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Post-V ACA Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units

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COMMENTS

POST-*VACA* STANDARDS OF THE UNION'S DUTY OF FAIR REPRESENTATION: CONSOLIDATING BARGAINING UNITS

I. INTRODUCTION

Thirty years ago, the Supreme Court announced that since section 2 of the Railway Labor Act[1] entitled a labor union to be the exclusive representative of all the employees in a bargaining unit for purposes of collective bargaining if designated as such by a majority of the employees in the unit, it was implicit that there was the duty on the part of the union to represent all of the employees in the unit fairly and in good faith.[2] Inasmuch as section 9 of the National Labor Relations Act[3] contains a similar exclusivity provision, the duty of fair representation was thereafter imposed upon those unions certified under that Act.[4] In the early decisions involving this principle, the union's duty was cast in broad, vague terms. The union was to represent its member employees fairly, impartially, and in good faith, avoiding hostile discrimination, in both the negotiation and administration of the collective bargaining agreement.[5]

In 1967, in *Vaca v. Sipes*,[6] the Supreme Court made its most comprehensive pronouncement concerning the nature of the duty of fair representation. This Comment will initially focus on the application of the *Vaca* standards by the lower federal courts and the National Labor Relations Board (NLRB or Board). The focus will shift for the remainder to examine the related questions of what special problems a union faces in fulfilling its duty of fair representation in the area of the consolidation of separate seniority rosters following the merger of two or more bargaining units; and how a broad reading of *Vaca* would best protect the interests of the individual employee without undermining the function of the union as the representative of its members.

II. *Vaca v. Sipes*

In order to adequately discuss the *Vaca* decision, a brief overview of the facts is first necessary. Owens, a member of Local No. 12 of the National Brotherhood of Packinghouse Workers having a history of high blood pressure, was employed by Swift & Co. In 1959, he entered the hospital on sick leave from his employment. After several months' rest, he was

1. 45 U.S.C. § 152 (1970).
2. Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944).
3. 29 U.S.C. § 159 (1970).
4. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953).
5. Humphrey v. Moore, 375 U.S. 335, 350 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953); Railroad Trainmen's Union v. Howard, 343 U.S. 768, 773 (1952); Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944).
6. 386 U.S. 171 (1967).

certified by his family physician as physically able to return to his heavy work at Swift, but Swift's doctor refused to certify his health for reinstatement. Owens consulted with his union, and a grievance was filed with Swift on his behalf. After the grievance reached the fourth step of the five-step grievance procedure established by the collective bargaining agreement,[7] the union decided to send Owens to another doctor, at union expense, to determine if the evidence was sufficient to succeed at arbitration, the fifth step in the grievance procedure. Upon receiving an unfavorable report, the union's executive board voted not to take the grievance to arbitration. The union advised Owens to accept Swift's offer of referral to a rehabilitation center, but Owens insisted on proceeding to arbitration and filed suit against the union in a Missouri state court, alleging that its refusal to take his grievance to arbitration was a breach of its duty of fair representation.[8]

The case eventually reached the United States Supreme Court.[9] The Supreme Court stated that in order for a union to breach its duty of fair representation, the union's conduct toward the individual employee must be "arbitrary, discriminatory, or in bad faith."[10] Applying this standard to the situation of processing a grievance, the Court indicated that the union would not be held to have breached its duty for merely having failed to

7. In steps one and two of the grievance procedure, either the aggrieved employee or the union's representative presented the grievance, first orally to Swift's department foreman, and then in writing to the division superintendent. In step three, the grievance committees of the union and management met, the company being required to state its position in writing. Step four consisted of a meeting between Swift's general superintendent and representatives of the national union. The fifth and final step was arbitration. *Id.* at 175 n.3.

8. *Id.* at 173–76.

9. A jury returned a verdict for Owens awarding compensatory and punitive damages, which the trial court set aside on the ground that Owens' complaint stated an arguable unfair labor practice under section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b) (1970), within the exclusive jurisdiction of the National Labor Relations Board (NLRB), 386 U.S. at 173. The Kansas City Court of Appeals affirmed the dismissal for lack of jurisdiction, but the Supreme Court of Missouri reversed and reinstated the jury verdict. Sipes v. Vaca, 397 S.W.2d 658, 666 (Mo. 1966).

Ultimately, the United States Supreme Court resolved this issue by exempting cases involving the duty of fair representation from the exclusive jurisdiction of the NLRB, even though these claims may state meritorious grounds for a finding of an unfair labor practice. The Court left open the issue of whether the union's breach of its duty of fair representation was an unfair labor practice. However, the Court stated that, assuming such a breach is an unfair labor practice, the NLRB nevertheless did not have exclusive jurisdiction where the employee's claim against the union was tied to a breach of contract action against the employer under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970) (*see* note 22 *infra*). 386 U.S. at 176–88.

It should be pointed out, however, that it would be surprising if the Supreme Court were ultimately to determine that a breach of the duty of fair representation does not constitute an unfair labor practice, due to the fact that the NLRB has been treating it as such for twelve years, ever since its decision in Miranda Fuel Co., 140 N.L.R.B. 81 (1962), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963).

The issue of the Board's preemption of these claims is beyond the scope of this Comment. For its treatment in *Vaca* as well as a general discussion of the preemption doctrine, *see* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 163–74 (1968); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1517–23 (1963); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81, 85–99 (1967); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 563 (1963).

10. 386 U.S. at 190.

take a grievance to arbitration, because the employee has no absolute right to compel his union to take such action.[11] Furthermore, the Court reasoned, mere proof that the grievance was meritorious would not be sufficient to demonstrate breach of the union's duty.[12] However, the Court indicated that a union could not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion,"[13] and that in weighing the merits of the grievance, a union must act "in good faith and in a nonarbitrary manner."[14] With respect to Owens' grievance, the Court observed that the union diligently supervised the grievance into the fourth step of the grievance procedure, with the business representative serving as Owens' advocate. Since Owens presented the union with medical evidence supporting his position, the Court continued, the union may well have breached its duty had it ignored the grievance, or processed it in a perfunctory fashion.[15] However, the record disclosed that the union had attempted to gather evidence favorable to Owens' grievance through a union-financed physical examination, and had concluded that arbitration would be futile only after the results of the examination proved unfavorable. After noting that there was no evidence to indicate that any union officer had been personally hostile to Owens, or that the union had acted in other than good faith at any time, the Court concluded that the union had not breached its duty in this case.[16]

While many of the earlier cases involving a union's duty of fair representation were primarily concerned with discrimination born of bad faith

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11. *Id.* at 191. In a dissenting opinion, Justice Black argued for an employee's right to compel the union to prosecute all "serious" grievances through arbitration. *Id.* at 209–10 (Black, J., dissenting). Others have suggested that an employee has the right to take *every* grievance to arbitration. *See* Donnelly v. United Fruit Co., 40 N.J. 61, 83–93, 190 A.2d 825, 836–42 (1963); Murphy, *The Duty of Fair Representation under Taft-Hartley,* 30 Mo. L. REV. 373, 389 (1965); Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. REV. 362, 399–404 (1962); *Report of Committee on Improvement of Administration of Union-Management Agreement,* 1954, 50 NW. U.L. REV. 143, 188 (1955) [hereinafter cited as *Report*].

The majority of the Court justified the union's discretion in taking grievances to arbitration on three grounds. First, the Court observed that this procedure would weed out frivolous claims prior to a costly arbitration; second, it would assure consistent treatment of similar complaints and perhaps lead to the identification and resolution of major problem areas in the interpretation of the collective bargaining agreement; and third, it would further the interest of the union as the statutory representative of all the employees in administering the collective agreement. 386 U.S. at 191–92.

12. 386 U.S. at 192–93. The Missouri Supreme Court had determined that the controlling issue was whether the evidence adduced at trial supported Owens' assertion that he had been wrongfully discharged by Swift (*i.e.,* his grievance was meritorious), and that, if it did, the union's refusal to process the grievance through arbitration was arbitrary and in breach of its duty. *Id.* at 189–90.

13. *Id.* at 191.

14. *Id.* at 194.

15. *Id.*

16. *Id.* at 194–95. An ironic note in the circumstances of the case further justified the decision that the union's failure to proceed to arbitration with Owens' grievance was based on its good faith doubt as to his physical fitness. Before the case reached the Court for review, Owens died of hypertension, just as the union's doctor said he would have, had he returned to work. *See* Feller, *Vaca v. Sipes: One Year Later,* 21ST ANN. N.Y.U. CONF. ON LABOR 141, 166 (J. Christensen ed. 1969).

or hostility,[17] the *Vaca* formulation added the term "arbitrary." That this was not unintended is evidenced by the Court's repeated use of and reference to the term "arbitrary" throughout the opinion.[18] 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,[19] although the opinion is devoid of elaboration. 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.[20] Thus, a breach of the union's duty of fair representation for failing to take a grievance to arbitration could be premised on a refusal to process the grievance for *no* reason, or for an objectively insufficient reason, in addition to bad faith conduct.

In a lone dissent,[21] Mr. Justice Black criticized this addition to the previously-used bad faith standard. While sympathetic to the plight of the individual employee, Justice Black felt that the majority's "vague phrase" was not explained sufficiently to permit jury application.[22] In the seven

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17. *See, e.g.,* Humphrey v. Moore, 375 U.S. 335, 350 (1964); Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944). *Cf.* Railroad Trainmen's Union v. Howard, 343 U.S. 768, 773 (1952).

18. 386 U.S. at 183, 190–91, 193–94. Both the Fourth and Ninth Circuits have held that this repeated usage indicates a calculated expansion of the gamut of proscribed conduct. *See* Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972). At least one commentator seems to concur in this reasoning. *See* Feller, *supra* note 16, at 167.

19. Both the Fourth and Fifth Circuits view the *Vaca* test as being one having three separate standards for measuring the union's duty. Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972). *But see* Jones v. TWA, Inc., 495 F.2d 790, 798 (2d Cir. 1974).

20. *Cf.* Lewis, *supra* note 9, at 107. In discussing the union's handling of Owens' grievance, the Court stated that a union must assess the merits of each grievance "in good faith and in a nonarbitrary manner." *See* note 14 and accompanying text *supra.* The use of the conjunctive here suggests that "arbitrary" is an objective standard against which conduct executed in good faith will be measured.

21. Four Justices joined in the majority opinion by Mr. Justice White. Mr. Justice Fortas, joined by the two remaining justices, concurred in the result because he believed that the NLRB had exclusive jurisdiction. 386 U.S. at 198–203 (Fortas, J., concurring).

22. 386 U.S. at 210 (Black, J., dissenting). Justice Black posed a question with regard to the definition of the standard which has since proved to be an interesting one: "Must the employee prove that the union in fact acted arbitrarily, or will it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration?" *Id.*

However, the main thrust of Justice Black's opinion was that an employee such as Owens should not have been required to prove the incidental claim of breach of the union's duty of fair representation when he sought direct judicial relief pursuant to a breach of contract claim against his employer under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970) (*see, e.g.,* Smith v. Evening News, 371 U.S. 195 (1962)).

Frequently, the employee's unfair representation claim against his union will be joined with a breach of contract action against the employer for violating the collective bargaining agreement. The latter claim is normally 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 may be properly invoked only against the employer. However, before bringing this action, the employee must initially exhaust the remedies provided in the collective bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). *Vaca* modified this procedural obstacle by permitting the employee to demonstrate that his failure to

years since *Vaca,* Justice Black's concern has been proved valid, not only by juries, but by the lower courts and the NLRB as well.

III. DECISIONS AFTER *Vaca*

As the discussion following will indicate, the courts have not been uniform in their application of *Vaca* to claims against unions for breaches of the duty of fair representation. Many still require a showing of bad faith as a prerequisite to a showing of a breach of the duty while several regard *Vaca* as having extended the liability of the union beyond the extreme instances of bad faith or hostile discrimination. Still others have read *Vaca* as subjecting the union to liability in situations where, in the absence of subjective bad faith, the union's decision to abandon a grievance was found to be without rational basis, as, for example, where the union made no effort to investigate the merits of the grievance. Some of these decisions have also emphasized *Vaca's* prohibition against a union's "perfunctory" processing of a grievance, a standard which also extends beyond bad faith conduct. While these courts uniformly recognize that ordinary negligence alone does not constitute a breach, they nonetheless have found the union liable for activity which fails to attain proportions of "hostility" toward the employee.

