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Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary, or Perfunctory Grievance Administration, The

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THE DUTY OF FAIR REPRESENTATION: THE EMERGING STANDARD OF THE UNION'S DUTY IN THE CONTEXT OF NEGLIGENT, ARBITRARY, OR PERFUNCTORY GRIEVANCE ADMINISTRATION

I. INTRODUCTION

Approximately 20 million workers are represented by unions and are subject to the terms of collective bargaining agreements.[1] With respect to these agreements, application of the principle of exclusivity[2] results in the surrendering by these workers of their ability to deal directly with their employers.[3] Under the principle of exclusivity, the union, selected by a majority of a bargaining unit's members, is granted the right to be the unit's *exclusive* representative.[4] This status as exclusive representative is a fundamental basis underlying union strength.[5]

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1. *See* Marchione, *A Case for Individual Rights Under Collective Agreements*, 27 LAB. L.J. 738, 738 (1976).

2. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 374-81 (1976).

3. Collective bargaining agreements entered into by the employer and the bargaining representative are binding on all employees within the unit. Moreover, separate agreements are invalid unless expressly provided for in the collective agreement. J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944); Order of R.R. Tel. v. Railway Express Agency, Inc., 321 U.S. 342, 347 (1944).

4. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976).

5. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220 (1977) ("The principle of exclusive union representation, which underlies the National Labor Rela-

Primarily because of the increased strength of unions, working conditions *as a whole* have improved. Furthermore, workers' positions with respect to management have improved. Still, it is not difficult to recognize the danger to *individual* rights inherent in a union's status as exclusive representative of all the employees within a bargaining unit.[6] A union represents the unit, not the individual; it often may subordinate the interests of the individual to further the interests of the group.[7] Consequently, the individual worker's position *with respect to the union itself* has weakened. It has become more difficult for the worker to challenge the union from within.[8]

The problem of reconciling the need for union strength and control and the desire to minimize injury to the rights of individual employees is a complex one.[9] In the area of contract negotiation, the argument in favor of broad union authority and control is persuasive. A union should have full freedom to bargain for the greatest good of the greatest number. Consequently, individual interests must at times be subordinated to the interests of the group. In the contract negotiation setting, the union must be afforded a broad range of discretion to resolve conflicts of interest within its ranks.

A union's control over the rights of the employees in the bargaining unit is not, however, limited to contract negotiation; it extends to imple-

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tions Act as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations.").

6. *See, e.g.*, Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096 (1974); Fowks, *The Duty of Fair Representation: Arbitrary or Perfunctory Handling of Employee Grievances*, 15 WASHBURN L.J. 1 (1976); Marchione, *supra* note 1; Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation*, 27 SYRACUSE L. REV. 1199 (1976).

7. The Supreme Court has recognized that the negotiation of collective bargaining agreements involves tradeoffs between diverse groups and interests. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

8. *See* Comment, *Finality and Fairness in Grievance Arbitration: Whether Allegations of Unfair Representation Justify Termination of Arbitration*, 1978 B.Y.U.L. REV. 132, 136.

9. Strong unions are viewed as necessary to maintain an effective system of collective bargaining and industrial self-government. . . . Strong individual interests, however, are also present in the relationship between unions and their members. Those interests may be affected by the actions of the union as the exclusive bargaining agent in contract negotiations and grievance procedures.

Comment, *Finality and Fair Representation: Grievance Arbitration Is Not Final if the Union Has Breached Its Duty of Fair Representation*, 34 WASH. & LEE L. REV. 309, 315 (1977).

mentation and administration of collective bargaining agreements, including the handling of grievances of individual employees.[10] Grievance mechanisms established by the union and the employer in the collective bargaining agreement usually allow *only* for the union to present a grievance independently. If unsupported by his bargaining representative, an employee generally may not pursue his grievance.[11] An employee, therefore, may have no avenue to correct employer injustices other than through the union-controlled grievance procedure. A grievance generally will allege that the employee has been deprived of a vested right under the collective bargaining agreement or has been treated unfairly by the employer. Because important individual rights may be at issue in the griev-

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10. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965); Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). *See generally* Lehmann, *The Union's Duty of Fair Representation*—Steele *and Its Successors*, 30 FED. B.J. 280 (1971). National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976) states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

The proviso to § 9(a) granting to the *individual* employee the right to adjust his grievance with the employer is not absolute. An employee is allowed to present a grievance to his employer only if it is not inconsistent with the terms of the collective bargaining agreement. Thus, the right is illusory because under most collective bargaining agreements unions have exclusive power to process and settle grievances and to carry cases to arbitration. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973). Furthermore, § 9(a) has not been interpreted as placing an *obligation* on the employer to consider individually pursued grievances. Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962). The proviso "merely gives the employer a defense to a charge of refusal to bargain with the majority union . . . when it adjusts a grievance with an individual employee or group of employees; it does not impose an affirmative duty to do so." R. GORMAN, *supra* note 2, at 392. On the other hand, if the collective bargaining agreement contains a grievance arbitration clause which covers the grievance, and the union presents the grievance to the employer, then the employer must consider it. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (specific performance granted to compel employer to arbitrate grievances). *See generally* Marchione, *supra* note 1, at 730.

11. *See* Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 59 (1972). *See also* note 10 *supra*.

ance setting,[12] as opposed to the contract negotiation setting,[13] the extent of union control over individual employee grievances should not be allowed to go unchecked.[14]

The courts have expressed concern for the rights of individual employees by adopting the duty of fair representation (DFR),[15] a doctrine which limits a union's discretion by proscribing discriminatory, bad faith, or arbitrary conduct in the processing of employee grievances.[16] This

12. The grievance procedure is the part of the collective bargaining process where the individual has his or her most tangible interest. It is here where the resulting decision is most likely to have a visibly direct, immediate and personal influence upon an individual. For example, the results may determine whether the person retains a job or is promoted. Wortman, Overton & Block, *Arbitration, Enforcement and Individual Rights*, 25 LAB. L.J. 74, 81 (1974).

13. For an excellent article favoring a different standard for negotiation as opposed to contract administration, see Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977). *See also* Note, *supra* note 6.

