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The Implications of *Vaca v. Sipes* on Employee Grievance Processing

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COMMENTS

THE IMPLICATIONS OF *VACA v. SIPES* ON EMPLOYEE GRIEVANCE PROCESSING

When an employer wrongfully discharges an employee and the union will not prosecute his grievance, what are the employee's remedies? Will he be successful in a suit against the union for breach of its duty of fair representation? Does the Labor-Management Relations Act of 1947[1] afford the employee any relief in a suit against the employer?

The Supreme Court recently answered these questions in *Vaca v. Sipes*.[2] A discharged employee brought suit in a Missouri state court against his union after the union refused to process his grievance through the last stage of the grievance procedure. The union claimed that it had acted in good faith as it considered the employee's claim to be without merit. The Supreme Court held that the union had not breached its duty of fair representation even though a jury had found that the grievance was in fact meritorious.[3]

This comment will discuss the implications of the *Vaca* decision. The case represents a significant statement of national labor policy, and it is an expression of the high court's position in the continuing controversy over the rights of individual employees in a bargaining unit.[4] The decision will undoubtedly have the effect of strengthening union control over the individual employee. It is submitted that as a result of the *Vaca* case in many instances a union's decision not to prosecute an individual's grievance will have the practical effect of stranding that individual with no judicial remedy. He will be unable to recover in suits against either the employer or the union.

The *Vaca* case also involves a jurisdictional question. This aspect of the decision is beyond the purview of this paper and will be considered only to the extent that it is necessary to an understanding of the broad implications of the case.

To fully grasp the impact of the *Vaca* decision it is necessary first to consider two related topics: the role of grievance procedures in contemporary labor relations and the duty of fair representation.

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1. The Labor-Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), *as amended*, 29 U.S.C. §§ 141-87 (1964). [hereinafter cited as LMRA].

2. 386 U.S. 171 (1967).

3. *Id.* at 194-95.

4. The term bargaining unit has been defined as:

> not a union; it is a group of jobs. It may be the jobs connected with a particular machine or operation; it may be the jobs of a particular craft, such as painters; it may be the jobs in a particular department of a plant; it may be clerical jobs or production jobs; it may be all nonsupervisory jobs in a given plant or in all the plants of the employer.

Labor Law Group Trust, Labor Relations and the Law 59 n.2 (3d ed. 1965). LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964) provides that the union selected by a majority of the employees in a bargaining unit shall be the exclusive representative for all the employees in the bargaining unit for purposes of collective bargaining.

I. Grievance Procedures

A basic distinction should be made between complaints and grievances. A complaint has been defined as "any behavior of the employer that an employee or the union does not like (what he has done or what he has failed to do) . . . ."[5] An employee may present a complaint to his union or to the foreman, but unless the complaint comes within the definition of a grievance, the collective bargaining agreement between the union and management will afford him no means of obtaining relief. A grievance "is a charge that the union-management contract has been violated."[6] It should be clear that some, but not all, complaints may be grievances. Grievances almost always take the form of a charge made by either an individual employee, a group of employees, or the union accusing the employer of a contract violation. In a rare case, management may assert a grievance against an employee or the union.[7]

Grievance procedures are created by contract and therefore may vary in form according to the intent of the parties—the union and the employer.[8] Yet, most collective bargaining agreements describe a basic successive step procedure. The mechanics of the typical procedure are straightforward:[9] an employee with a problem consults the union steward who will present it to the foreman on the employee's behalf. If no solution is worked out at this level the grievance is submitted in written form to the chief steward. He will discuss the matter with the superintendant of the grievant's department. If the matter remains unsolved at this second level it may be forwarded to the union grievance committee. The committee will represent the employee in a conference with the plant's industrial relations department. If agreement has still not been reached, then the matter will be submitted to arbitration.[10]

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5. S. Slichter, J. Healy & E. Livernash, The Impact of Collective Bargaining on Management 694 (1960).

6. *Id.*

7. Slichter attributes this rareness to the fact that management can proceed with its own interpretation of the collective bargaining agreement. *Id.*

8. *See* J. Kuhn, Bargaining In Grievance Settlement 5-21 (1961) for descriptions of the various forms which grievance procedures may take.