A. Bad Faith as a Prerequisite for Breach

Several courts have interpreted *Vaca* as requiring a showing of the union's bad faith in order to establish a breach of the duty of fair representation.[23] The most stringent standard to which an employee's proof must adhere is that propounded by the Second Circuit in *Cunningham v. Erie R. R.,*[24] wherein the court held that in order to establish liability on

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utilize the remedies under the contract was due to his union's refusal to process the grievance through the available procedures. 386 U.S. at 183–86.

Justice Black argued that the employee's burden to establish bad faith or arbitrary conduct by the union in order to sue the employer was intolerably great:

> The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer.

Id. at 203 (Black, J., dissenting). He proposed an absolute right in the employee to sue his employer. *Id.* at 208 (Black, J., dissenting). Justice Fortas, joined by Chief Justice Warren and Justice Harlan, concurred in the majority's disposition of *Vaca,* but regarded any discussion of § 301 problems as dicta. Nevertheless, he intimated that perhaps the employee *should* be able to sue his employer after showing that he demanded the union to process his grievance and that it refused to do so. *Id.* at 200 (Fortas, J., concurring). For further discussion of this problem, *see* Levy, *The Collective Bargaining Agreement as a Limitation on the Union Control of Employee Grievances,* 118 U. PA. L. REV. 1036 (1970); Lewis, *supra* note 9, at 93–95; Wellington, *supra* note 9, at 178–84.

23. *See* the cases discussed in Lehmann, *The Union's Duty of Fair Representation — Steele and its Successors,* 30 FED. B.J. 280, 283–85 (1971).

24. 266 F.2d 411 (2d Cir. 1959).

the part of the union, "[s]omething akin to factual malice is necessary."[25] While *Cunningham* was decided in 1959, the recent decision by the Second Circuit in *Jackson v. TWA, Inc.*[26] followed this test,[27] as did the decision of the Seventh Circuit in *Hiatt v. New York Cent. R.R.*[28] These two latter cases involved allegations by groups of employees that their respective unions had breached their duties of fair representation in agreeing to specific terms of the collective bargaining agreement.[29] Perhaps the use of the "factual malice" test is appropriate in the situation where one or more employees claim that the union had discriminated against a group of employees in agreeing to specific terms, as opposed to the instance wherein an employee asserts that the union has acted arbitrarily toward him or her *individually* in refusing to process a grievance. In the former case, the union rarely can be considered to have acted arbitrarily when it has acted in the interest of other members of the bargaining unit; the claim can only be based on discrimination against or malice towards the disgruntled employees.[30] Nevertheless, the phrase, "factual malice," appears to create a

25. *Id.* at 417. The court apparently meant "hostile discrimination" by its use of "factual malice": "The duty was no more than to forbear from 'hostile discriminations.'" *Id.* In other words, an employee would have to show a specific, antagonistic animus in order to establish a breach of duty. "The arbitrariness shown must be of the bad faith kind." *Id.*

26. 457 F.2d 202 (2d Cir. 1972).

27. *Id.* at 204.

28. 444 F.2d 1397, 1398 (7th Cir. 1971). Without mentioning *Vaca,* the court utilized the term "arbitrariness," but used it in the sense of bad faith amounting to "factual malice." *Id.*

29. In *Jackson,* senior flight engineers sued their union, the Airline Pilots Association, for breach of its duty of fair representation in adopting a retirement plan which allegedly deprived plaintiffs of vested rights. 457 F.2d at 203–04. In *Hiatt,* the jobs of the plaintiffs-switchtenders were eliminated by automation. The employees alleged that the union had breached its duty in agreeing that they should be entitled to take new positions as brakemen rather than positions in another category. 444 F.2d at 1397.

30. This distinction is suggested in another post-*Vaca* case in the Second Circuit, Simberlund v. Long Island R.R., 421 F.2d 1219 (2d Cir. 1970). In that case, the employer, during the renegotiation of the contract, offered a wage increase for all employees if the union would agree to withdraw all pending grievances, including the plaintiffs' claims for back pay and loss of seniority. After a discussion with the plaintiffs, the union informed them that their claims were without merit, and thereafter agreed to withdraw all grievances in return for the wage increase. *Id.* at 1222–23. The Second Circuit observed that a bargain which favors one group of employees over another is not unlawful "if it appears reasonable and if it is made in good faith," and included "factual malice" as an element of proof, citing *Cunningham. Id.* at 1227. The court concluded that no evidence indicated bad faith by the union and that, since the union had considered the merits of the grievances, its conclusion that they lacked merit and its subsequent trading-off of the claims for benefits for all the employees were reasonable. *Id.* However, in discussing the union's treatment of the *individual* grievances, as opposed to the wage increase agreement with the employer, the court cited the arbitrariness standard of *Vaca,* stating that the union would have been liable had it ignored a grievance or processed it in a perfunctory manner. *Id.* at 1225–26. for a brief discussion of trade-off agreements such as that which appeared in *Simberlund, see* note 43 *infra.*

The distinction between the union's representation of the grievance of a group of employees and the representation of one employee's grievance is also implicit in Pirone v. Penn Central Co., 370 F. Supp. 172 (S.D.N.Y. 1974), where one group of employees alleged that the union had breached its duty to represent them fairly in formulating a seniority list following the merger of their employer and a second employer whose employees were members of the same union. *Id.* at 2411. The court, citing *Vaca* and *Cunningham,* stated that the plaintiffs had failed to sustain their burden of proof because they had not shown "unlawful discrimination." *Id.* at 2414.

more demanding standard than that warranted even by a narrow reading of *Vaca,* and thus, as one commentator has observed, "goes too far."[31]

Other courts have imposed standards which would appear to be less stringent than the "factual malice" test. Note that all of these cases concern a claim that the union has not satisfactorily processed a grievance. A district court in the Sixth Circuit recently held that *Vaca* required either a showing of bad faith or proof that the union official was personally hostile to the employee.[32] Similar language appeared in the NLRB's decision in *UAW (North American Rockwell Corp.).*[33] In *Rockwell,* two employees performing similar work filed grievances concerning their rates of pay under the collective bargaining agreement. One employee's grievance was taken to arbitration and his claim was upheld. The union failed to take the other employee's grievance to arbitration, relying on its interpretation of the collective bargaining agreement that the arbitrator was precluded from considering evidence which arose more than thirty days prior to the filing of the grievance. The NLRB's General Counsel deemed the union's construction of this provision unreasonable, but the Board held that, even though it may in fact have been unreasonable, the agreement was given the same construction in both the grievances in question and there was no evidence to indicate that the agreement had been construed differently in the past. The Board continued by noting that while in some cases the union's conduct may be so patently arbitrary that the union official's motive need not be shown, no evidence in the case before it disclosed personal animosity toward the individual employee, an element which the Board noted had been present in all its prior decisions on fair representation.[34] This requirement of personal hostility by a union official places a heavy burden of proof on the employee, perhaps as great a burden as the "factual malice" formulation utilized by the Second and Seventh Circuits.

This test is sufficiently similar to the "factual malice" standard to warrant the conclusion that the Second Circuit, at least, believes it is appropriate in cases of *group* grievances. *See also* Freeman v. Locomotive Eng'rs, 85 L.R.R.M. 2806 (S.D. Ga. 1973).

The standard utilized in *Pirone* apparently conflicts with that applied in Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974). In that case, the court applied the *Vaca* arbitrariness standard to the union's representation of new union members in formulating a seniority list following the change of a formerly non-union job category into one with a union classification. *Id.* at 798. For a more detailed discussion of the case, *see* note 105 *infra.* These two decisions could be reconciled on any one or all of three possible grounds. First, *Pirone* might be read as limiting the "unlawful discrimination" test to the union's role in consolidating seniority lists when members of the *same* bargaining unit are involved. Second, *Jones* may be limited to the special facts of the case. *See* note 105 *infra.* Third, even if the latter case is not limited to its facts, it may represent a new interpretation of *Cunningham,* the benefit of which the Southern District of New York did not have in *Pirone,* as it decided the case before the Second Circuit handed down *Jones.*

The fourth section of this Comment presents a more complete discussion of the union's duty of fair representation in consolidating seniority lists following a merger.

31. Lehmann, *supra* note 23, at 284.

32. Hines v. Teamsters Local 377, 84 L.R.R.M. 2649, 2651 (N.D. Ohio, Sept. 23, 1973).

33. 194 N.L.R.B. 1085 (1972).

34. *Id.* at 1087.

Other courts have held that bad faith is an essential element in claims for breach of the duty of fair representation.[35] In *Dill v. Greyhound Corp.*,[36] the Sixth Circuit required a showing of "fraud, misrepresentation, bad faith, dishonesty of purpose or such gross mistake or inaction as to imply bad faith."[37] The *Dill* court reversed the district court's decision that the union had breached its duty in failing to take an employee's seniority grievance to arbitration. Noting that while the district court had made a finding that the union had acted arbitrarily and in reckless disregard of the employee's rights, no finding of "hostility, malice or bad faith" was made.[38]

The Ninth Circuit also has applied a bad faith test to union conduct. In *Local 13, ILWU v. Pacific Maritime Association*,[39] a longshoreman, who was also an officer of the union local, was "deregistered"[40] as a longshoreman for instigating illegal work stoppages. His union local filed suit against the employer and the international union, alleging that he had been wrongfully "deregistered" and that the international union had breached its duty of fair representation at the arbitration hearing. The thrust of the employee's complaint was that the provision of the collective agreement relating to "deregistration" following an illegal work stoppage was not applicable to union officers. The Ninth Circuit reversed the trial court's granting of

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35. *See* Breish v. Local 771, UAW, 84 L.R.R.M. 2596, 2597-98 (E.D. Mich., Oct. 10, 1973); Bruen v. Local 492, IUEW, 313 F. Supp. 387, 393 (D.C.N.J. 1969), *aff'd*, 425 F.2d 190 (3d Cir. 1970).

In *Breish*, an employee was discharged by the company on the grounds that he had stolen some equipment. The employee alleged that the union failed to seek out witnesses and evidence to corroborate his story that he had had the company's permission to use the article in question. 84 L.R.R.M. at 2597. The court held that the union had no duty affirmatively to seek out information favorable to the employee, so long as this failure was not due to dishonesty of purpose. *Id.* at 2598. *Cf.* Bazarte v. United Transp. Union, 305 F. Supp. 443 (E.D. Pa. 1969), *vacated*, 429 F.2d 868 (3d Cir. 1970). In *Bazarte*, an employee who had been discharged was given a hearing before the employer, where he was represented by a union official. The district court found that the union had breached its duty since the union representative had failed to adequately and fully present the employee's case at the hearing. Moreover, the representative had failed to bring all the relevant facts to the attention of the other union officers who were preparing a defense. 305 F. Supp. at 444. The Third Circuit reversed, noting that negligence or poor judgment on the part of the union was not a breach. 429 F.2d at 872. *See* note 50 and accompanying text *infra*.

At least in cases in which the grievance procedure for discharges culminates in arbitration, the union's preparation and presentation of a claim should be scrutinized more closely than most courts have thus far been willing to do, since statistics reveal that arbitrators overturn the penalty of discharge in the majority of cases. One study of over 1,000 discharge cases between 1942 and 1956 revealed that the discharge penalty was revoked by arbitrators in 24 percent, reduced in 34 percent, and sustained in 41 percent of the cases. S. SLICHTER, J. HEALY & R. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 657 (1960) [hereinafter cited as SLICHTER]. Such findings should also bear upon a court's decision in cases where the union fails to carry a discharge grievance to arbitration. Professor Lewis argues that the union's duty of fair representation should be more stringently applied in discharge cases. *See* Lewis, *supra* note 9, at 122-26.

36. 435 F.2d 231 (6th Cir. 1970).

37. *Id.* at 238. The court quoted the pre-*Vaca* decision of Balowski v. UAW, 372 F.2d 829, 834 (6th Cir. 1967).

38. *Id. Cf.* Morris v. Werner-Continental, 466 F.2d 1185 (6th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

39. 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

40. The effect of this "deregistration" was to deprive the employee of any opportunity of obtaining work as a longshoreman on the Pacific coast. 441 F.2d at 1062-63.

summary judgment against the local and remanded for trial, finding that a jury might have inferred from the evidence that certain officers of the International, motivated in part by hostility toward the employee, sacrificed his interests in order to obtain a concession from the employer's association on another dispute involving a larger number of employees. The court was careful to note that mere proof that the union had "traded off" one dispute for a concession on another was not a breach, observing that the union might have chosen, in good faith, between two interpretations of an ambiguous contract provision.[41] Had the union's interpretation of the provision been patently unreasonable, however, the court noted that this in itself might support an inference of bad faith.[42] Thus, the court refused to condone a bad faith sacrifice of the rights of one employee in favor of the interests of a greater number of employees.[43]

This analysis by the Ninth Circuit points out one ambiguity in the Supreme Court's opinion in *Vaca*. It is clear from *Vaca* that a breach of the union's duty of fair representation is not made out solely by proving that the underlying grievance was meritorious.[44] The problem arises, however, with regard to the question of whether or not a court may delve into the merits of a grievance as one *factor* of the standard against which the union's conduct can be measured. The Second Circuit reads *Vaca* as

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41. *Id.* at 1067.

