Health and Safety Provisions in Union Contracts: Power or Liability

Larry C. Drapkin
Morris E. Davis

Follow this and additional works at: https://scholarship.law.umn.edu/mlr
Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1772
Health and Safety Provisions in Union Contracts: Power or Liability?

Larry C. Drapkin*
Morris E. Davis**

I. INTRODUCTION

Congress enacted the Occupational Safety and Health Act (the Act) a little over a decade ago.1 This legislation arose out of an unrelenting crisis—an epidemic of injury, illness, and death in America's workplaces.2 The enactment of this legislation, together with the Federal Coal Mine Health and Safety Act of 1969,3 signaled official recognition of a problem already well known in the industrial world.

The passage of the Occupational Safety and Health Act signaled a new approach to the problem of workplace hazards. For the first time, a comprehensive federal law was intended to prevent workplace injuries and illnesses rather than to compensate workers already injured or ill. Under the common law an employer was often legally liable for the work-related injuries of employees.4 With the passage of workers' compensation legislation, employers again were recognized as being primarily responsible for those injuries and illnesses arising "out of and incidental to . . . employment."5 Similarly, under the Occupational Safety and Health 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

---

* Legal Coordinator, Labor Occupational Health Program, Institute of Industrial Relations, University of California, Berkeley.
** Presiding Official, United States Merit Systems Protection Board, San Francisco Field Office.

4. See D. BERMAN, supra note 2, at 19-20.
5. See, e.g., CAL. LAB. CODE § 3600(b) (West 1971 & Supp. 1980).
his employees.\textsuperscript{6} Although employees have a duty to comply with the Act's standards,\textsuperscript{7} the standards are primarily directed toward, and only enforceable against, employers.\textsuperscript{8} The Act does not explicitly or implicitly require employees' unions to ensure or to seek safe and healthful working conditions. Furthermore, the health and safety obligations of employers under the Act are nondelegable and cannot be contractually assumed by other employers or unions.\textsuperscript{9}

Organized labor has influenced the Occupational Safety and Health Act, and has, in turn, been influenced by it. Although health and safety issues had been considered "mandatory" subjects of bargaining under the National Labor Relations Act (NLRA)\textsuperscript{10} prior to 1970,\textsuperscript{11} widespread union activity on these issues was lacking. Since the enactment of the Occupational Safety and Health Act of 1970, however, a significant number of bargaining agreements have incorporated specific health and safety clauses. These provisions establish, for example, labor-management health and safety committees, workplace health and safety practices, and limitations for workplace exposure to hazardous substances and working conditions.

As unions began to bargain for the right to influence and, at times, control workplace health and safety practices, they were subjected to greater legal scrutiny. Since the early 1970s, numerous lawsuits have been brought against unions by union members, employers, and third-party manufacturers. These cases usually involve allegations that the union—particularly a union that has negotiated contract provisions dealing with health and safety issues—inadequately used its power to secure more safe and healthful working conditions. Consequently, many unions fear costly and time-consuming litigation. Responding to this fear, some unions have reassessed their desire to negotiate actively on health and safety issues; other unions have withdrawn entirely from such negotiations. This Article will analyze the strengths and weaknesses of such cases, particularly those cases that have arisen under the duty

\textsuperscript{7} See 29 U.S.C. § 654(b) (1976).
\textsuperscript{11} NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967) (construing 29 U.S.C. § 158(d) (1976)).
of fair representation and under various common law theories such as breach of contract or tort. This Article will then discuss various ways in which unions can minimize their legal risks without deterring their interests in promoting more safe and healthful work environments.

II. DUTY OF FAIR REPRESENTATION

The duty of fair representation, which was judicially derived from federal labor statutes, has recently served as the basis for suits alleging a labor union's failure to ensure workplace health and safety for its members. Such suits may arise in three contexts: contract negotiations, nonenforcement of collective bargaining agreements, and processing of health and safety grievances. Although a breach of this duty has been found in a peripheral case, these health and safety related actions have generally been unsuccessful.

A. ORIGINS OF THE DUTY

Federal labor law vests a great deal of power in the recognized bargaining representative—the union. Unions have the right to represent exclusively and bargain for their membership. Difficulties often arise, however, because of the large size of bargaining units and the occasional conflicts among the membership, specific unit members, management, and the union. Because of the diversity of union 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\(^\text{12}\) and section 2 of the Railway Labor Act\(^\text{13}\) to impose a duty of fair representation on the union that commences when the union becomes the exclusive bargaining representative for its unit members.\(^\text{14}\)

The duty of fair representation was not expressly articulated in the various labor laws. In establishing this duty by implication, the Supreme Court in Steele v. Louisville & Nashville Railroad\(^\text{15}\) stated:

> It is a principle of general application that the exercise of a granted

---

14. See Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953) (first case in which the Supreme Court held that a union has a duty of fair representation under section 9(a) of the NLRA); Steele v. Louisville & N.R.R., 323 U.S. 192, 199-203 (1944) (first case to find a duty of fair representation under the Railway Labor Act).
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.\(^\text{16}\)

