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The Duty of Fair Representation

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Comments

The Duty of Fair Representation

The growth of labor unions in our modern industrialized society is in large measure attributable to the national labor policy of encouraging collective bargaining to resolve industrial strife. That policy is premised on the fact that the representative of the majority of employees is most effective in gaining benefits for them while at the same time promoting industrial stability. Generally, national labor policy extinguishes the individual employee's power to choose his own course of action and encourages him to act collectively through a majority representative. It is argued that when the desires of an individual conflict with the majority it is the individual who must yield for the betterment of the group represented by their union. When individual action threatens the interests of the union or the employee group, the union should have the authority to discipline the errant individual member.[1] The primary source of power for union discipline is the authority inferred from its role as exclusive majority representative under the Railway Labor Act[2] and the Taft-Hartley Act.[3] The authority of unions to act as an exclusive representative for its members is subject to a concomitant obligation to represent all members in the bargaining unit fairly, hence: the doctrine of fair representation.

The doctrine was first expressed in *Steele v. Lousiville & Nashville R.R.*,[4] decided under the Railway Labor Act. The Court there held that the union was required "in collective bargaining and in making contracts with the carrier to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective

1. Scofield v. NLRB, 394 U.S. 423 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). *Cf.* NLRB v. Marine Workers, 391 U.S. 418 (1969).
2. 45 U.S.C. §§ 151, 152 (1964).
3. 29 U.S.C. §§ 151, 159(a) (1964).
4. 323 U.S. 192 (1944).

bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action."[5] Since under the Railway Labor Act[6] or the Taft-Hartley Act[7] minority factions of employees cannot bargain individually with the employer to the derogation of the union, the union must fairly represent the employees' interests otherwise they would have no means of protection.[8]

It is the purpose of this comment to set forth the individual's rights in the collective bargaining apparatus with special emphasis on the relationship of the union as a collective entity to the individual, the enunciation of the doctrine of fair representation, its nature and scope, and the remedies that are available to the employee when the union breaches its duty of fair representation. Preliminary to an analysis of these subjects certain jurisdictional aspects must be considered.

Jurisdiction

Collective bargaining agreements, like all contracts, must be enforceable to have any effect in industrial relations. Aggrieved parties under a collective bargaining contract should have right of action in federal courts without being forced to a state forum because of lack of diversity or because of the amount in question. Enforceability encourages parties to make fair contracts thus promoting the national policy of industrial peace. The laws encouraging collective bargaining are not effective unless there is some means of enforcement. For these reasons, in part,[9] Congress conferred jurisdiction for labor disputes on the federal courts by enacting Section 301 of the Taft-Hartley Act: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . . ."[10] Notwithstanding the creation of jurisdiction over labor contract disputes in the federal courts, the Act left three questions unresolved: (1) Whether federal jurisdiction was concurrent with state court jurisdiction and if so, (2) which law—state or federal—would be applied, and (3) the right of an individual union member to sue for breach of the employer-union contract.

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5. *Id.* at 204.

6. *See, e.g.*, Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944).

7. *See, e.g.*, Brooks v. NLRB, 348 U.S. 96 (1954); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

8. Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Wallace Corporation v. NLRB, 323 U.S. 248 (1944).

9. *Cf.* S. REP. No. 105, 80th Cong., 1st Sess., 15-18 (1959). *See also* 29 U.S.C. § 185(a) (1964).

10. *Id.* § 185 (1964).

In *Charles Dowd Box Co. v. Courtney*[11] it was held that state and federal courts have concurrent jurisdiction over Section 301 suits. In *Teamsters Local 174 v. Lucas Flour Co.*,[12] the Court decided that state courts deciding Section 301 cases must apply federal substantive law. The national labor policy was to encourage arbitration of disputes arising under collective bargaining contracts.[13]

The contentions that Section 301 excluded all suits brought by employees to enforce rights accorded them under the collective bargaining contract between the employer and the union was specifically rejected by the Supreme Court in *Smith v. Evening News.*[14] There, it was held that an employee may sue his employer on an alleged contract breach under Section 301 in state court even though the conduct involved was arguably an "unfair labor practice" subject to the exclusive jurisdiction of the NLRB.[15]

In the *Miranda Fuel Co.* case,[16] the NLRB held that a union's breach of its duty of fair representation was a violation of the Taft-Hartley Act. The *Miranda Fuel Co.* doctrine eventually received court approval in *Local 12, Rubber Workers v. NLRB*[17] when the Fifth Circuit indicated that the NLRB may have exclusive jurisdiction over breaches of duties of fair representation.

> Where the aggrieved employee's claim is not founded on a breach of the bargaining contract, but rather is based squarely upon an alleged violation of the union's duty of fair representation . . . [t]he unfair labor practice jurisdiction of the board will apparently be exclusive, totally preempting that of the courts.[18]

Once the NLRB decides that certain conduct is an unfair labor practice it should be held to have preempted the subject matter. At the time of the *Rubber Workers* decision the Supreme Court had not definitively indicated

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11. 368 U.S. 502 (1962).
12. 369 U.S. 95 (1962).
13. Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
14. 371 U.S. 195, 200 (1962).
15. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The Court stated the general rule that if the conduct of either a company or a union is "arguably" an unfair labor practice the NLRB has exclusive jurisdiction. However, the *Garmon* Court also cited with approval International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), wherein a suit by a member against his union for wrongful expulsion was held cognizable in state court even though it was possible that the NLRB could have granted relief. Reaffirmance of the "arguable" test of *Garmon* was given in *In Re* Green, 369 U.S. 689 (1962), and in *Ex parte* George, 371 U.S. 72 (1962).
16. 140 N.L.R.B. 181 (1962), *rev'd.*, 326 F.2d 172 (2d Cir. 1963).
17. 368 F.2d 12, 22 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).
18. *Id.* at 22.

that a breach of the duty of fair representation was an unfair labor practice.[19] The denial of certiorari in *Rubber Workers* seemed to indicate that such was the case and, if so, would, under the "arguable" test of *San Diego Building Trades Council v. Garmon*,[20] have been within the exclusive jurisdiction of the NLRB. The preemption doctrine, however, was not as clear cut as it might seem under the test of *Garmon*. For example, in *Garmon*, the Court observed that the Act leaves much to the states and that jurisdictional lines can only be made more definite by the course of litigation. If the matter under scrutiny is merely peripheral to the conduct regulated by the Act or the interests sought to be regulated are "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act"[21] then it is not within the exclusive jurisdiction of the NLRB. The vagueness of the standard and the suggestion of the case by case approach detracts from the arguable test also enunciated in the decision. In this growing body of litigation there was much to be said for uniformity of decisions and it was clear that the NLRB had fully acted by its holding in *Miranda Fuel Co.* and NLRB jurisdiction would seem to be exclusive. However, that was not the case.

The Supreme Court in its decision in *Vaca v. Sipes*[22] put to rest the dispute of whether or not the NLRB had exclusive jurisdiction. The Court held that while a breach of fair representation in the case may arguably be an unfair labor practice, the NLRB did not have exclusive jurisdiction. The suit could be brought in federal court or state court as long as federal law was applied. Three Justices, concurring in the result, would have found the matter to be within the exclusive jurisdiction of the NLRB. The rationale for finding no exclusive jurisdiction were: (1) the doctrine has not been applied to cases where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB; (2) the doctrine has not been applied to matters peripheral to the Act; (3) the rationale of the doctrine, *i.e.*, the need to avoid conflicting rules of substantive law and the desirability of leaving the development of such rules to the administrative agency created by Congress does not apply to fair representation cases; and (4) the NLRB has been tardy in entering the field of fair representation and when it finally did so in *Miranda Fuel Co.* it applied the *Steele v. Louisville & Nashville R.R.* line of cases, with which the federal courts were more than familiar. Thus

19. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); Humphrey v. Moore, 375 U.S. 335, 344 (1964); Local 100, Plumbers v. Borden, 373 U.S. 690, 696 (1963).

20. 359 U.S. 236 (1959).

21. *Id.* at 244.

22. 386 U.S. 171 (1967).

the degree of expertise brought to bear on the matters by the NLRB is not sufficient to displace the courts who have been handling these suits since *Steele*. While the action was against the union in *Vaca*, the Court stated the rule that before an employee can sue his employer for contract breach under Section 301, the employee must prove that he first attempted to exhaust his contractual remedies and that his attempt to exhaust was frustrated by arbitrary, discriminatory or bad faith conduct or a breach of a duty of fair representation by the union. The individual employee has no absolute right to have his grievance arbitrated. If he did it would undermine the settlement provisions of the union-management contract and destroy the employer's confidence in the union's authority over its membership. Even if the individual's grievance is meritorious he is without relief unless he can show the union breached its duty of fair representation. If the grievance is clearly meritorious it would seem the union would *per se* breach its duty if it failed to prosecute it, but the wide discretion of unions in deciding to prosecute reaches even meritorious grievances.[23] It is submitted that in a capital punishment, *i.e.*, a discharge case, the union's discretion should be curtailed. The same test should not apply to a case of little importance to the employee or status of the union and a more serious grievance regarding discharge or loss of seniority which could lead to accelerated discharge. As Justice Black observed in his dissenting opinion in *Vaca v. Sipes*, the decision "puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy . . . . [W]hile giving the worker an ephemeral right to sue his union for breach of its duty of fair representation, [the decision] creates insurmountable obstacles to block his more valuable right to sue his employer for breach of the collective bargaining agreement."[24]

Is it a union defense to a suit under Section 301 based on fair representation in federal court that an employee has filed charges with the NLRB? *Vaca* makes clear that state and federal courts have jurisdiction and so does the NLRB. The federal courts have jurisdiction even though an arbitrator has acted if the case involves a breach of fair representation[25] and even if the matter may amount to an unfair labor practice the courts still have jurisdic-

23. *Cf.* Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

24. 386 U.S. 171, 210 (1967). Of course, the rule of requiring exhaustion of contract remedies before resort to the courts was the rule prior to *Vaca*. In Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), the Court held that the individual must first exhaust his contractual remedies before resort to the courts on a breach of contract claim except where it would be futile for the employee to attempt to exhaust, *i.e.*, the employer repudiates the contractual procedures, or the union, possessing sole power under the contract to invoke the grievance procedure, wrongfully refuses to process the grievance.

25. Hill v. Air Corp., 275 F. Supp. 482 (N.D. Ohio 1967).

tion under Section 301 of the Taft-Hartley Act.[26] Contentions that the employee's sole remedy is a Section 301 suit have been rejected on the theory that the employer's contract with the union cannot deny the NLRB jurisdiction.[27] But if the employee files a charge with the NLRB he is not precluded from suing in state or federal court under Section 301 or for breach of fair representation. Therefore, filing with the NLRB or with the courts is not an election of remedies because jurisdiction is concurrent, not exclusive.[28] Indeed in some cases, such as expulsion from membership, the NLRB may be without power to grant any remedy and in such cases state court jurisdiction may be the only means of relief.[29] *Vaca v. Sipes* makes clear that jurisdiction in fair representation cases is tripartite in nature and that suits will lie in state or federal court or before the NLRB.

