contacting the:

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Phone: (202) 434-1160.

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