After comparing the similarity of functions of a legislature and a union, particularly the duty of representatives nondiscriminatorily to represent their constituencies, the Court in Steele held that unless unions are required to comply with a duty of fair representation, those in disfavor with the majority will be denied equal representation.\(^\text{17}\) Thus, a union now has the duty to represent fairly all employees in the bargaining unit for which it is the representative. This duty applies to contract negotiations\(^\text{18}\) as well as to the evaluation and processing of grievances.\(^\text{19}\)

**B. How “DUTY OF FAIR REPRESENTATION” SUITS ARE BROUGHT**

Under present case law, suits for breach of the duty of fair representation can be brought in both state and federal courts by implying a cause of action under the exclusive representation provision of an appropriate labor law.\(^\text{20}\) Many courts have entertained such suits under section 301 of the Labor Management Relations Act,\(^\text{21}\) which affords employees the right to sue for breach of a union-management contract. Additionally, some courts hold that the National Labor Relations Board (NLRB) can independently and concurrently determine whether a union committed an unfair labor practice by breaching its duty of fair representation.\(^\text{22}\)

\(^{16}\) Id. at 202.

\(^{17}\) Id. at 202-03.


\(^{19}\) Vaca v. Sipes, 386 U.S. 171, 190-92 (1967).


\(^{22}\) See NLRB v. Glass Bottle Blowers Local 106, 520 F.2d 693, 697 (6th Cir. 1975); Truck Drivers & Helpers Local 568 v. NLRB, 379 F.2d 137, 141-42 (D.C. Cir. 1967); Local 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB, 368 F.2d 12, 17 (5th Cir. 1966). In Miranda Fuel Co., the NLRB asserted its power to treat as an unfair labor practice a union's breach of its duty of fair representation, 140 N.L.R.B. 181, 183 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963), and in Vaca v. Sipes the Supreme Court implicitly affirmed the validity of the NLRB's jurisdiction to do so. 386 U.S. 171, 176-83 (1967). See generally R. Gorman, Basic Text on Labor Law 698-701 (1976).
C. Definition of Breach of the Duty of Fair Representation

Although courts disagree as to the scope of the duty of fair representation, it is clear that a breach of the duty occurs when a union's conduct toward a bargaining unit employee is "arbitrary, discriminatory, or in bad faith." This standard does not require a union to process all grievances or to negotiate equal working conditions for all unit employees. A union has a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion."24

Courts have held that a union breaches the duty of fair representation by bargaining for discriminatory contract provisions,25 by ignoring26 or failing to evaluate carefully27 the basis of a grievance, or by handling the grievance in a perfunctory or discriminatory manner regardless of whether there is bad faith.28 Courts still maintain that union negligence alone does not constitute a breach of the duty of fair representation.29 The distinction between negligence and perfunctory behavior, however, is slight.30

D. Breach of the Duty of Fair Representation Concerning Health and Safety Issues

1. Contract Negotiation

Under the duty of fair representation, a union generally has great leeway in negotiating contract language.31 A union can-

25. See Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944) (variations in contract terms based on racial differences alone are 'irrelevant and invidious' discriminations that breach the duty of fair representation).
26. See Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) (union representative's inexplicable failure to file requisite grievance statement before final deadline constitutes "arbitrary and perfunctory handling of a grievance" and thus breaches the duty of fair representation).
27. See Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.) (inadequate investigation of the merits of a grievance constitutes arbitrary and perfunctory handling and thus violates the duty of fair representation), cert. denied, 400 U.S. 877 (1970).
28. See Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) ("Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation."); Beriault v. Local 40, Super Cargoes & Checkers, 501 F.2d 258, 264 (9th Cir. 1974) (bad faith need not be shown).
not, however, use its power to bargain away those rights that are guaranteed by law to individual employees. Thus, it is a breach of a union's duty of fair representation to encourage the inclusion of or bargain for discriminatory contract provisions based on race, sex, or union membership. Arguably, a union's bargaining away of workers' Occupational Safety and Health Act rights might constitute a violation of its duty of fair representation. Furthermore, if a union willfully allowed certain employees to be exposed to health hazards because of race, sex, or union membership, the duty of fair representation might be breached. Thus, if a union failed to try to remedy health hazards predominantly affecting a specific work population (such as women, minority workers, or ethnic groups) a breach might occur. Without a showing of discrimination, however, it is doubtful that a breach of the duty of fair representation will be found because of a union's failure to bargain on health and safety issues.


