

April 1987

## Intentional Misconduct and the Union's Duty of Fair Representation: The Seventh Circuit's Hoffman Standard

Ronald Turner

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Ronald Turner, *Intentional Misconduct and the Union's Duty of Fair Representation: The Seventh Circuit's Hoffman Standard*, 63 Chi.-Kent L. Rev. 43 (1987).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol63/iss1/3>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

# INTENTIONAL MISCONDUCT AND THE UNION'S DUTY OF FAIR REPRESENTATION: THE SEVENTH CIRCUIT'S *HOFFMAN* STANDARD

RONALD TURNER\*

## I. INTRODUCTION

Federal labor law is premised on the belief that employees have a right to bargain collectively through representatives of their own choosing<sup>1</sup> and that an employer must recognize this right when a majority of employees in an appropriate bargaining unit designates a union as its collective bargaining agent.<sup>2</sup> Once recognized, the union is clothed with exclusive authority to negotiate and administer a collective bargaining agreement with the employer on behalf of all employees in the unit, including those who opposed such representation.

A corollary to this exclusive representation theory<sup>3</sup> is the union's duty of fair representation. Designed to insure that all members of the bargaining unit are fairly represented in the process of collective bargaining, the United States Supreme Court originally enunciated the duty in *Steele v. Louisville & Nashville Railroad*,<sup>4</sup> wherein the Court held that a labor organization must act "without hostile discrimination" amongst members and must "represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents."<sup>5</sup>

\* Attorney, Murphy, Smith & Polk, Chicago, Illinois; Research Associate, Industrial Research Unit, The Wharton School, University of Pennsylvania; B.A. Magna Cum Laude, Wilberforce University, 1980; J.D., University of Pennsylvania Law School, 1984; Member, Illinois Bar. Formerly Labor-management Relations Examiner, National Labor Relations Board; Research Assistant, Legal, Industrial Research Unit, The Wharton School, University of Pennsylvania. Co-Author, *FAIR REPRESENTATION, THE NLRB AND THE COURTS* (rev. ed. 1984) (The Wharton School, University of Pennsylvania); Author, *Impasse In the "Real World" of Labor Relations: Where Does The Board Stand?*, 10 *EMPLOYEE REL. L.J.* 468 (1984-85); Co-Author, *AIDS: Employer Options and Concerns*, to be published in an upcoming edition of the *LABOR LAW JOURNAL*. The author gratefully acknowledges the assistance of Ms. Diane Watanabe in the preparation of this manuscript.

1. See § 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157 (1982). [The National Labor Relations Act is hereinafter referred to as the "Act".]

2. See § 9(a) of the Act, 29 U.S.C. § 159(a).

3. For a criticism of the exclusive representation theory, see Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 *U. PA. L. REV.* 897 (1975).

4. 323 U.S. 192 (1944). *Steele* arose under the Railway Labor Act, 45 U.S.C. §§ 151-158 (1982). The doctrine of fair representation was subsequently extended to unions certified under the National Labor Relations Act. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

5. 323 U.S. at 202-03.

Subsequently, in *Vaca v. Sipes*,<sup>6</sup> the Supreme Court determined that a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Applying this standard to the question of what level of union misconduct will support an action for breach of the duty of fair representation, the majority of the federal courts of appeals has held that negligent or perfunctory representation by a union may give rise to unfair representation liability.<sup>7</sup> Rejecting this analysis, the United States Court of Appeals for the Seventh Circuit has held that "courts may enforce the duty of a union to fairly represent an employee only when union conduct breaching that duty is intentional, invidious, and directed at the employee."<sup>8</sup> This view, initially set forth in *Hoffman v. Lonza, Inc.*,<sup>9</sup> and consistently applied and reaffirmed by the court,<sup>10</sup> is clearly entrenched as the law of the Seventh Circuit.

This article examines the Seventh Circuit's application of the *Hoffman* intentional misconduct standard in contract administration duty of fair representation litigation. Part II of the article examines three decisions by the United States Supreme Court<sup>11</sup> which provide the framework for judicial analysis of the requirements of the duty of fair representation. Part III discusses the normative standards from which standards of fair representation are derived and the negligence/causation standard applied by the majority of the courts in fair representation cases. Part IV examines the Seventh Circuit's establishment and refinement of its intentional misconduct standard, a standard based on prohibited intent and motivation which rejects the theories of negligent and perfunctory representation recognized by other courts,<sup>12</sup> and concludes that, although the negligence standard has obvious appeal when viewed only through the prism of the interests of the individual employee, the intentional misconduct standard may offer the best accommodation of individual, union, and management rights which arise in the administration of collective bargaining agreements.

6. 386 U.S. 171, 190 (1967).

7. See *infra* notes 35-63 and accompanying text.

8. *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 520 (7th Cir. 1981) (citation omitted).

9. *Id.*

10. See *infra* notes 73-119 and accompanying text.

11. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274 (1971); *Vaca v. Sipes*, 386 U.S. 171 (1967).

12. See *infra* notes 64-123 and accompanying text.

## II. *VACA, LOCKRIDGE, AND HINES*: THE "ARBITRARY, DISCRIMINATORY, OR IN BAD FAITH" TEST

The underlying rationale of the duty of fair representation is that the imposition of legal liability will ensure that unions "act for and not against those whom it represents."<sup>13</sup> Upon a breach of that duty, courts will impose injunctive relief and appropriate damages. Consequently, the nature and extent of the union's obligation is of obvious importance<sup>14</sup> and requires a coherent standard of representation susceptible to reasoned and consistent application.<sup>15</sup>

Prior to 1967, courts grappled with the formulation of a definitive standard of fair representation. In *Steele v. Louisville & Nashville Railroad*,<sup>16</sup> the Supreme Court stated that a union must "exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."<sup>17</sup> Subsequently, most lower courts required a showing of "bad faith" arbitrariness, *i.e.*, union action or inaction motivated by bad faith.<sup>18</sup>

### *Vaca v. Sipes*

In 1967, the Supreme Court's decision in *Vaca v. Sipes*<sup>19</sup> led to a major reformulation of the fair representation standard. In *Vaca*, the plaintiff, an employee discharged as a result of a physical disability, alleged that his termination from employment was in violation of the collective bargaining agreement and that the union had arbitrarily, and without just cause, refused to take his grievance to arbitration. The Supreme Court of Missouri affirmed a jury award of compensatory and punitive damages for the plaintiff. The court reasoned that the question to be resolved was whether the evidence supported the plaintiff's assertion that he had been wrongfully discharged by the employer, regardless of the good faith of the union.

The United States Supreme Court reversed. Justice White, writing for the majority, enunciated the tripartite standard that has been generally accepted as the definitive formulation of the fair representation stan-

13. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944).