14. *See* Marchione, *supra* note 1, at 740 ("if unions and employers are allowed unrestricted freedom to 'bargain' over grievances, i.e., trade-off unrelated grievances, then the worker can no longer rely on the terms of his employment contract to protect his personal interests").

15. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967) ("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").

16. When a DFR suit is brought against the union alone, there is authority for the proposition that employees may sue in federal district court using 28 U.S.C. § 1337 (1976) as a jurisdictional basis. This statutory provision covers suits arising under a law of the United States regulating commerce. *See, e.g.*, Mumford v. Glover, 503 F.2d 878, 883 (5th Cir. 1974); Retana v. Apartment, Motel, Hotel & Elevator Operators Local 14, 453 F.2d 1018, 1021 n.3 (9th Cir. 1972). In the majority of cases, however, an employee's claim against his union will be joined with a breach of contract action against the employer for violation of the collective bargaining agreement. Such suits are brought under the Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1976), which provides in part: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States . . . ." This section refers only to suits by employers and labor organizations, and contains no mention of suits by individual employees. Nevertheless, the Supreme Court has expressly granted the right of individual employees to sue under § 301. Smith v. Evening News Ass'n, 371 U.S. 195, 200-01 (1962). Thus, § 301 provides jurisdiction for fair representation suits when such suits have been coupled with § 301 breach of contract suits against employers. Most plaintiffs will join DFR causes of action with § 301 causes of action because § 301 suits require proof of defective union representation as a prerequisite to obtaining relief against the employer. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 187 (1967).

Moreover, the breach of contract claim against the employer is generally

Comment will explore the development and extent of that duty in the areas of negligent, arbitrary, or perfunctory union conduct in the handling of individual employee grievances. The lower courts' efforts to find appropriate standards that protect individual employee rights will be analyzed. As will be seen, the outer limits of the duty are blurred. The duty of fair representation, referred to as a "term of art"[17] by the United States Court of Appeals for the Sixth Circuit in 1969, is still awaiting precise definition.

II. SUPREME COURT PRONOUNCEMENTS OF THE STANDARD

The DFR is a judicial invention first enunciated by the United States Supreme Court thirty-seven years ago in *Steele v. Louisville & Nashville*

more valuable to the employee. For example, if the employee has been wrongfully discharged by the employer, his main concern will be to obtain reinstatement, a remedy which can only be recovered from the employer. Additionally, the basic principle regarding damages in DFR suits is that the award against the union may not include damages attributable solely to the employer's breach of contract; only those damages caused by the union's wrongful conduct are recoverable from the union. *Id.* at 183-86. *See also* De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970), in which the court stated:

> In a case such as ours, when there has been no suggestion that the Union participated in the Company's improper discharge and where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date, we conclude that the Union's conduct cannot be said to have increased or contributed to the damages attributable to the Company's improper discharge. Thus, the entire amount of lost earnings of each plaintiff . . . is properly charged to the Company.

Id. at 289-90.

Although most unfair representation suits are brought in federal court, state courts also have jurisdiction. *See* Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962). But defendants have the right to remove to federal court under 28 U.S.C. § 1441(b) (1976). Avco Corp. v. Aero Lodge Local 735, 390 U.S. 557, 560 (1968).

A union's violation of the duty of fair representation also may constitute an unfair labor practice as a violation of the National Labor Relations Act § 8(1), 29 U.S.C. § 158(b)(1)(A) (1976). *See* Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Smith v. Evening News Ass'n, 371 U.S. 195 (1962), presented the question whether violations of the collective bargaining agreement that were also unfair labor practices fell within the exclusive jurisdiction of the NLRB. The Supreme Court in *Smith* held: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Id.* at 197.

17. St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128, 130 (6th Cir. 1969).

Railroad.[18] *Steele* arose under the Railway Labor Act and involved the negotiation of a racially discriminatory amendment to a collective bargaining agreement between the union and the railroad. The amendment sought by the union and the employer ultimately would have excluded all black firemen from employment with the railroad. The plaintiffs sought an injunction to prevent the amendment's performance. The *Steele* Court found that implicit in the statutory right of the labor organization to be the sole bargaining agent of all members of the unit[19] was a counterbalancing obligation to represent all members fairly, impartially, and without hostile discrimination. In other words, the DFR was the *quid pro quo* of the right of exclusive representation. By similar reasoning, the DFR was extended to cover unions which were granted exclusive bargaining representative authority under the National Labor Relations Act.[20] Although the DFR initially was applied to the negotiation of contract terms, it is now clear that it is properly imposed on all phases of a union's activities,[21] including the area of contract administration encompassing the handling of grievances.

Following pronouncement of the DFR, the Supreme Court struggled to develop a standard by which the duty could be measured.[22] In 1967 the most comprehensive assessment of the nature of the DFR was rendered in the landmark decision of *Vaca v. Sipes*,[23] a case involving a union's refusal to process a grievance. In setting out the parameters of the duty, the Court stated:

> A breach of the . . . [DFR] occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith* . . . .
>
> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a *perfunctory* fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.[24]

While many of the earlier cases describing the union's duty were concerned with discrimination, bad faith, or hostility, the *Vaca* formulation

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18. 323 U.S. 192 (1944).

19. The statutory rights mentioned in *Steele* emanated from the Railway Labor Act of 1926, § 2, 45 U.S.C. § 152 (1976).

20. Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). *See also* Syers v. Oil Workers Local 23, 223 F.2d 739 (5th Cir. 1955), *rev'd per curiam*, 350 U.S. 892 (1956).

21. Conley v. Gibson, 355 U.S. 41, 46 (1957); Brady v. TWA, Inc., 401 F.2d 87, 94 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). *See* ABA, THE DEVELOPING LABOR LAW 743 (1971); Flynn & Higgins, *supra* note 6, at 1109.

22. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

23. 386 U.S. 171 (1967).

24. *Id.* at 190-91 (emphasis added).

significantly added the term "arbitrary."[25] In one form or another, the lower courts universally have applied the *Vaca* standard of "arbitrary, discriminatory, or in bad faith" in deciding issues of a union's DFR.