Many unions regularly negotiate for specific contract provisions dealing with health and safety issues. These clauses may provide for the establishment of joint labor-management health and safety committees that have the right to inspect working conditions and make appropriate recommendations, and for the right of a union to withdraw workers from hazardous job assignments. A union's nonenforcement or inade-

35. Although health and safety matters are generally mandatory subjects of bargaining under section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1976), see NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967), no law requires that a union raise a subject merely because if raised an employer would have to bargain over it. Further, the employer already is required to provide employees with a safe and healthful workplace. See 29 U.S.C. § 654(a) (1976).
quate enforcement of such provisions can result in lawsuits based on a breach of the union's duty of fair representation.\textsuperscript{39} Workers who bring these duty of fair representation cases seek to recover consequential damages that are not provided by workers' compensation benefits.\textsuperscript{40} A suit against the union based on breach of the duty of fair representation is often the only cause of action a worker has because of the employer's protected status under the exclusive remedy provisions of most workers' compensation laws.\textsuperscript{41} In addition, employers or manufacturers who are sued by employees can file a third-party complaint against a union if they can show that the employee would have had a cause of action against the union either for the breach of the duty of fair representation or under common law.\textsuperscript{42}

In \textit{Brough v. United Steelworkers},\textsuperscript{43} the first duty of fair representation case involving occupational health and safety issues, the union was sued by a member who was injured while operating a machine alleged to be faulty. The plaintiff made two claims against the union: that it negligently performed its role as "safety advisor" to the employer under state common law principles, and that it breached its federal law duty of fair representation to the employees. Granting summary judgment for the union on the duty of fair representation count, the court stated that federal labor law "imposes upon the exclusive bargaining representative only a duty of good faith representation, not a general duty of due care."\textsuperscript{44} This general standard was followed and expanded in \textit{Bryant v. International Union, UMW}.\textsuperscript{45}

The \textit{Bryant} case was brought by the estates of coal miners who died in a mine explosion against the mining company for

\begin{itemize}
\item \textsuperscript{39} These cases have traditionally arisen out of workplace disasters or accidents. See, e.g., \textit{Bryant v. International Union, UMW}, 467 F.2d 1, 2 (6th Cir. 1972), \textit{cert. denied}, 410 U.S. 930 (1973) (mine explosion); \textit{Brough v. United Steelworkers}, 437 F.2d 748, 749 (1st Cir. 1971) (union member injured while operating allegedly faulty machine); \textit{House v. Mine Safety Appliances Co.}, 417 F. Supp. 939, 941 (D. Idaho 1976) (mine fire); \textit{Helton v. Hake}, 564 S.W.2d 313, 315 (Mo. App.), \textit{cert. denied}, 439 U.S. 959 (1978) (iron worker electrocuted). However, no punitive or exemplary damages are allowed. See note 53 infra.
\item \textsuperscript{40} See \textit{Vaca v. Sipes}, 386 U.S. 171, 197-98 (1967).
\item \textsuperscript{41} See, e.g., \textit{CAL. LAB. CODE} § 3601 (West 1971 & Supp. 1980).
\item \textsuperscript{42} \textit{Globig v. Johns-Manville Sales Co.}, 486 F. Supp. 735, 740 (E.D. Wis. 1980).
\item \textsuperscript{43} 437 F.2d 748 (1st Cir. 1971).
\item \textsuperscript{44} \textit{Id.} at 750 (emphasis added). The state court claim for common law negligence, however, was remanded to the state court. The union impleaded the company and settled for $10,000 in order to avoid further litigation.
\item \textsuperscript{45} 467 F.2d 1 (6th Cir. 1972), \textit{cert. denied}, 410 U.S. 930 (1973).
\end{itemize}
failure to comply with Federal Mine Safety Code standards, and against the union for failure to ensure the company's compliance with those standards. The collective bargaining agreement provided that upon discovery of a safety code violation the company must promptly carry out the federal inspector's recommended abatement, and 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 Sixth Circuit, in an opinion by Judge Celebrezze, held that: 1) no violations had been reported by any federal inspector, thus the union had no enforcement obligation; 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 implied that a duty of fair representation action could not prevail without allegations of discriminatory, arbitrary, or bad faith behavior by the union. More importantly, the court expressed its doubt that "the contract necessarily makes the Union financially responsible for a failure to compel correction of Code violations even in situations where such violations have been reported by federal mine inspectors." The court examined the nature and purpose of bargaining agreements and stated:

Collective bargaining agreements are literally agreements between unions and employers; the Union negotiators are intent on gaining the maximum power possible from management negotiators. Whether or not they choose to exercise all the power gained depends on a variety of situations relating to the overall employment situation in the industry. 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.

Articulating 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 health and safety provisions in future contracts. The Sixth Circuit recognized that such a development would "retard . . .

46. Id. at 3 n.3.
47. Id. at 4-5.
48. Id. at 5.
49. Id. at 4.
50. Id. at 5 (emphasis added).
51. Id. at 6.
the goals of the National Labor policy."\textsuperscript{52} Such "chilling" of federal labor law's goals is not tolerated by the courts.\textsuperscript{53}

Other courts have been sensitive to another policy concern inherent in allowing union liability for failure to enforce contract provisions—allowing liability would shift health and safety responsibility from the employer to the union.\textsuperscript{54} Such a development would conflict with the well-established common law and statutory doctrine that makes the employer responsible for ensuring workplace health and safety.\textsuperscript{55} A Pennsylvania court has determined that Congress did not attempt to alter the employer's traditional responsibility for health and safety, stating that "[b]y imposing upon [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."\textsuperscript{56}