9. Kuhn warns that although seemingly simple, most grievance procedures "are more complicated than a casual reading might suggest, for the written procedure hardly hints at the involved and intricate practice." *Id.* at 6. *See* L. Sayles & G. Strauss, The Local Union 14-15 (rev. ed. 1967) for a graphic presentation of the steps involved in typical grievance processing.

10. Arbitration has been described as follows:

> today, because of necessity and convenience, labor and management have by agreement established a procedure for settling disputes which includes their own forum and their own private judges, or arbitrators. . . . The parties select the arbitrator by agreement, or accept one appointed by some agreed-upon third party. . . . In the broadest sense, what both parties want from their private judge is a fair and practical decision. . . . His authority comes from the collective bargaining agreement, plus the submission or stipulation, if there is one. . . . It is not uncommon to make a record of the hearing in cases of importance. In many disputes the parties file briefs after the hearing. . . . [The arbitrator] usually writes an opinion to accompany his award. . . . An arbitration award is not merely the settlement of a dispute. Often it forms a rule or interpretation for the parties' future conduct, and they must live with it.

Grievances may be categorized into five principle classifications.[11] First, many grievances arise out of clear-cut contract violations by the employer. Second, a grievance may involve a question of fact only, *e.g.*, was Smith late for work? Third, a grievance may turn upon contract interpretation. This is especially common where the collective bargaining agreement contains vague and indefinite clauses. Fourth, grievances often arise on strictly procedural grounds. For example, was the union-management contract to be administered in a particular manner? Fifth, the reasonableness of an employer's course of action is frequently the subject of a grievance charge.

As the union-management relationship changes, the number of grievances pressed will vary.[12] During an organizational period, when a union is first seeking to gain recognition in a plant, an atmosphere of aggression towards management is often created. After the first union-management contract is signed the union frequently continues to foster hostility towards the employer. During this period most company decisions are actively protested by the union. The theory behind this forced antagonistic behavior has been explained as an effort on the part of union leadership to demonstrate its eagerness to actively represent the rank and file.[13] Not only do the union leaders foment grievances, but individual employees will also press claims to alert both union and management to unacceptable clauses in the contract.[14] Soon the need for harmonious union-management relations is realized,[15] leading to industrial peace. The parties appreciate the fact that mutual destruction will benefit neither side. It is at this point that a stable relationship begins.

A settled pattern of grievance processing can then be noted.[16] Union officers become selective, realizing the limitations of time and money. A definite strategy is established. For instance, union leaders learn that certain grievances will only antagonize management and management realizes that it must acquiesce in certain cases.

Grievance rates do not remain static. Union election campaigns often are characterized by increased grievance activity. Furthermore, if new leaders are elected, this surge may continue for some time.[17] Another source of fluctuation is the changing popularity of different employment or industrial problems within the union.[18] The determinants of whether grievance rates are high or low have been categorized by the following indicia: (1) "the state of relations between

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Hepburn & Loiseaux, *The Nature of the Arbitration Process*, 10 Vand. L. Rev. 657, 660-63 (1957).

11. *See* S. Slichter, J. Healy & E. Livernash, *supra* note 5, at 694-96 for a thorough discussion of these categories.
12. *See* L. Sayles & G. Strauss, *supra* note 9, at 7-13.
13. *Id.* at 8.
14. S. Slichter, J. Healy & E. Livernash, *supra* note 5, at 699.
15. L. Sayles & G. Strauss, *supra* note 9, at 9, trace the survival goal to E. Bakke, Mutual Survival: The Goal of Union and Management (1946).
16. *Id.* at 8-10.
17. *See* S. Slichter, J. Healy & E. Livernash, *supra* note 5, at 699.
18. *Id.*

the union and the employer," (2) the degree of experience of the union and the employer, (3) "personalities of management and local union officials," (4) "methods of plant operation," (5) "changes in operating methods or conditions," (6) "union politics," and (7) "management policies."[19]

Grievances serve more than just a negative function. Not only is a grievance the means by which an employee can complain about employment conditions, but, through creative grievance processing, the union is able to establish specific definitions for ambiguous contract terms.[20]

A major problem in this area and the subject of this comment is the union's discretion in processing grievances. An individual employee can promote his grievance within the union,[21] yet at each stage in the processing of his grievance the union may unilaterally terminate its efforts on his behalf.