Another more recent Supreme Court case, *Hines v. Anchor Motor Freight, Inc.*,[26] dealt with a union's duty in handling grievances. The contention of the employees in *Hines* concerned the *manner* in which the union had handled the grievances, not in refusing to process the grievances as in *Vaca*, but the conduct of the union in advancing the grievances up to and including arbitration. The dispute essentially involved the union's lack of diligence in investigating facts and marshalling arguments in presenting its case to the arbitrator. Although the Supreme Court reversed the case on other grounds, it did not upset the determination of the United States Court of Appeals for the Sixth Circuit that the allegations made by the employees were sufficient to present an issue of the union's breach of its DFR.

The Supreme Court has not defined precisely how inadequate a union's representation must be before the DFR is breached. Notwithstanding the Court's holding that arbitrary or perfunctory treatment will not fulfill a union's obligation, a few lower courts still hold that absent bad faith, no breach occurs.[27] Although a majority of the courts presently prohibit arbitrary union conduct as a violation of the DFR,[28] they are still

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25. That this was not unintended is evidenced by the Court's repeated use of and reference to the term "arbitrary" throughout the opinion. In addition, the use of the disjunctive in "arbitrary, discriminatory, or in bad faith," implies that each of the three terms represents a distinct obligation . . . . In contrast to the subjective notions of discrimination and bad faith, the term "arbitrary" suggests an objective standard against which a union's conduct is to be measured.

Comment, *Post-*Vaca *Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885, 888 (1974) (footnotes omitted).

26. 424 U.S. 554 (1976).

27. *See, e.g.*, Sharp v. Ryder Truck Lines, Inc., 465 F. Supp. 434, 436 (E.D. Tenn. 1979); Cooper v. Westinghouse Elec. Corp., 416 F. Supp. 13, 17 (S.D. Ind. 1976) ("plaintiff must show some evidence of fraud, deceit, or dishonest conduct as accounting for the union's failure to fully process his grievance"); Papillon v. Hughes Printing Co., 413 F. Supp. 1313, 1317 (M.D. Pa. 1976) ("nothing charged by Papillon amounts to the 'substantial evidence of fraud, deceitful action, or dishonest conduct' which he must show in order to prevail").

28. *See, e.g.*, De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970); Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970); Griffin v. International Union, UAW, 469 F.2d 181 (4th Cir. 1972); Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335 (6th Cir. 1975); Cannon v. Consolidated

struggling to define exactly what union action constitutes "arbitrary or perfunctory" behavior. While the term "arbitrary" can be defined in the abstract, in practice it has proven to be a very elastic concept.[29] Significantly, a number of courts have begun to include what appears in substance to be "negligence" in their repertoire of union actions violating the DFR.[30]

III. EXPLORATION OF THE DIMENSIONS OF THE DFR

In *Vaca*, the Supreme Court stated that an individual employee does not have an *absolute* right to have his grievance prosecuted or taken to arbitration. Nevertheless, the Court emphasized that a union's exclusive control over grievance procedures does not carry with it "unlimited discretion to deprive injured employees of all remedies for breach of contract,"[31] and that a union "may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[32] Attempts by lower courts to refine these somewhat hazy Supreme Court guidelines into a workable test have not been entirely consistent. Part of the emerging standard apparently places upon a union an affirmative obligation to investigate the grievance and evaluate its underlying merits based on proper considerations. Moreover, a union's decision to process or refuse to process a grievance must rest on justifiable grounds.[33]

Freightways Corp., 524 F.2d 290 (7th Cir. 1975); Minnis v. International Union, UAW, 531 F.2d 850 (8th Cir. 1975); Beriault v. Local 40, Super Cargoes & Checkers of I.L.&W.U., 501 F.2d 258 (9th Cir. 1974).

29. *See* Savner, *The Application and Meaning of the Duty of Fair Representation: Representing the Wrongfully Discharged Worker*, 13 CLEARINGHOUSE REV. 13 (1979).

30. *See, e.g.*, De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970); Connally v. Transcon Lines, 583 F.2d 199, 203 (5th Cir. 1978); Milstead v. Teamsters Local 957, 580 F.2d 232, 235 (6th Cir. 1978); Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 760 (E.D. Mich. 1976). In IBEW v. Foust, 442 U.S. 42 (1979), the United States Supreme Court was presented with an opportunity to decide the "negligence" issue but refused to rule on it. Instead, the Court limited itself to the narrow issue presented.

31. Vaca v. Sipes, 386 U.S. at 186.

32. *Id.* at 191.

33. This development was foreseen by one commentator in a comprehensive analysis of the nature of the duty of fair representation, where it was noted:

> At the very minimum . . . [unions] must be prepared to decide whether a union's purported reason [for a decision] is so frivolous or insubstantial that it seems to hide impermissible motives. And even without a hint of improper motives, some circumstances may justify holding that a union's reason was simply too insubstantial to support its action.

Clark, *supra* note 6, at 1139.

A. *Required Procedures*

It is clear from the previously mentioned Supreme Court standards that if the employer's consideration of a grievance is thwarted by the union for an insupportable reason which is unrelated to the merits of the grievance, then the DFR is not fulfilled. The fact that a union decides that the grievance is meritorious does not insulate it from liability if it subsequently fails to file the grievance on time. "If a union breaches its . . . [DFR] in failing to process a grievance before determining its merit, it is certainly liable for failing to initiate a grievance after acknowledging its merit."[34]

In *Ruzicka v. General Motors Corp.*,[35] the United States Court of Appeals for the Sixth Circuit held that a union's negligence in failing to file a timely notice of the employee's grievance with the employer constituted a breach of the DFR. The court stated, "[W]hen a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its . . . [DFR]."[36] The *Ruzicka* holding illustrates a growing trend toward applying a negligence standard in measuring the union's duty to an aggrieved employee in timely processing his claim against the employer. For example, the United States Court of Appeals for the Tenth Circuit in *Foust v. IBEW*[37] upheld a jury verdict of $40,000 against a union for filing the employee's claim two days after the contractual deadline. The delay in filing had been caused by needless correspondence between union officials, conduct described as "nothing more than negligence"[38] by one Supreme Court Justice.