Individual Rights Under Collective Bargaining

The development of the law regarding an employee's right to sue his employer for breach of collective bargaining process was necessarily connected, but not irretrievably so, with his union's duty of fair representation. When an employee is suing on a collective bargaining contract seeking arbitration of his grievance, or an order compelling his employer to abide by an arbitrator's award or merely for reinstatement on an allegation of wrongful discharge, it is generally because the union has refused at one point in the stage of the grievance-arbitration process to do it for him. Whether this refusal by the union is a breach of the duty of fair representation must depend on the circumstances of each case. Courts must balance the conflicting interests of the employee and his representative against the general standards of good faith and fair dealing enunciated in the *Steele v. Louisville & Nashville R.R.* line of cases and the broad standards of union discretion exemplified by the cases culminating in *Humphrey v. Moore.*[30]

Generally there were three theories regarding the employee's standing to sue his employer under the collective-bargaining contract. These theories, in the main, are embodied in *Black-Clausen Co. v. Machinists Lodge 355,*[31] *Donnelly v. United Fruit Co.,*[32] and *Jenkins v. Wm. Schluderberg T. J. Kurdle Co.,*[33] a case remarkably similar to and cited as being in accord with the now

26. Powers v. Troy Mills, Inc., 303 F. Supp. 1377 (D.N.H. 1969).
27. NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967).
28. Bartels v. Lithographers, 306 F. Supp. 1266 (S.D.N.Y. 1970).
29. IAM v. Gonzales, 356 U.S. 617 (1958); Lockridge v. Motor Coach Employees, 93 Idaho 294, 460 P.2d 719 (1969), *cert. granted,* 38 U.S.L.W. 3465 (U.S. May 25, 1970).
30. 375 U.S. 335 (1964).
31. 313 F.2d 179 (2d Cir. 1962).
32. 40 N.J. 61, 190 A.2d 825 (1963).
33. 217 Md. 556, 144 A.2d 88 (1958).

leading authority on fair representation matters, *Vaca v. Sipes.*

In *Black-Clausen* the federal circuit court held that an employee had no right to compel arbitration. The employee's contention that Section 9(a) of the Taft-Hartley Act[34] gave him the right to compel arbitration was rejected. The court construed the proviso as not granting employees a right but rather a privilege to present personal grievances to the employer for adjustment. The thrust of Section 9(a) was to protect the employer from charges of refusal to bargain under Section 8(a)(5) of the Act[35] by bypassing the union as exclusive representative[36] in voluntarily processing the individual grievance of the employee at the employee's request. Therefore, the employee had no right as an individual to compel arbitration of his grievance. Only the union as representative of the employee had standing to sue to compel arbitration especially where the terms of the contract gave this power only to the union.

In *Donnelly* the New Jersey Supreme Court held that employees had a vested right under Section 9(a) of Taft-Hartley to present grievances to their employer after giving the union an opportunity to process the grievance. An employee had standing to sue his employer under the contract based on the proviso to Section 9(a).

The third approach of the courts regarding an employee's right to sue to compel arbitration of grievances arising under the contract is embodied in *Jenkins.* The Maryland Supreme Court there held that the employer is immune from suits by individual employees unless the employee shows he exhausted his grievance in the procedures set out in the contract, that the union has refused to process the grievance, and that such refusal is a breach of the union's duty of fair representation.

Prior to *Smith v. Evening News*[37] state courts had treated the issue of employee standing and fair representation in a variety of ways similar to the approaches taken in *Jenkins, Black-Clausen,* and *Donnelly.* For example, in

34. 29 U.S.C. § 159(a) (1964).

> Sec. 9. (a): Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

35. 29 U.S.C. § 158(a)(5) (1964).

36. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); *cf.* NLRB v. Katz, 369 U.S. 736 (1962).

37. 371 U.S. 195 (1962). *See also* Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962).

Parker v. Borack[38] an employee brought suit in New York to compel arbitration of his discharge. His claim was dismissed on the claim that under the contract the union had exclusive rights to sue to compel arbitration. The employee changed his theory of recovery to a suit for breach of contract. The court held that the employee was a direct beneficiary of the contract but that his right could only be enforced by arbitration which was in exclusive control of the union. The only remedy the employee had under the *Parker v. Borack* decision was against his own union. It is apparent that the cases in New York in the main fall into the approach taken by the Second Circuit in *Black-Clausen.*

The Wisconsin courts have generally taken a pro-employee approach to the issue of individual standing to sue. By utilizing various theories these courts have allowed individual suits against employers similar to the *Donnelly* decision. In *Pattenge v. Wagner Iron Works,*[39] the Wisconsin court allowed an employee to sue to recover vacation pay even though arbitration was an exclusive remedy to the union. The individual's claim, although covered by the collective-bargaining agreement, was also included in his individual employment contract. The court also relied on the employee's vested right under Section 9(a) of the Taft-Hartley Act to have his grievance adjusted. In *Clark v. Hein-Werner Corp.*[40] individual Wisconsin employees were allowed, on due process grounds, to intervene in an arbitration proceeding where the union had taken a position adverse to that of the employees. Wisconsin also allows individual members to sue their union for breach of fiduciary duty such as negligence in failing to file a timely grievance.[41] Other courts have allowed individuals to sue on a theory that the individual, as an employee, is working under an individual contract of employment as well as a union contract. The rights vested in an employee in his status of an employee are not divested by his union's refusal to arbitrate his grievance.[42] Still other courts have seized on procedural and technical barriers as a bar to individual suits on the contract. Pleading requirements have been stringent.[43] Even Wisconsin has insisted on exhaustion of remedies even where it was apparent that such remedy was unavailable.[44] But as indicated above Wisconsin's courts have been willing to evaluate the employee's grievance on the merits and recognize

38. 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959); *cf.* Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).

39. 275 Wis. 495, 82 N.W.2d 172 (1957).

40. 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *rehearing denied,* 8 Wis. 2d 277, 100 N.W.2d 317 (1960).

41. Frey v. Meatcutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

42. Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So. 2d 98 (1957).

43. Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), *cert. denied,* 371 U.S. 920 (1962).

44. Wioduk v. John Oster Mfg. Co., 17 Wis. 2d 367, 117 N.W.2d 245 (1962).

that the union's refusal to arbitrate may in part be due to interests adverse to the individual employee.[45]

The decisions in the courts of New York and Wisconsin exemplify a difference of philosophy. New York's courts emphasize the union's position and those of Wisconsin recognize that the protection of the individual is the foremost consideration. The problem is a proper balancing of interests between the union, the employer and the individual employee. As the Court observed in *Smith v. Evening News:*

> Individual claims lie at the heart of the grievance and arbitration machinery, are to be a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.[46]

But there may be a difference of emphasis to be given to individual rights during bargaining for a contract and in the administration of that contract. To quote Professor Blumrosen:

> The ordinary inconveniences or disadvantages to some of the employees should not be allowed to overshadow the dominant purpose of the bargaining process by delaying or deterring agreement between union and management. In case of administration of labor agreements, however, considerations relating to the stability of contractual rights dictate that the balance be struck more favorably to the employees.[47]

Indeed, it may promote the national policy of industrial peace to open paths of protest for an aggrieved worker. It is arguable that an employer who only agreed to arbitrate with the union is not bound as a matter of contract law to arbitrate with an individual. But when the employer refuses to arbitrate with the union the individual should be able to seek court relief. Section 9(a) evidences the fact that the union has plenary power to negotiate agreements, within their duty of fair representation but the proviso supports the theory that the union does not possess plenary power to dispose of grievances and that the employee has standing to have his grievance adjusted. Indeed, contracts that give to the union exclusive control over grievances to the union

45. O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 107 N.W.2d 484 (1961).
46. 371 U.S. 195, 200 (1962).
47. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435, 1476 (1963).

may be contrary to statute.[48]

Public policy should not foreclose individual employees from suing their employer in cases involving discharge, the capital punishment of labor relations. One commentator has urged that "the duty of fair representation should allow the union, in good faith, to negotiate changes in conditions of employment as to all matters except seniority rights."[49] *A fortiori*, discharge should be immune from the doctrine of fair representation to the extent that the individual should be able to get court relief in the event the union in good faith declines to process his grievance.

There are valid policy reasons why an individual should not have standing to sue in every case where he claims his rights under the contract have been violated. First, control over the grievance machinery is usually vested solely in the parties to the contract, the union and the employer, thereby excluding the individual from standing. Allowing the employee to sue in every case would weaken the grievance procedure by reducing the incentive for the parties to the contract to settle matters because such settlements would lack finality. However, these policy arguments should not control in cases of discharge. Where the grievance is not frivolous but is a good faith pocketbook action, it should be sufficient to give the individual employee standing to sue to protect his job,[50] in view of the statutory support of Section 9(a).

Either the good faith test of *Steele* should not be applied to discharge cases[51] and in those cases of arguable merit the union must represent the employee or the employee should be given standing to press his claim. This approach is contrary to recent pronunciations by the Supreme Court in *Vaca v. Sipes*[52] but it is the sounder policy. "The history of collective bargaining demonstrates the basic flexibility of union and management. Management has survived the demise of the managerial prerogative theory of business operation. Unions have adapted to technological change. There is no reason to assume that similar flexibility would not exist in connection with the recognition of individual rights."[53]

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48. *See* Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421 (1963).

49. Blumrosen, *The Workers and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1482 (1963).

50. *Cf.* Flast v. Cohen, 392 U.S. 83 (1968). *See also* Associated Data Processing v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

51. 323 U.S. 192 (1944).

52. 386 U.S. 171 (1967).

53. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV., 1435, 1494 (1963).

The Nature and Scope of the Duty of Fair Representation

In *Brotherhood of Railway Trainmen v. Howard*[54] the duty of fair representation enunciated in *Steele* was extended to cover black employees who, while classified as train porters, did the same work as white brakemen represented by the union. The black employees were excluded from membership in the white union and were represented by another union. The union defendant contended that it owed no duty to the black employees because they were not in the unit or members of the craft represented by the union defendant. The Supreme Court rejected this contention and held that the union breached its duty of fair representation by its *active* discrimination in negotiating a contract with the carrier calling for abolition of the black employees' jobs thereby bestowing the jobs on its white members. The only basis for the denial of work to the black employees was their race which is irrelevant and constituted invidious discrimination and an unlawful use of the power conferred on the union by the Railway Labor Act. In *Conley v. Gibson*,[55] another case involving racial discrimination in the railway industry, the Court held that a union's *passive* discrimination by its refusal to process grievances by a union because the grievants were black is a violation of its duty of fair representation. The union's duty does not end with the making of a contract with the employer or carrier but it carries over into the administration of that agreement. A contract fair on its face may be unfairly administered against members of the bargaining unit. "Once [the union] undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes."[56] It has also been held that an all white negotiating committee representing two locals, one all white, one all black, violates the duty of fair representation when it negotiates a clause calling for segregated seniority lists.[57]

In cases involving racial discrimination it is apparent from an equitable standpoint that courts more easily will find breaches of the duty of fair representation as contrary to national policy.[58] But when obviously irrelevant factors, such as race, are not present the courts have been inclined to gauge the union's duty in the factual context in which the case arose giving great weight to union discretion.