42. *Id.* at 1067–68 n.10.

43. The court stated:

> What we hold is that a union may not agree with an employer, either expressly or tacitly, to exchange a meritorious grievance of an individual employee for some other supposed benefit.

Id. at 1068 n.11.

The abandonment of grievances by the union in return for concessions by the employer presents a complex problem of conflicting interests. *See generally* J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT (1961); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25, 45–47 (1959). Professor Cox recognizes that some trading might be necessary in order to ensure smooth functioning of the collective bargaining machinery, but warns that such practices are susceptible to the extraneous influence of intra-union political pressure. Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L.J. 850, 854 (1957). For examples of these various extraneous pressures, *see Report, supra* note 11, at 153–56. In the *Report*, a study was conducted in which questionnaires were sent to labor lawyers. Of the 175 who responded, over two-thirds stated that, in their experience, meritorious grievances were "at times" ignored or traded away because of political pressures within the union. *Id.* at 156.

Professor Cox would negate the union's ability to surrender a grievance by an individual which relates to a claim for wages already earned. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 633 (1956). While his discussion is limited to grievances concerning wages, the language used by Professor Cox suggests that the union should be prohibited from compromising any claim by an employee which has accrued under the collective agreement. The difficulty with such proposals, however, is that they presuppose that there is but one "correct" interpretation of the contractual provision in question. In some cases, the provision will be clear and unambiguous, and thus susceptible to such an analysis. Very often, however, the provision will lend itself to multiple interpretations, all of which are reasonable. In fact, Professor Cox himself observes that the terms of a collective agreement often are intentionally left ambiguous to ensure that the agreement remains sufficiently flexible to allow future rule-making by the parties under the guise of interpretation. *Id.* at 625–26.

44. 386 U.S. at 195.

prohibiting a court from considering the merits of a grievance,[45] because of the following language contained therein:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. . . . Therefore, we conclude that the Supreme Court of Missouri erred in upholding the verdict in this case solely on the ground that the evidence supported Owens' claim that he had been wrongfully discharged.[46]

It may be maintained, however, that this language merely restates the prohibition against the use of proof of a meritorious grievance as the *sole* ground for establishing a breach, while allowing such proof as evidence probative of the fact of the union's good faith. This argument is strengthened by the Court's observation that the union "may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[47] Without the power to determine if the grievance is meritorious, a court would be unable to utilize this standard. Moreover, the Court argued that the union's incentive to settle a grievance short of arbitration would be materially reduced if it could be held in breach of its duty solely by a subsequent finding by a jury that the grievance had merit. While this may be valid, a union would not be as inhibited in its dealings if the jury's findings were only one consideration of many to be weighed as evidence of the union's conduct. The only effect of such an approach would be to cause the union to be more circumspect when weighing the merits of an employee's grievance in order to ensure its good faith, surely a salutary result.[48]

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45. Simberlund v. Long Island R.R., 421 F.2d 1219, 1225–26 (2d Cir. 1970). One commentator concurs, observing that *Vaca* holds a court's consideration of the merits of the grievance to be reversible error. Kroner, *The Individual Employee — His "Rights" in Arbitration After Vaca v. Sipes,* 20TH ANN. N.Y.U. CONF. ON LABOR 75, 78 (J. Christensen ed. 1968).

46. 386 U.S. at 192–93.

47. *Id.* at 191.

48. The Ninth Circuit, in Local 113, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), indicated that the merit of the grievance was an important consideration in assessing the union's good faith. 441 F.2d at 1067–68, nn.10, 11.

Justice Black, in his dissent in *Vaca,* read the majority opinion as permitting an inquiry into the merits of a grievance. 386 U.S. at 210 (Black, J., dissenting). Professor Kroner, while disagreeing with Justice Black's reading of *Vaca,* nonetheless argues that such an inquiry by a court is necessary in order to enforce the standard adequately, as well as to explain the results in several prior cases. Kroner, *supra* note 45, at 79–84. One prior decision by the Supreme Court, not mentioned by Professor Kroner, included an analysis which suggested that judicial inquiry into the merits of a grievance was an important consideration in assessing the fairness of union conduct. *See* text accompanying note 127 *infra.*

A related point is the implication in *Vaca* that if a court determines the grievance to be *without merit,* then the union cannot be held in breach of its duty, since no harm is suffered by the employee. This interpretation is drawn from the section of the Court's opinion in *Vaca* concerning the apportionment of damages between the union and employer when the union is found to have unfairly represented grievant. The Court observed that if the company's breach of contract triggered the controversy (*i.e.,* the grievant's claim was meritorious), the union cannot be held

The courts that have required the employee to allege and prove personal hostility or other bad faith conduct on the part of the union have placed a heavy burden on the employee plaintiff. This is particularly true if the

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responsible for those damages which were proximately caused by the company's breach. 386 U.S. at 195–98. The Court notes that "all or almost all" of the damages suffered in such cases would be attributable to the employer, irrespective of the union's conduct in handling the grievance. *Id.* at 197–98. *But see* Czosek v. O'Mara, 397 U.S. 25 (1970), where the Court states that, in circumstances the same as those in *Vaca,* a union may be responsible for damages which result from its unfair refusal to process a grievance "to the extent that its refusal to handle the [grievance] added to the difficulty and expense of collecting from the employer." *Id.* at 29.

It might be argued that *Vaca*'s implication that an employee suffers no damage when his union fails to process an unmeritorious grievance is invalid as a blanket proposition in view of the realities of the collective bargaining process. One study has shown that 58 per cent of the discharge penalties are either revoked or reduced when brought to arbitration. SLICHTER, *supra* note 35, at 657. The implication is, of course, that the discharged employee has a substantial chance of at least reducing the penalty if the union proceeds to arbitration. While these figures might be misleading because many unmeritorious grievances might not have been taken to arbitration, the fact remains that very often an arbitrator will reduce a discharge penalty even if the grievance is unmeritorious. Moreover, an employer may concede to an unmeritorious grievance in return for acquiescence by the union on another matter or for some other reason which would be in the employer's self interest. *See generally* J. KUHN, *supra* note 43. Consequently, an employee with an unmeritorious grievance would lose the opportunity to have the arbitrator at least consider his claim or the employer concede to his demand, if the union fails to press his claim.

While this analysis may be theoretically sound, the practical problem of fashioning an effective remedy remains a formidable barrier to its utility. For if the employee was justifiably discharged, reinstatement under court order would be an inappropriate remedy, inasmuch as the company was concededly correct in its actions. Perhaps a monetary damage award against the union might be appropriate, but determining the amount of loss occasioned by the union's conduct would be highly speculative. The only equitable remedy, from the viewpoint of the union and the company, would appear to be an order directing the parties to arbitrate the grievance (assuming, of course, that the collective agreement provides for arbitration). While this remedy is attractive, it is not without its problems. An order to arbitrate is effective only if it is binding on both the company and the union. Should the court or the Board be unable to obtain jurisdiction over either the company or the union, an arbitration order would often be rendered ineffectual, as is evidenced by a recent Board decision. In Local 485, IUE (Automotive Plating Corp.), 170 N.L.R.B. 1234 (1968), an employee filed unfair labor practice charges with the Board, alleging that the union breached its fair representation duty in failing to grieve his discharge by the company. The Board found for the employee. As it lacked jurisdiction over the company, however, it could only order the union to "request" the company to consider the grievance and to arbitrate it should that be necessary. *Id.* at 1235. The union complied with the Board's order, but the company declined its request to consider the grievance. The Board then issued a supplemental order which required the union to be responsible for the employee's lost wages from the date that he requested the union to grieve his discharge until "such time as the Respondent [union] fulfills its obligation of fair representation . . . ." Local 485, IUE (Automotive Plating Corp.), 183 N.L.R.B. 1286 (1970). While this order resolved the arbitration dilemma, it failed to take into account language in *Vaca* to the effect that monetary damages in such cases must be apportioned between the union and the employer. The Second Circuit pointed this out when it denied enforcement to the Board's order. NLRB v. Local 485, IUE, 454 F.2d 17, 22–23 (2d Cir. 1972).

Despite these remedial problems, the Board is apparently willing to hold the union in breach of its duty of fair representation although the grievance is demonstrated to be meritless. In Teamsters Local 705 (Associated Transport Co.), 209 N.L.R.B. No. 48, 5 CCH LAB. L. REP. ¶ 26,271 (Feb. 28, 1974), the union was held to have breached its duty when it totally undermined the employee's grievance presentation before a joint grievance committee. (For a brief discussion of joint grievance committees, *see* note 116 *infra*). The Board, however, agreed with the finding of the administrative law judge that the employee's underlying grievance was without merit: thus no affirmative relief was ordered. *Id.* at 1121. Such a result, while pleasing to some theoreticians, is of no consolation to the disgruntled employee.

Second Circuit's interpretation that *Vaca* prohibits a court from assessing the merits of the employee's grievance is followed by other courts. If *Vaca* is to be thus interpreted as limiting a union's liability to instances of bad faith or hostile discrimination against employees, then the standard for the breach of the duty has remained constant since the fair representation principle was first announced.[49]

B. Duty Breached Without a Finding of Bad Faith

In contrast to the decisions holding that either bad faith or hostile discrimination by the union is a requisite for breach, several courts have read *Vaca* as expanding the standard for breach that had previously existed, and have found the union liable for conduct not rising to the level of bad faith. At the outset it is important to observe, however, that even these cases refuse to recognize mere negligence as a breach of the duty.[50]

In *Griffin v. UAW*,[51] the Fourth Circuit reasoned that the repeated references to "arbitrary" in *Vaca* reflected a calculated broadening of the standard of fair representation.[52] In *Griffin*, an employee was discharged by the company for his having engaged in a fist fight with a fellow employee who was the union officer with whom plant grievances were to be filed. The court held that, while the union may have acted in good faith, its requirement that the employee file a grievance with the man involved in the fight was equivalent to ignoring the grievance or handling it in a perfunctory manner, thereby violating the "arbitrary" standard of *Vaca*.[53] The Fourth Circuit's notion of "arbitrary" is indicated by its observation that "a union must especially avoid *capricious* and arbitrary behavior in the handling of a grievance based on a discharge — the industrial equivalent of capital punishment."[54] The term "capricious" indicates that the union

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49. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

50. *See* Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Brough v. Steelworkers Union, 437 F.2d 748, 750 (1st Cir. 1971); Dill v. Greyhound Corp., 435 F.2d 231, 238 (6th Cir. 1970); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir. 1970); Dill v. Wood Shovel & Tool Co., 80 L.R.R.M. 2445, 2448 (S.D. Ohio 1972).

See Hanslowe, *supra* note 43, at 47–48, where the author discusses the difficulties which would be experienced in establishing equitable standards, should a "negligence" test be adopted.

One observer argues that negligence — particularly gross negligence — should constitute a breach for which the union should be liable. Tobias, *A Plea for the Wrongful Discharged Employee Abandoned by his Union*, 41 U. CINN. L. REV. 55, 73–77 (1972). Tobias argues that even if the union cannot be held liable for mere negligence, the employee should be able to sue the employer for breach of contract upon a showing that the union negligently failed to press his claim, since "no public policy is served by allowing the employer to hide behind the union's derelictions of duty." *Id.* at 76.

51. 469 F.2d 181 (4th Cir. 1972).

52. *Id.* at 183. *Accord*, Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972). Professor Feller makes a similar observation. *See* Feller, *supra* note 16, at 167–68.

53. 469 F.2d at 184.

