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Union Must Provide Attorney Representation Without Regard to Union Membership--National Treasury Employees Union v. Federal Labor Relations Authority

Beth Cohen
Western New England University School of Law, bcohen@law.wne.edu

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Labor Law—Union Must Provide Attorney Representation Without Regard to Union Membership—*National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402 (D.C. Cir. 1983).

The Federal Service Labor-Management Relations Statute (Labor-Management Statute)[1] sets forth union guidelines for collective bargaining representation in the federal sector.[2] A labor organization with recognized exclusivity is responsible for the non-discriminatory representation of all bargaining unit employees without regard to union membership.[3] In *National Treasury Employees Union v. Federal Labor Relations Authority*,[4] a case of first impression, the court considered whether a federal employees union may, in accordance with statutory obligations, consider union membership in determining the type of representation it provides to individual employees.[5] The court held that by denying non-union members attorney representation and substituting representation by a shop steward or chapter official, the National Treasury Employees Union (NTEU) committed an unfair labor practice and violated the duty of fair representation.[6]

The NTEU represents federal employees of the United States Customs Service and United States Nuclear Regulatory Commission.[7] In 1978, NTEU informed employees of its policy of providing attorney representation to union members and shop steward or chapter official representation to non-union members.[8] The Federal Labor Relations Authority (FLRA) held that this policy violated Executive Order

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1. Title VII, Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1191-1216 (codified at 5 U.S.C. §§ 7101-7135 (Supp. V 1981)).

2. *See* 5 U.S.C. § 7114(a)(1) (Supp. V 1981) (interests of all bargaining unit employees must be represented without discrimination or regard to union membership); *id.* §§ 7116(b)(1), (b)(8) (unfair labor practice to interfere with employee rights and refuse to comply with any statutory section).

3. *Id.* § 7114(a)(1).

4. 721 F.2d 1402 (D.C. Cir. 1983). The National Treasury Employees Union (NTEU) policy of representation is a very common, yet typically unwritten, union practice. *See* Middleton, *Union Told To Give Legal Aid To All*, 6 NAT'L L.J. 1, 6, (Dec. 13, 1983) (unions commonly fail to provide attorney represention to all).

5. 721 F.2d at 1403.

6. *Id.* at 1406-07; *see* 5 U.S.C. § 7116(b)(8) (Supp. V 1981) (unfair labor practice for labor organization to "fail or refuse to comply with any provision of this chapter"); *see also id.* § 7114(a)(1) (exclusive union representative responsible for representing interests of all employees in bargaining unit in nondiscriminatory manner and without regard to union membership status).

7. 721 F.2d at 1404. Of the 120,000 employees in the bargaining unit represented by NTEU, approximately 65,000 are dues paying union members. *Id.*

8. *Id.* Representation was provided in matters pertaining to collective bargaining rights. *Id.*

11,491, which mandated union representation of all bargaining unit employees without discrimination.[9] Additionally, the FLRA found the union policy an improper interference with an employee's statutory right to refrain from joining the union.[10] Congress, however, subsequently enacted the Labor-Management Statute, codified in the Civil Service Reform Act (CSRA), which superseded yet reinforced the mandate of the executive orders.[11] Notwithstanding the new statute, the union expressed its intention to maintain the policy on representation.[12] The Customs Service and the Nuclear Regulatory Commission subsequently filed unfair labor practice charges against NTEU.[13]

An administrative law judge of the FLRA found that the union's policy of considering union membership when providing representation violated fair representation obligations and thus constituted an unfair labor practice under the Labor-Management Statute.[14] After

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9. National Treasury Employees Union, Chapter 202, 1 F.L.R.A. (No. 104) 909, 914 (1979); *see* Exec. Order No. 11,491, (as amended), *reprinted in* 5 U.S.C. § 7101 app. at 793-98 (Supp. V 1981) (exclusive bargaining representative responsible for nondiscriminatory representation). Section 10(e) of Executive Order 11,491 contains language virtually identical to Section 7114(a)(1) of the Federal Service Labor Management Relations Statute (Labor-Management Statute). 5 U.S.C. § 7114(a)(1) (Supp. V 1981). This language requires fair representation of all employee interests. *Id.*

10. National Treasury Employees Union, Chapter 202, 1 F.L.R.A. (No. 104) 909, 914 (1979). Both the Executive Order and the Labor-Management Statute make it an unfair labor practice to interfere, coerce, or restrain employees in the exercise of their rights to join or refrain from participating in union activities. *See* Exec. Order No. 11,491, §§ 19(a)(1)-(a)(5) (as amended), *reprinted in* 5 U.S.C. § 7101 note at 316 (Supp. V 1981) (prohibiting interference with employee rights).