14. T. BOYCE & R. TURNER, *FAIR REPRESENTATION, THE NLRB, AND THE COURTS* 6-7 (rev. ed. 1984) [hereinafter *Boyce & Turner*].

15. *Id.* at 47-48.

16. 323 U.S. 192 (1944).

17. *Id.* at 203.

18. *See, e.g.*, *ILWU v. Kuntz*, 334 F.2d 165 (9th Cir. 1964); *Gainey v. Brotherhood of Ry. S.S. Clerks*, 313 F.2d 318 (3d Cir. 1963); *Cunningham v. Erie R.R.*, 266 F.2d 411 (2d Cir. 1959). *See also Boyce & Turner, supra* note 14, at 47-48.

19. 386 U.S. 171 (1967).

dard in the contract administration context: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."<sup>20</sup> In another important passage, the Court stated that, "[t]hough we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion,"<sup>21</sup> employees have no absolute right to have a grievance taken to arbitration. In the Court's view, arbitration of all grievances "would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."<sup>22</sup>

Applying this standard of union liability in *Vaca*, the Court concluded that the union did not breach its duty of fair representation. The Court found no arbitrary or bad faith conduct on the part of the union because it diligently supervised the plaintiff's grievance, served as the plaintiff's advocate, attempted to amass medical evidence of his fitness to work, and determined that arbitration would be fruitless only after a medical examination of the plaintiff proved unfavorable.<sup>23</sup> Thus, the Court concluded that the duty was not breached since "[t]here was no evidence that any Union officer was personally hostile to [the plaintiff] or that the Union acted at any time other than in good faith."<sup>24</sup>

### *Motor Coach Employees of America v. Lockridge*

Four years later, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge*,<sup>25</sup> a case addressing the issue of the National Labor Relations Act's *preemption* of an employee's state action against a union, the Court's dictum contained language crucial to the Seventh Circuit's subsequent formulation of an intentional misconduct standard:<sup>26</sup>

20. *Id.* at 190 (citations omitted).

21. *Id.* at 191.

22. *Id.* at 192 (citation omitted).

23. *Id.* at 193-95.

24. *Id.* at 194 (footnote omitted). Justice Fortas, joined by Chief Justice Warren and Justice Harlan, concurred in the result. In his view, employee complaints of a breach of the duty of fair representation were subject to the exclusive jurisdiction of the National Labor Relations Board (the "NLRB" or the "Board"), a position rejected by the majority. *Id.* at 198 (Fortas, J., concurring). He opined that jurisdiction should remain with the Board because "[t]he nuances of union-employee and union-employer relationships are infinite and consequential, particularly when the issue is as amorphous as whether the union was proved guilty of 'arbitrary or bad faith conduct.'" *Id.* at 203.

In dissent, Justice Black argued, *inter alia*, that arbitrariness is "a standard which no one can define." *Id.* at 209 (Black, J., dissenting). Noting that the Court did not explain what "arbitrary" or "bad faith" conduct meant, he concluded that *Vaca* would create insurmountable obstacles to an employee's right to sue an employer for breach of a collective bargaining agreement. *Id.* at 210.

25. 403 U.S. 274 (1971).

26. See *infra* notes 83-86 and accompanying text.

[t]he doctrine [of the duty of fair representation] . . . carries with it the need to adduce substantial evidence of discrimination that is *intentional, severe and unrelated to legitimate union objectives* [such] that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight . . . [t]he very distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained.<sup>27</sup>

This passage suggests that fair representation liability will arise only when the union deliberately and intentionally engages in conduct which deprives an employee of his or her right to union assistance. Interestingly, while the elements of discriminatory and bad faith conduct from the *Vaca* standard were recognized by the *Lockridge* Court, the third element—arbitrary conduct—was not mentioned. Questions arose with respect to the effect and impact of *Lockridge*. Did *Lockridge* reject *Vaca*'s broadening of the union's duty of fair representation to prohibit arbitrary conduct, or did the *Lockridge* Court inaccurately describe or simply misstate the *Vaca* standard?<sup>28</sup>

### *Hines v. Anchor Motor Freight*

The Court's next fair representation decision, *Hines v. Anchor Motor Freight, Inc.*,<sup>29</sup> did not cite or discuss *Lockridge*, much less disavow it. However, in holding that the finality of an arbitrator's award does not protect an employer where an employee proves a breach of the duty of fair representation, the *Hines* Court relied on *Vaca* in reaffirming the proposition "that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."<sup>30</sup> Writing for the Court, Justice White, the author of the majority opinion in *Vaca*, stated that the *Vaca* ruling "stemmed from our evaluation of the manner in which the union had handled the grievance in its earlier stages."<sup>31</sup> Yet, in other passages, he queried whether the finality of an arbitration decision "binds employees who assert that the process has fundamentally malfunctioned by reason of the bad-faith performance of the union,"<sup>32</sup> and further stated that arbitration decisions must not stand where the union's representation "has been dishonest, in bad faith or discriminatory."<sup>33</sup>

27. 403 U.S. at 301 (citing *Vaca*, 386 U.S. at 180-81) (emphasis added).

28. For a discussion of this point, see Boyce & Turner, *supra* note 14, at 52; Comment, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1122-26 (1973).

29. 424 U.S. 554 (1976).

30. *Id.* at 568-69 (quoting *Vaca*, 386 U.S. at 191).

31. *Id.* at 569.

32. *Id.*

33. *Id.* at 571.

By not specifically addressing the effect of *Lockridge* on the tripartite standard of *Vaca*, the Court injected further uncertainty and ambiguity into fair representation analysis.<sup>34</sup> Notwithstanding this uncertainty, most courts have rejected the "bad faith only" standard of *Lockridge* and, as a result, unions attempting to administer a collective bargaining agreement in good faith and in a nondiscriminatory manner may still face fair representation liability for negligent or perfunctory conduct.

### III. STANDARDS OF UNION FAIR REPRESENTATION

#### *Normative Standards of Fair Representation*

Judicial analysis of a union's duty of fair representation ranges from an application of standards of ordinary or mere negligence to gross or egregious negligence to intentional misconduct.<sup>35</sup> Negligence standards have been and are currently recognized by a majority of the federal courts. Application of these standards necessarily requires that a court establish minimum standards of representation which unions must meet to satisfy their duty of fair representation to union employees. These standards of representation are derived from three norms: (1) the contractual rights norm; (2) the procedural due process norm; and (3) the duty of care norm.<sup>36</sup>

Derivation of a standard of representation from the contractual rights norm would impose an absolute duty upon the union to enforce substantive rights set forth in a collective bargaining agreement. Each member of the bargaining union could insist that the contract be administered and enforced to protect his or her rights; thus, any right available to one employee must be available, on the same terms and basis, to all employees. As such, a union could breach its duty by declining to file, process, or arbitrate a grievance that involved and was clearly grounded in a substantive right contained in a collective bargaining agreement, even though the union had a principled and rational reason supporting its action or inaction. The Supreme Court may have intimated as much in *Vaca v. Sipes* by noting that a union may not arbitrarily ignore a meritorious grievance.<sup>37</sup>

34. For example, in *Foust v. IBEW*, 572 F.2d 710 (10th Cir. 1978), *rev'd as to punitive damages*, 442 U.S. 42 (1979), the Tenth Circuit concluded that the district court properly used the tripartite test of *Vaca* in assessing the union's conduct despite the union's argument that the narrower *Lockridge* standard should apply.

