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Tara Selver

LABOR LAW—The United States Supreme Court Alters National Labor Policy: *Bowen v. United States Postal Service*

I. INTRODUCTION

Section 301 of the Labor Management Relations Act provides the basis for an employee's right to sue the employer for violation of a collective bargaining agreement.[1] In *Bowen v. United States Postal Service*,[2] the United States Supreme Court addressed the issue of apportionment of damages after an employee's successful hybrid section 301 suit[3] brought against an employer for wrongful discharge and against a union for breach of its duty of fair representation. The Court held that both the employer and the union are liable to the employee for compensatory damages in the form of back pay.[4] The Court apportioned damages between the two wrongdoers by holding the employer liable for back pay prior to a hypothetical arbitration date, and the Union liable for back pay thereafter.[5]

This Note examines the reasoning of the majority and dissenting/concurring opinions and analyzes the extent to which the *Bowen* Court's decision deviates from previous Supreme Court interpretations of national labor policy. The Note also anticipates the effect of *Bowen* on labor law and labor relations in light of the decision's realignment of the traditional policy balance of interests between the employee, the employer, and the union.

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1. Labor Management Relations Act § 301(a), (1976), 29 U.S.C. § 185(a) (1976) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Smith v. Evening News Ass'n., 371 U.S. 195 (1962), held that § 301 is not limited to suits brought by the union. Individual claims often lie at the heart of the grievance machinery and are thus entwined with union interests and questions concerning the enforcement of the collective bargaining agreement. *Id.* at 200. Limiting suits to those brought by the union would thwart congressional policy which favors administration of collective bargaining agreements pursuant to a uniform body of substantive law. *Id.* An individual employee therefore may file a cause of action on her own behalf under § 301 and is not forced to rely on the union to do so. *Id.*

2. 459 U.S. 212 (1983).

3. A "hybrid" § 301 suit refers to a cause of action brought by the employee against both the employer and the union. The employee sues the employer for damages caused by the alleged wrongful discharge and the union for a breach of its duty of fair representation in pursuing the grievance based on the wrongful termination. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56,66 (1981).

4. *Bowen*, 459 U.S. at 230.

5. *Id.* The hypothetical arbitration date is based on the average time that elapses between the filing of an employee's grievance and the rendering of an arbitration award. *See Bowen*, 459 U.S. at 235 n.4 (White, J., dissenting). The Federation Mediation and Conciliation Services provides these statistics in its Annual Report. *Id.*

II. STATEMENT OF THE CASE

After an altercation with a fellow employee, petitioner Bowen was discharged from his position with the United States Postal Service ("USPS").[6] He filed a grievance as provided by the collective bargaining agreement between USPS and his union, the American Postal Workers Union, AFL-CIO ("the Union").[7] The Union pursued the grievance through step three of the four-step grievance/arbitration procedure,[8] but decided not to take the grievance to arbitration.[9] Bowen then filed a hybrid section 301 suit against USPS and the Union in the United States District Court for the Western District of Virginia.[10] The district court found both defendants liable and apportioned the damages between them by means of a hypothetical arbitration date.[11] On appeal, the United States Court of Appeals for the Fourth Circuit overturned the damage award against the Union, granting the employee only the damages assessed in the district court against the employer.[12] The Supreme Court reversed the Fourth Circuit, and remanded for allocation of damages between USPS and the Union as provided in the district court judgment.[13] Eight of the nine

6. *Bowen*, 459 U.S. at 214.

7. *Id.*

8. Brief for Respondent Union at 4, *Bowen*, 459 U.S. 212 (1983). The typical grievance procedure includes four or five steps. It begins when the employee or her union representative brings the grievance to the foreman's attention, usually just by telling of the problem. *Id.* If the dispute continues, the grievance is filed, in writing, with the division superintendent. It will then be considered in a meeting between union and management committees with each side setting forth its position in writing. *Id.* A grievance not settled by progressive negotiations between the management and union hierarchies will be taken before a neutral arbitrator, whose decision is final and binding. If either party's wrongful refusal to go to arbitration defeats this process, the individual employee may seek redress in the federal courts pursuant to § 301 of the Labor Management Relations Act. Vaca v. Sipes, 386 U.S. 171, 185 (1967). *See supra* note 1 and accompanying text.

9. *Bowen*, 459 U.S. at 214.

10. *Id.*

11. Bowen v. United States Postal Serv., 470 F.Supp. 1127, 1130-31 (W.D. Va. 1979), *rev'd* 642 F.2d 79 (4th Cir. 1981), *rev'd*, 459 U.S. 212 (1983). The district court found that USPS had set the case in motion because of the wrongful discharge, but that the Union had delayed reinstatement by refusing to take Bowen's grievance to arbitration. *Id.* at 1131. Based on the jury verdict, the Court found the Union liable for approximately two-thirds of the time Bowen was unemployed from the date of discharge to the date of trial. *Id.* The employer was liable for the remainder of that period. *Id.* Accordingly, the Union was held liable to the plaintiff in the amount of $30,000.00 in compensatory damages and USPS was held liable for $17,000.00 in compensatory damages. *Id.*

12. Bowen v. United States Postal Serv., 642 F.2d 79, 83 (4th Cir. 1981), *rev'd*, 459 U.S. 212 (1983). The court of appeals stated that because "Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence no portion of the deprivations . . . was chargeable to the Union." *Id.* at 82.