11. 5 U.S.C. § 7114(a)(1) (Supp. V 1981). The Civil Service Reform Act gave a legislative base to federal labor policy, removing it from the exclusive control of executive orders. Coleman, *The Civil Service Reform Act of 1978: Its Meaning and Its Roots*, 31 LAB. L.J. 200, 206 (1980).

12. 721 F.2d at 1404. Following the decision by the Federal Labor Relations Authority (FLRA), the NTEU president sent an explanatory memorandum to all union chapters. *Id.* The memorandum disclosed that the union would not change its policy, because the FLRA ruling was based "on something [the executive order] no longer in existence." *Id.*

13. *Id.* at 1404-05. Several employees in the NTEU bargaining unit were involved in removal actions at the Nuclear Regulatory Commission. *See* Brief for FLRA at 6, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983) (discussing implementation of attorney representation policy). While two union member employees received attorney representation, one non-union employee had no union attorney representation; it is, however, unclear whether the non-union employee had private attorney representation. 721 F.2d at 1402. *See generally* 5 U.S.C. § 7114(5)(A) (Supp. V 1981) (employee has right to choose non-union representation).

The unfair labor practice charges alleged discriminatory standards for representation based solely on whether employees were union members. 721 F.2d at 1402. The union, however, did provide a union-trained shop steward or officer to represent the employee if an attorney was not provided. Brief for Petitioner at 4-5, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983).

14. National Treasury Employees Union, 10 F.L.R.A. (No. 91) 519, 525 (1981); *see* 5 U.S.C.

the union filed exceptions, the FLRA affirmed the administrative decision and ordered the union to cease and desist from providing different standards of employee representation solely on the basis of union membership.[15] On appeal, the United States Court of Appeals for the District of Columbia reviewed and affirmed the FLRA's orders.[16]

Federal sector labor policy initially developed with Executive Orders 10,988 and 11,491, which, modeled after private sector labor legislation, governed labor-management relations.[17] These orders made possible viable labor organizing in the Federal sector.[18] The Labor-Management Statute, codified in the Civil Service Reform Act of 1978, preempted the executive orders and provided a statutory base for

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§§ 7116(b)(1), (b)(8) (Supp. V 1981) (any violation of statutory obligations constitutes an unfair labor practice); *id.* § 7114(a)(1) (union has duty of nondiscriminatory representation without regard to union membership).

15. National Treasury Employees Union, 10 F.L.R.A. (No. 91) 519, - (1982). Although union members did not always receive union attorney representation and membership status was not, according to the union, the sole and dispositive factor, the administrative law judge (ALJ) ruled that any consideration of union membership was improper under the Labor-Management Statute. Brief for Petitioner at 4-5, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983). *But cf.* National Treasury Employees Union, 10 F.L.R.A. (No. 91) 519, 525 (1981) (finding by ALJ that union membership status dispositive factor).

The ALJ, however, recognized that unions may consider factors other than union membership in evaluating whether to provide attorney representation. National Treasury Employees Union, 10 F.L.R.A. (No. 91) 519, 525 (1981); *see* Brief for FLRA at 8-9, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983) (unions can consider factors other than union membership so long as applied uniformly and nondiscriminatorily). In deciding whether to provide attorney representation, the union considered the merits and potential impact of the case on other employees, the ability of the local union representative to handle the case, the availability of a union attorney, and union membership. Brief for Petitioner at 4-5, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983).

16. 721 F.2d at 1402.

17. *See* 3 C.F.R. 521 (1959-1963 Comp.) (Kennedy executive order 10,988, mandating employee-management cooperation in federal service); 3 C.F.R. 861 (1966-1970 Comp.) (Nixon executive order 11,491, providing substantive organizational rights).