35. The intentional misconduct standard, adopted by the Seventh Circuit, is discussed *infra* in Part IV of this article.

36. Professors Harper and Lupu identify and discuss these norms in Harper & Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1212, 1254-56 (1985).

37. 386 U.S. 171 (1967) (discussed *supra* notes 19-24 and accompanying text). *Cf. Smith v.*

A procedural due process norm of fair representation would require that a union guarantee that bargaining unit members will be given an opportunity to be heard before the union renders any decision with respect to a course of action which would affect them. Thus, union actions taken without regard to the interests or views of individual employees could constitute unfair representation.<sup>38</sup> This norm may also require that unions inform employees of their rights under the contract and that established procedures prescribed by the contract be adhered to at all times.

Finally, the imposition of a duty of care norm would require that unions meet substantive minimum standards in processing grievances and administering the contract. This norm, similar to the fiduciary duties of a trustee, underlies the Supreme Court's statement in *Vaca* that a union may not process a grievance in a perfunctory fashion.<sup>39</sup>

Judicial preference for one of the three norms depends, of course, on the courts' view of their role in establishing externally-imposed standards of conduct and guidelines for unions engaged in the administration of collective bargaining agreements. A more stringent standard could have a greater impact on unions because more resources and administrative efforts would have to be devoted to insure compliance with that standard. Such compliance could result in a consequent and involuntary diversion of union assets from other areas deemed more significant by the union and, perhaps, its members. Conversely, a relatively lenient standard of fair representation could result in a lesser degree of judicial intrusion into union representation of bargaining unit members and, therefore, potentially less protection for the individual employee. Thus, to the extent that either standard is adopted in the extreme, the duty could become unduly restrictive for the union or afford inadequate protection to employees.

The employer's interests are also implicated because the standard of conduct imposed on a union by a court directly affects the finality of grievance-arbitration proceedings. As recognized by the Supreme Court in *Hines*:

To prevail against either the company or the Union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the

Evening News Ass'n, 371 U.S. 195 (1962) (individual employees acquire legally enforceable rights under the collective bargaining agreement).

38. See Harper & Lupu, *supra* note 36, at 1254-55.

39. Harper & Lupu, *supra* note 36, at 1255-56. See *supra* note 21 and accompanying text.



Union. As the District Court indicated, this involves more than demonstrating mere errors in judgment.

. . . In our view, enforcement of the finality provision . . . is conditioned upon the Union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings.<sup>40</sup>

Thus, all segments of the labor-management community are affected by, and have a stake in, the normative standards of fair representation applied by the courts.

### *The Negligence or Perfunctory Conduct Standard*

Unlike the Seventh Circuit, other courts have held that the duty of fair representation may be breached by arbitrary or negligent conduct. The case cited most often as an illustration of the negligence standard is the United States Court of Appeals for the Sixth Circuit's decision in *Ruzicka v. General Motors Corp. (Ruzicka I)*.<sup>41</sup> In that case, the employee's suit alleged that the union's failure to timely file a statement of an unadjusted grievance constituted unfair representation. Holding that the employee had not demonstrated that the union's inaction was tainted by hostility, the district court dismissed the complaint. Reversing on appeal, the Sixth Circuit held that a showing of bad faith was not required for a successful fair representation action. Reasoning that *Vaca* established three separate standards for a breach of the duty of fair representation, the court concluded that arbitrary union conduct could amount to unfair representation even where bad faith was not at issue. As stated by the *Ruzicka I* court:

Such negligent handling of the grievance, unrelated as it was to the merits of [the] case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance . . . .

. . . [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 duty of fair representation.<sup>42</sup>

The court concluded, therefore, that the union's failure to timely file the statement of grievance was unfair representation.<sup>43</sup>

40. 424 U.S. at 570-71.

41. 523 F.2d 306 (6th Cir. 1975).

42. *Id.* at 310.

43. Concurring in the result, Judge McCree argued that negligence did not fall within the arbitrary or perfunctory standard of *Vaca* because the latter standards referred only to intentional conduct. However, because he determined that the union's conduct, though unintentional, was egregious, Judge McCree concluded that the union breached its duty to fairly represent the employee. *Id.* at 315-16 (McCree, J., concurring).

In *Ruzicka II*,<sup>44</sup> the Sixth Circuit clarified its previous decision, instructing that ordinary negligence would not constitute a breach. However, stated the court, union action taken “without a sound reason for its decision” would constitute an arbitrary action violative of the duty under the holding of *Ruzicka I*.<sup>45</sup> In another decision, the Sixth Circuit recently noted that *Vaca* “set forth a three-prong test that a union must meet in order to fulfill its statutory duty to fairly represent its members.”<sup>46</sup> The court opined that a union “must conform its behavior to each of these three standards”: (1) it must treat all factions of its membership without hostility or discrimination; (2) it must exercise its discretion in complete good faith and honesty; and (3) it must avoid arbitrary conduct.<sup>47</sup> It is thus clear that the Sixth Circuit has adopted a broad reading of *Vaca* and will find certain conduct unlawful even when it is not the result of hostile motive or discrimination.

Union liability based on an inadvertent failure to timely file a discharge grievance was held to be arbitrary and a breach of the duty by the Court of Appeals for the Ninth Circuit in *Dutrisac v. Caterpillar Tractor Co.*<sup>48</sup> Seeking to limit its holding to those cases in which “the individual interest at stake is strong and the union’s failure to perform a ministerial act completely extinguishes the employee’s right to pursue his claim,”<sup>49</sup> the *Dutrisac* court determined that the union breached its duty because (1) the employee had been discharged and only the union could file for arbitration with respect to that employment action and (2) the union’s failure to meet the filing deadline terminated the employee’s resort to the grievance-arbitration procedure. Thus, concluded the court, the union’s unexplained and unexcused failure to timely file the grievance constituted a breach of the duty of fair representation.

The Ninth Circuit has also made clear that it will require unions to exercise special care in handling discharge grievances and expects at least minimal investigation into the facts and merits of employee grievances<sup>50</sup>; that a union’s conduct will not be deemed “arbitrary”, and therefore a breach of the duty, where it errs in evaluating a grievance or interpreting

44. *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981).