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34. Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 760 (E.D. Mich. 1976).

35. 523 F.2d 306 (6th Cir. 1975).

36. *Id.* at 310. Judge McCree, in a concurring opinion, stated:

> [W]hen a statutorily established exclusive bargaining representative fails to file a statement that is a prerequisite for submission of an employee's claim to arbitration, not because the union has made a good faith judgment for a lawful reason that it should not file the document, but merely because of its negligent omission, then it has breached its duty of fair representation.

Id. at 316 (McCree, J., concurring). For discussions of the *Ruzicka* decision, see *Union's Duty of Fair Representation Held to be Breached by Negligent Failure to Act on Behalf of Members*, 44 FORDHAM L. REV. 1062 (1976); *Duty of Fair Representation—Imposing Liability for Arbitrary Union Negligence*, 7 MEMPHIS ST. U.L. REV. 168 (1976); *Negligent Failure to File a Grievance Breaches Union's Duty of Fair Representation*—Ruzicka v. General Motors Corporation, 10 SUFFOLK U.L. REV. 642 (1976).

37. 572 F.2d 710 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979).

38. 442 U.S. at 53 (Blackmun, J., concurring).

In another case, *Robesky v. Qantas Empire Airways, Ltd.*,[39] the United States Court of Appeals for the Ninth Circuit held that the union had breached its DFR by failing to notify timely an employee that her grievance would not be taken to arbitration, thereby leading her to reject a company settlement offer that she otherwise would have accepted. It was the *Robesky* court's view that arbitrary conduct is not limited to intentional conduct. While stating that simple negligence may not breach the duty, the Ninth Circuit adopted a gross negligence standard: "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."[40]

In the absence of any negligence or other wrongful conduct by a union, it is clear that no breach can occur. For example, in *Ethier v. United States Postal Service*,[41] liability was not imposed on the union even though the grievance was found not to have been timely filed. The union steward in *Ethier* had vigorously pursued the employee's grievance but had made an understandable error in construing the time limits found in the collective bargaining agreement. The *Ethier* court found no wrongdoing on the part of the union and held that a reasonable interpretation of a contract term, although ultimately found to be erroneous by an arbitrator, does not constitute a breach of the DFR.

Many commentators praise *Ruzicka* and its progeny as correcting the injustices suffered by employees whose meritorious grievances were denied because of union negligence.[42] Not all courts, however, have been willing to adopt a negligence standard. In *Coe v. United Rubber, Cork, Linoleum & Plastic Workers*,[43] the plaintiff-employee had been discharged. The union filed a grievance on his behalf which was denied by the employer. Thereafter, the union attempted to notify the employer of an appeal to arbitration. On the notice of appeal, the union designated the employee's grievance as #881, when in fact it was #681. When the union finally filed a proper notice, it was denied by the employer as untimely. Although characterizing the union's conduct as "carelessness,"[44] the United States Court of Appeals for the Fifth Circuit refused to hold the union liable. The court stated that while "the union may have occasioned the employer's defense of untimeliness by misnumbering Coe's claim,"[45] "an error in one

39. 573 F.2d 1082 (9th Cir. 1978).
40. *Id.* at 1090.
41. 590 F.2d 733 (8th Cir.), *cert. denied*, 100 S. Ct. 49 (1979).
42. *See, e.g.*, Flynn & Higgins, *supra* note 6, at 1147 ("there appears to be no valid reason to leave employees, damaged because of union negligence in the handling of their grievance, without redress").
43. 571 F.2d 1349 (5th Cir. 1978).
44. *Id.* at 1350.
45. *Id.*

number does not furnish so much as a scintilla of evidence to support Coe's claim of arbitrary conduct by the union."[46] The decision in *Coe* arguably effected a result denounced in *Hines*, that "[w]rongfully discharged employees [were] left without jobs and without a fair opportunity to secure an adequate remedy."[47]

B. *Screening Grievances*

A union clearly may "sift out wholly frivolous grievances which would only clog the grievance process."[48] A union may not, however, "ignore a meritorious grievance."[49] Thus, a majority of courts hold that in making its decision to pursue an employee's grievance, a union is under a duty to make a good-faith determination of the meritoriousness of the grievance;[50] such a determination necessitates an adequate investigation of the grievance and an evaluation of its merit based upon proper considerations.[51] This emerging standard was well expressed in *Baldini v. Local 1095, UAW*:[52] "If . . . the union has taken a grievance seriously and made reasonable efforts to investigate and process it . . . [and] [i]f the union has made an honest, informed and reasoned decision not to proceed, it has not

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46. *Id.* at 1351. It is unclear whether the *Coe* court would have accepted a gross negligence standard, since the situation presented in *Coe* appeared to be no more than simple negligence on the part of the union.

47. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976).

48. Humphrey v. Moore, 375 U.S. 335, 349 (1964).

49. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

50. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 558 (1976); Vaca v. Sipes, 386 U.S. 171, 194 (1967); Melendy v. United States Postal Serv., 589 F.2d 256, 259 (7th Cir. 1978) (union has a duty to screen grievances and arbitrate those the union believes are meritorious); Foust v. IBEW, 572 F.2d 710, 715-16 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979); Hayden v. RCA Global Communications, Inc., 443 F. Supp. 396, 399 (N.D. Cal. 1978).

51. *See, e.g.*, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1240 (8th Cir. 1980) ("The need for a union fairly to evaluate the merits of grievances has been recognized repeatedly."). In Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), a breach was found where the union agreed not to press a meritorious grievance on behalf of the plaintiff, a worker suspended for 60 days, in exchange for the company's agreement to rescind the discharge of a worker who had violated a number of company rules and would in all likelihood have lost his grievance. A breach of the DFR was found because the union's consideration of the plaintiff's grievance was not based upon its merits.