Both state and federal courts have uniformly failed to find that a union has breached its duty of fair representation by

\begin{thebibliography}{99}
\[\text{[The]} \text{Union by attempting to improve the working and safety conditions of its members . . . through the introduction into its collective bargaining agreement with Plaintiff's employer of provisions dealing with safety, did not thereby assume a duty or liability to its members . . . to provide them with a safe place to work and is not chargeable with the duty of reasonable care in making the safety inspections.}\]
\item 53. \textit{See, e.g.,} IBEW v. Foust, 99 S. Ct. 2121, 2127-28 (1979). In \textit{Foust}, the Court refused to award punitive damages in duty of fair representation suits under the Railway Labor Act. The Court stated that such damages thwart the intent of labor legislation by limiting union flexibility in deciding which cases it should process to arbitration and by possibly threatening the economic stability of unions. \textit{Id.} at 2127. The same reasoning is applicable in duty of fair representation suits concerning health and safety issues. Imposing liability upon a union for negligent exercise or failure to exercise a bargained-for right may serve to deter the union from participating in health and safety activities, thereby limiting union flexibility in an area of considerable importance. In addition, the possibility that victims of mass disasters will sue a union for breach of its duty of fair representation concerning health and safety matters may threaten the economic stability of unions. For example, the Oil, Chemical and Atomic Workers Union settled a lawsuit, arising from its alleged negligence in not informing its members of the hazards to which they were exposed, in order to avoid the costs of litigation and potential economic disaster if a judgment were entered against the Union. \textit{See} 7 Occupational Health & Safety Letter 3 (Dec. 22, 1977).
\item 55. \textit{See} notes 4-9 \textit{supra} and accompanying text.
\end{thebibliography}
negligently enforcing or failing to enforce a contract provision concerning health and safety, even in cases in which the union has the power to remove employees from hazardous conditions.\textsuperscript{57} Thus, a union safety committee established to monitor safety conditions and to make appropriate recommendations does not breach its duty of fair representation if it is aware of a potentially hazardous condition but fails to try to correct it merely because no employees complained about the condition.\textsuperscript{58} Neither will a union's failure actively to search out and discover workplace health hazards constitute a violation of its duty of fair representation.\textsuperscript{59} Nor will a union breach its duty to a member if it negligently refers to the worksite a violence-prone individual who maliciously attacks the member.\textsuperscript{60}

Although negligence alone does not constitute a breach of the duty of fair representation, a negligent act may violate that duty if it can be interpreted as "arbitrary" conduct. In \textit{Ruzicka v. General Motors Co.},\textsuperscript{61} a union representative who forgot to process a grievance within the appropriate time limit was deemed intolerably negligent by the court because the union was on notice that its member wanted to continue his grievance to the next stage of processing. The court held that such "negligent handling" of a grievance was a "clear example of arbitrary and perfunctory" union action and thus breached the union's duty of fair representation.\textsuperscript{62} In a concurring opinion, Judge McCree acknowledged that \textit{Ruzicka} establishes the principle that a union representative's negligent handling of a grievance by failing to act in a timely manner is "so egregious that... the union should be held responsible."\textsuperscript{63} \textit{Ruzicka}, however, does not mean that a union's failure to enforce its in-

\textsuperscript{57} Helton v. Hake, 386 F. Supp. 1027, 1032 (W.D. Mo. 1974); R. GORMAN, supra note 22, at 719-20. But see Helton v. Hake, 584 S.W.2d 313 (Mo. App.) (upheld a state tort action against a union that failed to provide a safe working environment), \textit{cert. denied}, 439 U.S. 959 (1978) (for discussion of Helton, see notes 74-78 infra and accompanying text); R. GORMAN, supra note 22, at 720-21 (a number of courts have found no distinction between "negligent" and "arbitrary" union action).

\textsuperscript{58} See Brooks v. New Jersey Mfrs. Ins. Co., 170 N.J. Super. 20, 27, 36, 405 A.2d 466, 469, 474 (union safety committee was aware of disconnected safety switch but did not try to correct the hazard), \textit{cert. denied}, 408 A.2d 806 (1979).


\textsuperscript{61} 523 F.2d 306 (6th Cir. 1975).

\textsuperscript{62} \textit{Id.} at 310.

\textsuperscript{63} \textit{Id.} at 316.
spection right is a breach of its duty of fair representation. *Ruzicka* can be distinguished from those health and safety related cases previously discussed on the ground that it involved procedural negligence which can be easily prevented. Moreover, Judge Celebrezze's opinion for the court in *Ruzicka* in no way contradicts his earlier opinion in *Bryant*. *Bryant*’s specific concern with promoting union flexibility in enforcing contracts generally is quite different from unacceptable inaction on a specific member’s grievance.

3. **Breach of the Duty of Fair Representation in Evaluating or Processing a Health and Safety Grievance**

The duty of fair representation requires that a union not process health and safety grievances arbitrarily, discriminately, or in bad faith. Although the law of fair representation is broad in scope, several principles are important to an understanding of that duty in the health and safety context.