45. *Id.* at 1212. On remand, the district court held that the union did not breach its duty of fair representation because it relied on the parties’ past practice of extending time limits in which to file grievances. 519 F. Supp. 893 (E.D. Mich. 1981), *aff’d*, 707 F.2d 259 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983).

46. *NLRB v. Local 299, Int’l Bhd. of Teamsters*, 782 F.2d 46, 50 (6th Cir. 1986).

47. *Id.* at 50-51 (quoting *Ruzicka I*, 523 F.2d at 309-10).

48. 749 F.2d 1270 (9th Cir. 1983).

49. *Id.* at 1274.

50. *Evangelista v. Inland Boatmen’s Union of the Pac.*, 777 F.2d 1390, 1395 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986).

the provisions of a collective bargaining agreement<sup>51</sup>; that as long as a union's interpretation of an agreement is reasonable and not made in reckless disregard of an employee's rights, the court will not second-guess a decision not to arbitrate a grievance<sup>52</sup>; and that a grievant need not be given notice and an opportunity to be heard in contract interpretation cases where the collective bargaining agreement does not require such notice.<sup>53</sup> The crucial distinction for the court, as evidenced by the foregoing, is the nature of the union's conduct: "When the union's conduct does not involve a purely ministerial act, but lies within the traditionally discretionary sphere of grievance evaluation, the union may in good faith forbear pursuit of a meritless grievance after due investigation and analysis."<sup>54</sup>

Further support for the view that a tripartite standard of fair representation governs union conduct is found in *Griffin v. UAW*.<sup>55</sup> There, the Court of Appeals for the Fourth Circuit concluded that arbitrary conduct, standing alone, is sufficient for a judicial finding of a breach of the duty. Noting that a union has three distinct obligations under *Vaca*, the court stated that a union's pursuit of an unreasonable or arbitrary course of action may breach the duty even where no showing of hostile motive is made.<sup>56</sup> Similarly, in *De Arroyo v. Sindicato de Trabajadores Packinghouse*<sup>57</sup> and *Curtis v. United Transportation Union*,<sup>58</sup> the Courts of Appeals for the First and Eighth Circuits adopted the majority view that a union may breach the duty of fair representation without a showing of hostile motivation.

More recently, the Court of Appeals for the Second Circuit ruled that evidence of bad faith is not a prerequisite for establishing the existence of unfair representation. *NLRB v. Local 282, International Brother-*

51. *Id.* at 1396 n.2; *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985).

52. *Evangelista*, 777 F.2d at 1396; *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir. 1985); *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1482 (9th Cir. 1985); *Peterson v. Kennedy*, 771 F.2d at 1253; *Tenorio v. NLRB*, 680 F.2d 598 (9th Cir. 1982).

53. See *Evangelista*, 777 F.2d at 1397; *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1354 (9th Cir. 1981), *disapproved on other grounds*, *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 51 (1983). *Accord Higdon v. United Steelworkers of Am.*, 706 F.2d 1561 (11th Cir. 1983); *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335 (6th Cir. 1975), *cert. denied*, 425 U.S. 981 (1976).

54. *Evangelista*, 777 F.2d at 1399 n.5 (citing *Eichelberger v. NLRB*, 765 F.2d 851, 855 (9th Cir. 1985)); see also *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983).

55. 469 F.2d 181 (4th Cir. 1972).

56. *Id.* at 183. See also *Carpenter v. West Virginia Flat Glass, Inc.*, 763 F.2d 622, 624 (4th Cir. 1985); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980) (perfunctory handling of a meritorious grievance may subject union to unfair representation liability).

57. 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

58. 700 F.2d 457 (8th Cir. 1983). *Accord NLRB v. American Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980).

*hood of Teamsters*,<sup>59</sup> involved the question whether a union breached the duty of fair representation by providing inadequate notice of an arbitration award affecting many of its members. Enforcing an NLRB order, the court concluded that the Board correctly found that the union breached its fiduciary duty to those workers:

We agree with other courts which have held that arbitrary conduct amounting to a breach is not limited to intentional conduct by union officials but may include acts of omission which, while not calculated to harm union 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."<sup>60</sup>

The court further stated that it did "not agree that a showing of bad faith is a prerequisite for establishing the existence of a breach. While it certainly is a sufficient condition, it is not a necessary one."<sup>61</sup>

As indicated above, several courts have applied a standard of fair representation which requires, at a minimum, that the union investigate and render a decision on the merits of a grievance. As a practical matter, a union must use reasonable care in investigating, filing and processing a grievance; by failing to meet these standards, a union exposes itself to an after-the-fact examination of the underlying grievance-arbitration proceeding by the court and potential unfair representation liability.

Under the negligence/causation standard, liability may be imposed upon the union only where the union's action or inaction is the "solitary and indivisible cause of the complete extinguishment of [the] employees' grievance rights."<sup>62</sup> Inherent in the use of such a standard is the intrusion of external influences on internal union matters, significant influences which may affect a union's priorities and distributional judgments. The union may thus be forced to spend a greater portion of its treasury on grievance investigation and staffing as a direct result of external notions of "good" and "equitable" representation.<sup>63</sup> A negligence standard also reflects judicial recognition of a duty of care norm as courts generally require some form of union consideration of grievances arising out of work place disputes.

#### IV. THE SEVENTH CIRCUIT'S INTENTIONAL MISCONDUCT STANDARD

The issue of external influence on union decisionmaking and after-

59. 740 F.2d 141 (2d Cir. 1984).

60. *Id.* at 147 (citation omitted).

61. *Id.* at 148 n.13 (citation omitted).

62. *Evangelista*, 777 F.2d at 1399 n.5 (quoting *Peterson v. Kennedy*, 771 F.2d at 1254).

63. See *Harper & Lupu*, *supra* note 36, at 1272.

the-fact judicial review is a significant matter crucial to the application of a negligence/causation standard of fair representation. The Court of Appeals for the Seventh Circuit has charted its own course, however, and has adopted and reaffirmed an intentional misconduct standard which requires evidence of intentional, severe, and hostile discrimination against bargaining unit members.