The Fourth Circuit, however, refused to amend the judgment and assess full damages against USPS because Bowen failed to cross-appeal against USPS for the full amount. *Bowen*, 642 F.2d at 82 n.6. As a result, Bowen was left with an award of $22,954.00 instead of the $52,954.00 which the jury had awarded him. *Bowen, Id.* at 82-83.

13. *Id.* at 230.

justices supported the award of the total assessed damages to Bowen, while only five of the eight voted to apportion damages so that the Union was primarily liable for loss of back pay and the employer secondarily liable for the loss of wages.[14] This Note concerns only the opinions behind the 5-4 split on the apportionment issue.

III. DISCUSSION AND ANALYSIS

A. The Majority Decision

Justice Powell premised the majority opinion on Supreme Court precedent providing that an employee may recover damages against both the employer and the union when his employer has wrongfully discharged him and the union has breached its duty of representation in pursuing the resulting grievance.[15] The principle underlying this precedent was that each wrongdoer should be held liable for that portion of the damages

14. Justice Powell, writing for the majority, was joined by Justices Burger, Brennan, Stevens and O'Connor in remanding to the court of appeals for entry of the district court's judgment allocating the damages award between the employer and the union. *Bowen*, 459 U.S. at 230. Justice White, joined by Justices Marshall and Blackmun concurred in part in the judgment, but dissented as to apportionment of back pay liability between the employer and the Union. *Id.* at 245-46. Justice Rehnquist concurred in the minority opinion as to the issue of apportionment, but questioned the soundness of the rest of the Court's determination that Bowen's failure to cross-appeal was not fatal to his recovery of the full jury award. *Id.* at 246-47.

15. *Bowen*, 459 U.S. at 218 (relying on Vaca v. Sipes, 386 U.S. 171 (1967)). It is established doctrine that all unions acting as exclusive bargaining representatives under authority of the National Labor Relations Act, 29 U.S.C. §§ 151-187, owe employees the duty of fair representation. *See Bowen*, 459 U.S. at 226; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). The duty of fair representation is not limited to negotiation of a collective bargaining agreement, but includes administration of that agreement and processing of grievances thereunder. Humphrey v. Moore, 375 U.S. 335, (1964).

Where the union has obtained exclusive representation of the employees, the employees have accepted a restriction of their individual rights. Summers, *The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 256 (1977). The interest of an individual employee is necessarily subordinated by the collective interests of all employees in the bargaining unit. Vaca v. Sipes, 386 U.S. 171, 182 (1967). Thus "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.*

In *Vaca*, a union employee sued union officials for a breach of the union's duty of fair representation, alleging a wrongful discharge on the part of the employer and an arbitrary refusal on the part of the union to take his grievance through arbitration, the final step of the grievance procedure. *Id.* at 173. The employee was discharged on the grounds of poor health since he suffered from chronic high blood pressure and his job demanded strenuous activity. *Id.* at 174. The union sought the plaintiff's reinstatement and at the final step of the grievance procedure sent the plaintiff to a doctor at union expense. *Id.* at 175. The Union then decided not to take the grievance to arbitration because the medical report was unfavorable to the employee. *Id.*

The Court held, inter alia, that (1) a wrongfully discharged employee can bring an action against his employer despite the defense of failure to exhaust contractual remedies, provided such failure was due to the union's breach of its duty of fair representation in pursuing the grievance and (2) in such a case, the union and the employer have committed two separate breaches. *Id.* at 184, 197. While the employer and the union should each be liable for that portion of the damages which it

attributable to its breach.[16] This apportionment recognizes the particular interests which the collective bargaining agreement creates: the union's interest in participating in the administration of the agreement through its role in the grievance process, the employer's interest in limiting administrative remedies, and the employee's interest in vindicating his claim.[17] Of these, the employee's right to be made whole is of paramount importance.[18]

While an employee normally cannot file a section 301 suit to recover damages for a wrongful discharge without first utilizing the grievance procedure,[19] this bar is lifted where such failure is caused by the union's breach of its duty of fair representation.[20] Otherwise, the employee would be left without remedy.[21] The wrongful union conduct which justifies lifting the bar also requires that the union assume liability for the harm which it causes.[22]

The collective bargaining agreement not only creates particular interests between the parties, but it also embodies a system of self-government: the grievance procedure[23]. The union plays a crucial role in the grievance process because it decides which claims to pursue.[24] The *Bowen* Court

caused, the employer should not be absolved of any damages it would otherwise have had to pay. *Id.* at 197-98. Increases in those damages caused by the union's wrongful refusal should not be charged to the employer.

The *Bowen* majority relied heavily on this apportionment principle to justify assessing backpay liability against the union although the loss of wages was a direct result of the employer's breach of contract. *Bowen*, 459 U.S. at 230.