The extent of the union's duty to eliminate racial discrimination is not entirely clear. Commentators have suggested various solutions, such as the

54. 343 U.S. 768 (1952).
55. 355 U.S. 41 (1957).
56. *Id.* at 47; *cf.* Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).
57. Syres v. Oil Workers, 350 U.S. 892 (1955).
58. Brown v. Board of Education, 347 U.S. 483 (1954).

union's affirmative duty to eliminate racially discriminatory practices in negotiating and administering the collective bargaining contract. One commentator suggests that unions must only refrain from using its power and status as the exclusive representative "to negotiate invidious distinctions."[59] Others claim that the union has an affirmative obligation in bargaining to require the employer to eliminate racial discriminatory practices.[60] It is sufficient to say that unions, because of their past history of discrimination against blacks in denying them full membership rights,[61] face a stiffer burden in demonstrating to the NLRB and the courts that they have acted in a fair, honest and good faith manner. Indeed, as of 1963, one commentator claimed "the only cases in which unions have been found to have violated their duty of fair representation in negotiating an agreement have been cases of racial discrimination."[62]

However, the union as majority representative cannot be straight-jacketed into rigid rules if it is to be an effective representative for its membership. If the union is not effective the employees may become disenchanted and take unilateral action thus subverting the collective bargaining process. Negotiating effectiveness requires that the bargaining agent enjoy a degree of discretion in the give and take of collective bargaining which includes negotiation and administration of the contract. The interests of the bargaining unit may be as diverse as the number of employees embraced. An attempt to satisfy everyone in the unit is often futile. The Court in *Ford Motor Co. v. Huffman* observed:

> 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.[63]

The use of union discretion frequently arises in cases involving seniority rights of employees affected by merger of companies or company facilities resulting in a decrease of the number of jobs available and a resultant layoff. Often the problem is anticipated in the collective bargaining contract. Generally, retention of jobs will depend on seniority. A union is without power

59. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 176 (1957).
60. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 581 (1962).
61. Id. at 576.
62. Summers, *Collective Power and Individual Rights in the Collective Bargaining Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421 (1963).
63. 345 U.S. 330, 338 (1953).

to bargain away vested rights,[64] and the issue is whether seniority rights are vested. Dilution of seniority rights has been justified as a matter of national policy favoring military veterans.[65] Relevant considerations must control the union's decision in handling seniority grievances. The union may not draw distinctions between competing groups of employees which are based on their political power in the union. The decision must be based on rational standards.[66] There is some merit in the position that seniority rights are so vital that they occupy the status of a vested right. As a result "the duty of fair representation should allow the union, in good faith, to negotiate changes in conditions of employment as to all matters except seniority rights."[67] However, this approach has not received court approval and the union is free, consistent with its duty of fair representation, to make decisions adversely affecting seniority rights of employees.[68] In *Humphrey* the Court rejected the contention that antagonistic interests of two sets of employees represented by the same union meant inadequate representation of one of the groups. Relying on *Ford Motor Co. v. Huffman*, the Court held that it was

> . . . not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents not in supporting the position of one group of employees against that of another . . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process.[69]

The scope of union discretion is well illustrated by a case where the union agreed with the employer to arbitrarily lay off part of the employees in a unit of lunch counter employees as an attempt to discover which employees were responsible for suspected thefts. It was held that the union had authority to make the agreement with the employer in face of contract language that prohibited discharge except for just cause.[70] This wide breadth of union discre-

64. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945).
65. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).
66. Ferro v. Railway Express, 296 F.2d 847 (2d Cir. 1961).
67. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 1482 (1963).
68. Humphrey v. Moore, 375 U.S. 335 (1964). *Cf.* Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32 (3d Cir. 1968).
69. Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). *Cf.* Taylor v. Dealers Transport Co., 73 L.R.R.M. 2106 (W.D. Ky. 1970).
70. Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961). *See also* Hildreth v. Union News Co., 315 F.2d 548 (6th Cir.), *cert. denied*, 375 U.S. 826 (1963).

tion in fair representation could lead to unjust results regarding employees working under a collective-bargaining contract if they as individuals did not have standing to sue, to arbitrate, or to grieve as individuals.

Retirees

The union's duty of fair representation, flowing as it does from its status as exclusive representative under Section 9 of the Act, should expand as its status is enhanced by new decisions of statutory construction of Section 8(a)(5)[71] which requires the employer to bargain with the majority representative of his employees. For example, does a union owe a duty of fair representation to retired employees who are no longer working in the unit? In *Brotherhood of Railway Trainmen v. Howard*[72] the duty of fair representation was extended to employees beyond the confines of the bargaining unit. It would seem to follow that if an employer must bargain with the union over mandatory subjects affecting retired employees, the union would owe those employees a duty of fair representation. In *Pittsburg Plate Glass Co.*[73] the NLRB held that retirees' benefits are mandatory subjects for bargaining and an employer cannot unilaterally change benefits the retirees receive. To this extent, the NLRB found that retirees are "employees" within the meaning of the Act.[74] The dissenting opinion in *Pittsburg Plate Glass* raised possible problems that may confront the NLRB or the courts. For example, when the union currently representing employees is not the same union that represented the retirees when they were working, which union is the appropriate representative of the retirees? Is the present bargaining agent required to represent retirees who earned pensions when there was no union representative and, if so, is the duty of fair representation the same that is owed to the active employees? It would seem that if retirees are "employees" the union owes them a duty of fair representation as to those issues that may affect their interests and they should have standing to compel fair representation by the union before the NLRB or courts. This is especially true if those benefits flowing to retired employees are "vested" as the seniority rights were in *Elgin, J. & E.R.R. v. Burley*.[75] Many of the issues raised by the dissent in *Pittsburg Plate Glass* were resolved in *Nedd v. Mine Workers*[76] where the court held that in a suit by retired mine workers to require their former employers to make

71. 29 U.S.C. § 158(a)(5) (1964).
72. 343 U.S. 768 (1952).
73. 177 N.L.R.B. No. 114, 71 L.R.R.M. 1433 (1969). One court has held that a union owes a duty of fair representation to retired employees. Nedd v. U.M.W., 400 F.2d 103 (3d Cir. 1968).
74. 29 U.S.C. § 152(3) (1964).
75. 325 U.S. 711 (1945); *cf.* Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969).
76. 400 F.2d 103 (3d Cir. 1968).

payments on their behalf to a health and welfare fund the miners had to show a breach of fair representation to recover. While it would not be a breach of the union's duty to favor working members over retired members, "damages might be recoverable if, as a result of the [union's] alleged failure to insist on the [mine owner's] contributions, it is no longer possible to collect delinquent payments in full from all [mine owners]."[77]

What is applicable to retired employees should also be applicable to applicants for employment for they also are "employees" within the meaning of the Act under the rule in *Phelps Dodge v. NLRB*.[78] Since a union may not affect an employee's job status or opportunities because of his lack of union membership it follows that the statute that protects the employee in that regard and creates the duty of fair representation would protect the employees as a job applicant from a union's breach of its duty of fair representation. Under the Taft-Hartley Act the union's duty of fair representation begins with the birth of the employee-employer relationship and extends to the grave and the duty or liabilities for breach of the duty even extends to the heirs of the employee.[79]

Unions have been given the right to be present at the investigatory stage of a disciplinary action aimed at an employee in the unit. In the *Texaco* case,[80] the company was held to have violated Section 8(a)(5) in bypassing the union and refusing the employee's and union's request for union representation. This *Miranda-Escobedo*[81] rule in industrial relations is significant and relevant to the doctrine of fair representation under the Taft-Hartley Act. Since the union has the right to be present and the employee a right to request union representation, does the union breach its duty of fair representation by refusing to appear and defend the employee if requested to do so by the employee? As in criminal law, admissions or other evidence given by the employee when the investigation begins to "focus on the accused" may lead to his capital punishment, discharge. While many of the constitutional amendments have been applied to the states through the Fourteenth Amendment, it is generally held that with the exception of due process safeguards, they do not apply to administrative or NLRB proceedings.[82]

77. *Id.* at 106-07.
78. 313 U.S. 177 (1941).
79. Port Drum Co., 180 N.L.R.B. No. 90 (1969).
80. Texaco, Inc., 168 N.L.R.B. No. 49 (1967), *rev'd*, 408 F.2d 142 (5th Cir. 1969). *See also* Ingraham Industries, 72 L.R.R.M. 1245 (1969) (where the union's presence at a meeting to disseminate information to employees about a profit sharing plan was not required). *Cf.* Jacobe-Pearson Ford Inc., 172 N.L.R.B. No. 84 (1968); Chevron Oil Co., 168 N.L.R.B. No. 84 (1967).
81. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
82. NLRB v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir. 1969); F.J. Buckner Co. v. NLRB, 401 F.2d 910 (9th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969).

Nevertheless, the concepts underlying those amendments such as fairness, substantial justice, and due process do apply at least by analogy. It would seem that especially in those cases where discharge may result, the union must appear and defend when requested and conceivably should volunteer to represent the employee without having received a formal request from him. The NLRB has consistently held that a union must be accorded the opportunity to be present in the handling and adjustment of grievances.[83] Since the union has the right, it is not a large step forward to require the union to exercise the right consistent with its duty of fair representation. As the economic and industrial system changes and as the union's economic and political power grows and as their status as bargaining representative is enhanced by the national labor policy of encouraging collective bargaining, it becomes more necessary to ensure that it is not abused at the expense of the individual. If his union does not fairly represent him someone must. At least the courts and the NLRB should be sympathetic to his plea.

A review of recent court cases regarding the duty of fair representation will help to further delineate the scope and nature of the union's duty of fair representation. In *Hall v. Pacific Maritime Association*[84] employees were deregistered for work because of a dispute they had with a union leader's brother. They were allowed to maintain their suit under Section 301 on an allegation of conspiracy by the union and employer to deprive them of work and for breach of fair representation by the union. It was also held that a duty of fair representation is not owed by a union official in his individual capacity, since the union official had no statutory power as an exclusive representative. Also, the individual business agent, while the *agent* for the employee, will not be held to a lawyer's degree of care for "bad advice." To recover the employee must show a confidential relationship that relieves him of a duty of diligence to protect his legal rights.[85] A minority union owes no duty of fair representation because by virtue of its minority status it cannot be an exclusive representative.[86]

While the duty of fair representation does not extend to filing law suits to challenge state laws that may discriminate because of sex,[87] a union may engage attorneys on a salary basis to represent individual members' claims,[88] so it is arguable that to meet its duty of fair representation it should afford

83. Sohio Chemical Co., 141 N.L.R.B. 810 (1963); Westinghouse Electric Corp., 141 N.L.R.B. 733 (1963); Globe-Union, Inc., 97 N.L.R.B. 1026 (1952); Bethlehem Steel Co., 89 N.L.R.B. 341 (1950).
84. 281 F. Supp. 54 (N.D. Cal. 1968).
85. Bland v. Reed, 68 L.R.R.M. 2517 (C.D. Cal. 1968).
86. Wells v. Rwy. Conductors, 73 L.R.R.M. 2322 (N.D. Ill. 1970).
87. Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968).
88. Mine Workers District 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

counsel in those cases that can be clearly won and also in seniority, pension, or vested rights cases or discharge cases where the chances of victory are not so great. Indeed, since the union acts under statutory authority, for it to provide attorney services in some cases and deny the services in others with no rational basis for distinguishing between the two, may be a denial of due process or equal protection.

The trend is away from the vested rights theory to the good-faith test of *Vaca v. Sipes*. For example, seniority rights are generally held to be subject to alteration with each successive contract and the union may, consistent with its duty of fair representation, bargain away seniority rights.[89] The individual must show that action or inaction of the union agent was motivated by bad faith in cases involving negotiation of a change in the contract because of the wide discretion allowed unions in negotiation of agreements.[90] Since seniority rights can be bargained away, a mere negotiated change in the contract eliminating an employee's super seniority does not by itself establish a breach of the union's duty of fair representation.[91]

Contract provisions may overlap and different provisions may be supportive of adverse interests. Parties defend their actions as being consistent with contract provisions. Where parties purport to act in accord with the contract, the court should determine whether the contract reasonably supports their position. When an aggrieved employee complains about the administration of the contract by the union, a determination of the union's duty need not be separated from language of the contract under which the employee is claiming. The court should view the problem as a whole, developing on a case by case approach, requirements of fair representation which may demand more of the union than mere abstention from hostility and invidious discrimination. For example, failure of the union in arbitration to assert provisions of the contract most favorable to the aggrieved employees may be a breach of the duty of fair representation[92] since the failure would be evidence of bad faith.