Seventh Circuit jurisprudence with respect to the appropriate legal standard to be applied in fair representation litigation was, at one time, in general accord with the views of the majority of the federal courts of appeals. In *Baldini v. Local Union No. 1095, UAW*,<sup>64</sup> the court, in an opinion by Judge Pell, applied the standards of *Vaca v. Sipes*<sup>65</sup> in a hybrid section 301/duty of fair representation suit:

Under *Vaca* . . . a union breaches its duty of fair representation when its conduct towards the member is "arbitrary, discriminatory, or in bad faith." It is noted that the standard is disjunctive. *Vaca expressly rejected an argument that only obvious breaches such as discrimination or hostile treatment would be actionable.* A union may not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."<sup>66</sup>

Turning to the effect of the Supreme Court's *Lockridge* decision,<sup>67</sup> the court stated that "[o]ccasional sentences lifted from their context might make it seem that invidious hostility or some sort of malice is always required."<sup>68</sup> The court noted, however, that "the treatment of the issue in *Hines* . . . leaves little doubt that such has not become the law. Nor do we think a fair reading of *Lockridge* . . . to this effect really supports" such an argument.<sup>69</sup> Similar reasoning was presented in *Miller v. Gateway Transportation Co.*:<sup>70</sup>

Although evidence of intentionally hostile or invidious action by a union is clearly relevant to determining whether the duty of fair representation has been breached, *the duty may be breached without scienter* on the part of the union. "[P]atently wrongful conduct such as racial discrimination or personal hostility" is not the sole measure of what is prohibited . . . A union also breaches its duty when it arbitrarily ignores or perfunctorily processes a grievance.<sup>71</sup>

*Baldini* and *Gateway* illustrate the Seventh Circuit's previous recog-

64. 581 F.2d 145 (7th Cir. 1978).

65. 386 U.S. 171 (1967).

66. 581 F.2d at 150-51 (emphasis added) (footnote omitted).

67. See *supra* notes 25-28 and accompanying text.

68. 581 F.2d at 150 n.5 (citations omitted).

69. *Id.* at 150-51.

70. 616 F.2d 272 (7th Cir. 1980).

71. *Id.* at 277 n.11 (emphasis added) (citations omitted). The court also noted that "the duty of fair representation is of special importance when a grievance for wrongful discharge is involved." *Id.* at 277 n.12. "A union must especially avoid capricious and arbitrary behavior in the handling of a

nition of the disjunctive, tripartite standard of *Vaca* and the court's prior rejection of *Lockridge* as the definitive articulation of the test of unfair representation.<sup>72</sup> However, the question whether *Vaca* was limited or narrowed by *Lockridge* was again presented to the Seventh Circuit, and the court's intentional misconduct standard emerged.

The lead case establishing the intentional misconduct standard is *Hoffman v. Lonza, Inc.*<sup>73</sup> In that case, the union "forgot" to file a required appeal of a grievance within the contractually-provided five day period. The Seventh Circuit, affirming the district court's entry of summary judgment for the union, held that the duty of fair representation may be enforced by the courts only when the union's conduct is "intentional, invidious, and directed at the employee,"<sup>74</sup> and that an action for breach of the duty requires more than a showing that the union failed to properly process a grievance. In his opinion for the court, Judge Peck of the Sixth Circuit, sitting by designation, expressly relied on the Supreme Court's statement in *Lockridge* that a claim of unfair representation "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives."<sup>75</sup> The court determined that a requirement of intentional misconduct is necessary to limit judicial and administrative interference with the results of grievance and arbitration proceedings.

The *Hoffman* court posited a second reason for limiting fair representation suits to cases involving intentional misconduct by unions: an employee who succeeds in his or her suit against the union will have the grievance-arbitration result set aside and may then attempt to prove that the employer's action breached the bargaining agreement.<sup>76</sup> "Thus, in many 'unfair representation' suits . . . while the union is a putative defendant, the ultimate relief sought by the employee is reinstatement and back pay."<sup>77</sup> This consideration concerned the court:

At least insofar as an employee seeks reinstatement and back pay, the union defendant of a suit for "unfair representation" may have little reason to vigorously contest the issue of alleged union wrongdoing. To

grievance based on a discharge—the industrial equivalent of capital punishment." *Id.* (quoting *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972)).

72. *But see Cannon v. Consolidated Freightways Corp.*, 524 F.2d 290, 293 (7th Cir. 1975) ("the plaintiff must show that the Union's conduct was intentional, invidious and directed at that particular employee").

73. 658 F.2d 519 (7th Cir. 1981).

74. *Id.* at 520 (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971)).

75. *Id.* at 522 (quoting *Lockridge*, 403 U.S. at 301).

76. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (discussed *supra* notes 29-33 and accompanying text).

77. *Hoffman*, 658 F.2d at 522.

permit an employee to recover because his union "forgot" to follow required grievance procedures would create an unacceptably high risk of collusion between union and employee . . . By permitting actions for failure to fairly represent only where the employee can show intentional, invidious misconduct by the union, the possibility of collusive suits is minimized.<sup>78</sup>

Accordingly, stated the court, an unfair representation claim cannot be based solely on acts or omissions that result in employees not receiving a "fair" hearing on the merits of a grievance. Labeling the employee's suit as an "action for the union intentionally causing harm to an employee involved in a grievance proceeding,"<sup>79</sup> the court instructed that the employee must present "substantial evidence of fraud, deceitful action or dishonest conduct."<sup>80</sup> Because *Hoffman* involved a case of union forgetfulness and negligence<sup>81</sup> and did not "state a claim of arbitrary, discriminatory, or bad faith conduct,"<sup>82</sup> the district court's judgment against the employee was affirmed.

As noted, the *Hoffman* court's holding was grounded on the Supreme Court's opinion in *Lockridge*. In the Seventh Circuit's view, "*Lockridge* is quite clearly the Supreme Court's most definitive amplification of the *Vaca* language."<sup>83</sup> Moreover, stated the court, the Supreme Court's decision in *Hines*<sup>84</sup> was not a retreat from the *Lockridge* Court's interpretation of *Vaca*; in its view, *Hines* "asserted that arbitral decisions where the union's representation of the employee has been 'dishonest, in bad faith, or discriminatory' are subject to relitigation."<sup>85</sup> Thus, concluded the Seventh Circuit, the "arbitrary" standard of *Vaca* cannot be less "than the deliberate and severely hostile and irrational treatment of *Lockridge*."<sup>86</sup> The court also rejected the analysis of the Sixth Circuit in *Ruzicka I*<sup>87</sup> and distinguished its prior rulings in *Baldini* and *Gateway*.<sup>88</sup> With respect to the latter decisions, the court opined that neither of those cases held that *Vaca* arbitrariness may be anything less than intentional wrongdoing, although *Baldini* dictum did provide to the contrary.<sup>89</sup>

78. *Id.*

79. *Id.*

80. *Id.* (citing *Lockridge*, 403 U.S. at 299).

81. "Mere negligence cannot rise to the level of misconduct necessary to support an action for breach of the Union's duty of fair representation." *Id.* at 523.

82. *Id.*

83. *Id.* at 522 n.2.

84. See *supra* notes 29-33 and accompanying text.

85. 658 F.2d at 522 n.2 (quoting *Hines*, 424 U.S. at 571).