54. *Id.* at 183 (emphasis added). Professor Lewis also would scrutinize more closely union handling of discharge grievances. *See* Lewis, *supra* note 9, at 122–26.

should be liable when it fails to process a grievance for no rational reason as well as for a bad faith one.[55]

In *Retana v. Apartment Operators Local 14*,[56] the Ninth Circuit also read *Vaca's* "arbitrary" language as increasing the union's obligations,[57] in contrast to its decision in *Pacific Maritime*.[58] The court found that the complaint brought by several Spanish-speaking employees in a predominately Spanish bargaining unit stated a cause of action for breach of the duty in that it alleged that the union failed to provide a bilingual liason between the union and the members; failed to provide the members with a Spanish translation of the collective bargaining agreement or explain to them their rights under it; and failed to provide a bilingual supervisory system to direct them in their jobs. Although these allegations, if proven, would arguably support a finding of bad faith, the court made it clear that such a finding was not necessary.[59]

In *DeArroyo v. Sindicato de Trabajadores Packinghouse*,[60] several employees complained to their union that they had been discharged in contravention of the seniority provisions of the collective bargaining agreement had with the company, since they had had greater seniority than some of the employees who were retained. The agreement provided that seniority would control the order of discharge, provided the qualifications of the affected employees were equal.[61] The union failed to take the claims through the grievance procedure, and the employees filed suit. The First Circuit ruled out the possibility of bad faith, hostility, discrimination, or dishonesty on the part of the union, but observed that *Vaca* also condemned the "arbitrary and perfunctory handling by a union of an apparently meritorious grievance."[62] The court held that this latter standard had not been met since the evidence disclosed that only one of the plaintiff's complaints had been investigated by the union,[63] and that the jury's finding that their grievances were meritorious was supported by the evidence.[64] The testimony indicated that the union president had not filed these grievances because he believed that the propriety of the discharges would be determined by the Board in connection with a subcontracting dispute, but the court found that belief unreasonable, since the Board clearly had confined its inquiry to the complaints of those employees who had been discharged because of the subcontracting.[65] Had there been a reasonable basis for such a belief, the court noted, the union might not have been found in

55. *See* text accompanying note 20 *supra*.
56. 453 F.2d 1018 (9th Cir. 1972).
57. *Id.* at 1023 n.8.
58. *See* text accompanying note 39 *supra*.
59. 453 F.2d at 1024–25.
60. 425 F.2d 281 (1st Cir. 1970).
61. 425 F.2d at 288 n.8.
62. *Id.* at 284.
63. *Id.*
64. *Id.* at 288–89.
65. *Id.* at 284.

breach of its duty.[66] Thus, the union was held liable merely for its attorney's good faith — albeit gross — mistake.[67]

In *St. Clair v. Teamsters Local 515*,[68] the Sixth Circuit arguably recognized a breach of the union's duty without proof of bad faith, in contrast to its decision by another three-judge panel in *Dill v. Greyhound Corp.*, discussed previously.[69] In *St. Clair*, an employee was discharged by the company after failing to report for work.[70] Unlike most collective agreements, this one contained no provisions for arbitration;[71] thus the only means which the union could employ to obtain the employee's reinstatement was that of informal oral advocacy; if that failed, the union could strike. The evidence disclosed that the union's business agent, upon discovering that the employee's job had been assumed by another worker, telephoned the company twice in an effort to reinstate the employee. Two days later the employee received formal notification from the company regarding his discharge. He then contacted the business agent, who referred him to the president of the local union. At that time, there was an election campaign in progress within the local, and the employee was vocally opposed to the incumbents, including the president. The employee contacted the president, who obtained another job for the employee rather than pleading his cause with the company. The court held that a union may violate its duty of fair representation if it ignores or perfunctorily processes a grievance, noting that the key question was whether the union's conduct was "arbitrary, discriminatory or in bad faith."[72] The court stated that the union could have protested more vigorously, threatened to strike, and even called a strike. As for the strike, the court noted that it was a question for the jury whether or not a union acted in bad faith by considering the welfare of many employees in refusing to call a strike in support of one employee.[73]

It is questionable whether *Vaca* mandates a strike by an entire bargaining unit in support of one employee where there is no provision for

66. *Id.* at 284 n.4.

67. *See* notes 88–90 and accompanying text *infra*. The facts of *De Arroyo* might be an example of a situation in which Professor Tobias would argue that relief should be granted the employee on the basis of gross negligence. *See* Tobias, *supra* note 50.

68. 422 F.2d 128 (6th Cir. 1969).

69. *See* notes 36–38 and accompanying text *supra*.

70. The facts on this point were in dispute. The employee alleged that he failed to report to work due to illness. A company representative told the union's business agent that the employee was discharged because he failed to report to work, and because he was an agitator and troublemaker. Several days after his discharge, the employee received a termination slip from the company stating that he had quit. 422 F.2d at 129–30.

71. A 1966 study indicated that 95% of the collective bargaining agreements contained provisions for binding arbitration. *See* Benewitz, *Discharge Arbitration and the Quantum of Proof*, 28 ARB. J. 95 (1973), *citing* U.S. BUREAU OF LABOR STATISTICS, BULL. No. 1425–26, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES 5 (1966).

72. 422 F.2d at 130, *quoting* Vaca v. Sipes, 386 U.S. 171, 190 (1967).

73. 422 F.2d at 131. The Eastern District of Michigan in the Sixth Circuit has recently concluded that as a matter of law the union need not strike in support of one employee's discharge in order to fulfill its duty of fair representation. Breish v. Local 771, UAW, 84 L.R.R.M. 2597 (E.D. Mich., Oct. 10, 1973).

abritration, even though his discharge was wrongful, in view of the potential economic hardship to the majority of employees such a duty would occasion. Although a union might conceivably put the matter to a vote in the affected unit and ultimately call a strike should the majority endorse such action, its failure to advocate or call a strike should not be deemed bad faith, in the absence of clear proof of hostility toward the wronged employee.

The *St. Clair* court ultimately remanded the case to the trial court, noting that it was a question of fact whether the business agent's failure to contact the company after the employee received his termination slip was motivated by bad faith.[74] Bad faith in the sense of personal hostility, as the Sixth Circuit applied in *Dill*,[75] might have been present in *St. Clair* due to the employee's political opposition to the president of the local, as well as the court's statement that "the evidence of bad faith is minimal. . . ."[76] It can be argued, however, that the tone of the court's discussion of the union's failure to contact the employer following the employee's receipt of the notification of discharge supports a finding that the grievance had been capriciously ignored. "Bad faith" would thus be equated with arbitrariness in its objective sense. If such a reading is correct, the Sixth Circuit's standard for review of the union's duty is unclear.

The NLRB has expressly found a union in breach of its duty under the "ignoring or perfunctorily processing a grievance" language in *Vaca*. In *Spector Freight System, Inc.*[77] the employee had been discharged from his position as truck driver on the ground that he had reported late for a driving assignment. The employee filed a grievance with his union, alleging that the real reason for his discharge was his refusal to accede to layover practices of the company, which were favored by the union but which he regarded as illegal under the collective bargaining agreement. The union processed his grievance through the entire procedure provided for in the collective agreement, including the two final stages of grievance committees comprised of union and management representatives, one at the local level and one at the state level. An agent of the employee's local union represented him at both these committee hearings, and the state committee broke the deadlock at the local level by denying the grievance. The employee then filed unfair labor practice charges with the Board, and a trial examiner found the local union in breach of its duty "[b]y its lack of candor and by virtue of its misrepresentations of material facts and as a result of the languid, perfunctory presentation given [the employee's] grievance"[78] at the state committee's grievance hearing. While the Board's

74. 422 F.2d at 131.

75. *See* notes 36–38 and accompanying text *supra*.

76. 422 F.2d at 131.

77. The Board's opinion is unreported. The facts of the case and the Board's disposition are gleaned from the Second Circuit's opinion in Steinman v. Spector Freight System, Inc., 441 F.2d 599 (2d Cir. 1971).

78. *Id.* at 601, *quoting* Trial Examiner's Decision (Mar. 1968). The Board ordered the union to request the joint committee to rehear the employee's grievance, stipulating that the employee be represented at the hearing by independent counsel. Additionally, the union was ordered to reimburse the employee for back wages lost

rationale is not apparent from the brief excerpt in the Second Circuit's opinion, its decision did not seem to turn on a finding of bad faith.[79] Apparently, the Board deemed the local's representation to be "languid and perfunctory" due to the local's failure to apprise the state grievance committee of certain relevant facts and evidence, including testimony concerning the employee's opposition to the company's layover policies and the minutes of the local grievance committee hearing.[80] This is the lone decision by the Board discovered to date wherein the union has been held liable for perfunctorily processing a grievance.[81]

In at least one other decision, a union was held liable on a showing of considerably less than bad faith conduct. In *Zalejko v. RCA*,[82] the employee was on sick leave; the company's doctor pronounced her fit to return to work, while her own doctor maintained that she was unable. After she failed to report to work, the company discharged her. The union took her grievance through four of the five steps in the procedure, the last step being arbitration. Relying on its attorney's advice that the opinion of the company doctor was controlling under the bargaining agreement, the union failed to produce the report by the employee's doctor during its discussions with the company, and ultimately determined that taking the grievance to arbitration would be futile. Despite an express finding of an absence of bad faith, the New Jersey Appellate Division upheld the trial court's finding that the union's representation was "inadequate," and thus unfair,

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as a result of the union's failure to represent him fairly. The union paid the employee $8,642 in back pay and made the request as ordered, but the committee refused to reopen the matter, whereupon the employee brought suit against the union and the employer in federal district court. 441 F.2d at 602.

In the first appeal to the Second Circuit, the court reversed the district court's summary judgment order in favor of the union and the employer, and remanded the case. *Id.* at 604. The court noted that *Vaca* contemplated a fair hearing on the merits of the employee's grievance in some forum, and that the Board had determined in the instant case that the employee had not received one. *Id.* at 603. The employee, therefore, was entitled to proceed to the merits of his lawsuit. On remand, the district court tried the issue of fair representation without a jury and found for the union. Steinman v. Spector Freight System, Inc., Civil No. 68-341 (W.D.N.Y. 1972). The Second Circuit affirmed this decision on appeal, noting that the effect of the Board's finding that the union had breached its duty was not pressed by the employee either in the district court or on appeal. Steinman v. Spector Freight System, Inc., 476 F.2d 437, 439 (2d Cir. 1973).

79. It is arguable that there *was* an implied finding of bad faith because the union had an interest in the failure of the employee's grievance. Since the layover practices were favored by the union, it is understandable that they did not wish the employee to succeed in his claim that the real reason he was discharged was that he rejected the illegal layover practices. Thus, the union's perfunctory handling of the grievance might have been deemed deliberate by the Board. This conclusion is supported by the trial examiner's finding that the union made material misrepresentations. *See* text accompanying note 78 *supra*.

80. *See* 476 F.2d at 439 n.3. For another example of liability imposed upon a union for perfunctorily processing a grievance, *see* Bazarte v. United Transp. Union, 305 F. Supp. 443 (E.D. Pa. 1969), *vacated*, 429 F.2d 868 (3d Cir. 1970).

81. *See also* Teamsters Local 705 (Associated Transp. Co.), 209 N.L.R.B. No. 48, 5 CCH LAB. L. REP. ¶ 26,271 (Feb. 28, 1974). The union's handling of the grievance in that decision is difficult to categorize.

82. 98 N.J. Super. 76, 236 A.2d 160 (1967).

since the union attorney was mistaken as to the interpretation of the agreement.[83] The union was thus held liable for merely being wrong.[84]

C. *Summary*

It is apparent from a review of the decisions that "[the] phrase 'fair representation' is something of a term of art and the standards by which . . . [the courts] are bound have not been explicitly set down in a code."[85] The *Vaca* Court undoubtedly framed the standards of the duty in broad, flexible terms in order to allow the courts and the Board to strike a case-by-case balance between the interests of the individual employee and the interests of the union as the reprsentative of the entire bargaining unit.[86] It is doubtful however, that the Court contemplated the proliferation of conflicting standards which followed its opinion. Generally, the courts have read *Vaca* narrowly, with the majority of the decisions interpreting the "arbitrary" standard to mean "bad faith caprice"; if, indeed, they recognize the standard at all.[87] In addition, the individual employee's interests are hampered by what Professor Wellington characterizes as a judicial tendency to attach a heavy presumption of regularity to union activity.[88]

As a result, many observers maintain that the present application of the union's duty of fair representation is insufficient to safeguard the rights of the injured employee.[89] In the remainder of this Comment, several proposals by these observers will be examined in the context of the problem presented by the unions' duty to represent fairly the employees whose seniority is affected by a merger with a separate bargaining unit.

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83. *Id.* at 84, 236 A.2d at 164. The court made no determination regarding the reasonableness of the attorney's interpretation of the agreement. Had the interpretation been reasonable, the union arguably fulfilled its duty. *See* Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061, 1067 n.10 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972), and notes 41–42 and accompanying text *supra.*

84. *See* Feller, note 16 *supra,* at 155–56.