When a union fails to prepare a proper defense or fails to advise the em-

89. Schick v. NLRB, 409 F.2d 395 (7th Cir. 1969); Oddie v. Ross Gear & Tool Co., Inc., 305 F.2d 143 (6th Cir. 1962); Ferrara v. Pacific Intermountain Express Co., 301 F. Supp. 1240 (N.D. Ill. 1969). The vested rights concept has not entirely been abandoned. In the recent case of Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969), the court held pension rights to be vested and thus the union had no power, absent express consent by the employees, to bargain away the employee's rights. Even though the union's action may have been innocent, recovery may be allowed for the tort of conversion.

90. Balowski v. UAW, 372 F.2d 829 (6th Cir. 1967).

91. Meatcutters, Local 5, 73 L.R.R.M. 1529 (1970); Bolen v. Lau Blower Co., 71 L.R.R.M. 2309 (S.D. Ohio 1969).

92. Price v. Teamsters, 71 L.R.R.M. 2167 (E.D. Pa. 1969).

ployee of procedural steps necessary to grieve his discharge it is negligent but the failure may not be actionable. But if the union's conduct was a conscious misrepresentation or based on an irrelevant consideration it may be a breach of the union's duty. One case held that the union representative bound the union by his acts of failing to bring all relevant facts to the attention of the grievance committee and the union officers breached their duty by not becoming fully acquainted with all of the relevant facts of the grievant's case.[93]

A breach of the duty is difficult to prove. Withdrawal of even meritorious grievances in exchange for benefits for the overall unit is generally within the union's discretion. Two recent Second Circuit decisions seem to indicate that an individual can keep his grievance alive by negating the union's authority before settlement. An employee is still able to press his grievance if his union breaches its duty of fair representation *or* if his employer engaged in

> conduct which would deprive it of its right to rely on the [union's] apparent authority to settle [an employee's] grievance. As a matter of law one of these wrongful actions must be found to have occurred before an employee can sue his employer on a contract claim which has already been negotiated to a settlement between the employee's collective representative, purporting to act on his behalf.[94]

Even assuming that one of the wrongful actions exist, the employee must, under the *Burley* decisions,[95] take steps to negate the union's authority to settle his grievance to preserve his rights against the employer. In *Sumberland v. Long Island R.R.*[96] failure by the union to notify the employee of the precise terms of the settlement reached did not operate as a revocation of the union's authority to make the settlement.[97] Nor was it indicative of bad faith. *Sumberland* also held that in resolving the issue of fair representation the court must not inquire into the merits of an employee's grievance.[98] It is submitted that such an approach is erroneous because it is inconsistent with the Third Circuit's *Rothlein v. Armour & Co.* decision[99] which held that the court must inquire into the merits to determine good faith. It is inconceivable that a court in judging the reasonableness and good-faith conduct of a un-

93. Bazarte v. United Transportation Union, 305 F. Supp. 443 (E.D. Pa. 1969).

94. Pyzynski v. N.Y. Central R.R. Co., 421 F.2d 854, 864 (2d Cir. 1970); *cf.* Durham v. Mason & Dixon Lines, Inc., 404 F.2d 864 (6th Cir. 1968), *cert. denied,* 394 U.S. 998 (1969).

95. Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711 (1945), *opinion adhered to,* 327 U.S. 661 (1946).

96. 421 F.2d 1219, 1223 (2d Cir. 1970). *Cf.* Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969).

97. 421 F.2d 1219, 1225 (2d Cir. 1970).

98. *Id.*

99. 391 F.2d 574, 579-80 (3d Cir. 1968). *See also* Price v. Teamsters, 71 L.R.R.M. 2167 (E.D. Pa. 1969).

ion would disregard the fact that a grievance is wholly without merit when measured against the contract language. An essential ingredient or threshold issue to be resolved in a fair representation suit is the potential validity of the grievance and its importance in the overall collective bargaining setting.[100] Decisions of arbitration committees and the union must be "vigorously scrutinized for reasonableness."[101] The restrictive approach by the Second Circuit is irreconcilable with earlier decisions which excused employees noncompliance with procedural steps under the contract where the employer had conspired with the union.[102] For example, where the union failed to fairly represent an employee,[103] the employee was allowed recovery from his employer even though the employer was not responsible for the employee's failure to exhaust his contractual remedies. It is submitted that the better approach is to require the courts to look to the merits of the grievance as one of several factors and surrounding circumstances to be weighed in judging the good faith of the union. Since the union has a great deal of discretion, the courts should vigorously scrutinize its actions to insure that their discretion is not abused.

The Duty of Fair Representation Under the Taft-Hartley Act

The NLRB did not (until 1962) formulate a rule that a breach of the duty of fair representation was an unfair labor practice.[104] Early in the NLRB's history, however, it did treat racial discrimination by unions in the representation cases arising under Section 9 of the Taft-Hartley Act.[105] The NLRB has refused to exclude blacks from bargaining units because of race.[106] It has refused to entertain petitions for elections if the petitioning union did not admit blacks to membership.[107] In *Pioneer Bus Co.*[108] the NLRB held a con-

100. Watson v. Teamsters, 399 F.2d 875 (5th Cir. 1968).

101. Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32, 40 (3d Cir. 1968).

102. Desrosiers v. American Cyanamid Co., 377 F.2d 864 (2d Cir. 1967).

103. Desrosiers v. American Cyanamid Co., 299 F. Supp. 162 (D. Conn. 1969). If, however, the right violated is one protected by Landrum-Griffin there is no jurisdictional basis for a suit against the employer and relief can only be sought against the union. Thompson v. N.Y. Central R.R., 361 F.2d 137 (2d Cir. 1966).

104. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir. 1963).

105. 29 U.S.C. § 159(a) (1964). This section provides for NLRB conducted secret ballots in elections in which employees choose their bargaining representative. If a union is chosen it is certified by the NLRB as the exclusive bargaining representative.

106. Aetna Iron & Steel Co., 35 N.L.R.B. 136 (1941).

107. Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999 (1943). *Cf.* Haus & Brother Company, Inc., 62 N.L.R.B. 1075 (1945); Larus & Brother Co., Inc., 62 N.L.R.B. 1075 (1945).

108. 140 N.L.R.B. 54 (1962). The NLRB has also set aside elections on the ground that racial appeals were made in the election campaign. Sewell Mfg. Co., 138 N.L.R.B. 66 (1962); Allen-Morrison Sign Co., 138 N.L.R.B., 73 (1962); *cf.* Archer Laundry Co., 150 N.L.R.B. 1427 (1965).

tract that divides the unit of employees along racial lines cannot serve as a bar to an election so sought by an intervening union. The NLRB intimated that representation by unions along racial lines may warrant revocation of the certification held by the union. This issue was resolved in *Hughes Tool Co.*[109] where the NLRB revoked the certification held by unions because their contract was racially discriminatory in that it divided the bargaining unit along racial lines.

The NLRB has construed Section 9(a) to give individual employees the right to present grievances at every stage of the arbitration process.[110] This approach, although it might seem attractive and while it survived the congressional amendments in 1959, it has not withstood the development of court law in recent years. The judicial trend minimizes the individuals' rights and role in the arbitration-collective bargaining process.

The origins of the NLRB's approach, as well as the court's approach, to fair representation were predicated on the potent factor of race discrimination to which both the NLRB and the court would be sympathetic. The union had the duty under the Wagner Act "to represent *all* members of the unit *equally* and *without discrimination* on the basis of race, color, or creed."[111] However, in the broadest regulation of union conduct enunciated by the NLRB in *Miranda Fuel Co.*[112] neither race nor lack of union membership was involved. In that case, the NLRB held that Sections 7 and 8(b)(1)(A) of the Taft-Hartley Act[113] "prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[114] By virtue of its exclusive representative status under the Act the union had a duty of fair representation to all employees in the unit.[115] A breach of that duty is a violation of Section 8(b)(1)(A) which makes restraint or coercion of employees by a union an unfair labor practice.

In *Miranda Fuel Co.* the NLRB also found a violation of Section 8(b)(2)[116] which prohibits unions from discriminating against employees because of their lack of membership in the union. In *Radio Officers Union v. NLRB*[117] the Supreme Court held that there must be a showing of encouragement of union membership which was a foreseeable result of the union con-

109. 147 N.L.R.B. 1573 (1964).
110. Hughes Tool Co., 104 N.L.R.B. 318 (1953).
111. *Id.* at 325.
112. 140 N.L.R.B. 181 (1962), *enf. denied,* 326 F.2d 172 (2d Cir. 1963).
113. 29 U.S.C. §§ 157, 158(b)(1)(A) (1964).
114. 140 N.L.R.B. at 185.
115. Wallace Corp. v. NLRB, 323 U.S. 248 (1944).
116. 29 U.S.C. § 158(b)(2) (1964).
117. 347 U.S. 17 (1954).

duct aimed at an individual's employment status. However, not all encouragement is unlawful. In *Local 357, Teamsters v. NLRB*[118] the Court overruled the NLRB's *Mountain Pacific* doctrine,[119] which had held that exclusive hiring hall arrangements giving unions exclusive control over job referrals were unlawful *per se* because such arrangements unlawfully encouraged membership in the union. In *Local 357* the Court held there must be a showing of discrimination in union activities before the Act is violated. While the hiring hall arrangements encourage membership, encouragement alone, without discrimination is not a violation of the Act. When the union acts arbitrarily to affect an employee's job status it has the result of demonstrating to the employee the union's power to achieve less than legitimate ends. If the union can act unreasonably and arbitrarily without sanction this tends to encourage membership in an unlawful manner.[120] Two NLRB members dissented in *Miranda Fuel Co.* on the ground that discrimination to be unlawful must be related to union membership and there was no such showing in that case. However, the dissent in *Miranda* recognized that a union had a duty of fair representation under Section 9 of the Act but that an aggrieved party must look to the courts for enforcement of that duty and his only recourse under Taft-Hartley was to petition the NLRB to revoke the union's certificate.[121]

The dissent disagreed with the majority's view that the duty of fair representation is read into Section 7 so that any breach of the duty infringes on the Section 7 rights thus violating Section 8(b)(1)(A). The dissent placed special reliance on language in *Ford Motor v. Huffman* that "the statutory authority of a collective bargaining representative [has] such breadth that it removes all ground for a substantial charge that [the union] by exceeding its authority committed an unfair labor practice."[122]

In *Local 12, Rubber Workers*,[123] the NLRB held that a union may not refuse to process a grievance to arbitration for racially discriminatory reasons because such conduct violates the union's duty to bargain in good faith under Section 8(b)(3)[124] as well as Sections 8(b)(1)(A) and (2). The violation of Section 8(b)(1)(A) does not turn on membership or nonmenbership but is founded solely on the breach of the union's duty to fairly represent members of the unit. The same NLRB members who dissented in *Mi-*

118. 365 U.S. 667 (1961).
119. Mountain Pac. Ch. of Ass'd Gen. Contractors, Inc., 119 N.L.R.B. 883 (1957).
120. Miranda Fuel Co., 140 N.L.R.B., 181 (1962).
121. *Cf.* Larus & Brother Co., 62 N.L.R.B. 1075 (1945).
122. 345 U.S. 330, 332 n.4 (1953).
123. 150 N.L.R.B. 312 (1964), *aff'd.*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).
124. 29 U.S.C. § 158(b)(3) (1964).

randa Fuel Co. dissented in *Rubber Workers* while, as in *Miranda,* agreeing that the union has a duty of fair representation under the Act.