A union can decide not to proceed with a meritorious grievance 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 or because the chance of success does not merit the cost of pursuing redress. It is questionable, however, whether a union could arbitrarily

---


65. See Vaca v. Sipes, 386 U.S. 171, 177 (1967); notes 23-24 *supra* and accompanying text.


67. See Powell v. Globe Indus., Inc., 431 F. Supp. 1095, 1099-1100 (N.D. Ohio 1977). In *Powell*, the union refused to take a grievance to arbitration on the belief that the company’s offer to reinstate the grievant without back pay was the best that could be obtained. The grievant, who had allegedly been discriminated against because he reported health and safety violations to the Occupational Safety and Health Administration, 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 because there was a high probability that the discharge would be upheld at arbitration. *Id.* If the union had informed the grievant that it would take the case to arbitration and the grievant had done so, the union would probably have been guilty of breach of its duty of fair representation. Even if the failure to tell the grievant of its unwillingness to arbitrate was an inadvertent error, the duty would nevertheless be breached. “Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.” Robesky v. Quantas Empire Airways Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978).

or perfunctorily refuse to grieve matters arising under a particular clause in a collective bargaining agreement solely because the union 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?  

Professor Summers' point has important implications for unions that bargain for contract provisions dealing with the health and safety of workers. It suggests that a union could not refuse to assert its contractual health and safety rights because its leadership is not interested in pursuing them. Thus, a union's power to ignore certain health and safety concerns could be significantly reduced. Summers' proposal would not, however, change the result in cases such as Bryant in which the union's failure to exercise its enforcement power did not breach its duty of fair representation. The distinction is clear—a union can choose not to enforce a contractual provision as long as union members have not sought to enforce that particular provision.

A union handling a health and safety grievance involving the interpretation of technical or scientific data may breach its duty of fair representation by failing to obtain expert witnesses to represent its grievants. Recently a district court held that a union violated its duty of fair representation by providing incompetent nonexpert representation for a member seeking reinstatement after surgery, reasoning that the union's actions were tantamount to "perfunctory representation." Thus, a union may have a duty not only to enforce meritorious health and safety grievances but also to provide expert representation.

Ironically, although a union may be obligated to grieve all meritorious claims and supply expensive expert representation, it might still successfully argue that the union budget can-

69. Summers, supra note 66, at 266. Cf. Price v. International Bhd. of Teamsters, 457 F.2d 605, 610 (3d Cir. 1972) (implicit in section 104 of the Landrum-Griffin Act is the assumption that absent appropriate amendment of the labor contract there could be no changes in the agreement that would abrogate rights contained in it).

70. See notes 45-53 supra and accompanying text.


not afford such costly grievances. Thus, the duty of fair representation has afforded litigants only limited success in suits against labor unions involving health and safety issues.

III. NEGLIGENCE ACTIONS UNDER COMMON LAW

In numerous cases plaintiffs who could not prevail in duty of fair representation suits have instead brought common law tort actions against their unions. Most of these cases involve allegations that the union breached a 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. Although negligence alone is not sufficient to show breach of a union's duty of fair representation, it will support a cause of action under state tort law. Nevertheless, the doctrine of federal preemption has precluded most duty of fair representation 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.* In *Helton,* an employee was electrocuted while working near noninsulated high-tension wires. The union was sued in tort for failing to comply with its obligation under the bargaining agreement to ensure the safety of employees who work near high tension lines. Significantly, the union contract provided that the union steward "'shall see that the provisions of these working rules are complied with'" and that "'the Employer is in no way responsible for the performance of these functions by the steward.'" The Missouri Court of Appeals found that under this contractual language the union chose "to go far beyond a mere advisory status or representative capacity in the processing of grievances. Rather, it [took] over for itself a managerial function, namely the full independent right to enforce safety requirements." The court held that once the union assumed the affirmative duty of ensuring a safe workplace, it could be liable in tort for a breach of that duty.

The *Helton* court distinguished the result in *Bryant* by relying heavily on the language of the union contract in *Helton,*
which explicitly gave the union the sole responsibility for ensuring workplace safety. The court never considered whether the union's assumption of the employer's duty to provide a safe workplace was consistent with public policy. Arguably, an employer cannot legally delegate the responsibility to ensure workplace health and safety. In enforcement cases, the Occupational Safety and Health Review Commission and the courts have consistently held that employers cannot contractually escape their primary responsibilities under the Occupational Safety and Health Act.\footnote{See Frohlick Crane Serv., Inc. v. Occupational Safety & Health Review Comm'n, 521 F.2d 628, 631-32 (10th Cir. 1975); Howard Elec. Co., 78 OSHA RC 37/B9, p.10 (1978) (microfiche); A.J. McNulty & Co., 76 OSHA RC 46/D2, p.10 (1976) (microfiche).}