There are a number of factors which influence union leadership in deciding which grievances to pursue. A union officer's choice will have political ramifications within the union.[22] He must consider the interests of the various groups within the union to be sure that he is not weakening the bargaining position of the majority for the sake of a few. Union leaders clearly "trade off" the interests of one group against another within the union.[23] As Professor Blumrosen has aptly pointed out:

> On many matters the union hierarchy may be forced to choose between competing claims of different union subgroups, for the union consists of men with disparate interests; differences in age, health, marital status, aspirations, skills, and departmental outlook mark the union membership.[24]

At the same time, it has often been shown that union officers prefer some grievances on the basis of personal favoritism rather than on the merits of the claim.[25] Another factor influencing the union's choice will be the maintenance of good relations with management.[26] The union hierarchy will usually be careful not to push petty grievances which might antagonize management. The union may not only seek to prevent a clogging of the grievance machinery, but may wish to pursue only those claims which are of precedent value. An additional consideration is the amount of rank and file support that can be mustered to back up the claim[27] for it may be difficult to settle the grievance successfully unless management appreciates the gravity of the claim. Perhaps

19. *Id.* at 701-20 for a thorough discussion of these indicia.

20. For an analysis of the effect of grievance procedures on collective bargaining, *see generally* Ryder, *Some Concepts Concerning Grievance Procedure*, 7 Lab. L.J. 15 (1956).

21. L. Sayles & G. Strauss, *supra* note 9, at 35. Sayles and Strauss suggest "buttonholing" officers, voting for those men likely to favor the grievant's cause, and more primitive techniques such as slowdowns and wildcat strikes.

22. *Id.* at 41.

23. Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 217 Md. 556, 574, 144 A.2d 88, 98 (1958).

24. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of The Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 65 (1963).

25. *See, e.g.*, O'Brien v. Dade Bros., 18 N.J. 457, 114 A.2d 266 (1953).

26. L. Sayles & G. Strauss, *supra* note 9, 41-42.

27. *Id.* at 42-43.

the most common reason offered by unions for refusing to process an individual's grievance is its lack of merit.[28]

Grievance procedures are established and defined in union-management contracts. The individual employee's right to pursue his grievances are therefore limited by the terms of that contract.[29] Since the typical collective bargaining agreement provides that the power to press grievances rests solely with the union,[30] the employee must seek relief outside of the contract if the union fails to entertain his claim. For example, he may elect to sue the union for breach of its duty of fair representation.[31]

II. The Duty of Fair Representation

The principle that a labor organization has a duty to represent fairly all the individuals in a bargaining unit, whether members of the union or not, was first enunciated in *Steele v. Louisville & Nashville R.R.*[32] Under the authority of the Railway Labor Act of 1926[33] the defendant union, the Brotherhood of Locomotive Firemen and Enginemen, had been recognized as the exclusive bargaining representative of a craft of railway employees—the firemen employed by the Railroad Company. The majority of the firemen were white and were members of the Brotherhood. Negro firemen had always been excluded from membership because of a restrictive clause in the constitution of the Brotherhood. The difficulty arose when the Brotherhood, without giving the Negro firemen a hearing, amended the collective bargaining agreement with the Railroad. The new agreement provided, in effect, for the gradual phasing out of the Negroes from employment as firemen. Plaintiff, a Negro fireman, brought suit against both the employer and the Brotherhood to enjoin enforcement of the agreement.[34] The Alabama Circuit Court dismissed the suit

28. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967).

29. It has frequently been argued that the individual can present his grievance directly to the employer in disregard of his union under the proviso to LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964). *See infra* Part III(A), pp. 172-74, and the Supreme Court's recent ruling on the matter, *infra* Part IV(A), pp. 176-78.

30. *See, e.g.*, Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).

31. The employee might also bring a § 301 suit against the employer for breach of the collective bargaining contract. LMRA § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964). Under the exhaustion of contractual remedies doctrine though, he will still have to prove that the union breached its duty of fair representation. *See infra* Part IV(C), pp. 180-82. He might also charge the union with an unfair labor practice in a proceeding before the NLRB. *See* Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); Local 12, United Rubber Workers v. NLRB, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966) (Breach of the duty of fair representation held an unfair labor practice.). In proving the unfair labor practice the employee would undoubtedly be held to the same standard of "fairness" as in a court suit against the union for breach of its duty.