In view of the closeness of the issue, the *Miranda-Rubber Workers* doctrine could change, but one impetus for its continued vitality is the fact that the doctrine has received judicial approval.[125] Furthermore the dissenting opinion of the NLRB in *Miranda* relied on *Ford Motor v. Huffman.* That case dealt with negotiation, not administration of collective bargaining contracts. The union's discretion in negotiation is broader than it is in administration.[126] Therefore the dissent's reliance on *Ford Motor v. Huffman* is misplaced since both *Miranda* and *Rubber Workers* involved *administration* of collective bargaining contracts.

While *Miranda* was denied enforcement in the Second Circuit, that decision involved three separate opinions with only one judge finding explicitly that a breach of the duty of fair representation was not an unfair labor practice. On the other hand, the Fifth Circuit in *Rubber Workers* fully endorsed the NLRB's broad construction of Section 8(b)(1)(A) to include breaches of the duty of fair representation.

While *Miranda Fuel Co.* and *Rubber Workers* are the lead cases for the proposition that a breach of the duty of fair representation is an unfair labor practice, a brief review of more recent cases helps define that duty in its practical application.[127]

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125. Local 12, Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967). *See also* Vaca v. Sipes, 386 U.S. 171 (1967) (which approved the NLRB's *Miranda* decision); Truck Drivers, Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

126. 325 U.S. 711, 739-41 (1945).

127. The subject of fair representation under the Taft-Hartley Act has been the subject of extensive comment. *See, e.g.,* Aaron, *Some Aspects of the Union's Duty of Fair Representation,* 22 OHIO ST. L.J. 89 (1961); Albert, *NLRB-FEPC,* 16 VAND. L. REV. 547 (1963); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435 (1963); Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957); Hanslowe, *The Collective Agreement and the Duty of Fair Representation,* 1963 LAB. L.J. 1052; Herring, *The "Fair Representation" Doctrine,* 24 MD. L. REV. 113 (1964); Murphy, *The Duty of Fair Representation Under Taft-Hartley,* 30 MO. L. REV. 373 (1965); Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964,* 49 MINN. L. REV. 771 (1964); Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 COLUM. L. REV. 563 (1962); Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda,* N.Y.U. 16TH ANN. CONF. ON LAB. 3 (1963); Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. REV. 362 (1962); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions,* 50 GEO. L.J. 457 (1962); Wellington, *Union Democracy and Fair Representation,* 67 YALE L.J. 1327 (1958); Comment, *Discrimination and the NLRB,* 32 U. CHI. L. REV. 124 (1964); Comment, *Racial Discrimination and the Duty of Fair Representation,* 65 COLUM. L. REV. 273 (1965); Note, *Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation,* 26 U. PITT. L. REV. 593 (1965); Note, *Federal Protection of Individual Rights Under Labor Contracts,* 73 YALE L.J. 1215 (1964).

In *Hughes Tool Co.*[128] the NLRB held that a union violates Section 8(b)(1)(A) by failing to process a grievance to arbitration for racially discriminatory reasons since such conduct is a breach of the union's duty to fairly represent employees. Any union action based on racial grounds violates Section 8(b)(1)(A).[129]

Unions, like any organization, possess rule-making authority to assist them in the administration of their affairs. The rules may be the subject of fair representation complaints by individuals affected. In cases where union rules have no legitimate basis their enforcement will be an unfair labor practice based on the *Miranda Fuel Co.* theory of illegal encouragement of union membership.[130] This does not mean that all union rules which result in derogation of employment status is an unfair labor practice. If the basis of the rule has a legitimate end, *e.g.*, to allow the union to better serve the unit it represents and the enforcement of the rule is free of arbitrary or irrelevant considerations, it will not be held unlawful.[131] Grievances may be filed regarding the enforcement of a union rule. Obviously, a union has wide discretion to refuse to handle grievances. But, if the refusal is predicated on an irrelevant or arbitrary reason, such refusal will violate Section 8(b)(1)(A) and its duty of fair representation[132] and in the appropriate case the NLRB will order the union to process the employee's grievances.[133]

Just as a union may breach its duty by allowing its actions toward the employees to be governed by political considerations or by an attempt to preclude employees from access to the NLRB, it also may breach its duty by economic considerations tantamount to a conflict of interest. In *NLRB v.*

128. 147 N.L.R.B. 1573 (1964).

129. Local 1367, Longshoremen, 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Houston Maritime Ass'n, 168 N.L.R.B. No. 83 (1967); Cargo Handlers, Inc., 159 N.L.R.B. 321 (1966); Local 453, UAW & 149 N.L.R.B. 482 (1964).

130. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954); Local 357 Teamsters v. NLRB, 365 U.S. 667 (1961).

131. *See* Los Angeles Paper Handlers' Union No. 3, 181 N.L.R.B. 70 (1970) (bar members from working at other jobs during a lockout); Columbus Typographical Union No. 5, 177 N.L.R.B. No. 58 (1969); Local 10, Musicians, 153 N.L.R.B. 68 (1965) (spreading of work); New York Typographical Union No. 6, 144 N.L.R.B. 1555 (1963), *enforced sub. nom.*, Cafero v. NLRB, 336 F.2d 115 (2d Cir. 1964); Local 820, Teamsters, 145 N.L.R.B. 225 (1963) (restrictions on the transfer of employees from one classification to another).

132. Teamsters Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967) (union took an adamant stand against dovetailing for reasons of political expediency); Local 923, Teamsters, 172 N.L.R.B. No. 248 (1968) (refusal to help employees find work for political reasons); Selwyn Shoe Mfg. Co., 172 N.L.R.B. No. 81 (1968) (employees filed charges against the union with the NLRB); Clothing Workers Local 485, 171 N.L.R.B. No. 119 (1968) (employees utilized the processes of the NLRB); IUE Local 485, 170 N.L.R.B. No. 121 (1968) (union's refusal predicated on the fact that the grievant opposed the union agent's position on the employer's overtime policy).

133. Port Drum Co., 170 N.L.R.B. No. 51 (1968).

David Buttrick Co.,[134] a local union represented the Buttrick Co. employees. The International Union, with whom the local was affiliated, made a substantial loan to a competitor of the employer. The court held that a conflict of interest would disqualify a union from representing the employees. There is no conflict of interest for a union to agree to expend funds with an association of employers to lobby for matters beneficial to the industry of which the employer is a part,[135] but a conflict of interest will exist where the union has a direct and immediate allegiance which conflicts with their function of protecting and advancing the interests of the employees.[136] When the union is faced with a latent danger that it may bargain not for the employees but for enchancement of business interests in competition with those of the employer at the bargaining table, it is a conflict of interest.[137]

Interesting problems arise under the union and employer's mutual obligation to bargain under Sections 8(b)(3) and 8(a)(5), respectively. Both parties have the obligation under those sections to bargain in good faith in the mandatory subjects of bargaining, *i.e.*, matters falling within wages, hours, and working conditions under Section 8(d) of the Act.[138] The issue is whether the union's obligation to bargain in "good faith" extends only to the employer or also to the employees. Authorities disagree about whether the obligation to bargain in good faith with the employer may imply bargaining fairly on behalf of all the employees and a breach of the duty of fair representation is a violation of Section 8(b)(3).[139] The NLRB in *Rubber Workers* found the Union to have violated Section 8(b)(3) in refusing to process grievances and in failing to embody a clause abolishing racial discrimination in their contract. It is not a large step forward to require unions to take affirmative action to compel recalcitrant employers to abolish racially discriminatory practices especially since racial discrimination by an employer may be a violation of Section 8(a)(1), which forbids an employer from coercing employees in their right to join or not join a union.[140]

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134. 399 F.2d 505 (1st Cir. 1968). *Cf.* Margaret-Peerless Coal Co., 173 N.L.R.B. No. 16 (1968).

135. A. Palodini, Inc., 168 N.L.R.B. No. 137, 67 L.R.R.M. 1022 (1967). *Cf.* Mechanical Contractors Ass'n v. Plumbers Locals 420, 428, 690, 265 F.2d 607 (3d Cir. 1959); Centreville Clinics, 73 L.R.R.M. 1337 (1970); Bausch and Lomb Optical Co., 108 N.L.R.B. 1555 (1954).

136. Welfare and Pension Funds, 178 N.L.R.B. No. 3 (1969). *Cf.* H.P. Hood & Sons, 182 N.L.R.B. No. 28 (1970).

137. Bambury Fashions, Inc., 179 N.L.R.B. No. 75 (1969).

138. 29 U.S.C. § 158(d) (1964). *Cf.* Borg-Warner Corp. v. NLRB 356 U.S. 342 (1958).

139. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 172 (1957). *But see* Sovern, *National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 589 (1962).

140. 29 U.S.C. § 158(a)(1) (1964). *See* Farmers Cooperative Compress v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 90 S. Ct. 216 (1969). This

Since employees who may desire to eliminate an employer's racially discriminatory practices must work through their union to accomplish this result,[141] it follows that the union has an affirmative duty to eliminate racially discriminatory practices. Failure to do so would be a breach of their duty of fair representation. While remedial provisions of the Act can be improved, from a procedural view, the NLRB is in particularly good position to insure that the union gives fair representation to employees it represents while at the same time insuring that the union uses its best efforts to eliminate those practices of employers that are racially discriminatory or otherwise detrimental to employee interests.

The employer is under no duty to bargain with the union until the union demonstrates that it represents a majority of the employees in an appropriate bargaining unit. This status is usually accomplished by being certified in an NLRB election[142] or by evidence of majority representation through the use of authorization cards.[143] In the great majority of cases the union gets bargain rights by winning an election. For example, the NLRB in 1967 conducted 8,116 elections but issued only 157 bargaining orders based on a card majority.[144] Therefore certification is important in a great number of cases and if the NLRB is willing to revoke its certification this would be a helpful tool to achieve fair representation in race and non-racial cases. If the *Farmers Cooperative Compress v. NLRB* case remains the law, i.e., that racial discrimination by an employer is a violation of Section 8(a)(1) the burden on the union is easier because if they are unsuccessful in their attempts to achieve the elimination of the employer's discriminatory practices they could seek relief from the NLRB. The union has a duty to resist employer racial discrimination as well as a duty to refrain from such conduct itself. The union should be required to insist that benefits of the contract be available without regard to race, they must press for the elimination of existing discrimination, and if a union precludes blacks, or other minority groups from membership, any issue that adversely affects those employees should be presumed to have been handled unfairly by the union.[145]

The NLRB's duty to ensure fair representation of unions to the employee does not end merely because the union presses a grievance to arbitration. It

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decision has been criticized by Gould, *Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 MICH. L. REV. 237 (1969). *See also* 116 CONG. REC. 2736 (1970).

141. NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 219 (9th Cir. 1969).

142. 29 C.F.R. § 102.69(b) (1970).

143. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

144. Levi Strauss & Co., 172 N.L.R.B. No. 57 (1968).

145. Sovern, *National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 584 (1962).

is conceivable that a union may breach its duty by not vigorously or negligently prosecuting the employee's claim or by consciously subverting the arbitration process to the disadvantage of the employee. It has long been held that the existence of an arbitration remedy under a contract does not deny the NLRB's jurisdiction to remedy an unfair labor practice and an award in favor of one party or another does not preclude the NLRB from finding the arbitrated conduct violated the Act.[146] The statute itself is clear that NLRB jurisdiction is not upset by private agreements.[147] The Court in the *Steelworkers Trilogy*[148] enunciated a national policy favoring arbitration of labor disputes as a means of achieving industrial peace. The NLRB has been anxious to further that policy and therefore it has imposed on itself certain guidelines to follow in deciding whether to abide by an arbitrator's decision. The general rule is that the NLRB will not upset an arbitrator's award if the arbitration proceeding was fair and regular, all parties had agreed to be bound, and the arbitrator's decision was not clearly repugnant to the politices of the Taft-Hartley Act.[149]

The issue arises as to what extent may the NLRB second guess the arbitrator to see whether or not there has been a breach of the duty of fair representation. As a corollary to that, the NLRB must sometimes interpret the contract under which the grievance is filed. In *NLRB v. C & C Plywood Corp.*[150] the Supreme Court held that the NLRB had jurisdiction to interpret the collective bargaining contract to determine whether either party had committed an unfair labor practice. On the same day the Court decided *NLRB v. Acme Industrial Co.*[151] which upheld the NLRB's power to order the employer to furnish the union with information pertaining to grievances the union has filed. It is clear that the existence of an arbitration clause in the contract would foreclose court review of the merits of a claim for arbitration under the *Steelworkers Trilogy*. The Court in *Acme Industrial* stressed that the relationship of the NLRB to the arbitration process is a different

146. NLRB v. Wagner Iron Works, 220 F.2d 126 (9th Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); NLRB v. Auto Workers, 197 F.2d 698 (7th Cir. 1952); NLRB v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945); International Harvester Co., 138 N.L.R.B. 923 (1962).