Few other health and safety cases against unions have been successful under a theory of common law negligence.\footnote{The only other reported case, Nivins v. Sievers Hauling Corp., 424 F. Supp. 82 (D.N.J. 1976), involved a claim by an employer against the union from which he had contracted to hire construction workers. The agreement required that competent employees be referred by the union to the employer. \textit{Id.} at 85. The court found the union had an "express duty under the contract" to provide competent workers. \textit{Id.} Thus, when the union breached that obligation and a subsequent injury resulted from that breach, the union was liable for the resulting damages. \textit{Id.} at 88-89. Because this case was brought by the employer, and not by a unit member, no duty of fair representation questions arose.} In \textit{Dunbar v. United Steelworkers},\footnote{100 Idaho 523, 602 P.2d 21 (1979), \textit{cert. denied}, 100 S. Ct. 2963 (1980). \textit{But see} House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976). In \textit{House}, the federal district court held that federal labor law preempted a state tort action arising out of the same Sunshine Mine disaster as in \textit{Dunbar}. \textit{Id.} at 945.} the only case that directly follows Helton, the Idaho Supreme Court held that survivors of a mining disaster may bring negligence actions against their union for failure to function adequately as an accident prevention representative.\footnote{100 Idaho at 528-29, 602 P.2d at 26-27.} For the most part, however, cases alleging union negligence in health and safety matters have held that federal labor law preempts the states' common law, and federal law standards for breach of the duty of fair representation have thus been applied.\footnote{See notes 83-99 \textit{infra} and accompanying text. It is interesting to note that individual employees, as opposed to their unions, are more likely to be governed by common law standards. An individual's potential liability, however, is virtually eliminated by agency principles and by workers' compensation statutes. Under agency principles, individual union agents and officials are not personally liable for the negligent performance of their duties when serving as a union representative on any health and safety committee. \textit{See} Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 247-49 (1962). Under most workers' compensation statutes, lawsuits against fellow workers for their ordinary negligence arising out of the scope of employment are prohibited. \textit{See, e.g.,} \textsc{Cal. Lab. Code} \textsection{} 3601.
IV. FEDERAL LABOR LAW PREEMPTION OF STATE COMMON LAW REMEDIES

Courts generally recognize that the relationships among most private sector "labor unions, union members, and employers are governed solely by federal law.” Therefore, federal labor law will preempt inconsistent state laws. The United States 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. The states, however, are not totally precluded from regulating behavior that is peripheral to the policies sought to be promoted by federal law, particularly when the regulated conduct is traditionally a matter of deeply rooted local concern.

In San Diego Building Trades Council v. Garmon, the Supreme Court held that "when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." Although breach of the duty of fair representation may be considered an unfair labor practice, a union's negligent nonenforcement of a general contract provision (absent a grievance) does not constitute a violation of its duty of fair representa-


89. Id. at 244.

90. See note 22 supra and accompanying text.
Therefore, union negligence of this sort is neither prohibited nor protected by federal law. A number of courts, however, have held that a union's only duty to its members is subsumed within the duty of fair representation. These courts have held that any claim arising out of any duty allegedly owed by the union to an employee must be governed solely by federal labor law standards for breach of the duty of fair representation.

The preemption issue was raised in House v. Mine Safety Appliances Co., a suit by the survivors of miners killed in the Sunshine Mine disaster against the employers. The employers filed third-party complaints 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 found that a common law negligence action alleging a union's breach of its safety duty was "inextricably intertwined and embodied in the union's duty of fair representation." The court held that any claim of negligence arising out of the enforcement of duties assumed in a bargaining agreement must be governed by federal law and the duty of fair representation, not by state common law; thus, the common law action was preempted.

Similarly, in Globig v. Johns-Manville Sales Co., another federal court refused to find an exception to the preemption doctrine in a suit involving allegations that a union negligently performed its safety duty on behalf of its members. The court found that "[t]he duties and responsibilities of a labor union to its members is not a peripheral concern of the federal labor policy, nor is there a deep rooted state interest in imposing a duty of care which does not exist under federal law." Other courts have also held that tort claims alleging a union's inadequate protection of workplace health and safety pose a significant potential for interference with federal labor law; these

91. See notes 57-60 supra and accompanying text.
94. Id. at 945.
95. 486 F. Supp. 735 (E.D. Wis. 1980).
96. Id. at 741.
courts have therefore found federal preemption of the state claim. A few courts have not specifically held that the federal law preempts state law. A number of those courts, however, either have declined to rule on the merits of the negligence issue or have found that the union did not breach any common law duty to the employee.99

Two significant cases, Helton v. Hake100 and Dunbar v. United Steelworkers,101 allow common law negligence actions regardless of the preemption doctrine. In Helton, the court found that the contract language created a mandatory duty in the union to seek out and correct health and safety hazards.102 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.103 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 nonmandatory duty.104

The Dunbar court’s holding was even broader; it did not seek to base its decision on the distinction between mandatory and permissive functions. In deciding that a common law action for wrongful death is not preempted, the court emphasized that the NLRB does not decide such cases.105 Under the Dunbar analysis, a union could potentially be liable for any duty to ensure workplace health and safety 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 a union’s duty of fair representation.106 Therefore, they concluded that under the Garmon test pre-