32. 323 U.S. 192 (1944). On the duty of fair representation, *see generally*, Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 Cornell L.Q. 25 (1959).

33. 44 Stat. 577 (1926), *as amended*, 54 Stat. 785 (1940), 45 U.S.C. §§ 151-88 (1964).

34. Plaintiff also sought to enjoin the Brotherhood from acting as his exclusive representative, and to recover damages.

for failure to state a cause of action and the Alabama Supreme Court affirmed.[35] The United States Supreme Court[36] reversed this judgment, stating:

> Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.[37]

Congress, in enacting the Railway Labor Act, had expressly authorized the majority of a craft to choose an exclusive bargaining representative for the entire unit.[38] The court concluded that it could therefore be inferred from the Act that the union had a duty to represent fairly all employees in the craft.[39]

The duty of fair representation was thus considered to have been derived from the statute. It has since been extended to unions certified under section 9(a) of the Labor-Management Relations Act.[40]

In *Miranda Fuel Co. v. NLRB*,[41] the National Labor Relations Board for the first time held that a union's violation of its duty of fair representation was an unfair labor practice.[42] Although denied enforcement by the Court of Appeals for the Second Circuit,[43] this doctrine was again espoused by the board in another case, *Local 12, Rubber Workers v. NLRB*.[44] In this case the Court of Appeals for the Fifth Circuit enforced the board's decision[45] and indicated that the *Miranda Fuel* doctrine would preempt breach of fair representation cases from the courts in accordance with the jurisdictional rule established in

35. 245 Ala. 113, 16 So.2d 416 (1944).
36. 323 U.S. 192 (1944).
37. *Id.* at 201.
38. Railway Labor Act, § 2, Fourth, 44 Stat. 578 (1926), 45 U.S.C. § 152 (1964).
39. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202-203.
40. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). LMRA § 9(c), 61 Stat. 143 (1947), 29 U.S.C. § 159(c) (1964), provides for elections to be conducted by the NLRB whereby the employees in a bargaining unit elect a union to represent them for bargaining purposes and the NLRB will certify the results of that election.
41. 140 N.L.R.B. 181 (1962).
42. The NLRB held that breach of the duty of fair representation violated LMRA § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964), *and* LMRA § 8(b)(2), 61 Stat. 141 (1947), 29 U.S.C. § 8(b)(2) (1964). The LMRA forbids two types of unfair labor practices, *i.e.*, violations by the employer and violations by the union. Examples of employer unfair labor practices are discrimination against employees because of union activity, and refusal to bargain with the authorized bargaining representative of his employees. LMRA §§ 8(a)(3), (5), 61 Stat. 140, 141 (1947), 29 U.S.C. §§ 158(a)(3), (5) (1964). Examples of union unfair labor practices are refusal to bargain collectively with the employer and, in certain situations, the imposition of excessive initiation fees. LMRA §§ 8(b)(3), (5), 61 Stat. 141, 142 (1947), 29 U.S.C. §§ 158(b)(3), (5) (1964). A charge may be brought before the NLRB that an employer or a union is engaged in an unfair labor practice. If after a hearing the NLRB finds that there has been a violation, it may issue a cease and desist order or take appropriate affirmative action.
43. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).
44. 150 N.L.R.B. 312 (1964).
45. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

San Diego Building Trades Council v. Garmon.[46] In *Vaca v. Sipes*[47] the Supreme Court disagrees with the Fifth Circuit and concludes that the *Garmon* preemption doctrine is inapplicable. As a result, fair representation cases may now be brought before either the courts or the National Labor Relations Board.