86. *Id.*

87. See *supra* notes 41-45 and accompanying text; see also *Boyce & Turner*, *supra* note 14, at 59-62.

88. See *supra* notes 64-71 and accompanying text.

89. *Hoffman*, 658 F.2d at 521. Concurring in the result, Judge Cudahy argued that the court's

The *Hoffman* formulation of an intentional misconduct standard rested on two rationales. First, as discussed in the preceding paragraph, the Seventh Circuit determined that Supreme Court precedent required the application of an intentional misconduct standard in duty of fair representation cases. This conclusion rested, in turn, on the court's resolution of the issue of whether the disjunctive, tripartite test of *Vaca* or the narrower standard of *Lockridge* governed. Adopting the latter view, the Seventh Circuit determined that a finding of hostile, intentional misconduct was a necessary predicate to the successful maintenance of a fair representation suit. Secondly, *Hoffman* offered a practical assessment of the risks faced by the employer in fair representation litigation. In the court's view, the union had little reason to vigorously contest an employee's suit against it because the employer would bear the brunt of any judicial order requiring reinstatement and back pay.<sup>90</sup> Collusive suits would follow, reasoned the court, absent an intentional misconduct standard.

The Seventh Circuit inexplicably retreated from *Hoffman* in *Rupe v. Spector Freight Systems, Inc.*<sup>91</sup> Addressing a discharged employee's unfair representation/breach of contract claim, the court, per Judge Eschbach, quoted from *Vaca*: "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."<sup>92</sup> Dividing the *Vaca* test into two categories, Judge Eschbach stated, first, that *Vaca's* prohibition on discriminatory or bad faith conduct "connotes a fundamental requirement of evenhanded representation."<sup>93</sup> The second category of arbitrary and perfunctory conduct "may imply a further re-

liance on the dicta of *Lockridge* was misplaced because that case dealt with federal preemption of state common law claims. Further, citing *Baldini* and *Gateway*, he stated that the Supreme Court's decision in *Hines*, issued five years after *Lockridge*, did not discuss or cite *Lockridge* while reaffirming the *Vaca* standard that arbitrary conduct is a basis of liability. Thus, opined Judge Cudahy, the majority's intentional misconduct standard was incorrect. *Id.* at 523-24 (Cudahy, J., concurring). Judge Cudahy also argued for adoption of the standard set forth in *Baldini*: "whether the union was guilty of malfeasance and whether its conduct was within the range of acceptable performance" by a union. *Id.* at 524. He reasoned that the union's failure to process Hoffman's grievance, while unintentional, was only arbitrary and not sufficiently egregious to constitute a breach. *Id.* at 525.

90. This risk may have been reduced by the Supreme Court's ruling in *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983). In *Bowen*, the Court held that an employer's liability for damages suffered by an employee in hybrid § 301/duty of fair representation suits ends at the date at which an arbitration of the employee's grievance would have been held had the union not breached its duty. Holding that the union would be responsible for any increase in damages beyond the hypothetical arbitration date, the *Bowen* Court opined that this mode of apportionment of damages would provide an additional incentive for unions to process the warranted claims of its members and would have a positive effect on the willingness of employers to enter into and comply fully with contractual grievance-arbitration procedures. *Id.* at 227.

91. 679 F.2d 685 (7th Cir. 1982).

92. *Id.* at 691 (quoting *Vaca v. Sipes*, 386 U.S. at 191).

93. *Id.*



quirement of basic diligence. It has been argued that even in the absence of evidence of bad faith or discrimination, the duty of fair representation may be violated by conduct . . . so acutely perfunctory that it fails to attain a basic level of acceptable performance" by a union.<sup>94</sup> Articulating a burden of pleading and proof of these standards of actionable conduct, the court stated that (1) the establishment of bad faith or discrimination would require evidence of fraud, deceitful action or dishonest conduct, and (2) where lack of diligence is alleged, something more than mere negligence must be shown. The court concluded that neither standard had been satisfied in *Spector Freight* because no direct evidence of union animosity toward the employee had been demonstrated. Nor was the union's conduct "so perfunctory as to support an inference of bad faith."<sup>95</sup>

Judge Peck, the author of the *Hoffman* majority opinion, disagreed with Judge Eschbach's suggestion that gross negligence by a union could violate the duty, for, in his view, that very argument had been rejected in *Hoffman*:

*Hoffman* rejects the argument that negligent conduct, whether or not it may be characterized as "egregious", may be the basis for an action for failure to fairly represent under Section 301 and makes it unnecessary for us to go beyond the question whether the union's conduct was intentionally "dishonest, in bad faith, or discriminatory."<sup>96</sup>

Moreover, stated Judge Peck, any suggestion that lack of diligence or negligence could be so egregious that it would constitute unfair representation should also be dismissed:

Concepts of "negligence" or "lack of diligence" by definition refer to unintentional conduct, and such conduct may not constitute a breach of the duty to "fairly represent." On the other hand, the adjectives "arbitrary" and "perfunctory", which have often been used to describe conduct breaching the duty, by definition refer to intentional conduct . . . I do not agree . . . that "arbitrary" or "perfunctory" conduct includes unintentional, negligent conduct.<sup>97</sup>

In any event, concluded Judge Peck, the question whether gross negligence violates the duty of fair representation had already been answered, in the negative, by the Seventh Circuit in *Hoffman*.<sup>98</sup>

Subsequent decisions returned to the intentional misconduct stan-

94. *Id.* (citing *Hoffman*, 658 F.2d at 524 (Cudahy, J., concurring)).

95. *Id.* at 695.

96. *Id.* at 696 (Peck, J., concurring) (quoting *Hoffman*, 658 F.2d at 522 n.2).

97. *Id.* (citation omitted) (footnote omitted).