98. Brough v. United Steelworkers, 437 F.2d 748, 750 (1st Cir. 1971) (case remanded to state court; settled before trial).
100. 564 S.W.2d 313 (Mo. App.), cert. denied, 439 U.S. 959 (1978).
101. 100 Idaho 523, 602 P.2d 21 (1979), cert. denied, 100 S. Ct. 2963 (1980).
102. 564 S.W.2d at 321.
103. Id. at 319-21.
104. Id. at 320.
105. 100 Idaho at 526, 602 P.2d at 24.
106. Dunbar, 100 Idaho at 527, 602 P.2d at 25; Helton, 564 S.W.2d at 318-19.
107. See text accompanying note 88 supra.
emption was not required. These courts also found 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 duty of fair representation. The Dunbar court disagreed with the conclusion of the court in House that the common law duty was intertwined with the duty of fair representation. Rather, the Dunbar court concluded that any potential for conflict with the federal duty was "tangential at best."

The cases indicate clear disagreement as to whether common law negligence actions will actually interfere with the goals and purposes of the federal labor laws. Successful wrongful death cases may directly deter unions from bargaining on at least some types of health and safety provisions. If Dunbar is followed in other jurisdictions, unions may well be discouraged from establishing health and safety committees or from taking an active role in hazard identification and correction. Such consequences will retard the federal policy of promoting workplace cooperation and improvement. Thus, in the area of health and safety, the duty of fair representation must be seen as the exclusive duty owed by the union to its members. The imposition of more stringent standards will undermine union efforts to supplement and make more effective the workplace health and safety protections afforded workers by the Occupational Safety and Health Act.

V. HOW TO AVOID UNION LIABILITY

Bargaining on health and safety issues should not be deterred because of a few successful lawsuits. Unions can act to lessen significantly the chances of being embroiled in litigation arising either out of a breach of the duty of fair representation or out of a common law duty for the negligent performance of their health and safety functions. Unions can insulate themselves from liability through both careful drafting of their health and safety contract provisions and thorough exercise of their contractual prerogatives to encourage workplace health and safety. Several of the legislative developments that may significantly alter and prevent union liability for health and

108. *Dunbar*, 100 Idaho at 527-28, 602 P.2d at 25-26; *Helton*, 564 S.W.2d at 318-19.
109. *Dunbar*, 100 Idaho at 528-29, 602 P.2d at 26-27; *Helton*, 564 S.W.2d at 318-19.
110. See text accompanying notes 92-93 supra.
111. 100 Idaho at 529, 602 P.2d at 27.
safety activities could also serve to protect unions that are active in this area.

A. PROTECTIVE CONTRACT PROVISIONS

The major case holding a union liable for negligent performance of its health and safety functions, Helton v. Hake,112 based its holding on the rationale that the union voluntarily assumed “the full independent right to enforce safety requirements.”113 Because the union had the unilateral power to enforce contract provisions concerning health and safety issues, and therefore to remove workers from hazardous work areas, the court found that in this particular case the union had far greater control over workplace conditions than do most unions.114 The Helton court, therefore, held that a union can contractually assume a duty of care to its members when it begins to exercise control over workplace conditions.

Although some unions may be content with not having independent control over health and safety conditions in the workplace, others perceive such power to be essential in order to protect unit members. Therefore, the response to the Helton case should not be to retreat from negotiating for the unilateral power to control working conditions. Instead, unions may negotiate clauses that give them the permissive power to exercise control, thereby retaining the same power and influence over workplace conditions. Thus, in Helton the clause providing that the union steward “‘shall see that the provisions of these working rules are complied with,’”115 should 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 power in Bryant. In that case, Judge Celebrezze pointed out that a union does not assume a duty to enforce all of its contract rights.116 Noting that the bargaining agreement stated that the union “may inspect any mine,” the court held that “[t]he use of the permissive ‘may’ rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created.”117 Significantly, the Helton court distinguished the permissive duty in

112. 564 S.W.2d 313 (Mo. App.), cert. denied, 439 U.S. 959 (1978).
113. Id. at 321. See notes 76-78 supra and accompanying text.
114. See id. at 321 & n.2.
115. Id. at 316 (emphasis added) (quoting collective bargaining agreement).
117. Id.
From the "full duty" assumed by the union in Helton.\textsuperscript{118}

In addition to changing the nature of its duty from a mandatory to a permissive one, a union may draft other contract provisions to protect itself from liability. A union should seek to have the contract reiterate the employer's exclusive duty to provide a safe and healthful workplace.\textsuperscript{119} The contract should also contain a clause stating that the union, by negotiating for and establishing its power to control health and safety conditions, does not assume any of the employer's exclusive duty. In addition, some unions have included language providing that the international union, local unions, union safety committees, union officers, employees, and agents will not be liable for any work-related injuries, disabilities, or diseases.\textsuperscript{120} Such language attempts to insulate the union from lawsuits brought by its unit members and their survivors, and from third party lawsuits brought by consumers, employers, or manufacturers.