The duty of fair representation was a judicial creation[48] and its development for the most part has been left to the courts. The trend, as evidenced by the case law, has been to protect the unions in their discretionary decisions as to which grievances are worthy of processing.[49] The courts have facilitated this policy in a few instances by imposing strict procedural requirements on the individual employee seeking redress in court.[50]

A more effective means of strengthening union control of grievance procedures at the expense of individual employee rights has been to impose a liberal standard of fairness on the union. The duty of fair representation, as defined in *Steele v. Louisville & Nashville R.R.*,[51] required the union "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." This standard, labeled the good faith test, has been almost uniformly followed by the courts.[52] It means, in essence, that if the union can show that it refused to process a grievance in good faith, then its duty of fair representation has not been breached. The Supreme Court has also indicated that another consideration in meeting the requirements of the fairness test dictates that unions act in a non-arbitrary fashion.[53] That is, the union, in representing individual employees within the bargaining unit, must "avoid arbitrary conduct."[54]

A possible variation of the standard of fairness required in breach of duty cases may be traced to a portion of the Supreme Court's decision in *Ford Motor Co. v. Huffman.*[55] In that case, complainant alleged that a provision in the collective bargaining agreement between the union and the employer violated

46. 359 U.S. 236, 245 (1959). The Supreme Court established the basic policy that "when an activity is arguably subject to § 7 or § 8 of the [LMRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

47. 386 U.S. 171, 188 (1967).

48. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

49. *See* Blumrosen, *supra* note 24, at 1470-71. He argues that "the lower federal courts and state courts have not willingly protected individual rights under the duty of fair representation."

50. *See, e.g.*, Colbert v. Brotherhood of Railroad Trainmen, 206 F.2d 9 (9th Cir. 1953) (Strict pleading requirement—complaint failed to set forth a claim upon which relief could be granted.); Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952) (Since a union is an unincorporated association and inseparable from its individual members, therefore it cannot be sued by a member.), *overruled by* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).

51. 323 U.S. 192, 204 (1944).

52. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959); Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960).

53. Humphrey v. Moore, 375 U.S. at 342.

54. Vaca v. Sipes, 386 U.S. at 177.

55. 345 U.S. 330 (1953).

his rights.[56] The Supreme Court held that the contract provision was valid and that the union had not breached its duty of fair representation. In arriving at this decision, the Court made the observation that the provisions of the collective bargaining agreement were "within reasonable bounds of relevancy."[57] This phrase could arguably be interpreted to have added another element to the standards which must be considered in defining the duty of fair representation.[58]

The duty of fair representation is a significant but sometimes powerless defensive weapon in the arsenal of the employee. He is in need of protection because of the combative stance which unions have been forced to adopt, as a labor organization must often ignore an individual's grievances when these conflict with the bargaining aims of the unit. It has become apparent that the duty of fair representation will often provide scant relief to individual grievants in such situations. As indicated above, the courts have sacrificed individual rights and have struck the balance in favor of unions.[59] This trend has given rise to a heated debate among commentators, which *Vaca v. Sipes*[60] has settled.

III. The Debate

A. The Individual May Take His Grievance Directly To The Employer: Section 9(a) Proviso

The proviso to section 9(a) of the Labor-Management Relations Act states 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.[61]

The procedure contemplated in the proviso to section 9(a) is basic:[62] the individual has a choice. He may submit his grievance to the union for presentation or he may submit his grievance directly to the employer and person-

56. In determining seniority the contract gave credit not only for post-employment military service, but also for pre-employment service. Complainant argued that this was "unfair" because in some instances men had been in the employment of Ford for a shorter period of time, yet had more seniority due to their pre-employment service.

57. Ford Motor Co. v. Huffman, 345 U.S. at 342.

58. The Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), has added an additional variation to the definition of fairness. *See infra* Part IV(B), pp. 178-79.

59. *See infra* Part IV, pp. 176-82, for a discussion of the Supreme Court's recent statement in *Vaca* that union discretion is necessary to the national policy of collective bargaining.

60. 386 U.S. at 191.

61. 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

62. For a description of this procedure *see Report of Committee on Improvement of Administration of Union-Management Agreements, 1954,* 50 Nw. U.L. Rev. 143, 174 (1955).

ally process it through settlement. If the second method is chosen, however, the union must be notified so that its representative may be present when the parties come to terms.