98. In dissent, Judge Swygert argued that the duty of fair representation requires that a union's representation be even-handed and diligent; thus, he would affirm the jury's finding that the union breached its duty by perfunctorily handling the employee's grievance. *Id.* at 696-98 (Swygert, J., dissenting).

dard. In *Cote v. Eagle Stores, Inc.*,<sup>99</sup> the employee's claim that the union unlawfully failed to diligently investigate the facts surrounding her discharge did not escape the *Hoffman* rule. Lack of diligence does not constitute a breach of the duty, stated the court, for there must be a showing of intentional and severe discrimination.<sup>100</sup> Likewise, in *Graf v. Elgin, Joliet & Eastern Railway Co.*,<sup>101</sup> Judge Posner's opinion for the court noted that a union breaches the duty of fair representation only if it refuses to represent an employee deliberately and without justification. "Negligence, even gross negligence . . . is not enough; and, obviously, intentional misconduct may not be inferred from negligence, whether simple or gross. . . . [e]xtreme recklessness is so close to intentional wrongdoing that the law treats it as the same thing. . . ."<sup>102</sup>

*Superczynski v. P.T.O. Services, Inc.*<sup>103</sup> involved yet another return to the issue of the applicable standard of fair representation in cases involving a union's administration of a collective bargaining agreement. The Seventh Circuit again instructed that *Hoffman* "is the law of this circuit regarding the proof required of a plaintiff seeking to establish a breach of fair representation in an individual grievance proceeding . . . The union's misconduct must be intentional."<sup>104</sup> Judge Bauer's opinion for the court reviewed the analysis set forth in earlier Seventh Circuit opinions interpreting the Supreme Court's decisions in *Vaca*, *Lockridge*, and *Hines*.<sup>105</sup> In his view, those cases indicated that *Hoffman* correctly set "a stringent standard for proof of a union's breach."<sup>106</sup> Judge Bauer also expressly rejected the holdings and analyses of *Baldini*, *Gateway*, and *Spector Freight*. "*Hoffman* is controlling; a union member must show that his union deliberately failed to properly pursue his claim against the company."<sup>107</sup>

Notwithstanding the entrenchment of *Hoffman* as the definitive

99. 688 F.2d 32 (7th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1218 (1983).

100. *Id.* at 34. The court did not discuss its detour in *Spector Freight*. See also *United Steelworkers of Am. v. NLRB*, 692 F.2d 1052, 1057 (7th Cir. 1982) (per curiam) ("A union breaches the duty . . . if it acts on 'arbitrary, hostile, or bad faith grounds.'" (quoting *Hoffman*, 658 F.2d at 522)) ("[o]nce having undertaken to process an employee's grievance, a union may not arbitrarily ignore it or handle it in a perfunctory manner").

101. 697 F.2d 771, 778 (7th Cir. 1983), later appeal, 790 F.2d 1341 (7th Cir. 1986).

102. *Id.* at 778 (citations omitted). In *Graf*, a case arising under the Railway Labor Act, the local chairman of the union inadvertently failed to submit an appeal challenging the employee's discharge for falsification of forms. Judge Posner found that the union official was not "trying to do in" the plaintiff, nor did his memory lapse "signify such a reckless indifference . . . that it can be called intentional misconduct." *Id.* at 779.

103. 706 F.2d 200 (7th Cir. 1983).

104. *Id.* at 202 (citations omitted).

105. See *supra* notes 19-33 and accompanying text.

106. 706 F.2d at 203.

107. *Id.*

standard in the Seventh Circuit, plaintiffs continued to bring, and the court continued to reject, unfair representation claims brought under negligence theories.<sup>108</sup> The court recently received yet another opportunity in *Camacho v. Ritz-Carlton Water Tower*.<sup>109</sup> There, an employee discharged for leaving work early was represented at a grievance hearing by a union business agent. The grievance was denied at the hearing and the union declined to take the employee's case to arbitration. Alleging that the union business agent was such an inferior advocate that he was denied fair representation, the employee filed suit. The district court granted the employer's motion for summary judgment, concluding that the employee had not established that the union engaged in intentional misconduct.

On appeal, the Seventh Circuit affirmed. In his opinion for the court, Judge Easterbrook declined the plaintiff's request to overrule *Hoffman* and replace it with a causation standard: a union "is not liable . . . for careless or bone-headed conduct. When the prohibition is directed against the motive rather than the result, it is necessary to use the standard of intent or recklessness (from which intent may be inferred)."<sup>110</sup> He also rejected the plaintiff's argument that *Hoffman* should be overruled as inconsistent with *Hines v. Anchor Motor Freight*.<sup>111</sup> Judge Easterbrook noted that *Hines* summarized the nature of the union's breach as that which is based on lack of good faith and honesty, dishonest and bad faith representation, or malfeasance.<sup>112</sup> *Hines*, he concluded, "did not consider the question we address today, but the language of *Hines* does not cast *Hoffman* to the wolves."<sup>113</sup>

Four rationales were offered by Judge Easterbrook in support of the intentional misconduct standard. First, he stated that any other standard would involve the courts in the merits of employment decisions:

A court could not implement a standard based on causation—Did perfunctory handling cause an employee to lose a meritorious griev-

108. See, e.g., *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983). In *Dober*, Judge Posner, writing for the court, applied *Hoffman* in a case involving a plaintiff's challenge of the union's conduct in representing him at a grievance hearing. Noting that *Dober* was not a case in which the union failed to properly represent a worker because he was in disfavor with the union, or was not a union member, or was a member of a racial or minority group, Judge Posner instructed that the Seventh Circuit limits suits for breach of the duty to instances of intentional misconduct; inept, lackluster, or careless representation is not enough. *Id.* at 294.

Concurring, Judge Cudahy again maintained that the Supreme Court's *Vaca* standard could not be narrowed to intentional misconduct. *Id.* at 297 (Cudahy, J., concurring).

109. 786 F.2d 242 (7th Cir.), cert. denied, 106 S. Ct. 3282 (1986).

110. *Id.* at 244 (citation omitted).

111. See *supra* notes 29-33 and accompanying text.

112. 786 F.2d at 246.

113. *Id.*

ance?—without deciding which grievances are meritorious and which are not. That would move the locus of decision from the grievance-arbitration process to the courts, and the movement would both violate the contractual allocation of decision making power and undermine the national policy favoring nonjudicial disposition of labor disputes.<sup>114</sup>

Second, continued Judge Easterbrook, a negligence/causation standard would interfere with the right of employees to choose the level of care they were willing to “pay” for. Business agents are not lawyers or private investigators, he noted, and a higher quality of representation would require a greater expenditure of limited union funds which may be allocated for a strike fund or other union function.

Third, Judge Easterbrook concluded that a union could determine, without breaching its duty, that “the employees as a group are better off displaying a cooperative and conciliatory spirit than showing arms in every encounter over a discharge.”<sup>115</sup> Imposition of a causation standard would compel a union to change its resource allocation which, in turn, would undercut the right of employees “to control their own destiny.”<sup>116</sup> The causation standard could also result in an increase in the level of grievances pursued through the grievance-arbitration procedure, and employers could seek to reduce employee access to the grievance machinery; thus, argued Judge Easterbrook, a union must be able to settle grievances short of arbitration. In his view, any resulting dissatisfaction with a reduced level of representation could be remedied by the employees’ installation of a new representative.