147. 29 U.S.C. § 160(a) (1964).

148. Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

149. Ratheon Co., 140 N.L.R.B. 883 (1963), *enf. denied*, 326 F.2d 471 (1st Cir. 1964); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). *But see* NLRB v. Auburn Co., 384 F.2d 1 (10th Cir. 1967) (approving the NLRB's refusal to honor an arbitration award); Raley's Supermarkets, Inc., 143 N.L.R.B. 256 (1963) (where the policy of deferring to arbitration was applied to a representation case).

150. 385 U.S. 421 (1967).

151. 385 U.S. 432 (1967).

matter. Under *C & C Plywood* and *Acme Industrial*, the NLRB does not have to wait for rulings by arbitrators or courts before construing contracts to decide a case properly before it. The effect of these decisions on the duty of fair representation is that the union is given the benefit of the NLRB processes to gain information relating to the grievance. When judging the good faith of a union's refusal to prosecute grievances one factor to be considered is the ease with which information could be gathered. *Acme Industrial* assists the union in that regard. Therefore a corresponding increase in willingness to prosecute an employee's grievance should follow. Where the subject matter of the contract dispute involves a possible unfair labor practice the union could avoid the expense of arbitration by proceeding to the NLRB. This will leave more funds, time and energy available to unions to prosecute those fair labor practice grievances that in the past may have to have been dropped due to lack of funds or time.

Other decisions by the NLRB and courts which serve to strengthen the union's hand in the bargaining process should result in a corresponding increase of the union's duty of fair representation. Indeed, the NLRB has relied on the doctrine of fair representation to support a Section 8(a)(5) finding against an employer who refused to furnish the union a list of the unit employees' home addresses. The list was sought to aid the union in its negotiation and administration of the collective bargaining contract.[152] It would seem justifiable to rely on Section 8(a)(5) and the union's growing power under that section to develop a theory of a corresponding increase in the duty of fair representation. However the opposite effect has been the case.

In all cases the aggrieved employee's choice of forum is in federal or state court or before the NLRB. The remedies available to him will vary with the severity of the breach of fair representation. Undoubtedly most remedies try to restore the status quo. Often the breach of fair representation is an outgrowth of loss of seniority leading to discharge or outright discharge itself. The employer is not blameless, for it is often his conduct, such as discharging the employee, that will precipitate the union's breach of its duty. One question is the apportionment of the employee's loss between the employer and the union. Another issue will be what type of damages are recoverable; *e.g.*, will malicious conduct by the union warrant punitive damages; will damages lie for actual loss, mental suffering, attorney's fees, and myriad of other losses.

152. Prudential Ins. Co. v. NLRB, 412 F.2d 77 (2d Cir. 1969), *cert. denied*, 396 U.S. 928 (1969); Standard Oil Co., 166 N.L.R.B. No. 45 (1967), *enforced*, 399 F.2d 639 (9th Cir. 1968).

Substantive and Procedural Obstacles to Recovery

Court suits for breaches of the duty of fair representation will raise procedural problems whether brought in state court, where local rules will govern, or in federal court, where the parties will be bound by the Federal Rules of Civil Procedure. Preliminary problems of pleading and exhaustion will confront the injured employee in his court suit. He will have to weigh many factors in choosing either a court suit or to proceed before the NLRB. Generally, in a court suit, the employee will have to allege a breach of contract by the employer, that he has attempted to exhaust his remedies, and that he was frustrated in his endeavor by the union whose action amounted to a breach of his duty of fair representation. How does the employee state his claim and, once stated, what relief can he get?

The Claim

Where race is alleged to be a consideration in company and union action, the requirement of exhaustion is narrowly construed. An allegation that a formal effort to pursue contractual remedies in a racial case will suffice and "no time consuming formalities" are required[153] "[But] after the free-hand given the Union in *Humphrey v. Moore* . . . and *Vaca* . . . there is little a union can do to blunder into liability, except in the case of a personal vendetta . . . . [The] effect of substantive limitation placed on judicial inquiry as to the union's conduct in grievance handling eviscerates the test previously applied [and] insulates the union and the employer from the average honest claim and thus deprives the worker of any role in the grievance process . . . ."[154]

There are judicial techniques available in the application of the standards to achieve substantial justice. A court may still reverse the decision of the union or arbitrating committee if based on fraud or deceit, or breach of the duty of fair representation. But those are not the only grounds whereby an individual's case can get to a court.

> If . . . the private decision complained of is a 'jurisdictional' one—that a certain dispute will not be considered on its merits by the pri-

153. Glover v. St. Louis Ry., 393 U.S. 324, 331 (1969). Indeed relief may be sought under the easier standards of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). *See* Norman v. Missouri Pacific R.R., 414 F.2d 73 (9th Cir. 1969). It is now clear that neither Title VII nor the Taft-Hartley Act preempts the other. Farmers Cooperative Compress v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (D.C. Cir. 1968). Thus where race is a factor the individual grievant may proceed on these theories of recovery, Title VII, Taft-Hartley, or fair representation.

154. Kroner, *The Individual Employee—His "Rights" in Arbitration after Vaca v. Sipes*, 20 N.Y.U. CONF. ON LAB. 75, 82-83 (1967).

> vate decision maker—then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties . . . . This is particularly true where the court is convinced that a private procedure used for the determination is not adequate to decide fairly and fully such an important initial question.[155]

The individual's case may not get to court if the power to invoke the grievance procedure under the contract is given by the contract solely to the union. The union's good faith settlement of the matter, albeit adverse to the employee, extinguishes his claim.[156] Another impediment to a court suit by an employee is the requirement that he first exhaust his remedies under the contract.[157] However, if the employer repudiates the grievance provisions of the contract he is estopped in a suit under Section 301 of Taft-Hartley to assert as a defense the employee's failure to exhaust his contractual remedies.[158] Absent these types of cases the employee must contend with the *Vaca v. Sipes* requirement that the union's action in refusing to prosecute the employee claim was in bad faith.[159]

Must a union pursue an appeal of an arbitrator's award against an employee? If not, may an employee appeal to the courts? In *Acuff v. Papermakers*[160] the Court held that the union may properly determine not to appeal an adverse arbitrator's award. Failure to appeal is not conclusive as to inadequate representation and the employees have *no* right to intervene at the appellate stage under Rule 24(a) of the Federal Rules.[161] "The right to arbitration is an incident not of the employment relationship as such but of the collective bargaining relationship."[162] The decision is a misapplication of *Vaca v. Sipes* for that case only applied past cases giving broad discretion to the union in handling grievances and arbitration. *Vaca v. Sipes* does not compel the result reached in *Acuff* and that decision should not be followed. The policy of labor peace is encouraged by intervention by the individual for it provides remedies for dissidents within the union-employer collective-bargaining structure rather than forcing them out into the streets.

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155. Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32, 38 (3d Cir. 1968).

156. Williams v. Pacific Maritime Ass'n, 384 F.2d 935 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968). *See also* Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 394 U.S. 955 (1969) (where an employee recovered by showing disparate handling of delinquent dues payments).

157. Borne v. Armstrong Cork Co., 384 F.2d 285, 289 (5th Cir. 1967).

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

159. 384 F.2d 285, 288-89 (1967). *See also* Vaca v. Sipes, 386 U.S. 171 (1967); Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).

160. 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).

161. FED. R. CIV. P. 24(a).

162. Acuff v. United Papermakers, 404 F.2d 169, 172 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).

One rationale for requiring the employer to process grievances arising under the contract is to preserve the integrity of the bargaining agent as indicated in *Vaca v. Sipes*. That policy is not undermined by allowing an employee to assert a right consistent with the collective bargaining contract. As the Court said in *Smith v. Evening News Association*, "Individual claims lie at the heart of the grievance and arbitration machinery, [and] are to a large degree inevitably intertwined with union interests . . . ."[163] Where the individual is asserting a right consistent with the contract, Sections 9(a) and 7 of the Act should give him the right to proceed alone. "To reason otherwise is to deny the very purpose for which the union exists; that is, the protection of the rights of the individual employee."[164]

There has been judicial indication that the finality of arbitration awards is not always binding on the courts under the *Steel Workers Trilogy*. For example, if there is a breach of the duty of fair representation in the arbitration proceeding the courts will entertain such a claim. In *Rothlein v. Armour & Co.*,[165] a suit for accrued pension benefits, the court indicated that there may be standards in addition to those of bad faith enunciated in *Vaca v. Sipes* for judging the validity of a settlement or contractual determination of the merits of a grievance. The judge should be satisfied that the procedures for resolution of grievances "is commensurate with the substantiality of the claim or dispute presented by the employee . . . . If an infirmity less than [a breach of fair representation] is present, federal labor policy would suggest that the rights of a few . . . be carefully balanced against the concern of the many . . . ."[166] This language suggests a general equity power in the courts to grant relief in absence of a breach of collective bargaining. The reluctance of the courts to proceed further is bothersome. The vested rights theory of *Burley*[167] would have been a perfect tool. As *Rothlein* points out there is support in *Vaca* for the proposition "that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion. . . ."[168] It is arguable that discharge, seniority rights, and "vested rights" are subjects that require the test of arbitrariness, good faith, and honesty in dealing be more vigorously applied. The more serious the grievance the less discretion the union should be permitted. If a grievance is traded for benefit to the unit employee as a whole, the benefit received should be commensurate with the seriousness of the grievance.

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163. 371 U.S. 195, 200 (1962).
164. Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 289 (8th Cir. 1968) (Lay, J., dissenting).
165. 391 F.2d 574 (3d Cir. 1968).
166. *Id.* at 580.
167. 325 U.S. 711 (1945).
168. 386 U.S. 171, 191 (1967).