16. *Bowen*, 459 U.S. at 218 (citing *Vaca*, 386 U.S. at 197-98.) The *Bowen* Court noted that, while this principle is clear in its pronouncement, its application has caused some confusion among the lower courts. *See Bowen*, 459 U.S. at 218, n.8. *Id.* at 220-22. By declining to apply traditional principles of contract law, the *Bowen* Court recognized that the collective bargaining agreement is more than a contract and, instead, creates relationships and interests governed by the federal common law of labor policy. *Id.* at 220. By delineating the rights and duties of the parties, the agreement represents a resolution of conflicting employer/employee interests and also offers a framework within which future differences should be settled. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960). The agreement creates a common law which governs the entire employment relationship. *Id.* at 580-81. The collective bargaining agreement embodies a system of industrial self-government, the essence of which is the grievance process. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These three cases are commonly referred to as the steelworkers trilogy.

18. *Bowen*, 459 U.S. at 222.

19. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

20. *Vaca*, 386 U.S. at 186.

21. *Id.* at 185-86.

22. *Bowen*, 459 U.S. at 222. "[D]amages attributable solely to the employer's breach of contract should not be charged to the Union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Vaca*, 386 U.S. at 197-98. The *Bowen* Court read this statement of *Vaca*'s governing principle as mandating apportionment of liability. *Bowen*, 459 U.S. at 223.

23. *Bowen*, 459 U.S. at 224-25.

24. *Id.* at 225.

inferred from this that the employer has a right to rely on the union's decision.[25] An employer whose employees are not represented by a union can rely on an employee's waiver of any right to challenge the discharge.[26] Because the union acts as the exclusive representative of organized employees, the employer should have the same right to rely on the union's judgment.[27] Thus when a union fails to pursue a claim, the union, rather than the employer, becomes liable for the lost wages and damages incurred after the hypothetical arbitration date.[28]

Finally, the grievance procedure is premised on the supposition that both the employer and the union will fulfill their respective obligations.[29] If they do not, each party should be liable for that portion of the damages arising from its wrongful conduct.[30] Holding the employer solely liable for all back pay lost when both the employer and the union were at fault might deter the employer from including an arbitration clause in future agreements and, moreover, would offer no incentive for the union to perform its duty faithfully.[31] Accordingly, the *Bowen* Court assessed back-pay liability against the employer, USPS, from the time of discharge until a hypothetical arbitration date when Bowen would have been reinstated.[32] The Court held the Union liable for the wages lost from the hypothetical date until the date of the judicial ruling, on the ground that the Union caused this continued loss by its wrongful refusal to take the grievance to arbitration.[33]

B. The Minority View

Justice White,[34] writing for the minority, took issue with the majority analysis of the apportionment issue. He argued that: (1) precedent required that the union be held liable only for the cost of litigation, rather than any portion of the employee's lost wages;[35] (2) the employer and the union have committed separate breaches, and the damages recoverable

25. *Id.*
26. *Id.* at 226.
27. *Id.*
28. *Id.* at 223-24.
29. *Id.* at 227.
30. *Id.*
31. *Id.*
32. *Id.* at 218-30.
33. *Id.* at 230.
34. It should be kept in mind that Justice White wrote for the Court in *Vaca*, 386 U.S. 171, Czosek v. O'Mara, 397 U.S. 25 (1970) (union is only liable for damages which flow from its own conduct) and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (proof of breach of the duty of fair representation removes the bar of finality from arbitral decisions). Justice White used all three decisions to substantiate his analysis in *Bowen*. *See infra* note 36 for a discussion of *Czosek*.
35. *Bowen*, 459 U.S. at 235-36 (White, J., dissenting and concurring in part).

from each are of a different nature;[36] (3) nothing in the agreement at issue, nor in the typical collective bargaining agreement, nor in the judicially created doctrine of fair representation, allows the employer to rely on the union's decision not to pursue a grievance thereby absolving the employer of post-arbitration-date back pay; and (4) attaching backpay liability to unions might affect their willingness to include an arbitration clause in future agreements[37] and would force unions to process even frivolous grievances in order to avoid the possibility of a breach-of-duty charge.[38]

The minority, therefore, would have held the employer solely liable for the employee's loss of wages, that is, the damages caused by the employer's wrongful discharge.[39] The Union as a result would be liable only for litigation costs, that is, the portion of damages caused by its wrongful refusal to pursue the grievance through the grievance procedure.[40]

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36. *Id.* at 235 (White, J., dissenting and concurring in part). The *Bowen* minority emphasized *Vaca*'s concern in not allowing the employer to hide behind the union's separate breach when it is the employer who committed the initial wrong and who has the sole ability to rectify that wrong through reinstatment. *Id.* at 236, 239 (White, J., dissenting and concurring in part). The minority further relied on Czosek v. O'Mara, 397 U.S. 25 (1970), wherein the Court addressed the question of what type of liability may be assessed against the union in a hybrid § 301 suit. *Bowen,* 459 U.S. at 236 (White, J., dissenting and concurring in part). The *Czosek* Court stated that "[d]amages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 397 U.S. at 29. The *Bowen* minority maintained that *Czosek* reassured unions that they would not be held liable for damages which were wholly or partly attributable to the employer's wrongful conduct. *Bowen,* 459 U.S. at 236 (White, J., dissenting and concurring in part). While this might result in *de minimis* liability for the union, it is justified in light of the need to protect the collective interests of union members since excessive awards threaten the union's financial stability. *Id.* The minority argued that this policy underlies *Vaca* and *Czosek* and was reaffirmed in Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979). *See Bowen,* 459 U.S. at 236 (White, J., dissenting and concurring in part).