Although the section 9(a) proviso is an explicit statutory directive, many courts have deprived individuals of any independant right of access to the employer.[63] Yet, other courts have granted individual employees the right to process their own grievances.[64]

A problem arises in that grievance procedures are considered to be creatures of contract. The employer and the union, in most collective bargaining contracts, agree that grievances may be processed only through the grievance procedures established in the contract. These procedures normally vest in the union exclusive authority to process grievances. Furthermore, many union constitutions have clauses granting the union the exclusive right to negotiate grievances on behalf of the members.[65]

A considerable number of academicians have advanced the thesis that the section 9(a) proviso grants every individual employee the absolute right to have his grievance processed.[66] The argument has been succinctly stated in the following terms: "the individual grievance should be recognized as an affirmative right. If the employer has agreed to discuss with the union certain grievances in a certain manner, he should be obligated to give equal recognition to an individual grievance."[67]

The proponents of this proposition base their argument on a concept of strong individual rights in labor-management relations.[68] As Professor Summers points out, many grievances involve basic job rights with loss of seniority or discharge at stake.[69] "Making the union the exclusive representative for processing grievances subordinates those interests of individual employees and endangers interests which collective bargaining purposes to protect."[70] Further-

63. *See, e.g.*, Broniman v. Great Atl. & Pac. Tea Co., 353 F.2d 559 (6th Cir. 1965); Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962); Ostrofsky v. United Steel Workers, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960); Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959).

64. *See, e.g.*, West Texas Util. Co. v. NLRB, 206 F.2d 442 (D.C. Cir.), *cert. denied*, 346 U.S. 855 (1953); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960).

65. *See* Committee Report, *supra* note 62, at 152.

66. *See, e.g.*, Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 Rutgers L. Rev. 631 (1959); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. Rev. 373 (1965); Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 Md. L. Rev. 233 (1964); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility In a Federal System*, 67 Yale L.J. 1327 (1958).

67. Committee Report, *supra* note 62, at 188.

68. *See* Wyle, *Labor Arbitration and the Concept of Exclusive Representation*, 7 B.C. Ind. & Com. L. Rev. 783, 785 (1966). Wyle, an opponent of this position, makes the criticism that few of these academicians have had any "practical experience in collective-bargaining."

69. Summers, *supra* note 66, at 392.

70. *Id.*

more, this position is bolstered by the obvious "opportunities for subtle discriminations" which exist when the union is permitted full control over the prosecution of grievances.[71] For example, the grievances of loyal union members might receive more favorable treatment by the union than those claimed by non-members, or by those "who opposed the business agent in the last election . . . ."[72]

The thesis that the individual may take his grievance directly to the employer finds primary support in the words of the section 9(a) proviso. Professor Summers has analyzed its legislative history,[73] noting that the proviso was first embodied in the original Wagner Act, but in less explicit form.[74] Two early cases,[75] which construed the original proviso and were instrumental in framing the 1947 amendments to section 9(a),[76] indicated that the individual had the right to process his claim without regard to union interference. A study of the committee reports and legislative debates concerning the Labor-Management Relations Act of 1947 leads Summers to the conclusion that Congress rewrote the proviso with those cases in mind.[77] Furthermore, Summers contends, the principle intent of the legislators "was to protect the individual employee from being wholly submerged by the collective bargaining structures."[78]

B. The Union Should Have Exclusive Power To Prosecute Grievances

Many federal and state courts have held that the individual employee cannot compel the employer to entertain his grievance.[79] These courts have construed the section 9(a) proviso as giving the employer the *right* to consider the grievances of the individual employee, rather than the *duty*.[80] The Supreme Court made a cryptic reference to this question of individual rights in *Republic Steel v. Maddox*,[81] but did not pause to offer a conclusion.[82] However, many commentators have taken a position,[83] arguing that national policy requires that labor organizations have exclusive power to prosecute grievances.

71. Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 630 (1956). Although an opponent of the LMRA § 9(a) proviso provision, Cox recognized the risks of his own position. *See infra* Part III(B), pp. 174-76.

72. *Id.*

73. Summers, *supra* note 66, at 380-84.

74. The National Labor Relations Act, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151-67 (1964). The original proviso read: "That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

75. Matter of Hughes Tool Co., 56 N.L.R.B. 981 (1944), *enforced as modified*, 147 F.2d 69 (5th Cir. 1945); Elgin, Joliet & Eastern R.R. v. Burley, 325 U.S. 711 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946).