All courts have not been as generous to the individuals as *Rothlien*. In *Slogley v. Illinois Central R.R.*[169] the court seized on technicality in the pleadings to dismiss an employee's suit against his employer for wrongful deprivation of seniority rights and against the union for unlawful discrimination against him. The court said that "[t]o come within the *Maddox-Vaca* exception to the general exhaustion requirement an employee . . . must allege that he has attempted to utilize the available contract grievance procedure and that his attempt has been thwarted by union conduct constituting a breach of the duty of fair representation."[170] Allegations that the union action was wrongful, unlawful, arbitrary, capricious were not sufficient to accomplish that purpose. Such an approach is contrary to the rule in *Conley v. Gibson*[171] and the intent of the federal rules which only require a short plain statement sufficient to afford fair notice to the defendant.[172] At the very least the plaintiff should have been allowed to freely amend his complaint rather than have it dismissed.[173]

The Statute of Limitations Problem

Another issue is the applicability of the statute of limitations if any. Under *Taft-Hartley* the individual would be proceeding on a *Miranda-Rubber Workers* theory and the NLRB's six month statute of limitations would apply.[174] However, in a suit brought under Section 301 *Taft-Hartley* there is no statute of limitations enunciated thereby raising the implication that suit may be begun within a reasonable time. This contention was rejected, however, in *United Auto Workers v. Hoosier Cardinal Corp.*[175] where, in a suit by the union on behalf of the employees for wages due under the contract, the Court held that in absence of a governing federal provision "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations."[176] A further issue is whether a suit on a breach of a duty of fair representation in federal court is governed by Section 10(b) of Taft-Hartley or the state statute as in *Hoosier Cardinal* or some other time limit. Certainly if the case were before the NLRB the six month limitation would apply. Although it may be arguable that in fair representation cases alone the NLRB could, if it chose to do so, defer to the state statute of limitations to enable the complainant a longer period in which to bring his

169. 397 F.2d 546 (7th Cir. 1968).
170. *Id.* at 551-52.
171. 355 U.S. 41, 47 (1957).
172. FED. R. CIV. P. 8(a)(2).
173. FED. R. CIV. P. 15(a); Foman v. Davis, 371 U.S. 178, 182 (1962).
174. 29 U.S.C. § 160(b) (1964); *cf.* Local 1424, IAM v. NLRB, 362 U.S. 411 (1962).
175. 383 U.S. 697 (1966).
176. *Id.* at 704-05.

suit. This is unlikely since there is a federal provision that governs, *i.e.*, Section 10(b). One of the difficulties with *Vaca* is permitting suits against the union in state and federal courts as well as a proceeding before the NLRB. The suit is a matter of federal law; presumably if the suit were in state court it would have to look to substantive federal law for guidance but *Hoosier Cardinal* would indicate that the state could apply its own statute of limitations. There is court authority for the proposition that in a suit in federal court on a theory of breach of fair representation, the federal court must apply the state statute of limitations.[177] This may not be as simple as it sounds. It is arguable that since *Vaca* concedes that a breach of fair representation may be an unfair labor practice there is a governing federal statute—Section 10(b). Therefore, the reliance by the court in *Gray v. Asbestos Workers* on *Hoosier Cardinal* is arguably misplaced. Rather, in suits in federal or state courts, those courts must apply the applicable federal law which is a six month statute of limitations. However, such a policy would be unduly restrictive on the individual. The policy underlying Section 10(b) of Taft-Hartley's six month limitation is to ensure that the federal policy of rapid disposition of labor disputes to accomplish industrial peace, that goal may not always be the same as vindication of individual employee rights.[178] Therefore, from the individual's position the rule in *Gray* that the state statute of limitations governs in a fair representation suit in federal court is preferable. Such a rule may pose a conflict of laws problem where several employees bring suits on occurrences in several states against the same union. Needless concern with choice of law problems should not impede recovery. Such problems posed by the dissent in *Hoosier Cardinal* could be avoided by utilization of the Federal Rules of Civil Procedure dealing with joinder and severance of actions and parties[179] which would allow separate suits by the individuals affected in the forum of their choice thus hopefully obviating choice of law problems as to the applicable statute of limitations.

Assuming that the state statute of limitations applies to fair representation suits another issue to be resolved is characterization. How is the suit to be characterized; is the suit a contractual claim for relief; or is it a claim sounding in tort? In *DeArroyo v. Sindicato de Trabajadores Packinghouse*[180] the court held that a fair representation suit is properly characterized a tort action and therefore the local statute of limitations regarding torts was to be applied. The court expressly rejected the argument that Section 10(b) of

177. Gray v. Asbestos Workers Local 51, 416 F.2d 313 (6th Cir. 1969).
178. Local 1424, IAM v. NLRB, 362 U.S. 411, 428 (1960).
179. FED. R. CIV. P. 18, 20, 21. *Cf.* UMW v. Gibbs, 383 U.S. 715 (1966); Sporia v. Greyhound, 143 F.2d 105 (3d Cir. 1944).
180. 425 F.2d 281 (1st Cir. 1970).

Taft-Hartley should apply.

Remedial Considerations

The remedy in a fair representation suit may be against the union employer or both. The test stated in *Vaca v. Sipes* is "to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer."[181] If breaches by both the union and employer are proven, the court must fashion appropriate remedies.

The court indicated in *Vaca* that the NLRB is without power to remedy an employer's breach of contract unless the employer's conduct amounts to a participation in the union's unfair labor practice.[182] As *Vaca* indicates, the remedies will vary from case to case. An order compelling arbitration is one possibility. Remedies of damages on the contractual claim may be allowed. Even if the suit is solely against the union and the employer is not joined, the union is only liable for those damages that flowed from its wrongful conduct. "Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle grievances added to the difficulty and expense of collecting from the employer."[183] A union is only liable to the individual employee for loss of income, less his interim earnings for its share of the wrong perpetrated on him. In a fair representation suit an employee is not able to recover damages for humility, embarrassment, or incidential damages such as loss of home to a mortgage holder.[184] He is also unable to recover attorney's fees in a fair representation suit. However, if a right has been violated it is not merely a private but also a public right and it should be fully vindicated. Since it is the vindication of a public and statutory policy (that a union owes a duty of fair representation to the employees it represents) all impediments of vindication of that policy should be removed. These suits should be encouraged and a major impetus to accomplishment of this goal would be to allow a successful employee to recover attorney fees. In one case under the Railway Labor Act attorney fees were awarded in a fair repre-

181. 386 U.S. 171, 197-98 (1967). *Cf.* Carroll v. Railroad Trainmen, 417 F.2d 1025 (1st Cir. 1969), *cert. denied*, 73 L.R.R.M. 2971 (1970).
182. 386 U.S. at 188 n.12.
183. Czosek v. O'Mara, 397 U.S. 25, 29 (1970).
184. St. Clair v. Local 513, Teamsters, 422 F.2d 128 (6th Cir. 1969).

sentation case.[185] Analogously, stockholders have been awarded attorney fees for years in stockholders derivative suits on the theory that such suits should be encouraged to vindicate public rights.[186] The need for allowing attorney fees is emphasized by the fact that punitive damages are not allowed in Section 303 Taft-Hartley suits because that section does not provide for them.[187] Since Sections 301 and 9 of Taft-Hartley are also silent on the subject it is doubtful that punitive damages would lie in a suit for breach of a duty of fair representation. As indicated by *Vaca and Czosek v. O'Mara*,[188] the normal damages to be assessed will be compensatory in nature. There is language in *Vaca* that indicates a possibility of punitive damages in a flagrant case of breach of duty by union. "[T]he jury awarded compensatory damages . . . plus punitive damages . . . . We hold that such damages are not recoverable from the Union in the circumstances of this case."[189] If, for example, malice were involved, punitive damages should be available.[190] But even if available, punitive and even compensatory damages have been difficult to collect.[191]

Suits under Landrum-Griffin have allowed damages for mental anguish and injury to reputation.[192] Section 102 of Landrum-Griffin[193] provides for relief as may be "appropriate" which as a statutory test is similar to that enunciated in *Vaca*. There is a basis for extensions of remedies to provide for wrongs in the individual case and in the general area of fair representation as a whole. To effectively insure full and fair representation, remedies in suits for breach of the union duty should not exclude punitive damages, nor be limited to compensatory damages, and should award membership rights in the appropriate case, and include awarding attorney fees to successful employees. Courts should be free in the exercise of their general equity power

185. Tischler v. Airline Pilots Ass'n, 67 L.R.R.M. 2579 (D. Fla. 1968); *cf.* McGraw v. Plumbers, 341 F.2d 705 (6th Cir. 1965) (denying a jury trial in a suit for wrongful expulsion). *Contra*, Boilermakers v. Braswell, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968); Simmons v. Local 713, Textile Workers Union, 350 F.2d 1012 (4th Cir. 1965).

186. Hornstein, *The Counsel Fee in Stock Holder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939). *See also* Murphy v. North American Light & Power Co., 33 F. Supp. 567 (S.D.N.Y. 1940), where the court stated, "Allowances in causes of this kind . . . should not be niggardly for appetite for effort in corporate therapeutics should be . . . encouraged." *Id.* at 571. *See also* Pergament v. Kaiser Frazer Corp., 224 F.2d 80 (6th Cir. 1955).

187. Local 20, Teamsters v. Morton, 377 U.S. 252 (1964).

188. 397 U.S. 25 (1970).

189. 386 U.S. 171, 195 (1967).

190. Boilermakers v. Braswell, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968).

191. Herring, *The Fair Representation Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113, 144 (1964).

192. Simmons v. Local 713, Textile Workers, 350 F.2d 1012 (4th Cir. 1965).

193. 29 U.S.C. § 412 (1964).

to award "appropriate" relief.

The First Circuit has taken a long stride toward effective and just relief for employees unfairly represented.[194] The court held that not only was backpay and reinstatement a proper remedy in a wrongful discharge case but also that future lost earnings may be allowed, together with attorney fees. Hopefully more courts will follow the First Circuit's lead to achieve fairness to the individual.

If the breach of the union's duty results in a deprivation of "vested rights," those and accrued benefits should be treated with preference. If the benefits are due because of statutory authority it is not necessary to plead a breach of fair representation if the statute is of a type whereby it cannot be abrogated by private agreement.[195]

One other problem remains a source of increased litigation. That is the problem of the union that wrongfully excludes employees from union membership. At common law there was no cause of action for wrongful exclusion.[196] This concept was retained by Congress when it enacted Taft-Hartley in 1947. The proviso to Section 8(b)(1)(A) of Taft-Hartley expressly gives unions plenary authority to set rules for acquisition and retention of membership.[197] Under Section 8(b)(2) of Taft-Hartley[198] unions are prohibited from discriminating against nonmembers in the bargaining unit.[199] The fair representation doctrine also requires that the union represent all employees in the bargaining unit. However, these statutory and interpretive prohibitions are often insufficient. Wide union discretion, temptations to act for the politically expedient reason at the expense of the nonunion member, and difficulties in carrying burdens of proof are reasons to not permit arbitrary or wrongful exclusion from membership. "[T]he shadowy right to 'fair representation' by the union . . . is by no means the same as the hard concrete ability to vote and to participate in the affairs of the union."[200]

If a union denies an employee admittance to membership and then flagrantly violates its duty of fair representation a remedy may lie which would

194. DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970).

195. Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065 (4th Cir. 1969).

196. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33 (1947).

197. It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .

29 U.S.C. § 158(b)(1)(A) (1964).

198. *Id.* § 158(b)(2) (1964).

199. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

200. Directors Guild v. Superior Court, 64 Cal. 2d 42, 48 Cal. Rptr. 710 (Sup. Ct. Cal. 1966).

deprive the union of its traditional right of freedom of association and restriction of membership. In a concurring opinion in *Phalen v. Theatrical Protective Union*,[201] Judge Fuld reasoned that this extraordinary remedy would lie because the union could not, under state law, arbitrarily exclude an employee from membership. Since the NLRB had no power to order admittance to membership under the proviso to Section 8(b)(1)(A), the state was not preempted from ordering a union to admit an employee to membership. Law suits and injunctions under a fair representation theory are no substitute for the processes of union democracy flowing from membership in the union. Judge Fuld would require unions to admit all employees to membership without discrimination and if the union rejects an applicant in bad faith the state court will order the union to admit him. To use new techniques to curb abuses of union power might be desirable. However, to force a union to open its membership rolls to all employees may amount to a breach of the duty of fair representation to its present members. In times of shortage of work, it would be a serious imposition on the out of work members to be forced to compete with members imposed on a union by a court order. On the other hand the remedy in *Phalen* would only apply in case of drastic or flagrant abuse of union power. Denial of membership for certain arbitrary grounds such as race, national origin or sex is already illegal under Title VII[202] and state court action could be a supplement to the congressional policy embodied there and in the *Miranda-Rubber Workers* doctrine which finds an unfair labor practice under Taft-Hartley for arbitrary use of union power.[203] Individual claims for remedial action are in the main statutory and will be filed with the NLRB. The issue is whether NLRB remedial power poses an effective deterrent to abuses of union power.

