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# Does the NLRB Have Exclusive Jurisdiction over Claims of Discriminatory Job Referrals?

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## *Does the NLRB have exclusive jurisdiction over claims of discriminatory job referrals?*

by Jay E. Grenig

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**Lynn L. Breininger**

v.

**Sheet Metal Workers International Association**

**Local Union No. 6**

(Docket No. 88-124)

*Argument Date: Oct. 10, 1989*

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### ISSUE

This case raises the issue of whether courts are precluded from determining whether a union has breached its duty of fair representation on the theory that the National Labor Relations Board (NLRB) has primary jurisdiction to determine the legality of the conduct involved.

The case also raises the issue of whether a union's alleged refusal to refer one of its members to jobs as a result of his political opposition to the union's leadership constitutes "discipline" within the meaning of the Labor-Management Reporting and Disclosure Act (LMRDA).

### FACTS

Local 6 of the Sheet Metal International Association represents sheet metal workers in a multi-employer bargaining unit in the Toledo, Ohio area. The union has collective bargaining agreements with two associations of employers. These agreements provide that the union is to establish and administer a job referral system.

Under the job referral system, when an employer asks the union to provide particular individuals to work on a job, the union attempts to honor the request. However, if the employer does not request particular individuals or if the individuals requested are unavailable, the union refers workers from an "out-of-work list." A sheet metal worker may also solicit employment directly from sheet metal contractors.

In 1984, Lynn Breininger, a longtime union member, filed a complaint in the U.S. District Court for the Northern District of Ohio, alleging that the union had refused to honor employer requests for his services and had unjustifiably passed him over in making referrals from the

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out-of-work list.

According to his complaint, the union's conduct breached its duty of fair representation. Breininger also alleged that the union's conduct was in retaliation for his political opposition to the union's leadership and violated the (union) Member's Bill of Rights in the LMRDA.

The district court granted the union's motion for summary judgment, holding that all of Breininger's claims were within the exclusive jurisdiction of the NLRB.

The U.S. Court of Appeals for the Sixth Circuit affirmed the lower court, holding that "union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB." 849 F.2d 997.

The court of appeals explained that it was "of no consequence that the union's allegedly discriminatory referral policies are described as a breach of . . . the duty of fair representation or as a violation of the LMRDA bill of rights."

The court of appeals also ruled that Breininger's LMRDA claim was insufficient on the merits, because Breininger did not demonstrate that he had been improperly disciplined within the meaning of that Act.

### BACKGROUND AND SIGNIFICANCE

The Supreme Court has held that a union's broad authority to act as an exclusive bargaining agent for its members is tempered by its obligation to serve the interests of all members without hostility or discrimination toward any.

According to the Court, this duty of fair representation extends not only to the negotiation of the collective bargaining agreement itself but to the subsequent enforcement of the agreement. *Communications Workers of America v. Beck*, 108 S.Ct. 2641 (1988) (duty of fair representation extends to expenditures of dues collected from members).

The Supreme Court has recognized a general rule that courts may not assume jurisdiction over claims based on activity that is arguably protected or prohibited by Sections 7 and 8 of the NLRA. On the other hand, the Court has held that the courts have jurisdiction over cases that involve a breach of contract by the employer or a breach of the duty of fair representation by the union.

Courts also have concurrent jurisdiction over duty of fair representation claims that emerge as "collateral issues" in actions brought under independent federal remedies. In *Beck*, however, the Supreme Court cautioned that employees "may not circumvent the primary jurisdiction of

the NLRB simply by casting statutory claims as violations of the union's duty of fair representation."

A determination that the courts have jurisdiction over duty of fair representation claims that do not involve either an employer's alleged breach of contract or collateral issues in actions brought under independent federal remedies will make it easier for individual workers to sue their union for breaches of its duty of fair representation.

While such a ruling might provide greater protection for individuals, it could weaken the ability of unions to act on behalf of the collective interests of the represented workers.

With respect to the second major issue presented to the Supreme Court, the LMRDA was enacted to ensure that unions are democratically governed and responsive to the will of their membership.

The Act establishes a "Bill of Rights" for union members. Among those rights is a right to procedural due process when a member is "fined, suspended, expelled or otherwise disciplined" by a union.

Last term the Supreme Court held that a union member who had been removed as a union officer because of his free speech activity was deprived of his rights under the LMRDA. *Sheet Metal Workers v. Lynn*, 109 S.Ct. 639 (1989).

As presented by Breininger, the question before the Court is whether the alleged refusal of the union to refer Breininger to an employer because of his political opposition is "discipline" within the meaning of the LMRDA.

A determination that the union's actions did constitute "discipline" could encourage suits against unions by union dissidents.

## ARGUMENTS

**For Lynn L. Breininger** (*Counsel of Record, Francis J. Landry, Wasserman, Bryan, Landry & Honold, 300 Inns of Court Bldg., 405 North Huron St., Toledo, OH 43604; telephone (419) 243-1239*):

1. A union member's claim that his union breached its duty of fair representation may be brought in federal district court under 28 U.S.C. § 1337 where the conduct can be both an unfair labor practice and a breach of the duty of fair representation, notwithstanding the absence of an affirmative allegation that the employer breached a collective bargaining agreement.
2. Even though the NLRB might view the same conduct as a violation of the NLRA, the federal courts retain their

authority to award relief for a breach of the duty of fair representation.

3. Because the collective bargaining agreement established a referral system for employment, the union's operation of that system represented the administration of the collective bargaining agreement and placed its operation within the scope of the union's duty of fair representation.
4. A union's discriminatory refusal to refer its members to jobs is "discipline" within the meaning of the LMRDA and a union member's claim brought under the LMRDA is not pre-empted by the jurisdiction of the NLRB.
5. It is doubtful that Congress meant to deny a remedy under the LMRDA for punishment meted out by means of a union leader's abuse of his position, simply because he chose not to invoke formal union processes.

**For the Sheet Metal Workers International Association Local Union No. 6** (*Counsel of Record, Jeffrey I. Julius, 3161 N. Republic Blvd., Toledo, OH 43615; telephone (419) 535-1976*):

1. Only adverse union action in administering a job-referral system that is premised on the basis of union membership or union activities is prohibited by the NLRA.
2. Claims that a union has violated the NLRA's requirements in administering a job referral system must first be addressed by the NLRB.
3. A judicial cause of action for breach of the duty of fair representation is limited to the processing of grievances or the negotiation of the terms of employment in collective bargaining agreements and does not extend to union conduct in administering job referral systems.
4. For purposes of the LMRDA, the term "discipline" refers only to those actions for which procedural protections of the Act apply.
5. An allegation that union officials retaliated against certain individuals to stifle their political opposition involves abuse of power rather than "discipline" under the LMRDA.

## AMICUS BRIEFS

The Solicitor General for the United States, the Association for Union Democracy, Teamsters for a Democratic Union, and the National Right to Work Legal Defense Foundation filed briefs in support of Lynn Breininger.