The *Bowen* majority distinguished *Czosek* by asserting that it arose under the Railway Labor Act. *Id.* at 229. The Act provides that railway employees are not limited to the contractual grievance process, but may also seek relief before the National Railroad Adjustment Board. *Id.* at 228-29; 45 U.S.C. §§ 153 First (i), (j). Upon the union's failure to pursue their grievances, the railway employees in *Czosek* could have immediately pursued their remedy before the Railroad Adjustment Board. *Bowen,* 459 U.S. at 229. In *Czosek,* therefore, the union's breach did not increase the damages the employer would otherwise have had to pay. *Id.* at 229-30. The *Bowen* majority maintained that *Czosek* and *Bowen* are consistent because the damages caused by the Union's breach in *Bowen* are ostensibly greater than those in *Czosek. Id.* at 230. Nonetheless, nothing in the reasoning of *Czosek* indicates that the availability of another remedy was a consideration. *See Czosek,* 397 U.S. at 30. The *Czosek* Court simply decided that damages suffered from loss of employment were not a result of the union's breach and, therefore, could not be assessed against it. *Id.*

37. *Bowen,* 459 U.S. at 241 (White, J., dissenting and concurring in part).

38. *Id.* at 241-42 (White, J., dissenting and concurring in part).

39. *Id.* at 239 (White, J., dissenting and concurring in part).

40. *Id.* at 236, n.6 (White, J., dissenting and concurring in part). *See also* accompanying text. The *Bowen* minority contended that the facts in *Vaca* further substantiate its view. *Bowen,* 459 U.S. at 234 (White, J., dissenting and concurring in part). The *Vaca* Court stated that, had the Union

C. *The Bowen Decision and its Implications for Labor Relations*

This section of the Note examines the values underlying the majority decision in Bowen, as well as those underlying the minority view, as a means of analyzing the repercussions that the *Bowen* holding is likely to have in the area of labor management relations within the context of the grievance procedure. The majority's value judgments will also be examined in light of Supreme Court precedent to show how the Court has now limited the freedom which unions had previously enjoyed from judicial interference in the realm of industrial dispute resolution.

1. The Values Underlying the Majority and Minority Opinions

Both the majority in *Bowen* and the minority, at least implicitly, agreed that the grievance procedure seeks to protect the following interests: (1) the employer's interest in limiting administrative remedies and liability; (2) the union's interest in implementing the collective bargaining agreement and limiting liability; and 3) the employee's interest in vindicating his claim and being made whole.[41] All eight Justices, with the arguable exception of Justice Rehnquist,[42] agreed that the employee's interest in being made whole is of paramount importance.[43] The majority and minority disagreed, however, as to the relative priority of the union and employer interests. The value judgment inherent in the majority's holding is that the employer's interest in limiting his liability outweighs the union's concern of safeguarding its members' collective interests by protecting its financial stability. Conversely, the minority Justices urged that the union's interest in participating in the administration of the collective bargaining agreement and in protecting collective interests should outweigh the employer's concerns.[44] The Justices were in fundamental discord as to whether imposing considerable backpay liability on the union would, in fact, enhance the workings of the grievance procedure.[45]

Prior to *Bowen*, the individual employee's right to be made whole took first priority, followed by all employees' collective interest in protection by a strong union.[46] As a result of *Bowen*, although the individual em-

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breached its duty, "all or almost all" of the damages would be attributable to the employer rather than the Union. 386 U.S. at 198. This would not have been true if the *Vaca* Court had envisioned what is now the *Bowen* formula. It took seven years from the date of discharge to obtain a judicial ruling in *Vaca*. An arbitral decision could have been reached within eight months. *Bowen*, 459 U.S. at 234-35 & n.4. In *Vaca*, therefore, the union, rather than the employer, would have been liable for the bulk of the award. *Bowen*, 459 U.S. at 235.

41. *Compare* at 221-22 with *id.* at 236 (White, J., dissenting and concurring in part).
42. *See id.* at 246-47 (Rehnquist, J., dissenting). *See also supra* note.
43. *Id.* at 222 and *id.* at 245 (White, J., dissenting and concurring in part).
44. *Id.* at 242 (White, J., dissenting and concurring in part).
45. *Compare id.* at 225 and *id.* at 232 (White, J., dissenting).
46. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 49-51 (1979).

ployee's interest will remain paramount, the employer's interest in limiting remedies available to the employees and in limiting employer liability for breach of its duty to the employee now supercedes the employees' collective interests and those of the union. *Bowen* has thus altered the basic premises underlying the grievance procedure.