52. 581 F.2d 145 (7th Cir. 1978). *See also* Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972) ("A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so *without* reason . . . .") (emphasis added).

breached its duty . . . ."[53] Applying similar standards, the United States Court of Appeals for the Eighth Circuit held in *Minnis v. International Union, UAW*[54] that the union breached its DFR by its "utter failure . . . to make even a minimal attempt to investigate" the grievance.[55]

De Arroyo v. Sindicato de Trabajadores Packinghouse[56] was a case in which a union's *total* failure to investigate the merits of a grievance was held to be a violation of the union's DFR. The union in *De Arroyo* mistakenly relied on unfair labor practice charges before the NLRB to vindicate the grievants' rights. The United States Court of Appeals for the First Circuit concluded that if the union had made an investigation, it would have easily learned that the employees' claims were meritorious and distinct from unfair labor practice charges. *De Arroyo* demonstrates a growing trend toward measuring the union's conduct by a reasonable care standard. Although not all cases dealing with the union's obligation in screening grievances have gone so far as to focus on negligence as a breach of duty, the cases have shown a marked shift in emphasis from the "bad faith" and "discriminatory" aspects of the *Vaca* test to the "arbitrary" and "perfunctory" ingredients of the formula.[57]

The courts do not limit their inquiry to the mere fact that an investigation, however cursory, was made. An *inadequate* investigation may, just as easily as no investigation, lead the union to withdraw a meritorious grievance. In *Hughes v. International Brotherhood of Teamsters, Local 683*,[58] the union chose not to arbitrate the grievant's wrongful discharge claim against his employer. This decision was based on a thirty-minute interview between the union attorney and the employee in which the employee was only allowed to admit or deny the employer's charges against him and was given no opportunity to qualify his answers. In holding the employee's evidence sufficient to withstand the union's motion for summary judgment, the United States Court of Appeals for the Ninth Circuit stated:

> If summary judgment would be proper in the present case, all a union would have to do to protect itself against a fair representation suit would be to go through the motions of processing an employee's grievance short of arbitration sufficient to withstand a

53. 581 F.2d at 151.

54. 531 F.2d 850 (8th Cir. 1975).

55. *Id.* at 853.

56. 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

57. For a typical case in which the union was held to have made an adequate investigation, see Dishman v. Crain Bros., 415 F. Supp. 277 (W.D. Pa. 1976). In *Dishman*, the union made a good faith effort to investigate the grievance and had held meetings with company officials; it then dropped the grievance only after concluding that because the grievance was based on an undisputed contract term it was groundless. The court found no breach of the union's duty of fair representation.

58. 554 F.2d 365 (9th Cir. 1977).

> claim that these motions were perfunctory. In this way, an employee with a legitimate claim against his employer would have no means of adjudicating his claim.[59]

An inadequate investigation is not, however, established by facts indicating only that the union's investigation "was not as thorough as that desired" by the employee.[60]

All courts apparently do not agree on the extent of the union's duty to investigate a grievance. In *Wyatt v. Interstate & Ocean Transport Co.*,[61] the plaintiff-employee had been discharged for health reasons. The union representative declined to pursue the grievance after the employer provided him a medical report from the employee-plaintiff's physician. The court was not persuaded by the employee's argument that there were differing medical opinions available which the union had not considered, since "these . . . were never brought to the union's attention"[62] by the employer or the employee. Evidently, the court in *Wyatt* did not believe that it was the union's responsibility to inquire on its own into evidence supporting the grievant's position.

Baldini, Minnis, De Arroyo, and *Hughes* demonstrate that, as a general rule, no investigation, or an inadequate one, does not lead to a reasoned decision on the meritoriousness of a grievance and constitutes "arbitrary" or "perfunctory" treatment in breach of the union's DFR. If, however, the union does make a reasonable investigation and reaches a good-faith conclusion that the grievance lacks sufficient merit to justify pursuing it, this action should not become a breach of the DFR simply "because a judge or jury later found the grievance meritorious."[63] Thus, the mere fact that the union's investigation led to an incorrect decision does not justify a finding that the DFR was breached.[64]

A distinction can be drawn between inadequate investigation of a grievance or other forms of negligence, and a mistake in judgment. This distinction was recognized in *Pesola v. Inland Tool & Manufacturing,*

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59. *Id.* at 368.

60. *See* Hershman v. Sierra Pac. Power Co., 434 F. Supp. 46, 51 (D. Nev. 1977).

61. 454 F. Supp. 429 (E.D. Va. 1978).

62. *Id.* at 433.

63. Vaca v. Sipes, 386 U.S. 171, 193 (1967).

64. *See, e.g.*, Savel v. Detroit News, 435 F. Supp. 329, 335 (E.D. Mich. 1977); Besedich v. Missile & Space Div. of LTV Aerospace Corp., 433 F. Supp. 954, 958 (E.D. Mich. 1977); Hilliard v. Armco Steel Corp., 421 F. Supp. 658, 662 (W.D. Pa.) (the actual impropriety of the grievant's discharge is immaterial to the strength of a *Vaca*-type action; the real issue is whether or not the union acts in good faith when it determines that the discharge is proper within the meaning of the applicable collective bargaining agreement), *aff'd mem.*, 532 F.2d 746 (3d Cir. 1976).

Inc.[65] Although the United States District Court for the Eastern District of Michigan in *Pesola* stated that negligent processing of a grievance may be a breach of the DFR, it concluded that no allegations to support even a claim based on negligence had been presented. The court stated:

> Although local officials decided against arbitration, that decision was based on a duly considered judgment that . . . [the employee's] absenteeism was too excessive to be defensible before an arbitrator. Even though the local's executive board reversed the initial decision against arbitration, the fact of reversal does not establish that the initial decision was arbitrary, discriminatory, or in bad faith. It indicates only that local officials made a mistake, or, perhaps, simply a difference in opinion between the committee and the executive board. Mistakes in judgment do not evidence a breach of the union's duty to represent its members fairly.[66]

Similarly, if a contract provision supports the grievance under one interpretation and the union reasonably gives it another interpretation, the fact that the union's interpretation may be mistaken does not establish a violation of the DFR.[67] In other words, a union may make a mistake in judgment but not violate its DFR, as long as the mistake is reasonable.