85. St. Clair v. Teamsters Local 515, 422 F.2d 128, 130 (6th Cir. 1969).

86. The Court's refusal to set down rigid rules for evaluating the union's conduct also allows the courts and the Board to look behind the manifestations of union decision-making to analyze subjective motivation. *See, e.g.,* Teamsters Local 17 (Colorado Transp. & Storage Co.), 80 L.R.R.M. 1683 (1972).

87. *See* Tobias, *supra* note 50, at 73–74.

88. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L.J. 1327, 1341 (1958).

89. *See* Kroner, *supra* note 45; Levy, *supra* note 22, at 1055; Tobias, *supra* note 50; Wellington, *supra* note 9, at 162; Comment, *The Implications of Vaca v. Sipes on Employee Grievance Processing,* 17 BUFFALO L. REV. 165, 172, 181 (1967); Comment, *Union's Duty To Fairly Represent Its Members in Contract Grievance Procedures — The Impact of Vaca v. Sipes,* 19 SYRACUSE L. REV. 66, 84–85 (1967); Comment, *Protection of Individual Rights in Collective Bargaining: The Need For a More Definite Standard of Fair Representation Within The Vaca Doctrine,* 14 VILL. L. REV. 484, 496 (1969); Comment, *Individual Control Over Personal Grievances Under Vaca v. Sipes,* 77 YALE L.J. 559 (1968).

IV. FAIR REPRESENTATION AND SENIORITY RIGHTS FOLLOWING A MERGER

A. Seniority

In its most general sense, seniority is commonly understood to mean status enjoyed by an employee by virtue of his or her length of service with the company or within some division of the company.[90] Its purpose is to provide basic job security for employees, in addition to establishing a yardstick for measuring an employee's right to promotions, job preferences, and fringe benefits.[91] Seniority is often divided into two categories: One is "benefit" seniority, which concerns such fringe benefits as paid vacations, retirement pay, and severance pay. This type of seniority usually depends solely on length of service, and its value is not determined by the employee's rank on the seniority list. The second type of seniority has been denoted "competitive-status" seniority, and refers to an employee's right, vis-á-vis his fellow employees, to preference in regard to such matters as promotion, lay-off, re-call after lay-off, transfer, and other employment opportunities. This type of seniority is not determined by the employee's length of service, but rather by his rank on the seniority list.[92] While length of service is a dominant factor, other variables such as skill, ability, former position, experience in the industry, and similar criteria, are often considered.[93] For the purpose of this Comment, the term "seniority" will hereinafter be used in the sense of "competitive-status" seniority, since the focus will be on the types of rights which that term denotes.

B. The Union's Duty to Represent All Employees Fairly When Altering Seniority Rights.

Seniority exists as a matter of "right" only to the extent made so by the collective bargaining agreement,[94] surviving only for the life of the

90. *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 373 (2d ed. 1960) [hereinafter cited as ELKOURI]; Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962); Industrial Rayon Corp., 24 Lab. Arb. 73, 76 (1955); Curtiss-Wright Corp., 11 Lab. Arb. 139, 141–42 (1948).

91. *See* ELKOURI, *supra* note 96, at 377; Kennedy, *Merging Seniority Lists* in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS OF THE SIXTEENTH ANNUAL MEEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 2 (1963); Industrial Rayon Corp., 24 Lab. Arb. 73, 76 (1955).

92. *See generally* SLICHTER, *supra* note 35, at 106; Kennedy, *supra* note 97, at 2–3. *See also* Seniority Roster, Local 640, IATSE, 53 Lab. Arb. 1253, 1258 (1969).

93. *See* ELKOURI, *supra* note 96, at 384; Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1481 (1963).

94. *See* Charland v. Norge Div., Borg-Warner Corp., 407 F.2d 1062, 1064 (6th Cir.), *cert. denied*, 395 U.S. 927 (1969); Cortez v. Ford Motor Co., 349 Mich. 108, 112, 84 N.W.2d 523, 525 (1957); Hartley v. Bhd. of Ry. & S.S. Clerks, 283 Mich. 201, 206, 277 N.W. 885, 887 (1938).

Even prior to the rise of collective bargaining, employers generally gave job preferences to employees who had the most years of service, as long as they could adequately perform the required work. *See* ELKOURI, *supra* note 96, at 375, *citing* J. LAPP, HOW TO HANDLE PROBLEMS OF SENIORITY 2–3 (1946).

collective agreement or until the agreement is amended by the parties.[95] As the bargaining agent, the union may modify the seniority provisions either of an existing agreement or from one agreement to another, subject at all times to its duty to represent all employees fairly. Since any change in the seniority rules operates more favorably toward certain segments of the employee unit than others, the union is given a great deal of discretion in this area, as exemplified by the Supreme Court's oft-quoted statement from *Ford Motor Co. v. Huffman*:[96]

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[97]

The lower courts have traditionally accorded the union this considerable discretion in negotiating changes in seniority provisions, and have usually upheld the resulting arrangements in the face of objections by disgruntled employees.[98] One generally recognized limitation on union discretion is the prohibition against altering seniority provisions solely to

95. *See* Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1949); Oddie v. Ross Gear & Tool Co., 305 F.2d 143, 149 (6th Cir.), *cert. denied*, 371 U.S. 941 (1962); Steelworkers Local 4076 v. Steelworkers Union, 338 F. Supp. 1154, 1161 (W.D. Pa. 1972).

The Second Circuit at one time took the position that seniority was a vested contractual right which, while subject to bilateral amendment, could not be altered unilaterally. As a vested right, it was held even to survive the expiration of the collective agreement. Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir.), *cert. denied on this issue*, 368 U.S. 814 (1961). The *Zdanok* decision was criticized by most legal commentators. *See, e.g.*, Aaron, *supra* note 90, at 550–54; Lowden, *Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.*, 48 VA. L. REV. 291, 298 (1962); Turner, *Plant Removals and Related Problems*, 13 LAB. L.J. 907, 911–14 (1962). *But see* Blumrosen, *Seniority Rights and Industrial Change: Zdanok v. Glidden Co.*, 47 MINN. L. REV. 505, 523–24 (1963). Seven years after it was decided, *Zdanok* was overruled by the Second Circuit in Local 1251, UAW v. Robertshaw Control Co., 405 F.2d 29 (2d Cir. 1968) (*en banc*).

96. 345 U.S. 330 (1953).

97. *Id.* at 338. In *Huffman*, the Court upheld the union's negotiation of a provision which granted seniority credits to those employees who were hired subsequent to their service in the military, in addition to granting credit to those who were employed prior to their military duty. The Court noted that seniority was a function of other factors besides length of employment:

> Seniority rules governing promotions, transfers, layoffs, and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary.

Id. at 338–39 (citations omitted). *See* note 93 and accompanying text *supra*. Thus, the Court noted that the provisions were "within reasonable bounds of relevancy" and were common among other labor agreements. 345 U.S. at 342–43.

98. *See, e.g.*, Fuller v. Teamsters Local 107, 428 F.2d 503 (3d Cir. 1970); Schick v. NLRB, 409 F.2d 395 (7th Cir. 1969); Sweeney v. Biltemmant, 373 F.2d 491 (6th Cir. 1967); NLRB v. Whiting Milk Corp., 342 F.2d 8 (1st Cir. 1965).

favor the numerically larger or politically favored segment of the unit.[99] In the absence of such blatant bias, however, the problem is one of defining the standard against which the union's decision-making process is to be tested. On the one hand is the *Vaca* standard, narrowly interpreted by a majority of courts as requiring a showing of bad faith;[100] on the other, the reasonableness of the resulting seniority provisions as an objective test of the union's conduct which would follow from a broad reading of *Vaca*. Both approaches find support in the language of *Huffman*.[101]

Professor Blumrosen argues that *Huffman* stands for the latter proposition — a court has the duty to examine closely the facts of the case and the arguments proferred by the union in order to protect the expectations of the employees.[102] Professor Wellington takes a similar position with regard to the protection of the expectations of the employees, even to the point of advocating that there be a determination that *each* instance of union action comports with the "employee-community expectation."[103] Regarding seniority provisions, he notes that while employees expect that their seniority rights may be altered, the union should have less freedom to modify rights acquired in previous agreements than it has to establish a seniority system in the initial agreement.[104] Even Professor Cox, a staunch advocate of the union's power to bind all the employees it is charged with representing, recognizes the importance of employee reliance on established seniority systems:

> From a practical standpoint seniority confers a status more important than a bare contractual undertaking. In practice seniority clauses are usually carried forward from year to year. Contract and custom create expectations. Expectations create reliance. It is scarcely an exaggeration to say that in some industries, notably railroads, employees build their lives upon seniority preferences in bidding for jobs

99. *See, e.g.,* O'Mara v. Erie Lack. R.R., 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Teamsters Local 568 v. NLRB, 379 F.2d 137, 143, 146 (D.C. Cir. 1967); Ferro v. Railway Express Co., 296 F.2d 847, 851 (2d Cir. 1961); O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 500, 107 N.W.2d 484, 489 (1961).

Another common limitation is the refusal to permit the union to condition seniority on the length of union membership or the payment of union dues. *See* United Steelworkers (Columbia Steel & Shafting Co.), 171 N.L.R.B. 945 (1968); Woodlawn Farm Dairy Co., 162 N.L.R.B. 48 (1966). *Contra,* NLRB v. Whiting Milk Corp., 342 F.2d 8 (1st Cir. 1965).

100. *See* note 87 and accompaning text *supra.*

101. The same sentence in *Huffman* leads to either conclusion. *See* quote accompanying note 97 *supra.* The Court also devoted a considerable portion of its opinion to a justification supporting the reasonableness of the union's decision to grant seniority credits for preemployment military service. 345 U.S. at 339–43.

102. Blumrosen, *Union-Management Agreements Which Harm Others,* 10 J. PUBL. L. 345, 372 (1961). In addition, Professor Blumrosen would negate the authority of the union to alter existing seniority rights "without adequate justification rooted in the national labor policy." Blumrosen, *supra* note 95, at 1477.

103. Wellington, *supra* note 88, at 1359–61. The term "employee-community expectation" describes the collective expectations of the bargaining unit as a whole, which Professor Wellington asserts is a more reliable standard, since a particular employee's expectations may be unreasonable. *Id.* at 1360. He also purports to derive this standard from the "language and tone" of *Huffman. Id.* at 1360 n.166.

104. *Id.* at 1360.

> in a defined pool of work. Under these circumstances it seems highly formal to reason that since the union and company negotiated the original seniority clause, they can change it at will. When established seniority rights are changed, the bargaining representative should be required to show some practical justification beyond the desire of the majority to share the job opportunities theretofore enjoyed by a smaller group.[105]

In spite of the view of these commentators, only a few courts have applied the objective test and inquired into the reasonableness of the seniority provisions enacted in light of the surrounding circumstances, such as employee expectations.[106] The majority of the courts have refused to assess the objective merits of the union's decision, and have upset its determinations only when a wrongful motivation has been disclosed.[107] Because of the importance of seniority to the individual employee, it is doubtful that this narrow application of the duty of fair representation is responsive to his or her interests. It would seem more equitable to place upon the union the burden to come forward with objective reasons for any adjustment in the seniority rights of its members. If these rights have not been in existence through a prior agreement, the union need only offer minimal proof to overcome its burden. If, on the other hand, the seniority provisions have remained constant through a series of collective agreements, the union would face a substantial burden in attempting to justify any

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105. Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151, 164 (1957) (citation omitted).

106. *See* Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974); Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 187 (9th Cir.), *cert. denied,* 371 U.S. 920 (1962); O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 501, 107 N.W.2d 484, 490 (1961).

In Jones v. TWA, Inc., *supra,* the employer and the union agreed that a non-union job category would be re-classified as a union job which in turn was incorporated into a larger job category. The seniority provision of this larger job category provided that seniority depended primarily upon when the employee entered a job classification. Consequently, the former non-union employees who chose to join the union had lower seniority than those employees already members of the union, because they were deemed to have entered their present union job classification when they joined the union, rather than when they actually began work at that job. *Id.* at 793–95.

The district court held for the union on the grounds that there was no proof of malice on the part of the union. *Id.* at 798. The Second Circuit reversed, stating:

> [B]ad faith is not universally required to support an employee claim against his union. Bad faith or hostile discrimination is certainly a sufficient condition to evidence an irrational decision, but it is not a necessary condition. It is also sufficient that a distinction be arbitrary or not based on some rational consideration. . . . The objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit.