2. The Basic Premises Underlying the Grievance Procedure Prior to *Bowen*

Supreme Court precedent acknowledged that resolution of labor disputes through the grievance procedure furthers the national goal of avoiding industrial strife[47] because the settlement process is viewed as the *quid pro quo* for a "no strike" clause.[48] The grievance procedure is thus designed to ensure that the union plays an active role in the administration of the collective bargaining agreement.[49]

The process is also intended to provide an exclusive, uniform method of dispute resolution that safeguards the individual grievant against "the vagaries of independent and unsystematic negotiation."[50] In addition, it promotes the employer's interest in limiting the remedies available to the employee.[51]

3. *Bowen* Limits Exercise of the Union's Discretionary Authority

While the *Bowen* majority agreed with all of the above goals, it paid scant attention to what the Court has previously viewed as the very underpinnings of the grievance process: the union's exercise of its discretionary authority.[52] The Supreme Court previously stated that peaceful resolution of employer/employee disputes and efficient functioning of the grievance procedure mandate that the union exercise its discretion in determining which grievances should be pursued through arbitration and which claims should be settled prior to this most time-consuming and expensive step.[53] Supreme Court precedent had accordingly expressly refused to grant the individual employee an absolute right to have his grievance taken to arbitration.[54]

Bowen, however, has virtually guaranteed this right by leaving the union, as a practical matter, very little choice in deciding not to pursue

47. *Vaca*, 386 U.S. at 191.
48. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567 (1960).
49. *Vaca*, 386 U.S. at 191.
50. *Id.*
51. *Bowen*, 459 U.S. at 221.
52. *See Vaca*, 386 U.S. at 191.
53. *Id.*
54. *Id.*

anything but the most specious grievances all the way to arbitration. Fear of having sizeable backpay awards assessed against the union, in conjunction with the nebulous standard of conduct which may establish a breach of the duty of fair representation, have sealed the union's predicament and will force it to arbitrate virtually all employee's claims of employer breach of contract.

a. *Bowen* Effectively Lowers the Standard of Conduct Necessary to Constitute a Breach of the Union's Duty of Fair Representation

The *Bowen* majority maintained that the union's discretionary authority was left intact by the decision because a plaintiff has to show arbitrary or bad faith conduct in order to prove breach of the union's duty of fair representation.[55] The *Bowen* Court, however, has arguably created the potential to lower the arbitrary or bad faith behaviorial standard to one of negligence. The facts in *Bowen* illustrate this danger clearly.

Bowen was discharged from the Postal Service for allegedly assaulting a co-worker.[56] Bowen's claim of wrongful discharge was thoroughly investigated; initially by the Union Local's president who conducted taped interviews of Bowen's supervisor and his fellow employees.[57] A regional representative of the Union was also sent to help in the investigation.[58] The Post Office refused to reinstate Bowen at the first two steps of the grievance procedure.[59] The grievance was then sent on to the regional representative in Washington, D.C. for his review of the case.[60] The Union official, with seven and a half years experience in discipline matters, decided that the assault charge had arguable merit, but that the discharge was too harsh a penalty.[61] The Postal Service, however, again refused reinstatement.[62] Bowen's case was then sent on to the Union's National Headquarters where an Administrative Vice President of the Clerk Craft made the final decision whether to certify the grievance for arbitration.[63] The Vice President had six years of experience, during which time he had reviewed between 15,000 and 20,000 files to make similar decisions.[64] He spent approximately half an hour reviewing Bowen's file

55. *Bowen*, 459 U.S. at 227 n.16.
56. Brief for Respondent Union at 3, *Bowen*, 459 U.S. 212.
57. *Id.* at 4-5.
58. *Id.* at 5.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 6.
63. *Id.*
64. *Id.* at 7.

and then decided not to take the case to arbitration.[65] His reasons were as follows: (1) in the past, the Union had been unsuccessful in winning reversals of discipline in assault cases; (2) the employer's investigation of the matter appeared thorough and credible; and (3) Bowen seemed to have a tendency to act violently against his fellow employees.[66] Although the Vice President did not listen to the taped interviews, he did read written summaries of them.[67] After this seemingly complete and scrupulous review of Bowen's file, the Union official made his decision. The jury, nonetheless, found that his decision not to arbitrate had been made in an arbitrary and perfunctory manner.[68] Moreover, the jury found that in so doing, the Union had acted in reckless and callous disregard of Bowen's rights and therefore held the Union liable for $10,000 in punitive damages.[69]

The facts of Bowen's case, the jury's findings, the resulting decision of the trial court, and the Supreme Court's affirmance of the District Court point out two distinct and significant dangers of the *Bowen* holding. It is hard to imagine a more diligent and thorough investigation as a basis for a decision whether to arbitrate a grievance. Nevertheless, the jury found the Union's conduct sufficient basis for an award of compensatory as well as *punitive* damages. In effect then, "arbitrary and perfunctory" behavior giving rise to punitive damages is arguably becoming synonymous with mere negligent conduct.

At least one member of the Supreme Court has previously acknowledged the possibility that a union's breach of its duty of fair representation may be based on "conduct that betrayed nothing more than negligence."[70] Both the Tenth and the Sixth Circuits have held that negligent failure to file an employee's grievance in a timely manner constitutes a breach of the union's duty.[71] These decisions represent a growing trend in adopting a negligence standard.[72] The value judgment which the *Bowen* Court has

65. *Id.*

66. *Id.*

67. *Id.*

68. *Bowen*, 470 F.Supp. at 1129.