Although such "hold-harmless" clauses sound attractive to a cautious union, they may, in part, be 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 employees under a third-party beneficiary theory,\textsuperscript{121} employees could not be bound by any contract clause insulating the union from lawsuits brought by unit members.\textsuperscript{122} In addition, courts are not willing to uphold such disclaimers if, in their opinion, injustice will result.\textsuperscript{123}

An employer's waiver of any cause of action resulting from alleged union negligence (third-party actions) is likely to be upheld by the courts. The doctrine of assumption of risk allows parties to contract in advance that one of them will "not be liable for the consequences of conduct which would otherwise be negligent."\textsuperscript{124} Such an agreement should stem from free and open bargaining between parties with relatively equal stature or weight. Thus, employers will probably have the capacity and

\textsuperscript{118} Helton v. Hake, 564 S.W.2d 313, 320 (Mo. App.), cert. denied, 439 U.S. 959 (1978).


\textsuperscript{120} P. CHOWN, WORKPLACE HEALTH AND SAFETY: A GUIDE TO COLLECTIVE BARGAINING 67-68 (1980).


\textsuperscript{124} Id. at 442.
power to negotiate a waiver of their potential legal remedies for a union’s negligence in conducting its health and safety functions.\textsuperscript{125}

Some unions have bargained for indemnification clauses that 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. Although such clauses may be difficult to obtain at the bargaining table, they do serve lawfully to insulate the union from negligent performance of its health and safety powers. Such agreements have been approved by the courts,\textsuperscript{126} although there may exist some argument that these provisions will encourage union negligence. Indemnification agreements are common among manufacturers and seek to insure against negligent acts. As the Seventh Circuit has commented, “[t]here is nothing unconscionable or illicit involved in an individual or private corporation contracting for protection against his or its own negligence.”\textsuperscript{127} Likewise, an indemnification agreement between a union and an employer is valid.

B. PREVENTING LIABILITY BY EXERCISING HEALTH AND SAFETY AUTHORITY

Lawsuits over a union’s negligent performance of its health and safety functions may be prevented not only by clever contract language, but also by diligent and concerned enforcement of those contract provisions. A union can show its good faith efforts through 1) effective health and safety educational efforts for its officers, representatives, and unit members; 2) timely and effective exercise of inspection rights, committee membership rights, and the like; 3) a willingness to consult the employer and outside agencies such as the Occupational Safety and Health Administration and the National Institute for Occu-

\textsuperscript{125} The general presumption is that employers have greater economic power than unions. “Thus it is generally held that a contract exempting an employer from all liability for negligence toward his employees is void as against public policy.” \textit{Id}. It is likely, however, than an agreement exempting a union from all liability arising out of its health and safety functions would be valid because 1) it is a waiver of liability for only one of the union’s functions; 2) health and safety concerns are generally the responsibility of the employer; and 3) an agreement between two parties that gives the traditionally weaker party an advantage must be presumed to be the product not of coercion but of “free and open bargaining between the parties.” \textit{Id}.

\textsuperscript{126} \textit{Id.} § 51, at 310 n.90.

pational Safety and Health to report workplace conditions that the union or its membership perceives as dangerous; 4) diligent support of unit members' health and safety protests when those objectives have merit under the contract; 5) careful evaluation of health and safety grievances; and 6) a willingness to consult outside experts when health and safety problems are of a technical or specialized nature.

C. LEGISLATIVE PROPOSALS TO LIMIT LIABILITY

Finally, as the courts in *Bryant* and *House* suggested, there are compelling policy reasons why unions should not be held liable for their health and safety activities.\(^{128}\) The primary reason is simple and straightforward: 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.

These policy concerns have prompted some significant legislative developments that attempt to address the problem of union liability. One pertinent example is a provision already incorporated in the Michigan workers' compensation legislation that exempts unions, their members, and their safety committee members from liability for union activity, or lack of activity, in health and safety matters.\(^{129}\) Although the Michigan law is significant, a state-by-state approach is necessarily of limited benefit. Labor unions in industrial states such as Michigan may benefit from the passage of such laws, but these laws are unlikely to be enacted in less industrialized areas, where labor is most vulnerable on this issue.

Proposed federal legislation has also specifically provided for union nonliability. 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."\(^ {130}\) This provision extends to unions the protection of the typical exclu-

---


\(^{130}\) S. 420, 96th Cong., 1st Sess. § 10(a) (1979).
sive remedy provision found in most workers' compensation laws.\textsuperscript{131}

VI. 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. The unions' greatest vulnerability does not arise under the duty of fair representation 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 state court actions, but in a few cases this approach has been rejected. It is these cases that make unions uneasy.

The threat of liability can be minimized without sacrificing union influence or power 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. Furthermore, various legislative proposals may offer unions the legal protection that they seek.

A union's liability for its health and safety activities is a relatively recent phenomenon. It is likely that such liability will attract increased attention as unions assert more influence over these issues and as public awareness of occupational hazards increases. Although the threat of liability can cause unions to be more diligent in health and safety matters, it can also cause unions to forego 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 health and safety activities. The courts, the Congress, and individual state legislatures must more thoroughly address this policy issue.

\textsuperscript{131} See note 129 supra and accompanying text.