Finally, Judge Easterbrook reasoned that because a union has little incentive to cooperate with the employer in litigation when the plaintiff offers the union immunity, the *Hoffman* standard protects employers from the risk of union-employee collusion. Although noting that the employer’s liability for damages has been limited in fair representation cases,<sup>117</sup> he opined that a union and employee are not prevented from joining together against the employer. Thus, although other circuits have adopted a negligence/causation standard,<sup>118</sup> the *Ritz-Carlton* court reaffirmed that *Hoffman* governs and will continue to govern in the Seventh Circuit until the Supreme Court resolves the split among the circuits.<sup>119</sup>

114. *Id.* at 244 (citation omitted).

115. *Id.* at 245.

116. *Id.*

117. *See Bowen v. United States Postal Serv.*, 459 U.S. 212, 222 (1983) (discussed *supra* note 90).

118. *See supra* Part III.

119. *Ritz-Carlton*, 786 F.2d at 246. Judge Cudahy, registering his continuing disagreement with the *Hoffman* rule, nevertheless concurred that *Hoffman* is the rule in the Seventh Circuit. *Id.*

The Seventh Circuit's formulation of the *Hoffman* standard reflects an approach by the Court which is attractive in several respects. *Hoffman* establishes a clear and easily applicable fair representation standard by which a union's conduct may be measured and thus eliminates the confusion and difficulty often expressed by courts attempting to define and apply broad notions such as "arbitrariness" and "negligence". In addition, greater finality will be afforded the contractual grievance-arbitration machinery where it is more difficult for aggrieved employees to establish a breach of the union's duty of fair representation, for the employees must first overcome the doctrinal hurdle of demonstrating unlawful representation before challenging the underlying employer action. Further, an intentional misconduct standard may allow unions more flexibility in making both routine and difficult decisions with respect to administration of the collective bargaining agreement. By requiring a showing of deliberate and hostile motivation, the Seventh Circuit has reduced the practical need of the union to measure its conduct in terms of potential subsequent exposure to fair representation litigation, a consideration which may otherwise lead to the arbitration of a greater number of grievances.<sup>120</sup> Thus, the *Hoffman* standard may promote the finality of employment decisions as determined by the contractual grievance-arbitration procedure.

Interestingly, an additional factor suggested by Judges Posner and Easterbrook, that of extreme recklessness, arguably encompasses conduct which would otherwise fall outside of the intentional misconduct standard of *Hoffman*. In *Graf*, Judge Posner opined that extreme recklessness is so close to intentional misconduct that "the law treats it as the same thing."<sup>121</sup> Likewise, in *Ritz-Carlton*, Judge Easterbrook noted that the "standard of intent or recklessness (from which intent may be inferred)" is the proper standard to be applied in fair representation

(Cudahy, J., concurring). See also *NLRB v. Local 139, Operating Eng's*, 796 F.2d 985, 993 (7th Cir. 1986) ("this court interprets *Vaca v. Sipes* as requiring intentional union misconduct to show a breach of the duty of fair representation").

For examples of district court application of *Hoffman*, see *Mechmet v. Four Seasons Hotels, Ltd.*, 639 F. Supp 330 (N.D. Ill. 1986); *Gorski v. Local Union 134, IBEW*, 636 F. Supp 1174 (N.D. Ill. 1986); *Wagner v. Owens-Illinois, Inc.*, 622 F. Supp. 29 (N.D. Ill. 1985); *Harbers v. Shop 'N Save Warehouse Foods, Inc.*, 605 F. Supp. 244 (S.D. Ill. 1985); *Williams v. National Can Corp.*, 603 F. Supp. 1268 (N.D. Ind. 1985); *Faraciano v. Miller Brewing Co.*, 582 F. Supp. 1262 (E.D. Wis. 1984); *Kaftantzis v. D & L Transp. Co.*, 531 F. Supp. 566 (N.D. Ill. 1982).

120. Union attorneys have stated that it is "much cheaper and more sensible to arbitrate cases of doubtful merit than to go to the greater expense and more time-consuming effort involved in defending a breach case in court." Schwartz, *Different Views of the Duty of Fair Representation*, 34 LAB. L.J. 415, 425-26 (1983). Thus, the grievance-arbitration machinery of a collective bargaining agreement would be overwhelmed by the large influx of grievances with a consequent increase in the costs of administering the bargaining agreement.

121. 697 F.2d at 778 (discussed *supra* text accompanying notes 101-102.).

cases.<sup>122</sup> These references to recklessness raise the questions of what constitutes sufficiently reckless conduct, and whether unintentional conduct by the union can amount to reckless, and therefore unlawful, conduct. Suppose, for example, that a union official repeatedly “forgets” to timely file grievances on behalf of employees and that the union, aware of this problem, does nothing to correct it. Is this “reckless” conduct as that term is understood by the judges? Is a reckless conduct standard any more susceptible to consistent application than an arbitrary or perfunctory standard?

*Hoffman* represents a minority view with respect to the standard to be applied in contract administration duty of fair representation cases. As set forth above, the Seventh Circuit has reasoned that the intentional misconduct standard operates to promote the federal labor policy of non-judicial disposition of labor disputes while protecting the decision-making power of both unions and workers. Further, in the court’s view, the *Hoffman* standard eliminates the possibility of collusion between employee and union and thus protects the employer from litigation directed more at regaining the employee’s job than at proving unfair representation by the union. By narrowing the fair representation standard and limiting union and employer exposure to liability, the Seventh Circuit rule best accommodates the interests of those segments of the labor-management community.

When viewed only through the prism of employee interests, of course, the Seventh Circuit’s standard may appear less attractive. The *Hoffman* standard may not have the equitable appeal of the negligence/causation standard adopted by other courts because of the seemingly harsh result of a complete foreclosure of an employee’s appeal of an adverse employment decision where a union inadvertently fails to process a grievance. Moreover, *Hoffman* rejects the normative standards of contractual rights, procedural due process, and duty of care,<sup>123</sup> for it excuses all union conduct not motivated by discriminatory or other invidious reasons. Thus, absent a “smoking gun”, employees will face an unfriendly judicial reception when pursuing hybrid section 301/duty of fair representation cases in courts within the jurisdiction of the Seventh Circuit.

## V. CONCLUSION

The Seventh Circuit has charted its own course in duty of fair representation cases involving the administration of collective bargaining

122. 786 F.2d at 244.

123. See *supra* notes 36-39 and accompanying text.

agreements. In adopting an intentional misconduct standard, the court has consistently held that a union does not breach its duty of fair representation in the absence of evidence demonstrating that the union acted in a deliberate and discriminatory fashion. This view of the doctrine of fair representation, while contrary to the view of the majority of the federal courts of appeals, is, and will remain, the definitive analysis applied by the Seventh Circuit. As Judge Easterbrook stated in *Ritz-Carlton*, “[o]ne day the Supreme Court will resolve these recurring differences . . . [u]ntil that day, however, *Hoffman* stands.”<sup>124</sup>

124. *Ritz-Carlton*, 786 F.2d at 246.