18. *See* Coleman, *supra* note 11, at 200-01 (describing executive orders as roots of federal labor law). Within two years of the adoption of the first executive order (Kennedy Order 10,988), granting workers in the federal sector the right to organize, approximately 250,000 federal employees belonged to bargaining units. Coleman, *supra* note 11, at 200-01. The Kennedy Order, while providing employees with basic organizational rights, was more conceptual than substantive. Coleman, *supra* note 11, at 200-01. As the number of organized workers neared one million, pressure increased to expand the applicability of the Executive Order. U.S. CIVIL SERVICE COMM'N, UNION RECOGNITION IN THE FEDERAL GOVERNMENT 26 (1974). Thus, President Nixon issued Executive Order No. 11,491, creating protections to safeguard the employee rights established by the Kennedy Order. Coleman, *supra* note 11, at 201.

The National Labor Relations Act of 1935 (Wagner Act), the first comprehensive American labor organizing law applicable to the private sector, specifically excluded federal employees.

federal labor-management relations.[19] Continuing the parallel to private sector labor relations, the Labor-Management Statute affirmed the organizational rights and representational obligations previously established by executive orders.[20] Under the statute, a union is responsible for the nondiscriminatory representation of all bargaining unit employees without regard to union membership.[21] Furthermore, the duty of fair representation, a judicially created doctrine derived from the private sector, extends protection to all individual employees in the bargaining unit.[22]

See 29 U.S.C. § 152 (1976) (specifically excluding federal employees from scope of Wagner Act). Moreover, in 1955, Congress made the act of striking the government a felony, thereby providing further evidence of the government's restrictive attitude toward federal employees' union activities. *See* Pub. L. No. 330, 69 Stat. 624 (1955) (codified at 18 U.S.C. § 1918(3) (1982)) (striking of government a felony). The Wagner Act promoted private sector collective bargaining and union organizing. *See* Coleman, *supra* note 11, at 200 (discussing history of labor relations in private and federal sectors). In 1947, Congress amended the Wagner Act by passing the Labor-Management Relations Act (LMRA); in various provisions of the LMRA, Congress attempted to restrict abuses by powerful unions. *See* 29 U.S.C. §§ 151-66 (1935), *as amended by* Act of June 23, 1947, Pub. L. No. 101, 61 Stat. 136 (1947) (regulating union behavior). *See generally* Coleman, *supra* note 11, at 200 (tracing development of labor law).

Public employee rights were adopted almost verbatim from the private sector legislation. Coleman, *supra* note 11, at 201. Additionally, the new statute required the imposition of the private sector concept of good faith bargaining. Coleman, *supra* note 11, at 201.

19. Title VII, Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1191-1216 (codified at 5 U.S.C. §§ 7101-35 (Supp. V 1981)). The Civil Service Reform Act, however, did not significantly alter the government's restrictive approach toward bargaining with federal employees. Coleman, *supra* note 11, at 200-03. It has been estimated that only 40% of private sector issues are bargainable at the federal level. Coleman, *supra* note 11, at 203 n.21.

20. *Compare* 5 U.S.C. § 7104 (Supp. V 1981) (creating Federal Labor Relations Authority) *with* 29 U.S.C. § 153 (1976) (creating National Labor Relations Board). The General Counsel of the FLRA is responsible for prosecuting those charged with unfair labor practices and FLRA decisions are now subject to judicial review and enforcement. *See* 5 U.S.C. § 7123 (Supp. V 1981) (judicial review and enforcement of FLRA orders); *see also id.* § 7105 (enumerating powers and duties of FLRA); Frazier, *Labor-Management Relations in the Federal Government*, 30 LAB. L.J. 131, 131-34 (1979) (discussing important ramifications of Civil Service Reform Act).

The Federal Labor Relations Council, predecessor to the Federal Labor Relations Authority, was comprised of the Secretary of Labor and the Director of the Office of Budget and headed by the Chairperson of the Federal Civil Service Commission. *See* Frazier, *supra*, at 131-38 (Federal Labor Relations Council administered on part-time basis). The FLRA was established as an independent, bipartsan, full-time committee whose members are appointed for a fixed term. *See* Coleman, *supra* note 11, at 202-03 (comparing FLRA with National Labor Relations Board). *See generally* 5 U.S.C. §§ 7101, 7102, 7116 (Supp. V 1981) (respectively: enunciating legitimate policy reasons for legislation, providing for preservation of employee rights to organize or refrain from activity without penalty, and enumerating unfair labor practices).

21. 5 U.S.C. § 7114(a)(1) (Supp. V 1981).