69. *Id.* The punitive damages were not awarded because they could not be assessed against the Postal Service due to sovereign immunity. Thus the trial court thought it would be unfair to hold the Union liable for punitive damages when the Postal Service would be immune to the $30,000 assessed against it. *Id.* at 1131.

70. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring).

71. Foust v. Int'l Bhd. of Elec. Workers, 572 F.2d 710, 715 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42, 52 (1979); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975). *See also* Comment, *The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary or Perfunctory Grievance Administration*, 46 MO. L. REV. 142 (1981).

72. Comment, *The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary or Perfunctory Grievance Administration*, 46 MO. L. REV. 142 (1981). *See also* Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach*, 1981 WIS. L. REV. 155, 157 (1981).

made—that unions must be held accountable for the manner in which they handle an employee's grievance, even if such accountability results in large damage awards thereby threatening the union's financial stability—is similar to the policy which underlies a court's decision to hold the union liable for negligent conduct in handling a grievance. Both represent attempts to compel the union to discharge its duty of fair representation faithfully. This approach is problematic because the jury, instead of the union official, is now deciding what constitutes adequate review of an employee's grievance. Essentially, then, the jury is second-guessing the judgment of a union official in his area of expertise.

Until *Bowen*, the Supreme Court had specifically refrained from taking on this role in the field of industrial relations and had instead deferred to the expertise of union officials and labor arbitrators.[73] Thus, the dangers of *Bowen* are two-fold: 1) that the decision might encourage lower courts in their tendency to adopt a negligence standard for determining breach of a union's duty of fair representation, and 2) that the court's judgment will replace that of the union official in determining what amounts to an arbitrable grievance.

4. *Bowen* Creates the Employer's "Right to Rely"

The courts have previously afforded unions great latitude in negotiating and administrating collective bargaining agreements so that they may adequately protect the collective interests of employees[74] whose welfare depends on the strength of their union.[75] *Bowen* has narrowed this latitude by holding that the employer has a "right to rely" on the union's decision not to pursue a grievance.

Essentially, once the union has made that decision, the employer's liability is thereby limited. Should a jury find that the union decision was made in an arbitrary or perfunctory manner, then the employer is only

73. A negligence standard for breach of duty combined with the possibility of large damage awards assessed against the union contravenes the former position of the Supreme Court. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The Court has, to date, been circumspect in entertaining suits before the dispute has advanced through the steps of the grievance process. *See id.* The airing of grievances between employer and employee is thought to have a therapeutic effect on labor relations. Even where the Court has heard the case, it has often ordered arbitration where feasible, in as much as the parties have bargained for the arbitrator's judgment, rather than that of the courts. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567-68 (1960). Arbitration encompasses a system of private laws based on the collective bargaining agreement, practices of the industry, and customs of the particular shop. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). These combine to formulate the arbitrator's area of expertise, the industrial common law by which he is bound. *Id.* It is a source of knowledge to which the courts are not privy and to which they must defer. *Id.*

74. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976).

75. Int'l Bhd. of Elec. Workrs v. Foust, 442 U.S. 42, 51 (1979).

liable for backpay from the date of the wrongful discharge to the hypothetical arbitration date.[76] The union is liable for loss of backpay from that date until final judgment is rendered by the courts,[77] even though it is only the employer who has the power to reinstate the employee whom he has wrongfully discharged.[78] Thus, the union will now, in essence, indemnify the employer against consequential damages arising from the wrongful discharge. In effect, the union will insure the employer against liability for a breach of the employer's duty to an employee. The Court has *sub silentio* created a new employer right against the union.

The *Bowen* majority maintained that this "right to rely" coincides with the union's duty of fair representation.[79] As exclusive representative, the union has a duty to act fairly on behalf of all the employees.[80] The Court concluded that the employee depends upon the union's faithful execution of its duty and the employer has a right to rely on the presumption that the union has not breached its duty.[81] If this were not the case, the majority argued, then the grievance procedure could not, in reality, provide the exclusive method of dispute resolution upon which national labor policy depends.[82]

By establishing the employer's "right to rely," the *Bowen* Court changed the configuration of the relationships which arise in the context of the grievance procedure. Existing employer and union duties are traditionally owed to the employee.[83] The remedy for a breach is to right the wrong done to the employee, not to create rights and liabilities between employer and union.[84] The *Bowen* majority read an indemnification provision into the collective bargaining agreement which in essence modifies the substantive terms of the agreement by committing the union to cut off the employer's liability.[85]

Creation of this substantive provision is outside the scope of judicial authority.[86] It is well-settled that the courts have no power to modify the terms of a collective bargaining agreement when those terms are not in conflict with any existing federal or constitutional law.[87] Moreover, the indemnification provision which the *Bowen* Court has created is contrary

76. *See Bowen*, 459 U.S. 212.
77. *Id.*
78. *Id.* at 239 (White, J., dissenting and concurring in part).
79. *Bowen*, 459 U.S. at 226.
80. *Id.*
81. *Id.*
82. *Id.*
83. *See id.* at 239-41 (White, J., dissenting and concurring in part).
84. *Id.*
85. *Id.*
86. *See id.* at 240-41 (White, J., dissenting and concurring in part).
87. *Id.* (White, J., dissenting and concurring in part).