Id. (citation omitted). Clearly, this language demonstrates the court's willingness to consider the union's consolidation of seniority from an objective viewpoint, as indicated by its references to "rational consideration" and "irrational decision."

However, it is possible that the court limited the application of the objective test to the facts in this case, *i.e.,* the union's change of seniority rights was clearly discriminatory against non-union members; and the Second Circuit will continue to require a showing of bad faith in other situations. This view is supported by the fact that a union is generally held to have violated its duty of fair representation when the resulting seniority provision is clearly so discriminatory. *See* note 99 *supra.*

107. *See* the cases cited in note 98 *supra.*

change.[108] Moreover, since the union in many situations could justifiably adopt any one of several reasonable approaches to a seniority question, the adoption of this view would not seriously limit its valid discretion as the exclusive bargaining agent to any great degree.[109]

The difficulties which attend the assessment of the union's duty to represent all employees fairly when seniority rights of a single bargaining unit are altered increase when it is necessary to evaluate the union's role in modifying these rights following the consolidation of seniority rosters of previously distinct units, which generally occurs following the merger of two employers. The next section of this Comment will explore this complex situation.

C. Fair Representation and the Integration of Seniority Lists

Whenever two companies merge,[110] the seniority rights of the two groups of employees normally must be consolidated into one seniority system.[111] In general, two methods of integration are utilized. The first is "endtailing," whereby all the employees of one company are ranked below all the employees of the other.[112] In effect, the seniority rights of the endtailed employees do not survive the consolidation of the work forces, although, of course, each employee would maintain his relative position vis-á-vis his former co-workers. The other method is "dovetailing," whereby the employees of both groups are interwoven on the new seniority

108. This burden would not be an intolerable one, since examples of valid interests which would dictate changes in the method of seniority computation are numerous. A common one is granting seniority preference to military veterans. *See* Ford Motor Co. v. Huffman, 345 U.S. 330 (1952). *Huffman* notes several additional variables which might properly be considered. *See* note 97 *supra*. *See also* ELKOURI, *supra* note 90, at 387–409.

Courts have held that union officials may be entitled to preferential treatment regarding seniority, in order to facilitate the effective functioning of collective bargaining. *See, e.g.*, Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 527–28 (1949). Speaking for the Court, Justice Frankfurter observed:

> Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairmen play a very important role in the whole process of collective bargaining. Therefore it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory.

Id. at 528 (footnote omitted).

109. *Cf.* Blumrosen, *supra* note 101, at 372.

110. In addition to a merger situation, the problem of consolidating once separate seniority lists also exists when one company purchases the assets of another, and the seller goes out of existence but its employees continue to work for the buyer. The problem is also presented when one company closes a plant, or a segment of a plant, and transfers the employees to another seniority unit. The union's duty to represent the employees fairly applies equally in all these instances, although the final resolution of the seniority conflict may vary depending upon the nature of the transaction which caused the consolidation. *See* notes 132–33 and accompanying text *infra*.

111. Occasionally, the two groups of employees will retain their respective seniority rights where, for example, each group performs different work and continues to do so after the companies have combined. In such instances, the two seniority lists will remain separate, as though the companies had never combined. *See* Kennedy, *supra* note 91, at 20; Sibotone Corp., 42 Lab. Arb. 359, 363 (1964).

112. *See, e.g.*, Lagomarcino-Grupe Co., 43 Lab. Arb. 453 (1964).

roster so that each employee retains at least some of the seniority he previously acquired.[113] Regardless of the method of integration, some employees necessarily will lose some seniority status following a merger. If a single union represents both groups of employees prior to the merger, it is faced by the prospect of alienating a certain segment of the employees no matter what course it adopts.

The leading decision in this area, *Humphrey v. Moore,*[114] established that the union's choice of method of seniority integration must reflect its duty of fair representation. In *Humphrey,* two companies were engaged in the business of transporting automobiles from the assembly plant to dealers. Due to declining business in a region in which they were competing, one of the companies agreed to sell its equipment and operating authority in that area to the other.[115] The employees of both were represented by the same union local and governed by nearly identical collective agreements negotiated through multi-employer/multi-local bargaining. Article 4 of the contracts provided that when one company "absorbed" the business of another company, the seniority rights of employees "absorbed or affected thereby" were to be resolved by mutual agreement between the company and unions involved. Furthermore, Article 7 required that any controversy which arose regarding seniority rights after an absorption would be submitted to the joint grievance procedure.[116] Another subsection of Article 7 provided that all matters pertaining to the interpretation of any provision in the contract must be submitted to the contractually created Joint Conference Committee (JCC) for resolution.

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113. *See, e.g.,* Bieski v. Eastern Auto. Forwdg. Co., 396 F.2d 32, 35 n.3 (3d Cir. 1968).

There are a number of ways in which employees may be dovetailed. For example, length of employment at either company could be the sole criterion, in which case the employee with the most years of service would be ranked at the head of the new list, irrespective of which of the two former companies employed him. Another method of dovetailing ignores length of service in favor of the employee's absolute rank within his prior unit, in which case the first man on company *A*'s roster is followed on the new roster by the number one man on *B*'s list, then *A*'s second man, and so forth. *See generally* ELKOURI, *supra* note 90, at 382–83; Kennedy, *supra* note 91, at 12–30; Sonotone Corp., 42 Lab. Arb. 359 (1964).

114. 375 U.S. 335 (1964).

115. The automobile manufacturer determined that he no longer required two transportation companies in the area; hence, it announced that it would only grant operating authority to one of the companies, thereby necessitating the transaction. *Id.* at 336.

116. This procedure called for grievances to be discussed by the employer and the local union and, if not settled, to be submitted to the joint local committee, which was comprised of equal numbers of company and employee representatives. If no decision were to be reached at the local committee level, the matter would be taken to the Joint Conference Committe (JCC), composd of equal numbers of company and union representatives from the entire multi-partied bargaining group. The decision of the JCC was final and binding upon the parties involved. If the JCC were to be deadlocked, the matter would be submitted to arbitration. *Id.* at 338.

The joint committee is commonly utilized by the Teamsters Union, the union involved in *Humphrey. See, e.g.,* E. JAMES & R. JAMES, HOFFA AND THE TEAMSTERS 167–85 (1965); Azoff, *Joint Committees as an Alternative Form of Arbitration under the NLRA,* 47 TULANE L. REV. 325 (1973).

The president of the local union representing both employee groups initially determined that no employee of the selling company would carry over any seniority into the new unit. The seller's employees therefore filed a grievance, contending that some form of dovetailing was appropriate. The local joint committee deadlocked, and the matter was referred to the JCC. The union local decided to recommend that the seniority lists be dovetailed according to length of service, while the three shop stewards who represented the employees of the buyer argued for endtailing. The JCC determined that dovetailing in the manner advanced by the local was most appropriate, basing its decision on the "absorption" provision of Article 4. Since the employees of the seller generally had more years of service than those of the buyer, the decision resulted in many layoffs of the latter's employees.

Consequently, several of the buyer's employees brought a class action against the union and the company in state court on behalf of all the buyer's employees, seeking damages and an injunction against implementation of the JCC's decision. The action was based upon two theories: (1) the union had breached its duty to represent the buyer's employees fairly; and (2) the JCC had exceeded its authority under the collective agreement by taking jurisdiction over the controversy. The trial court denied the prayer for an injunction,[117] but the state court of appeals reversed, holding that even if Article 4 conferred jurisdiction upon the JCC, the committee's decision could not stand, since the situation involved antagonistic interests of two employees represented by the same union advocate.[118] In other words, the union breached its duty by espousing a position favoring one group at the expense of the other.

In reversing the decision, the Supreme Court initially found that the allegations of the complaint stated a cause of action under §301 of the Labor Management Relations Act (LMRA); therefore, substantive federal law was controlling.[119] In considering the merits of the claim, the Court reviewed the nature of the transaction between the companies and observed that the JCC had "reasonably concluded" that an Article 4 "absorption" had occurred, and that the Committee therefore had properly assumed jurisdiction over the dispute.[120] As for the committee's decision to dovetail the lists, the Court stated:

> The [JCC] was entitled . . . to integrate the seniority lists upon some rational basis, and its decision to integrate lists upon the basis of length of service at either company was neither unique nor arbitrary.

117. *See* 375 U.S. at 341.

118. 356 S.W.2d 241 (Ky. C.A. 1962).

119. 375 U.S. at 343-44, *citing* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See generally* Sovern, *supra* note 9.

This is not to imply that the state court was without jurisdiction in this matter. The fact that federal labor law is to be applied in section 301 suits does not remove such suits from the state courts. They must, however, apply federal law. 375 U.S. at 344, *citing* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

120. 375 U.S. at 346.

> On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here. The Joint Conference Committee's decision to dovetail seniority lists was a decision which [Article 4] empowered the committee to make.[121]

With respect to the issue of unfairness resulting from union representation of conflicting interests, the Court observed that a union is free to assume a good faith position contrary to some segments of the employee unit, the result of an opposite conclusion being a weakening of the processes of collective bargaining and grievance resolution.[122] Since the union, in the Court's words, had acted "honestly, in good faith and without hostility or arbitrary discrimination," and based its decision upon "wholly relevant considerations, not upon capricious or arbitrary factors,"[123] it had thereby fulfilled its duty toward all employees.[124] Finally, the Court answered the argument that the union's espousal of the rights of the seller's employees before the committee deprived the buyer's employees of a fair hearing by

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121. *Id.* at 347–48 (footnote omitted). At least two commentators argue that *Humphrey*'s analysis of the committee's substantive decision authorizes a court to delve into the reasonableness of such committee decisions by examining them against the language of the collective agreement. Lewis, *supra* note 9, at 110–14; Van Zile, *The Componential Structure of Labor-Management Contractual Relationships*, 43 U. DET. L.J. 321, 334–35 (1966). Professor Lewis argues that this approach unnecessarily constrains the parties in the resolution of disputes, since ad hoc settlement during the administration of the agreement, whereby the parties might waive certain contractual provisions in a particular dispute, would be unacceptable under such a reading of *Humphrey*. Lewis, *supra* note 9, at 113–16.

That such a reading of *Humphrey* was intended by a majority of the Court is bolstered by Justice Goldberg's concurring opinion, in which he asserted that a joint committee's decision cannot be attacked by an individual employee in a § 301 suit against the employer since the union and the employer are always free to amend or modify the agreement during the resolution of a grievance. Nor must the amendment be a formal one, since the parties may interpret an agreement in any mutually acceptable manner, even if a court could disagree with the interpretation. 375 U.S. at 352–55 (Goldberg, J., concurring). Justice Goldberg's approach would thus erect separate standards for judicial review of an arbitrator's decision and the decision of an employer/union committee, since the former must draw its essence from the collective bargaining agreement. *See* the *Steelworkers* trilogy: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav'n Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

The *Humphrey* majority, in contrast, impliedly recognized the similarity between arbitration and joint committee decisions, subjecting both to the limitations of the contract. *See* 375 U.S. at 351, wherein Teamsters Union v. Riss & Co., 372 U.S. 517 (1963), is cited for the proposition that the joint committee's decision in *Humphrey* was binding upon the parties under the terms of the agreement. In *Riss*, the Court reviewed a decision by an employer/union committee, subjecting it to the standards applicable to arbitration awards. *See also* Feller, *supra* note 16, at 147.

Despite the arguments that the *Humphrey* Court's analysis authorizes a court to view the actions of a joint committee in light of the language of the contract, it is also possible that any such discussion was limited solely to the question of the jurisdictional authority of the committee to settle the dispute. *Accord*, Tully v. Fred Olson Motor Serv., 37 Wis. 2d 80, 92–94, 154 N.W.2d 289, 294–95 (1967). If such a reading is accepted, then one must agree with Justice Goldberg that an employee's sole remedy in a *Humphrey* situation is a suit against the union on a theory of unfair representation. 375 U.S. at 358 (Goldberg, J., concurring).

122. 375 U.S. at 349–50.

123. The only "revelant consideration" which the Court emphasized was that "[o]ne group or the other was going to suffer." *Id.* at 350.