22. *Compare id.* § 7114 (imposing on union duty of fair, nondiscriminatory representation in public sector) *with* 29 U.S.C. § 159 (1976) (private sector union must represent interests

In *Steele v. Louisville & Nashville Railroad*,[23] the United States Supreme Court imposed on unions a duty of fair representation.[24] Subsequent decisions incorporated the elements of good faith and honesty into the interpretation of the fair representation duty.[25] Additionally, in *Vaca v. Sipes*, the Court held that union conduct may not be "arbitrary, discriminatory or in bad faith."[26] Substantial evidence that union discrimination is "intentional, severe and unrelated to legitimate union objectives" is necessary to prove breach of the fair representation duty.[27]

The duty extends beyond negotiation of the collective bargaining agreement into the realm of enforcement and administration of the terms of the agreement.[28] The duty of fair representation, however, does not require the extension of all internal union benefits to non-union members.[29] Moreover, when the union properly accounts for the interests of non-members, the union does not unlawfully

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of all employees of bargaining unit fairly without discrimination). *See generally* Summers, *The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251, 252-53 (1977) (judicially-created obligation of union to equally protect those represented).

Because exclusive representation naturally precludes individual action, the United States Supreme Court has intervened to protect individual interests. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202-03 (1944) (union may not racially discriminate). *Steele*, the seminal case involving the duty of fair representation, arose under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970). Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202-03 (1944). Subsequently, the Court held the duty of fair representation applicable under the National Labor Relations Act, 29 U.S.C. §§ 151-188 (1970). *See* Syres v. Oil Workers Int'l Union, Local 23, 350 U.S. 892, 892 (1955) (citing *Steele* and holding that National Labor Relations Act imposed comparable duty of fair representation); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (union discretion in contract negotiation subject to duty of complete good faith and honesty to serve all employees' interests). The *Steele* Court determined that race was an irrelevant ground for discrimination and that the duty of fair representation prohibited consideration of race. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944).

23. 323 U.S. 192 (1944). The *Steele* Court held that a union must represent the interests of all of the members of a bargaining unit. *Id.* at 202.

24. *Id.*

25. *See, e.g.*, Hines v. Anchor Motor Freight, 424 U.S. 554, 569 (1976) (fair representation duty prevents union from arbitrarily ignoring meritorious claim); Humphrey v. Moore, 375 U.S. 335, 342 (1964) (duty of fair representation is breached by dishonest, fraudulent conduct); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953) (union must represent employees honestly).

26. 386 U.S. 171, 190 (1967).

27. Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971).

28. Conley v. Gibson, 355 U.S. 41, 46 (1957). *Conley* was the first case to apply the duty of fair representation to union activities with respect to the administration of the terms of the collective bargaining agreement. *Id.* at 46. The Court recognized that a contract which appears to be fair may be administered in a discriminatory manner. *Id.*

29. *See* Del Casal v. Eastern Airlines, 634 F.2d 295, 300 (5th Cir. 1981) (noting union

discriminate by excluding non-union members from certain aspects of the contract negotiation process.[30] In *Del Casal v. Eastern Airlines*,[31] an analogous private sector case, the United States Court of Appeals for the Fifth Circuit held that although a union has the authority to determine the circumstances under which it will provide an attorney, non-union membership can play no part in that decision.[32] Contrary to the facts in the case-in-chief, union membership was the sole and dispositive factor in *Del Casal* where the union failed to provide the employee with any representation.[33]

In finding that the union had violated its statutory duty, the *National Treasury* court strictly and literally interpreted the applicable provisions of the Labor-Management Statute.[34] Affording great deference to and upholding the FLRA decision, the court relied heavily upon the private sector standard of fair representation including good faith, honesty, and nonarbitrary conduct.[35] Dismissing as "patently meritless" the union's attempt to equate "fair" and "adequate" representation, the court reasoned that no minimum objective standard of adequacy existed.[36] To satisfy the duty of fair representation, the court observed, the union must apply a non-arbitrary standard in a non-discriminatory

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not required to extend internal benefits to non-members), *cert. denied*, 454 U.S. 892 (1982); NLRB v. Amalgamated Local 286, 222 F.2d 95, 98 (7th Cir. 1955) (union need not offer same insurance to non-members).

30. *See* Branch 6000, National Ass'n of Letter Carriers, 232 N.L.R.B. 263, 264-66 (1977) (non-union members may be excluded from certain aspects of contract negotiation process), *aff'd*, 595 F.2d 808, 813 (D.C. Cir. 1979).

31. 634 F.2d 295 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 (1982).