NLRB Remedies For Breach of Fair Representation

As a procedural and practical matter the NLRB is an attractive forum to enforce the duty of fair representation when the union's action is arbitrary, invidious, unfair, or based on racial factors. The administrative procedures are less expensive and more expeditious from a charging party's view point than a suit in state or federal court. The NLRB is empowered to issue cease and desist orders[204] and to enforce those orders in the circuit courts and Supreme Court.[205] The NLRB also has power to seek injunctions against both em-

201. 22 N.Y.2d 34, 238 N.E.2d 295, 290 N.Y.S.2d 881 (1968).
202. 42 U.S.C. § 2000(e)(2) (1964).
203. Hurwitz v. Directors Guild, 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966); *cf.* Ferger v. Local 483, Ironworkers, 356 F.2d 854 (3d Cir.), *cert. denied*, 384 U.S. 908 (1966).
204. 29 U.S.C. § 160(c) (1964).
205. *Id.* § 160(e).

ployers and unions.[206] The major impetus for individuals to use the NLRB forum to vindicate their rights is the fact that the NLRB bears the charging party's costs in proceedings before it and the appellate courts.[207] Furthermore, the NLRB's backlog is generally shorter than that of the federal courts.[208] The NLRB's General Counsel has wide discretion in handling cases but this does not negate the desirability of utilizing the NLRB as an inexpensive, expeditious forum for vindicating employee rights in fair representation matters. The charging party may intervene before the NLRB while at the same time receiving cost free legal service by the General Counsel's office.[209] If the charging party is aggrieved by the NLRB determination he may seek judicial review.[210]

The *Miranda-Rubber Workers* line of cases finding a violation of Section 8(b)(2) is also helpful because the NLRB remedy normally is the payment of lost wages and restoration of the status quo ante.[211] In *Port Drum Co.*[212] the NLRB ordered the union who had breached its duty of fair representation to arbitrate the employee's grievance. On the subsequent death of the employee, the NLRB ordered the union to pay the employee's estate for the period beginning with the date the employee asked the union to grieve on his behalf and ending with the date of the employee's death. On the other hand, the NLRB remedies are nonpunitive in nature,[213] and are geared to restoration of the status quo ante and therefore are ineffective as a positive deterrent. Reinstatement, backpay with interest, notice posting, and cease and desist orders are the normal remedies available under the Taft-Hartley Act. While a contempt citation may result from an NLRB order, the NLRB is seemingly reluctant to initiate such proceedings and the courts are evidently unwilling to find contempt. In fiscal year 1968 there was only one case

206. *Id.* § 160(j).

207. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 264-66 (1940). The power to issue complaints and prosecute is vested with the General Counsel. 29 U.S.C. § 153(d) (1964). *See also* Mayer v. Ordman, 391 F.2d 889 (6th Cir.), *cert. denied*, 393 U.S. 925 (1970). For a review of case handling by the NLRB see H. SILVERBERG, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD (1967).

208. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1514 (1963).

209. Local 283, UAW v. Scofield, 382 U.S. 205, 219 (1966). *Cf.* Sears, Roebuck & Co. v. Carpet Layers Local 419, 410 F.2d 1148 (10th Cir.), *cert. granted*, 396 U.S. 926 (1969).

210. 29 U.S.C. § 160(f) (1964); *cf.* Pepsico, Inc. v. NLRB, 382 F.2d 265 (6th Cir. 1967); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

211. F. W. Woolworth Co., 90 N.L.R.B. 289 (1950); Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962).

212. 180 N.L.R.B. No. 90 (1970).

213. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

holding a union in contempt.[214] Further, the NLRB's use of injunctive proceedings is rare. In cases involving union and employer discrimination under the Act, the NLRB sought only one injunction and that was denied.[215] In the same period of time the NLRB received over 1600 charges alleging unlawful union discrimination.[216]

If the NLRB goes beyond the normal remedial practices they open themselves to the charge of punitive damages under the rule in *Consolidated Edison.*[217] Legislation is necessary to provide the NLRB with more effective, punitive remedial powers such as treble backpay or the power to award *actual* damages or monetary penalities or fines for aggravated violations. In 1948, the first fiscal year under the Taft-Hartley Act, the total unfair labor practice charges filed were 3,302, with 749 of those charges filed against unions.[218] Twenty years later 17,816 unfair labor practice charges were filed with the NLRB. The charges filed against unions totalled 5,846.[219] Even a casual glance at these figures questions the validity of the remedial policies and power of the agency[220] in correcting abuses of union power. Revocation of certification and removal of the contract bar as in *Pioneer Bus*[221] is only effective against weak unions because the unions with economic strength do not need NLRB certification because by virtue of their power they are able to obtain voluntary recognition from the employer as the exclusive representative of the employees. Generally it is not the weak unions who arbitrarily exclude blacks and other employees from membership.[222] While Professors Summers, Sovern, and Cox have debated the issue as to whether racial discrimination or breach of duty of fair representation is an unfair labor practice, the debate is meaningless when the ineffective remedial policies and provisions under the Taft-Hartley Act are considered.

In *NLRB v. Tiidee Products, Inc.*[223] the court recognized that the normal

214. 33 NLRB ANN. REP. 340 (1968).

215. *Id.* at 242. *But see* Little v. Portage Realty Co., 73 L.R.R.M. 2971 (N.D. Ind. 1970) (where the court granted an injunction directing an employer to bargain with the union).

216. 33 NLRB ANN. REP. 203 (1968).

217. 305 U.S. 197 (1938).

218. 13 NLRB ANN. REP. 6 (1948).

219. 33 NLRB ANN. REP. 203 (1968).

220. An extensive review of NLRB remedies can be found in an address by NLRB member John Fanning, before the Fifth Annual Labor Relations Institute in Atlanta, Ga. on November 21, 1968. 1968 LABOR RELATIONS YEARBOOK 164 (1969).

221. 140 N.L.R.B. 54 (1962).

222. Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda,* 16 N.Y.U. CONF. ON LAB. 3 (1963).

223. 73 L.R.R.M. 2870 (D.C. Cir. 1970); *cf.* Teamsters Local 992 v. NLRB, 73 L.R.R.M. 2924 (D.C. Cir. 1970); Food Store Employees 347 v. NLRB, 74 L.R.R.M. 2109 (D.C. Cir. 1970). *See also* St. Antoine, *A Touchstone for Labor Board Remedies,* 14 WAYNE L. REV. 1039 (1968). *Cf.* NLRB v. Strong Roofing & Ins. Co., 393 U.S. 357 (1969); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

NLRB cease and desist order affords only prospective relief, rewards parties for their wrongdoing and encourages frivolous litigation. Effective redress to a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of his violation. The court ordered the NLRB on remand to frame its remedy to encompass past damages. A union that breaches its duty of fair representation reaps a benefit in subverting employees to its interests or being able by its wrongful actions to perpetuate itself in office. If remedies are not devised to prevent fair representation breaches at the NLRB level, the NLRB shortcomings will have the effect of clogging court calendars thus diverting judicial attention from more pressing matters that are before the court. The court held in *Tiidee Products,* that the Act is effectuated by an award of damages by the NLRB. In cases of flagrant abuse of union discretion the NLRB should accept the mandate of the court in *Tiidee Products* and go beyond the routine cease and desist order. They may also suggest a make-whole order or even a *Port Drum* remedy of ordering the union to arbitrate in cases where it wrongfully refuses to do so. The remedy should first compensate the aggrieved employee for all his losses legitimately, foreseeably, and reasonably flowing from the union's breach of its duty, and second, the remedy should serve to deter future similar conduct in which the public has a definite interest. As quoted by the court in *Tiidee Products,* "In the evolution of the law of remedies some things are bound to happen for the 'first time.' "[224]

In those situations where the union violates its duty, appropriate and deterrent remedies are necessary to insure that similar conduct does not reoccur. Loss of job or important seniority status, threats to an employee's financial solvency, and resultant emotional distress may be significant. It may be specious to think that a union who has already demonstrated its hostility to an individual will vigorously represent him without the NLRB looking over its shoulder. *Port Drum* raises practical difficulties for a union if the employer refuses to arbitrate. The union would have to bring a Section 301 suit to comply with the NLRB order, for it has never been held that a refusal to arbitrate by an employer is a violation of Section 8(a)(5). The traditional remedy is a Section 301 suit.[225] The NLRB has long held that the union's duty of fair representation contemplates that the employee's interests will be vigorously defended and the employee's cause fully and fairly litigated.[226]

224. International Bhd. of Operative Potters v. NLRB, 320 F.2d 757, 761 (D.C. Cir. 1963).

225. Succession Mario Mercade & Hijos, 161 N.L.R.B. 696 (1966) Hortex Mfg. Co., 147 N.L.R.B. 1151 (1964), *aff'd* 343 F.2d 329 (D.C. Cir. 1965); Textron Puerto Rico, 107 N.L.R.B. 583 (1953). *Cf.* Local 611, Chemical Workers, 123 N.L.R.B. 1507, 1508 (1959).

226. Precision Fittings Corp., 141 N.L.R.B. 1034, 1041-42 (1963); Raytheon Co.,

Obviously the taking of an adverse position and misrepresentation to an impartial panel whose duty it is to decide the grievance is not a vigorous defense,[227] and appropriate remedies should lie.

Conclusions

The standards of fair representation have been enunciated by the NLRB and the courts. Apparently no distinction is to be drawn between discharge and nondischarge cases. The individual has to meet a considerable burden to prove his case. The standards of good faith, while necessarily vague, afford unions considerable latitude and discretion. A broad policy basis for allocating such discretion to unions has been aptly stated by Professor Summers:

> Bargaining is a process of exchange, compromise and surrender of a multitude of claims and the parties are concerned with finding a formula for settlement. For the courts to weigh too closely the allocation of the benefits among the employees would plunge the courts into a task far beyond their competence and seriously hinder the parties in reaching an agreement.[228]

The problem remains a proper balancing of interests to achieve the policy alluded to by Professor Summers and that of ensuring that the individual employee has effective, full, and fair representation. Adjudications necessarily proceed on a case by case basis, particularly in the initial stages of application of judicially imposed standards. The true rule of law is developed out of a series of *ad hoc* decisions. It is "the anguish of judgment"[229] in the final analysis that will determine the issue.

The courts can devise effective remedies without rejecting *Vaca* as Justice Douglas' opinion in *Textile Workers Union v. Lincoln Mills*[230] indicates. The Act "expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of expressed statutory mandate. Some will lack expressed statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."[231] It will

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140 N.L.R.B. 883, 886-87 (1963); International Harvester Co., 138 N.L.R.B. 923, 928 (1962). *Cf.* Local 469, Plumbers, 149 N.L.R.B. 39, 46 (1964).

227. Local 12, Plumbers, 152 N.L.R.B. 1093 (1965); Yuba Consolidated Industries, 136 N.L.R.B. 683 (1962).

228. Summers, *Collective Bargaining and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421, 434 (1963).

229. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947).

230. 353 U.S. 448 (1957).

231. *Id.* at 457.

be up to the courts to preserve the rights of the individual when they are pitted against the interests of the economic giants, big business and big labor. It is within the broad range of equity power possessed by the courts that this goal can be accomplished.

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