Although the courts will not substitute their judgment for that of the union's, the courts have required unions to make their decisions concerning the merits of a grievance on wholly relevant and competent considerations. As stated by the United States District Court for the Eastern District of Michigan in *Curth v. Faraday, Inc.*,[68] "[T]he meritoriousness of the grievance is not the test of fair representation. . . . It suffices that the union decides in good faith and on the basis of *objective, rational criteria* that the grievance lacks merit . . . ."[69] Generally, this requirement places no added burden on the union since its decision that a grievance lacks merit is usually based on valid considerations, such as a reasonable interpretation of a contract term.[70] A problem arises, however, when interests other than those of the grievant are affected by a decision to pursue or not to pursue a grievance.

In *Curth*, the union considered whether to take a facially meritorious grievance to arbitration when to do so would jeopardize the union's financial stability. The union, having been advised by its international representative that arbitration was likely to be futile, and knowing that the treasury was low, decided against arbitration. The *Curth* court, in upholding the union's action, recognized that circumstances sometimes require a difficult choice between the interests of a single member and the interests

65. 423 F. Supp. 30 (E.D. Mich. 1976).
66. *Id.* at 35-36.
67. NLRB, Office of the General Counsel, Memorandum 79-55 (1979).
68. 401 F. Supp. 678 (E.D. Mich. 1975).
69. *Id.* at 681 (emphasis added).
70. *See, e.g.*, Cronin v. Sears, Roebuck & Co., 588 F.2d 616 (8th Cir. 1978).

of the union as a whole. Nevertheless, "such determinations must be made, and the union does not breach its . . . [DFR] by deciding on the basis of rational and objective criteria."[71] Thus, the collective strength of the union and its ability to allocate group resources apparently are considered relevant criteria.[72]

The problem presented when the union refuses to process a meritorious grievance because it lacks the resources or decides that the grievance is not worth the cost has been considered by at least one commentator, who concluded that a union cannot be expected to carry every meritorious grievance to arbitration.[73] He recognized that a grievance may be frivolous either because it is trivial or because it lacks merit. It has been advocated, however, that under those circumstances, the union should allow the individual employee to pursue his grievance against the employer independently and at his own cost.[74]

In addition to institutional concerns, the interests of other individual employees or a group of employees may be affected by a union's decision to process a grievance. Moreover, the pursuance of one employee's grievance may adversely impact upon another employee. The union's position cannot be neutral in these situations. It must support the views of one individual or group against those of another. In such situations, the general standards apparently still apply, but with an added factor of a balancing of the competing interests.

To satisfy its DFR, the union must investigate the merits of the conflicting claims, evaluate them in the light of the applicable provisions of the collective bargaining agreement and any other pertinent considerations, and then decide which side to support.[75] This was the approach taken in *Smith v. Hussmann Refrigerator Co.*[76] In *Hussmann*, when four openings for positions as maintenance pipefitters were posted, the employer's maintenance foreman interviewed groups of employees who bid for the jobs. The foreman selected four workers, including the three plaintiffs in *Hussmann*, on the basis of superior skill and ability. The collective bargaining agreement specifically provided that in making promotions, seniority should govern when the skill and ability of those being considered for the promotion are substantially equal. Twenty-six unsuccessful bidders filed

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71. 401 F. Supp. at 681.

72. *See also* Buchanan v. NLRB, 597 F.2d 388 (4th Cir. 1979), in which the court stated that the maintenance of good relations between the employer and the employees in the collective bargaining unit is a relevant consideration in determining whether or not to process a grievance.

73. *See* Summers, *supra* note 13, at 274-75.

74. *Id.* at 274.

75. *See, e.g.*, Tedford v. Peabody Coal Co., 533 F.2d 952, 958 (5th Cir. 1976).

76. 619 F.2d 1229 (8th Cir. 1980).

grievances claiming that Hussmann violated the collective bargaining agreement in making the promotions. Of the twenty-six grievances filed, the union selected and processed four. These grievances had been filed by employees with greater seniority than the successful bidders. The United States Court of Appeals for the Eighth Circuit concluded that sufficient evidence had been presented for the jury to find that the union's conduct in processing these grievances constituted a breach of its DFR to the plaintiffs.[77]

The *Hussmann* court reasoned that a "union must fairly represent both groups of employees and may take a position in favor of one group only on the basis of an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement."[78] Applying this standard to the union's conduct, the court determined that the union had selected those grievances it would process *solely* on the basis of seniority; it never inquired about the plaintiffs' experience or other qualifications. The *Hussmann* court stated:

> This conduct may be viewed as a perfunctory dismissal of the interests and rights of plaintiffs. The union simply failed to represent them in any way. The modified seniority clause specifically required balancing the interests of merit and seniority whenever Hussmann deemed that the position warranted selection on the basis of merit. Under the collective bargaining agreement, after the company chose to select on the basis of merit, three separate considerations were relevant in determining the right of any employee to be promoted. These were (1) his selection by the company, (2) on the basis of skill and ability, (3) superior to the skill and ability of any senior employee who had bid for the position. Disregard for the qualification of superior skill and ability could manifest an arbitrary and perfunctory approach to promotion interests, as could ignoring the qualification of seniority or selection by the company.[79]

The *Hussmann* holding does not mean that seniority is irrelevant in weighing the merits of a grievance. In fact, it often may be the only relevant factor. In *Hussmann*, however, the contractual provision concerning promotions specifically listed skill and ability as well as seniority. The employees had a contractual right to expect that decisions concerning promotions would be made in conformity with this provision. Consequently, the union should have evaluated the merits of the grievances in light of this provision in the collective bargaining agreement and with due regard for all interested employees. The *Hussmann* court held that by failing to do so, the union had violated its DFR to the plaintiffs.

This reasoning of the *Hussmann* court is the converse of the inade-

77. *Id.* at 1240.
78. *Id.* at 1237.
79. *Id.* at 1239.

quate investigation decisions previously discussed. In a conflict of interests situation, if a union inadequately investigates and evaluates a grievance and decides to pursue it, then the union's conduct may be a breach of the DFR owed to employees with competing interests. Thus, a union may breach its DFR by deciding not to pursue a grievance, as well as by deciding *to* pursue a grievance.