124. *Id.*

noting that the buyer's employees were represented before the JCC by three union stewards, who were given the opportunity to state their position, yet who made "no request to continue the hearing until they could secure further representation and have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented."[125]

The Court was analyzing the union's duty toward the employees in terms of both substantive and procedural fairness. In approving the substantive position taken by the union, the Court was somewhat vague. It apparently placed great emphasis on the fact that some employees had to suffer following the "absorption," and, proceeding from that premise, concluded that therefore dovetailing upon the basis of length of service could not be termed arbitrary. This objective view of the union's decision to dovetail was also evidenced in the section of the opinion dealing with the JCC's contractual authority to settle the dispute. The Court there noted that the committee was entitled to integrate the seniority lists upon some "rational basis," and that dovetailing was a familiar method frequently used following a merger or "absorption."[126] This language suggests that the Court was willing to assess the merits of the employees' grievances in order to evaluate whether the union had met its obligation of fair representation.[127] Such an approach would be in accord with Professor Blumrosen's reading of *Ford Motor Co. v. Huffman,* discussed previously.[128] As for the *procedural* fairness of the union's grievance presentation, the Court imposed at least two requirements: 1) the employees in question must receive adequate notice of the joint committee hearing, and 2) the employees must be afforded the opportunity to state their position to the committee.[129]

In view of the critical importance of seniority rights to the individual employee, the two-pronged *Humphrey* test — inquiries into the "reasonableness" of the union's position and the "procedural fairness" involved — should be coupled with the requirement that the *union* prove that its decision was based upon rational, objective factors, as opposed to requiring the disgruntled employees to prove bad faith or arbitrariness.[130] In the majority of situations in which seniority lists are consolidated after a merger, some form of dovetailing is usually appropriate in order to equitably reflect

125. *Id.* at 350–51. The Court concurred in the trial court's observation that it would be mere idle speculation to assume that the committee's decision would have been altered had the grievance been presented differently. *Id.* at 351.

126. *Id.* at 347.

127. This language might also support the argument that the Court was engaged in second-guessing the parties' interpretation (through the JCC) of the collective bargaining agreement. *See* note 121 *supra.*

128. *See* note 102 and accompanying text *supra.*

129. 375 U.S. at 350.

130. *Cf.* notes 107-08 and accompanying text *supra.*

the contributions each group has made to the new operation.[131] In situations where one of the companies is insolvent, endtailing might be appropriate.[132] Following these general principles, the union should be required to justify its position regarding the integration of seniority lists by pointing to such objective factors as the nature of the transaction or the solvency of the companies involved.

The lower courts have not only refused to place the burden on the union to come forth with objective criteria in support of its position; many have also failed even to designate what objective support existed under the *Humphrey* "rational basis" test, or to apply the "procedural

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131. Kahn, *Seniority Problems in Business Mergers,* 8 IND. & LAB. REL. REV. 361, 378 (1955). After reviewing seniority integration practices in several industries, Professor Kahn observes:

> Seniority lists should be integrated when enterprises which are merged have both contributed "work" to the new consolidated operation, and it is the substance rather than the legal form of the merger which should determine seniority policy. Work opportunities should be allocated between the two employee groups in proportion to the contribution made to the joint operation by their respective original employers. Integregation of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer, but under special circumstances weight may be accorded to "status" by the use of a ratio or even a rank method.

Id. See Kennedy, *supra* note 90, at 22–30, for an explanation of Professor Kahn's "ratio" and "rank" terminology.

See also Sonotone Corp., 42 Lab. Arb. 359 (1964), where the arbitrator applied an interesting method of dovetailing. A company had closed down plant *A* and transferred those workers to plant *B*. The arbitrator regarded the consolidation at the *B* plant as a pool of jobs to which each group had made a contribution. Since the number of *A* employees who transferred contributed to 41.3% of the total number of jobs, the *B* group contributed the balance of 58.7%. Therefore, the *A* group contributed only 70% (approximately) as much as the *B* group to the new job pool. Accordingly, the employees were dovetailed on the list according to length of service at either plant, *but* each year of service at the *A* plant would be deemed the equivalent of 7/10ths of one year at plant *B*. Thus, employees who had 20 years of service at plant *A* would be ranked equally on the new roster with employees who had served 14 years at plant *B*.

132. *See* Cox, *supra* note 104, at 163. Professor Cox also suggests that endtailing might be appropriate where one company is much larger than the other, or one company purchases the assets of the other and the latter becomes liquidated, particularly where the selling company is in financial trouble, since its employees probably would have been laid off in any event, had the merger not been effected. *Id.*

Several Teamsters area agreements prescribe seniority integration in accordance with the legal characterization of the transaction between the companies, *i.e.,* if a merger occurs, dovetailing will occur, while if one company acquires the other, the acquired employees will be endtailed. *See, e.g.,* Morris v. Werner-Continental, Inc., 466 F.2d 1185 (6th Cir. 1972), *cert. denied,* 411 U.S. 965 (1973). Other Teamsters agreements contain provisions similar to those found in *Humphrey,* whereby the union locals and the companies involved in an "absorption" or a merger mutually determine how to effect the seniority integration, with grievances arising therefrom being submitted to the joint grievance procedure. In the Central States Teamsters agreements, a special Change of Operations Committe has been organized under the joint grievance machinery, under whose rules dovetailing occurs when the companies involved are both solvent, while endtailing occurs when an insolvent carrier is acquired. Bankruptcy, reorganization, or receivership must be shown in order to evidence insolvency. *See* Mater & Mangum, *The Integration of Seniority Lists in Transportation Mergers,* 16 IND. & LAB. REL. REV. 343, 363 (1963).

Professor Wellington would require dovetailing whenever seniority lists are integrated, in order to fulfill the "employee-community expectation," on the theory that while the employees would expect their seniority to be subject to revision, its elimination would not be anticipated. Wellington, *supra* note 92.

fairness" standard to the union's position.[133] For example, consider *Morris v. Werner-Continental, Inc.*[134] In *Morris,* two companies made an agreement which was characterized as a merger[135] both by the contract between the companies and by the Interstate Commerce Commission (ICC) in approving the transaction. The collective bargaining agreement provided that seniority grievances would be determined by a joint grievance committee whose rules stated that dovetailing would occur in the event of a merger, while endtailing of the acquired company's employees would result if there were a "purchase." This committee was initially informed by the employer that the transaction was a merger, but later was advised that it was a "purchase." The union locals involved represented both groups of employees and decided to remain neutral in the dispute. The joint committee determined that a "purchase" had occurred, which therefore mandated endtailing. Several of the endtailed employees filed suit against the newly formed company, alleging that 1) the ICC's order had a res judicata effect upon the issue of whether a "merger" had occurred, and 2) the union had breached its duty of fair representation.[136]

The Sixth Circuit quickly disposed of the first contention, noting that whether the transaction was a "purchase" or a "merger" was not an issue before the ICC. As for the union's duty of fair representation, the court observed that since the union, as the representative of *both* employee groups, would be in a difficult position, neutrality was probably the most prudent position to take. Actually, one of the four locals advocated the plaintiff's position of dovetailing. Perhaps this nonetheless would have satisfied the *Humphrey* procedural requirement that the employees be given an opportunity to espouse their position before the committee. However, had the plaintiffs instead favored endtailing, this requirement would not have been fulfilled, since that group had no advocate before the committee. In any event, the Sixth Circuit failed to mention this standard of procedural fairness, other than to assert that the "bargained for arbitration procedure was adequate to provide, and actually did provide, a fair decision . . . ."[137] As for

133. *See, e.g.,* Pekar v. United Brewery Workers Local 181, 311 F.2d 628, 637 (6th Cir. 1962); Pirone v. Penn Central Co., 370 F. Supp. 172 (S.D.N.Y. 1974); Freeman v. Locomotive Eng'rs, 85 L.R.R.M. 2806 (S.D. Ga. 1973); Turley v. Hall's Motor Transit Co., 296 F. Supp. 1183, 1187 (M.D. Pa. 1969). *But see* Brown v. Teamsters Local 355, 292 F. Supp. 125 (D. Md. 1968).

134. 466 F.2d 1185 (6th Cir. 1972), *cert. denied,* 411 U.S. 965 (1973).

135. The agreement was actually a tax-free reorganization. 466 F.2d at 1188.

136. *Id.* at 1186.

137. *Id.* at 1190. For a clear example of a court's failure to apply the *Humphrey* procedural fairness test to a joint committee decision, *see* Ampagoomian v. Johnson Motor Lines, Inc., 331 F. Supp. 262 (D.R.I. 1971) (union's failure to give notice of the joint committee hearing to involved employees will not render committee's decision invalid).

As for the substantive propriety of the decision by the joint committee that a "purchase" had occurred in *Morris,* the Sixth Circuit observed that it was "extremely difficult for us to see how the [joint committee] could translate or transform the merger that actually took place into a purchase," but nevertheless concluded that this decision could not be overturned in the absence of fraud, bad faith, or a showing of bias or collusion on the part of the committee. *Id.* at 1190–91. The court

the *Humphrey* "rational basis" test, the court simply pointed out that, in this instance, neutrality was a prudent position for the union to take as representative of both groups of employees.[138]

To date, only the Third Circuit has consistently applied the "procedural fairness" test of *Humphrey*. In *Bieski v. Eastern Automobile Forwarding Co.*,[139] that court faced a situation resembling the one in *Humphrey*. Two companies were engaged in the business of transporting automobiles from the plant to dealers in the same area of the country. Since both companies were faced with declining business due to increased shipment by rail, the manufacturer informed them that only one could continue doing business profitably. As a result, one company purchased substantially all of the other's operating equipment, as well as both of its operating terminals. After the sale, the seller went out of business completely (unlike the selling company in *Humphrey*).[140] As in *Humphrey*, both employee groups were represented by the same local union, and the collective agreements contained a provision, identical to that in *Humphrey*, to the effect that following an "absorption" or a merger, the seniority lists would be integrated by mutual agreement between the union and employer, and any grievance resulting therefrom would be submitted to a grievance procedure, which included joint committee hearings at the higher levels. Following the transaction, the employees of the seller filed grievances which eventually reached the joint committee, contending that they should have been dovetailed into the new unit. At the hearing, the union local officially remained neutral, while the union stewards and other employees of both buyer and seller argued for endtailing and dovetailing respectively. The joint committee unanimously found that there had been no acquisition, purchase, or merger within the meaning of the contract, and that the acquiring company therefore had no duty to recognize the seniority requests of the seller's employees. To forestall endtailing several of the seller's employees brought a class action against the company and union local, seeking both an injunction against the implementation of the committee's decision, and a ruling under Section 301 of the LMRA[141] that dovetailing was required under the collective agreement.[142]

The Third Circuit initially determined that the record disclosed no breach of the union's duty of fair representation sufficient to allow a court either to overturn the committee's decision or to order that dovetailing be carried out.[143] It then observed, however, that since the committee's decision was jurisdictional in nature — it had no jurisdiction since an

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further stated that the joint committee would not be restricted to the language of the collective agreement in reaching its decision. *Id.* at 1191. This observation is in line with the sentiments expressed by Justice Goldberg in his concurring opinion in *Humphrey*. *See* note 121 *supra*.

138. 466 F.2d at 1189-90.

139. 396 F.2d 32 (3d Cir. 1968).

140. *See* text accompanying note 115 *supra*.

141. 29 U.S.C. § 185 (1970). *Cf.* note 15 *supra*.

142. Bieski v. Eastern Auto. Forwdg. Co., 231 F. Supp. 910 (D. Del. 1964).

143. 396 F.2d at 37.

absorption or merger had not occurred — a court, following *Humphrey,* might properly interpret the contract language to determine if this decision were reasonable.[144] After concluding that the committee's decision was in fact *un*reasonable, and that the committee should have proceeded under the "absorption" or merger clause of the contract to resolve the seniority dispute, the court then examined the actions of the union local in the controversy.

The court recognized the delicate nature of the union's position as representative of both groups of employees. Assuming a neutral stance in the controversy, therefore, did not indicate either bad faith or arbitrary conduct.[145] However, the court observed, the grievance procedure under the agreement contemplated an adversary proceeding, with both sides presenting their views. The court distinguished *Humphrey* on the grounds that in that case neither of the companies involved had gone out of business; consequently the management members of the committee, consisting of members from the buyer and seller, had a substantial chance of being divided on the seniority question. Thus, the positions of each of the two employee groups had an equal chance of being adopted regardless of the union's stance. In *Bieski,* on the other hand, one company no longer existed and had no members on the committee. Thus, the remaining company's representatives would favor endtailing, since dovetailing, under the circumstances of the case, would increase the total seniority of the new unit, thereby causing the company to pay out more money in terms of seniority-based fringe benefits. While the stewards representing both groups were permitted to espouse their respective views before the committee, the court observed that the cause of the seller's employees had little chance of success since, with management aligned against them and the union neutral, no decision-maker "with any power" would be sympathetic to their cause.[146]

Since the joint committee had erroneously decided that it had no jurisdiction over the dispute, the court remanded to allow the committee to reconsider its position and resolve the question on the merits. The court indicated that should the union continue to espouse dovetailing, as it had before the court, the proceedings would then be genuinely adversary in nature, as contemplated by the agreement. If the union decided to revert to a neutral position, it should make the neutrality "genuine" by either deadlocking the committee and thereby sending the dispute to arbitration,

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144. *Id.* at 38. *See also* Local 13, ILWU v. Pacific Marine Ass'n, 441 F.2d 1061, 1065–66 (9th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972).