32. *Id.* at 301; *see* International Ass'n of Machinists, Local 697, 223 N.L.R.B. 832, 835 (1976) (invalidating union policy of charging non-members for grievance representation costs); *see also* Library of Congress v. FLRA, 669 F.2d 1280, 1287 (D.C. Cir. 1983) (relevance of private sector case law to federal sector labor law varies depending on issues, statutory provisions, and legal concepts).

33. *Compare* Del Casal v. Eastern Airlines, 634 F.2d 295, 300-01 (5th Cir. 1981) (no union representation provided because of non-union status) *with* 721 F.2d at 1404 (union provided representation to all employees).

34. 721 F.2d at 1405-06.

35. *See id.* (holding FLRA conclusions reasonable and compelled by statutory language). The Administrative Procedure Act governs judicial review of FLRA orders. *See* 5 U.S.C. §§ 706(2)(a), 7123(c) (1982) (detailing judicial review of FLRA). A decision of the FLRA may be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the applicable law. *Id.* § 706(2)(a). Courts may afford special scrutiny when examining decisions of the FLRA, and although not bound to uphold a statutory interpretation by the FLRA, a reasonable interpretation is entitled to some deference. 721 F.2d at 1405; *see* National Federation of Fed. Employees v. FLRA, 652 F.2d 191, 193 (D.C. Cir. 1981) (special judicial scrutiny of FLRA).

36. 721 F.2d at 1406. The union claimed that shop stewards and other union officials satisfied the mandate of providing adequate representation for the employees, because they were trained by the union and had a good record of successful representation. *Id.*

manner.[37] Viewing the policy as plainly discriminatory, the court noted that even the union recognized that non-attorney representation was not equal to attorney representation.[38]

The court also dismissed the union's argument that attorney representation is an internal union benefit and an incident of membership.[39] The court reasoned that because representation is inextricably related to enforcement of the collective bargaining agreement, an exclusive bargaining agent cannot limit the benefit of attorney representation to union members.[40] Continuing its analysis, the court disposed of the union's purported distinction between adequate representation in the present case and the lack of representation in the *Del Casal* case and consummated the decision with the rationale that a union must provide representation without regard to the employee's union membership status.[41] The court thus upheld the decision of the FLRA, finding the union policy in direct contravention of the statutory language and of the legislative history.[42]

The court's decision, a strict and literal statutory interpretation, ignores both the underlying fundamental purposes of and the realities faced by labor unions within the federal sector.[43] Narrow interpretation of the statute undermines the ability of unions to foster the voluntary membership support which is necessary in the federal sector due to the unavailability of union security contracts.[44] To remain vital,

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37. *Id.*

38. *Id.*

39. *Id.* The union argued that attorney representation should be viewed as an internal union benefit and that the union possessed discretion to provide attorney representation to its members. *Id.*

40. *Id.* at 1406-07.

41. *Id.* at 1407; *see supra* notes 30-31 and accompanying text (discussing *Del Casal*).

42. *Id.* at 1405-07. The legislative history demonstrates that unions must represent the interests of all employees in the bargaining unit, regardless of union membership. H.R. REP. No. 1403, 95th Cong., 2d Sess. 48 (1978).

43. *See* 721 F.2d at 1406-07 (discussing strict and literal approach); 5 U.S.C. § 7101 (Supp. V 1981) (stating congressional policies behind statutory provisions). Congress recognized that effective and amicable dispute settlements are an important public policy consideration. *Id.* Moreover, employee rights to unionize are viewed as an important vehicle toward the facilitation of dispute resolution. *Id.*

44. *See* International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48-52 (1979) (stressing need to preserve financial stability of unions to avoid impairing effectiveness); *In re* American Fed'n of Gov't Employees, Local 987, 3 F.L.R.A. (No. 115) 5, __ (1980) (breach of duty of fair representation narrowly defined to allow union broad discretion to protect viability of organization). *Cf.* L. IMUNDO, LABOR/MANAGEMENT RELATIONS AMONG GOVERNMENT EMPLOYEES 173-81 (H. Kershen ed. 1983) (federal employees join unions for different reasons than private employees). Federal employee unions must depend exclusively on voluntary membership fees as a financial base. *See id.* (financial stability important concern in federal sector where unions unable to compel dues or service fees and bargaining unit huge in comparison to union membership).

unions need to provide incentives for employees to become union members.[45] The court's holding, therefore, is unrealistic because unions cannot viably advance collective bargaining and private dispute settlement if employees can retain all of the benefits and the work product of union bargaining without providing any financial or personnel support.