to prior case law.[88] The Supreme Court has explicitly stated that the union's separate breach can not act to shield the employer from the natural consequences of his own act.[89] Liability for lost wages is a natural consequence of the employer's wrongful discharge.[90]

5. *Bowen* Ignored Precedent by Viewing the Separate Employer and Union Breaches as a Single Breach Thereby Implicitly Overruling this Precedent

The *Bowen* Court ignored the well-settled principle that a hybrid suit encompasses two separate breaches, each of a different nature.[91] This precedent was based on the notion that each breach gives rise to a distinct policy concern and therefore warrants a distinct remedy.[92] When the union breached its duty of fair representation, the remedy was aimed at deterring the union from arbitrarily abusing the settlement procedure in the future.[93] When the employer committed a breach of contract the remedy was aimed at deterring the employer from discharging employees without cause in the future.[94] Central to both remedies was the desire to make the injured employee whole.[95]

Supreme Court precedent noted that when the union has not participated in the employer's breach of contract or when the employer has not participated in the union's alleged breach of duty, judicial assessment of joint liability for either breach is unwarranted.[96] The Supreme Court also discussed the difficulty in fashioning an appropriate scheme of remedies.[97] If a union's failure to pursue a grievance constituted a breach of the union's statutory duty to the employee, then an order compelling arbitration was a possible remedy.[98] Similarly, when an employer committed an unrelated breach of contract resulting in loss of wages to the employee, there was no reason to allow the employer to "hide behind the union's wrongful failure to act . . . [by] requiring the union to pay the employer's share of the damages.[99]

88. *Id.* at 240 (White, J., dissenting and concurring in part).
89. *Vaca*, 386 U.S. at 186.
90. *Bowen*, 459 U.S. at 242 (White, J., dissenting and concurring in part), (*quoting Vaca*, 386 U.S. at 186).
91. *See id.* at 239-40 (White, J., dissenting and concurring in part). *See also Vaca*, 386 U.S. at 196-97; Czosek v. O'Mara, 397 U.S. 26, 30 (1970); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976).
92. *See Vaca*, 386 U.S. at 187, 193.
93. *Id.*
94. *Id.*
95. *Bowen*, 459 U.S. at 222.
96. *Vaca*, 386 U.S. at 197 n.18.
97. *Id.* at 196.
98. *Id.*
99. *Id.* at 197.

Despite this precedent, the *Bowen* Court created a single remedy for which both the employer and the union are liable according to their respective faults.[100] In so doing, *Bowen* implicitly altered Supreme Court precedent by, in effect, viewing the two instances of wrongful conduct as a single breach. A remedy of this type does not take into account the nature of the wrongs which the Court seeks to rectify, nor does it consider the repercussions of such an award.

As the union attempts to avoid a breach-of-duty charge, the grievance system may well become over-burdened with the union's forced pursuit of unmeritorious claims through arbitration.[101] The assessment of large damage awards against unions will threaten their financial stability and thus jeopardize the collective interests of the employees.[102] In addition, if the standard of conduct necessary to constitute a breach of the duty of fair representation is lowered,[103] the employer is placed in an increasingly incongruous position. For example, where the union's negligent failure to meet a time deadline constitutes a breach of duty, the employer may want to bring the mistake to the union's attention.[104] Otherwise the employer leaves himself vulnerable to a hybrid section 301 suit placing him in the court system rather than an arbitration hearing, the forum for which he bargained.[105] On the other hand, he has no monetary incentive to settle whether in arbitration or in court, since he is only liable for backpay up until the hypothetical arbitration date. The above is just one example of the possible repercussions of the *Bowen* decision which the Court either did not consider or chose to ignore.

6. Alternative Remedies

A more satisfactory remedy than that fashioned by the *Bowen* Court might be a court order to compel the union to take the claim to arbitration. This would return the grievance to the bargained for forum and subject it to the standards of judgment anticipated by the contracting parties. Additionally, an arbitral decision would preclude the possibility of a jury's erroneous finding of breach of a union's duty. Juries might well make a determination of breach based on their finding that the underlying claim of wrongful discharge is meritorious rather than on the factors properly applicable to a breach of duty.[106]

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100. *Bowen*, 459 U.S. at 230.

101. *Id.* at 241-42 (White, J., dissenting and concurring in part).

102. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979).

103. *See* discussion *infra* at note 108.

104. *See* Waldman, *The Duty of Fair Representation in Arbitration*, 29 NYU CONFERENCE ON LABOR 279, 294 (1976).

105. *Id.*

106. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 814-15 (1973).

Although the Supreme Court precedent declined to compel arbitration in all cases, the remedy may seem more appealing now as an effort to mitigate the threat which *Bowen* poses to the viability of the grievance process. The establishment of internal grievance procedures or grievance mediation programs might also prevent consequences such as the union's forced processing of specious claims in an attempt to avoid subjecting itself to substantial liability.[107] The *Bowen* remedy, which appears to contravene important public policy, will force unions to seek alternative methods of dispute resolution and will force those courts that do not share the *Bowen* Court's policy bias to devise alternative judicial remedies in an effort to mitigate the repercussions of the Supreme Court decision.