145. 396 F.2d at 39. While it had remained neutral before the joint committee, the union switched its position and advocated dovetailing before the court. The Third Circuit theorized that such a change of position may have been an attempt to save face at the other plants, since the union was aware that joint committee decisions are rarely overturned by the courts. *Id.*

146. *Id.* at 40.

or, "at the very least," ensuring that the position of the seller's employees was presented by experienced and competent representatives.[147]

The Third Circuit's emphasis in *Bieski,* therefore, was the adequacy and fairness of the grievance proceedings in relation to the gravity of the controversy involved.[148] The court noted that if the proceedings were conducted in a fair manner, it would decline to review the merits of the decision in the absence of fraud, deceit, or other breach by the union of its duty of fair representation.[149] While some commentators have criticized the Third Circuit's involvement with contractual interpretation in *Bieski,*[150] its inquiry into the fairness and adequacy of the joint committee's proceedings seems to have been clearly sanctioned by *Humphrey* and is extremely desirable, in view of the importance of seniority to an individual and his impotence when opposed by both union and management. Other Third Circuit opinions have expressed a willingness in that court to test the procedural fairness of joint committee or arbitration proceedings, although most evidence satisfaction when the employees' positions were advocated by union shop stewards, in contrast to *Bieski's* concern that the employees in some instances need more eloquent advocates.[151]

147. 396 F.2d at 42. The court further indicated that the union's neutral position would be justifiable if new evidence disclosed that the committee's decision that it lacked jurisdiction had been reasonable. *Id.* at 42 n.21. The district court's opinion on remand was not reported. Presumably, since the Third Circuit affirmed the district court's decision without an opinion, the court was satisfied that the requirements of procedural fairness had been fulfilled. Bieski v. Eastern Auto. Forwdg. Co., 497 F.2d 921 (3d Cir.), *cert. denied,* 43 U.S.L.W. 3306 (U.S. Nov. 26, 1974) (No. 74–252).

148. 396 F.2d at 38. *See also* Rothlein v. Armour & Co., 391 F.2d 584 (3d Cir. 1968), which involved a pension plan dispute. The Third Circuit again emphasized that the contractual grievance procedure, also containing provision for a joint committee, contemplated adversity of interests between union and management. The court observed that:

> [T]he [court] should be satisfied that the quality of the contractual grievance procedures, in actual practice and "legally," is commensurate with the substantiality of the claim or dispute presented by the employee. If the procedures suffer because a union is in breach of its duty of fair representation, clearly the individual should have recourse to the courts. *If an infirmity less than that is present,* federal labor policy would suggest that the rights of a few . . . be carefully balanced against the concerns of the many . . . .

Id. at 580 (footnote omitted, emphasis added).

149. *But see* Price v. Teamsters Union, 457 F.2d 605 (3d Cir. 1972) (joint committee decision will not be overturned unless dishonest, capricious, or beyond its authority).

The Board has been taking the *Bieski* approach, or at least a modifica- of *Bieski*'s approach. Under the doctrine of Spielberg Mfg. Co., 112 N.L.R.B. 1086 (1955), the Board honors an arbitration award if the arbitration proceedings were "fair and regular" and the outcome is not repugnant to the purposes or policies of the National Labor Relations Act. *Id.* at 1153. Apparently, the Board will accord the same respect to awards rendered by joint committees, at least by those set up by the Teamsters under the National Master Freight Agreement. *See, e.g.,* McLean Trucking Co., 202 N.L.R.B. No. 102, 82 L.R.R.M. 1652 (1973).

150. *See, e.g.,* Azoff, *supra* note 116, at 353–57; Note, 55 VA. L. REV. 368 (1969). Azoff is also critical of *Bieski*'s emphasis on adversity in joint committee decisions, arguing that this is irrational if the grievance procedure is to act as a means of achieving industrial harmony. Azoff, *supra* note 116, at 352. He concedes, however, that the Third Circuit's concern with the adequacy of the individual's representation before the joint committee when the union assumes a neutral stance is a realistic approach, at least in some instances. *Id.* at 358.

151. *See, e.g.,* Price v. Teamsters Union, 457 F.2d 605 (3d Cir. 1972); Fuller v. Teamsters Local 107, 428 F.2d 503 (3d Cir. 1970).

With respect to the first prong of the *Humphrey* standard, the "reasonableness" of the union's position, the court expressed a willingness to explore the union's position, as indicated by its suggestions to the union concerning its conduct during the upcoming joint committee hearing. Since the court's primary emphasis was on the procedural fairness of the grievance proceeding, the "reasonableness" of the union's position was of less importance because all sides of the controversy would be represented.

D. Suggestions for the Future

It must be concluded that the lower courts, with the exception of the Third Circuit, have been unresponsive to *Humphrey's* two-pronged inquiry into the union's position on the resolution of the seniority question. It would seem, then, that further clarification by the Supreme Court is needed in this area to assure that the viewpoints of all the employees involved in such disputes are fully and fairly presented to a joint committee. Moreover, if the individual employees are guaranteed a greater degree of procedural fairness — *Humphrey's* second standard — the reasonableness of the union's position — *Humphrey's* first standard — will become less crucial in these cases. If the joint committee hears both sides of the question, the position which the union advocates will, of course, be less determinative of the outcome.

The assurance of a full and fair presentation by both employee groups before the joint committee would have one further advantage. In contrast to judicial review of the union's position for reasonableness, a court's review of the procedural adequacy of such hearings would be neutral in the sense that it would not be concerning itself with the substantive merits of the labor questions involved. Thus, procedural safeguards would neither unduly hamper the union nor increase external involvement in the parties' administration of the collective bargaining agreement.

Several observers have expressed the view that the individual employee should be given a greater role in the arbitration hearing in the general grievance adjustment mechanism. Since the Supreme Court in *Humphrey* subjected the decision of the joint committee to the same standards of judicial review as an arbitrator's decision,[152] the suggestions by these observers should apply equally to joint committee hearings.

Several commentators have suggested that the employees have the right to notification and participation in the arbitration hearing, particularly when the employees are irreconcilably divided on the question involved — as in a seniority dispute — yet represented by the same union local.[153]

152. *See* note 121 *supra.*

153. *See* Tobias, *supra* note 50, at 89; Hanslowe, *The Collective Agreement and the Duty of Fair Representation,* 14 LAB. L.J. 1052, 1066–68 (1963); Summers, *supra* note 11, at 406–08; Williams, *Intervention: Rights and Policies* in 16 ANN. NATIONAL ACADEMY OF ARBITRATORS 265, 277–84 (1963). Professor Blumrosen also advocates individual intervention in arbitration, but would withhold this right until

Such intervention by individual employees would increase the expense of arbitration only minimally.[154] Should the employees *desire* an attorney to represent their interests, it would seem most equitable[155] for the employees to pay for the attorney out of their own pockets.[156] Moreover, in many instances, the employees' interests can be adequately protected, and their views persuasively advocated, by experienced union stewards, thereby avoiding the expenses of attorneys, as well as the problem of cost allocation.

These suggestions for requiring participation by the individual employees in arbitration would neither disrupt the parties' administration of the collective bargaining agreement nor greatly alter the present scheme of things. This change, probably best be accomplished by an amendment to the National Labor Relations Act,[157] is a prerequisite to the adequate protection of individual employee rights in grievance administration.

V. CONCLUSION

The volume of litigation revolving around the union's duty of fair representation has been startling, and is increasing rapidly.[158] Despite the doctrine's popularity with aggrieved employees, however, the cases have demonstrated that an employee's chances of recovering against his union are slight;[159] the majority of the reported decisions have resulted in either a dismissal on the pleadings or a summary judgment in favor of the defendants.[160]

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a court had first determined that the union had breached its duty of fair representation. *See* Blumrosen, *supra* note 102, at 372–74.

Traditionally, the courts have denied the right of the individual employee to participate in arbitration on general contract principles. The rationale was that since arbitration is a creature of the contract and the arbitration clause is worded as giving only the *union* and the employer the right to demand arbitration, the individual employee had no standing to demand to participate in the arbitration proceeding. *See, e.g.,* Acuff v. International Bhd. of Paper Makers, 404 F.2d 169 (5th Cir. 1968), *cert. denied,* 394 U.S. 987 (1969); Arsenault v. General Elec. Co., 147 Conn. 130, 157 A.2d 918, *cert. denied,* 364 U.S. 815 (1960); Mello v. Steelworkers Local 4408, 82 R.I. 60, 105 A.2d 806 (1954); Lenhoff, *The Effect of Labor Arbitration Clauses Upon the Individual,* 9 ARB. J. 3 (1954); Note, 58 MICH. L. REV. 796 (1960).

154. *See* Summers, *supra* note 11, at 405; *Report, supra* note 11, at 184–86.

155. *See, e.g., Report, supra* note 11, at 184–86.

156. Under Professor Blumrosen's approach, the union might be required to assume the employees' costs of legal representation in the arbitration or joint committee hearings, where it had been found in breach of its duty toward those employees by prior judicial determination. *See* note 153 *supra.* Absent such a finding of liability, however, it would be inequitable to burden the union with the legal expenses of one or both groups of employees.

157. At least one commentator suggests that legislation is the most appropriate device for providing individual participation in arbitration. *See* Lenhoff, *supra* note 153, at 25. Professor Williams observes that legislation is inevitable if the parties refuse to voluntarily allow employee intervention, but regrets the removal of flexibility from arbitration which governmental intervention would necessitate. *See* Williams, *supra* note 153, at 276.

158. A precise count of the number of cases has not been undertaken. Tobias asserts that, as of 1972, there had been "several hundred" cases reported after *Vaca.* *See* Tobias, *supra* note 50, at 67.

159. *See, e.g.,* Lenhoff, *supra* note 28, at 295; Summers, *supra* note 11, at 410.

160. *See* Tobias, *supra* note 50, at 67; Feller, *supra* note 10, at 152–53.

This trend is due, in part,[161] to the refusal of many courts to read *Vaca* as having expanded the scope of the union's duty beyond that of the prior decisions. More particularly, many of the courts have refused to uphold the employee's claim where he has demonstrated that the union, from an objective standpoint, arbitrarily ignored or perfunctorily processed his grievance. If, as *Vaca* proclaimed, the fair representation principle is to stand as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress,"[162] the lower courts must utilize a much more liberal approach to these cases in order to effectuate the spirit of *Vaca*. The Supreme Court must also resolve the conflict among the courts and the Board regarding the relationship between the merits of a grievance and the union's compliance with its duty.[163]

A broad reading of *Vaca* would inure to the benefit of the individual employee in the context of seniority disputes. The critical importance of seniority rights to the individual can be meaningfully protected from biased treatment by the union, in those instances where employees' interests are in conflict, only by coupling a more liberal reading of *Vaca* with the approach of the Third Circuit to the tests of fairness expressed in *Humphrey*.[164] The main philosophical undercurrent which militates against this approach is the traditional notion that, in order for the union to deal effectively with management, the various interests of the individual employees must be unified into one collective viewpoint, to be defined and controlled by the union. While it is crucial that the union retain the authority to bargain with management on behalf of the *entire* employee unit, there nonetheless remains a considerable area of issues within which the interest of the individual employee can be protected without vitiating the collective interests of the bargaining unit.[165] Moreover, it is submitted that the *union*, too, has a real interest — self-preservation — in protecting the individual's rights more jealously: If the individual employee can be assured only that his interest will be protected from bad faith activity by his union, the value of his union membership is seriously questioned.

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161. Other obstacles confront the employee in his attempt to remedy his injury in addition to a narrow reading of the union's duty, including: 1) his failure to exhaust remedies provided for under the collective bargaining agreement, and 2) his failure to exhaust internal union remedies. *See* Tobias, *supra* note 50, at 67.

162. 386 U.S. at 182.

163. *See* notes 44–48 & 80–87 and accompanying text *supra*.

164. *See* Price v. Teamsters Union, 457 F.2d 605 (3d Cir. 1972); Bieski v. Eastern Auto. Forwdg. Co., 396 F.2d 32 (3d Cir. 1968).

165. *See* notes 152–57 and accompanying text *supra*.