C. *Presenting Grievances*

Another aspect of the union's DFR arises once the union has decided to process an individual's grievance. A union may pursue a meritorious grievance to arbitration, but present it inadequately because it prefers this procedure to initially screening out the grievance and later defending a DFR suit. The result, however, is similar; the employee is denied a fair hearing on the meritoriousness of his grievance.[80] To guard against this possibility courts have begun to regulate union conduct in preparing and presenting grievances to ensure that the union's DFR is properly discharged.

Presently, there is disagreement over whether judicial review of a union's conduct in presenting grievances should turn on the same criteria as that applied in screening out grievances. There is authority for the proposition that a lesser standard of review is desirable once the union has decided to pursue a grievance on an employee's behalf; that some form of ill will, bad faith, or spite is required before a union will be deemed to have violated its DFR.[81] While this line of authority rejects an arbitrary or perfunctory standard in assessing the union's presentation of the grievance,[82] a contrary view apparently places the higher responsibility of an advocate on the union in cases it takes to arbitration.[83]

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80. *See* Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974), where the court stated:

> [I]t makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trial to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation . . . .

81. *See, e.g.*, Bruno v. United Steelworkers Local 3571, 456 F. Supp. 425, 428 (D. Conn. 1978). *See generally* Adomeit, Hines v. Anchor Motor Freight: *Another Step in the Seemingly Inexorable March Toward Converting Federal Judges (And Juries) Into Labor Arbitrators of Last Resort*, 9 CONN. L. REV. 627 (1977).

82. *See, e.g.*, Bernard v. McLean Trucking Co., 429 F. Supp. 284, 286 (D. Kan. 1977) (the court admitted that the hearing on plaintiff's grievance was "perfunctory," but refused to find the union in violation of its duty of fair representation).

83. *See, e.g.*, NLRB v. P.P.G. Indus., Inc., 579 F.2d 1057, 1059 (7th Cir. 1978) ("While a union has wide discretion in deciding whether to take a grievance to arbitration . . . , once the claim is taken to arbitration, the union must advocate the employee's position.").

The majority of cases involving a union's conduct in preparing and presenting an employee's grievance have dealt with claims involving no more than bad judgment. Because wrongful conduct, including negligence, is distinguishable from an exercise of poor judgment, unions in these situations generally have not been found to have violated their duty of fair representation.

Holodnak v. Avco Corp.[84] and *Kesner v. NLRB*,[85] are two exceptions to the general rule that courts will not find a violation of the DFR when a union attorney or representative has exercised poor judgment in presenting a grievance. In *Holodnak*, the employee-grievant wrote an article in a political newspaper criticizing the union and the company. Thereafter, he was discharged for violating a company rule prohibiting false or malicious statements. The union took the discharge grievance to arbitration. During the hearing, the union attorney conceded the validity of the employer's rule and its validity under the first amendment, although the company's act arguably was "state action" because its production was overwhelmingly defense related and the federal government owned nearly all of the land, buildings, machinery, and equipment. The union attorney also failed to object to the arbitrator's improper questioning of the plaintiff's political views. Based on the union lawyer's poor efforts, the court held that the union's representation was "sadly lacking and . . . arbitrary";[86] thus, the union had breached its DFR.

A case which questioned the judgment of a union representative, *Kesner v. NLRB*, involved an employee who was terminated during a merger of transport companies. The union pressed the grievance to arbitration, but at the arbitration hearing the union representative admitted that the plaintiff's grievance was without merit. The United States Court of Appeals for the Seventh Circuit held the union liable for a breach of its DFR, stating: "When one's own representative who has been willing to assume that status proclaims a lack of merit, it is indeed likely to be a *coup de grace* to the claim."[87]

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84. 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part and rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

85. 532 F.2d 1169 (7th Cir.), *cert. denied*, 429 U.S. 983 (1976).

86. 381 F. Supp. at 200-01.

87. 532 F.2d at 1175. It also has been alleged that a union's failure to present adequately a grievance was due to an inadequate investigation of the case. For an employee to receive a fair hearing, it is important that the union investigate the complaint fully so that the arbitrator can consider it intelligently. For example, in Milstead v. International Bhd. of Teamsters, 580 F.2d 232 (6th Cir. 1978), the court held that the union breached its DFR when the grievance was denied at the arbitration hearing because the union representative was not aware of, and had not argued, the applicability of a seniority provision in the collective bargaining agreement. *Milstead* is also important because it held that a union representative's negligence in failing to discover an applicable provision in the collective bargaining agreement constituted a violation of the DFR. The court

As previously stated, a majority of decisions in this area have held that the union's efforts have been sufficient to discharge its DFR.[88] It has been noted that complete satisfaction with the degree of representation union members receive cannot be expected. Consequently, the majority of courts hold that the fair representation standard in this area deals not with the question of whether the union member was satisfied with his union representation, or whether the union's conduct was negligent, but whether the union's conduct was "arbitrary, discriminatory, or in bad faith."[89]

A characteristic case is *Cannon v. Consolidated Freightways Corp.*,[90] in which a truck driver was fired because he refused to take the company's sobriety test after he was involved in an accident. The contract stated that an employee had to receive at least one warning prior to discharge unless the cause was drunkenness or other specified conduct. Although the plaintiff had received no warning, the company argued that it had an unwritten rule that refusal to take the sobriety test created a presumption of drunkenness and, therefore, no warning was required. At arbitration, the union

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stated: "Certainly the duty of fair representation may be breached whenever a union ineptly handles a grievance because it is ignorant of those contract provisions having a direct bearing on the case." *Id.* at 235. *See also* Connally v. Transcon Lines, 583 F.2d 199, 203 (5th Cir. 1978) (recognized that under some circumstances negligent conduct in presentation of case may constitute a breach); Marietta v. Cities Serv. Oil Co., 414 F. Supp. 1029, 1038-39 (D.N.J. 1976) (submissible issue regarding union's failure to gather evidence favorable to grievant that resulted in inadequate presentation of claim).