7. Practical Impact of *Bowen* on Attorneys

From a practical standpoint, *Bowen* will clearly have the greatest impact on those attorneys who represent unions. The possibility of having substantial damages assessed against the union coupled with the increasing complexity of the varying standards used to determine what constitutes a breach[108] of the union's duty should lead union attorneys to advise the unions to pursue virtually all grievances through the final step of arbitration. It is far preferable to have the arbitrator decide whether a grievance is meritorious[109] rather than have the union official risk that judgment and resolve the dispute at an earlier stage of the grievance process.

Moreover, it is probably advisable to have an attorney represent the employee at the arbitration hearing, rather than a union official as is the customary practice.[110] Failure to advance a particular contract interpretation or to object to introduction of certain evidence may constitute a breach of the union's duty.[111] Because such conduct might provide the basis for a breach, the tendency will be to have more formal hearings, more evidentiary objections, and more arguments advanced, no matter how tenuous they may seem.[112] An attorney is better suited than a lay-

107. *See The Supreme Court, 1982 Term*, 97 HARV. L. REV. 278, 284-86 (1983).

108. Comment, *Breaching the Duty of Fair Representation: The Union's Liability*, 17 J. MAR. 415, 436 (1984). A discussion of the vast variety of union conduct which has been held by the courts to be a breach of the duty of fair representation is beyond the scope of this Note. The following articles provide a review of judicial decisions and some guidance in this area: Savner, *The Application and Meaning of the Duty of Fair Representation: Representing the Wrongfully Discharged Worker*, 13 CLEARINGHOUSE REV. 13 (1979); Waldman, *The Duty of Fair Representation in Arbitration*, 29 NYU CONFERENCE ON LABOR 279 (1976); Comment, *The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary, or Perfunctory Grievance Administration*, 46 MO. L. REV. 142 (1981).

109. Waldman, *supra* note 108, at 289.

110. Comment, *Breaching the Duty of Fair Representation: The Union's Liability*, 17 J. MAR. 415, 436 (1984).

111. Waldman, *supra*, note 108, at 289-90.

112. *Id.* at 290.

person to represent the grievant in this type of hearing. Obviously, if the union is represented by an attorney, the employer should similarly be represented by counsel rather than by management personnel. Thus the nature of the hearing is transformed from the relatively informal setting of the arbitration hearing familiar to the parties, to one which more closely resembles a hearing before a judicial tribunal.

In any event, regardless of whether the parties are represented by counsel or whether the union seeks arbitration, the union should take considerable care to ensure that its treatment of the employee's claim cannot be viewed as arbitrary, perfunctory, or negligent. The union must, at the very least, undertake a thorough investigation of all available evidence,[113] analyze the claim in light of applicable contract provisions and any other relevant considerations,[114] and make certain that a decision not to pursue a grievance to arbitration is well-reasoned and based on a consideration of the claim's merits, rather than its trading value, the cost of the arbitration proceeding, or similar traditional concerns.[115] If the union does decide to go to arbitration, the union must ensure that the employee's grievance is vigorously litigated at the hearing.[116]

The union attorney might also seek to advise his client of alternative ways by which to safeguard the union against a possible breach-of-duty charge. For instance, the union might require its members to vote on the meritoriousness of the grievance,[117] thus obviating the possible contention that the decision not to pursue the grievance was arbitrarily made by a single union official. Alternatively, the local might consult with the international union before arriving at a final decision whether to pursue the grievance.[118] Finally, the union might establish a procedure of bilateral fact-finding and then require a meeting between the parties prior to setting the grievance for arbitration.[119]

In short, the damages principle set forth in *Bowen* demands that union attorneys strongly advise their clients to take the utmost care in handling each grievance. The union must avoid conduct that was previously viewed as necessary to balance individual interests against collective interests of the employees and conduct which takes into account the practical considerations of the workplace. Such conduct might now be viewed as arbitrary and can thereby leave the union vulnerable to assessment of

113. Comment, *supra* note 108, at 154.
114. *Id.* at 156.
115. Savner, *supra* note 108, at 17.
116. *Id.* at 18.
117. Comment, *supra* note 108, at 436.
118. *Id.*
119. *See also id.* at 436 n.124.

substantial damage awards against it. Both employer and union attorneys should advise their clients to consider hiring counsel to litigate vigorously their interests at the arbitration hearing rather than to have union and management personnel resolve the dispute as has been traditionally done.

IV. CONCLUSION

In *Bowen v. United States Postal Service,* the Supreme Court fundamentally altered the direction of national labor policy. Union discretion and judicial deference to arbitration no longer constitute the essence of the grievance procedure. The Court has chosen to force unions to indemnify employers against liability for which, until *Bowen,* the law has held the employer solely responsible. While the *Bowen* Court declared the grievance process essential for the promotion of industrial peace through private dispute resolution, it undercut the vitality of the system, jeopardized union strength, and chose to protect employer interests at the expense of employees' collective interests as embodied by the union.

TARA SELVER