Collective union goals and individual employee rights are not always compatible. Courts, therefore, must strive to balance the potential harm to non-union employees against the burden placed on unions.[46] The *National Treasury* court failed to adequately examine the competing interests, concentrating instead on a strict interpretation of the statutory language.[47] Although there is a fine line between creating incentives for union membership and undue interference with individual employee rights, courts have never interpreted a union's obligation of fair representation to include identical treatment and benefits for all individual employees, for such an interpretation would place unions in an untenable position.[48]

Interpreting fair representation as synonymous with attorney representation may financially incapacitate unions and undermine their efficiency in collective bargaining as well as in dispute resolution.[49] The union may be faced with the untenable choice of providing all employees with attorney representation or providing no attorney

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45. *See* Brief for Petitioner at 13, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983) (viability of unions in federal sector dependent upon attractiveness to foster membership). Moreover, financially, NTEU is only a break-even operation. *Id.*

46. *See* T. BOYCE, FAIR REPRESENTATION, THE NLRB, AND THE COURTS 3-4, 119-21 (Lab. Rel. and Pub. Pol'y Series No. 18, 1978) (discussing individual versus collective interests). *See generally* Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096, 1143-52 (1974) (discussing duty of fair representation as protection for individual employees).

47. 721 F.2d at 1405.

48. *See, e.g.*, Local 138, Int'l Union of Operating Eng'rs v. NLRB, 321 F.2d 130, 135-39 (2d Cir. 1963) (non-union members required to pay fee to use hiring hall funded by union dues); NLRB v. Amalgamated Local 286, 222 F.2d 95, 98 (7th Cir. 1955) (union need not offer non-union members identical insurance); Branch 6000, National Ass'n of Letter Carriers, 232 N.L.R.B. 263, 266 (1977) (no unfair labor practice if non-union members excluded from certain aspects of contract negotiation process), *aff'd*, 595 F.2d 808 (D.C. Cir. 1979).

49. *See* International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48-52 (1979) (financial stability important to union viability as bargaining representative); *cf.* Grovner v. Georgia-Pacific Co., 625 F.2d 1289, 1291 (5th Cir. 1980) (no breach of fair representation duty when union, rather than attorney, representation provided to employee). It is important to note that out of the 120,000 bargaining unit members represented by NTEU, only 65,000 are dues-paying union members. 721 F.2d at 1404; *see* Brief for Petitioner at 12-14, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983) (representational tasks at issue typically not performed by attorneys).

representation at all.[50] Even if the unions were to exclude consideration of union membership status in determining whether to provide an attorney, the costs of defending unfair labor practice claims by those denied attorney representation would be substantially onerous.[51]

Although the duty of fair representation protects individual employee rights, it is difficult to maintain a balance between individual and collective interests.[52] The courts, therefore, generally realize that unions must be afforded broad discretion in order to act effectively.[53] Unions themselves have an inherent interest in fairly representing all employees to gain support in collective bargaining efforts. In order for the union to effectively and efficiently bargain with management, the union must obtain and maintain a majority mandate from the employees.[54] Achieving the symmetry that would effectively balance individual and collective rights entails maximizing individual protections and minimizing judicial interference with intra-union interests.

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50. *See* 721 F.2d at 1404 (NTEU employs only 40 attorneys for entire bargaining unit of 120,000 employees).

51. *See generally* 5 U.S.C. § 7101 (Supp. V 1981) (public interest and fundamental purpose to encourage dispute settlement through use of labor organizations). Dispensing with all attorney representation would widen the disparity in bargaining position between employees and management, further weakening union standing. T. BOYCE, *supra* note 46, at 3 (labor policy to strengthen employees' rights through united front of union).

The court did not find NTEU guilty of inadequate representation. *See* Brief for Petitioner at 18-20, National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d at 1402, 1402 (D.C. Cir. 1983) (no harm or injury to any employee in bargaining unit).

52. *See supra* notes 21-30 and accompanying text (discussing judicial development of duty of fair representation to protect individual employees).

53. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (unions possess broad discretion).

54. *See* 5 U.S.C. § 7105 (Supp. V 1981) (majority of employees must select labor organization as exclusive representative). *See generally* Summers, *supra* note 22, at 253 (1977) (union owes fiduciary duty to employees represented).