88. *See, e.g.*, Hardee v. North Carolina Allstate Serv., Inc., 537 F.2d 1255, 1258-59 (4th Cir. 1976) (allegation of general lack of preparation and effort not enough to make out unfair representation claim; some evidence to suggest grievance was fully and vigorously presented, particularly where grievant congratulated union representative on his performance); Ness v. Safeway Stores, Inc., 598 F.2d 558, 560 (9th Cir. 1979) (per curiam) (union's conduct in allowing hearing to continue with one less union representative than required by the collective bargaining agreement but with equality of votes between the union and management did not violate the duty of fair representation); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899, 901 (9th Cir. 1979) (failure of the union to present certain medical records relating to the employee at the hearing did not breach duty); Siskey v. General Teamsters Local 261, 419 F. Supp. 48, 52-53 (W.D. Pa. 1976) (failure to inform grievant that his grievance would be presented and failure to discover and introduce a medical report did not violate the union's duty).

89. *See, e.g.*, Fleming v. Chrysler Corp., 416 F. Supp. 1258, 1261 (E.D. Mich. 1975), *aff'd per curiam*, 575 F.2d 1187 (6th Cir. 1978). For cases holding that a union's negligence in presenting a grievance does not violate the duty of fair representation, see Jensen v. Farrell Lines, Inc., 477 F. Supp. 335 (S.D.N.Y. 1979); Liotta v. National Forge Co., 473 F. Supp. 1139 (W.D. Pa. 1979); Ferdnance v. Automobile Transp., Inc., 460 F. Supp. 1206 (E.D. Mich. 1978); Hilliard v. Armco Steel Corp., 421 F. Supp. 658 (W.D. Pa.), *aff'd mem.*, 532 F.2d 746 (3d Cir. 1976).

90. 524 F.2d 290 (7th Cir. 1975).

argued that it was unlikely that the plaintiff had been drinking at 11:00 a.m. when the accident occurred and that the plaintiff had a safe driving record of eighteen years; nevertheless, the discharge was upheld. The plaintiff challenged the union's presentation of the case claiming that it failed to argue that the rule concerning the sobriety test was improper because it was unwritten. The court held in favor of the union. It characterized the union's failure to raise the issue as, at most, negligence or poor judgment and ruled that no breach occurred. Thus, the *Cannon* court viewed the employee's dissatisfaction with the union's representation as irrelevant and refused to measure the union's conduct by a negligence standard.

The courts also have been reluctant to assess the tactics and trial techniques of the union. In *Mangiaguerra v. D & L Transport, Inc.*,[91] the plaintiff, a truck driver, was fired for refusing an additional assignment upon completion of a driving run. Drivers were permitted to refuse such runs if they gave adequate advance notice. The factual issue presented to the arbitrator was whether the plaintiff gave this notice. The arbitrator held that the driver had not given such notice and sustained the discharge. Mangiaguerra then sued his union for failure to represent him properly. His allegations stated that the union representative did not hold a prior conference with him, was virtually silent at the hearing, failed to point out that the plaintiff informed his employer that he was fatigued, and failed to object to certain hearsay evidence. The court found the union representation adequate. It was not enough, said the court, that the union representative was guilty of poor judgment, laxity, or negligence.

It appears that most courts apply different standards to cases where the union has made some effort to present an employee's grievance, and cases in which the union has totally refused or inadequately processed an employee's grievance. Seemingly, more egregious behavior is required to establish a breach of the union's DFR in cases involving inadequate presentation of an employee's grievance.

IV. CONCLUSION

The DFR was designed as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."[92] Whether this statutorily implied duty, as applied to unions today, is sufficiently serving its intended purpose is questionable. This is most likely a result of the confusing array of standards and word-tests employed by the courts in measuring the duty. As the cases reveal, the present status of the nature of the DFR is anything but clear.

Fortunately, recent decisions reflect a trend away from requiring proof

91. 410 F. Supp. 1022 (N.D. Ill. 1976).
92. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

of bad faith, deceit, or improper motive for establishing a violation of the DFR. Acceptance of "arbitrary" and "perfunctory" as appropriate standards is rapidly becoming universal. In defining and applying these terms to actual union treatment of grievances, however, the courts have yet to develop a satisfactory approach that assures the important protection of workers' individual rights. The decisions lack a cohesive framework from which courts may proceed in their analyses of fair representation suits. The application of the well-developed reasonable care standard to union conduct in treating grievances would provide such a framework.[93]

Although the frequency of unfairness in grievance handling is impossible to measure, there is no doubt that the danger to the individual is substantial. The financial and emotional security of the American worker and his family depend largely upon his job rights.[94] Protection and enforcement of these rights take place through the union-controlled grievance machinery. A union's negligence in pursuing, preparing, or presenting grievances should not operate to deprive the individual worker of these all-important rights. Moreover, the well-established concept of negligence as a standard by which union behavior will be evaluated would provide a framework more workable than the less well-developed concepts now employed: "perfunctory," "fairly," or "in good faith." Furthermore, the judiciary is comfortable and well-versed in the application of the negligence standard and inconsistencies among courts in their assessments of union conduct would likely decrease.

Finally, the expansion of the parameters of the DFR would not place an intolerable burden on unions. The test for common law negligence, reasonable care *under the circumstances*, would allow the courts to consider the balancing of interests involved in fair representation cases and the different contexts of the union's duties.[95] Concern for the protection of workers' individual rights is an important but overlooked aspect of federal labor policy.[96] A need for reform in the area of union handling of griev-

93. *See* text accompanying note 30 *supra*.

94. *See* Tobias, *supra* note 11, at 57.

95. *See* Comment, *supra* note 9, at 326-27. *See also* Note, *Individual Actions for Breach of a Collective Bargaining Agreement: Judicial Alternative to the Grievance Procedure*, 1978 WASH. U.L.Q. 765. For a contrary view, see Comment, *The Union's Duty of Fair Representation: Group Membership Interests v. Individual Interests*, 16 DUQ. L. REV. 779 (1978).

96. Labor Management Relations Act § 1(b), 29 U.S.C. § 141(b) (1976), provides:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, [and] *to protect the rights of individual employees in their relations with labor organizations* . . . .

(Emphasis added.)

ances is apparent. "[U]nless the courts change their judicially created standard and allow a recovery for ordinary negligence, employees will always be second class citizens in their industrial world."[97]

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97. Flynn & Higgins, *supra* note 6, at 1144.