76. 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

77. Summers, *supra* note 66, at 383-84.

78. *Id.* at 384.

79. *See, e.g.*, cases cited *supra* note 63.

80. *See, e.g.*, Black-Clawson Co. v. Int'l Ass'n of Machinists, 313 F.2d 179, 185 (2d Cir. 1962).

81. 379 U.S. 650 (1965).

82. *Id.* at 652. "If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available."

83. *See generally* Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 Cornell L.Q. 25 (1959);

The thesis that the proviso to section 9(a) entitles the individual employee to take his grievance directly to the employer in disregard of his union, has been criticized as a "retrogressive approach to labor relations."[84] That is, the individual rights thesis represents

> a return to the arithmetical notion of equality, one man—one voice, one employer—one employee, an 'equality' which has no basis in social and economic reality. The argument is directed toward the abolition of collective bargaining . . . and a return to the inequities and social costs of the individual employment agreement.[85]

Professor Cox has pointed out several weaknesses in the individual rights approach.[86] He contends that it ignores orthodox collective bargaining procedures and would lead to a subordination of group interests. A further criticism is that the section 9(a) proviso is devoid of any enforcement sanctions.[87] Cox also argues that to construe the section 9(a) proviso in such a manner would be to disregard the clear implications of the Labor-Management Relations Act; the contention is that the statute clearly establishes the union as the exclusive bargaining agent for the employees in a bargaining unit, where the union has been selected by a majority of those employees.[88]

One rather speculative criticism of the individual rights theory is that it might induce unions to bargain for clauses which reserve their right to strike during the existence of the contract.[89] The argument hinges on the assumption that if the employer is forced to arbitrate individual grievances even though they have been rejected by the union, then management will refuse to include arbitration as a stage in grievance procedures. Since the *quid pro quo* for arbitration is the union's pledge to refrain from striking during the term of the contract,[90] strike clauses must undoubtedly result.

A further criticism is that continual harassment of management by individual grievants would undermine a good relationship with the employer.[91] An employer who can rest assured that the union will filter out meritless claims will probably be more receptive to the grievances which the union does prosecute. Thus, if the union were given exclusive control over grievance processing, more sanguine labor relations might result.

One other argument is that the goals of collective bargaining would be

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Wyle, *Labor Arbitration and The Concept of Exclusive Representation*, 7 B.C. Ind. & Com. L. Rev. 783 (1966).

84. Wyle, *supra* note 83, at 785.

85. *Id.*

86. Cox, *supra* note 83, at 631.

87. *Id.* at 624. *But see* Summers' rebuttal, *supra* note 66, at 380.

88. Cox, *supra* note 83, at 631, citing LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964), *and* LMRA § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964). Cox further argues, *id.* at 624, that the "office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before."

89. Wyle, *supra* note 83, at 789.

90. *Id.*, citing Textile Workers v. Lincoln Mills, 230 F.2d 81 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957).

91. *Id.* at 793.

most effectively realized if the exclusive authority to prosecute grievances were vested in the union.

> A delicate balance exists between the rights of an individual member of any group and the welfare of the majority of its members. Unions strive to maintain this equilibrium in a complex situation . . . . [They] must be prepared to engage in collective bargaining during the period of a contract to seek changes in the agreement, when warranted by changes in circumstances.[92]

The hypothesis supporting this position is that grievance settlements are a form of collective bargaining because they often redefine the terms and conditions of employment.[93] If the union had exclusive authority and then exercised its discretion and processed only those grievances furthering group interests, the labor organization would be properly functioning as bargaining representative for the unit.

IV. The Effect of the *Vaca* Case

A. Resolution Of The Debate

The United States Supreme Court in *Vaca v. Sipes*[94] has resolved the debate. After a cursory presentation of the opposing viewpoints,[95] Justice White sets forth the Court's position:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.[96]

In this one sentence the Court has silenced those who insist that the individual employee may by-pass the union and present his grievance directly to management. If the collective bargaining agreement vests exclusive control over grievance processing with the labor organization, then the individual employee must depend on the union to prosecute his claim. Of course, as the court indicates, the union is still subject to the overriding restraints of the duty of fair representation.[97]

The implication of the passage quoted above is that the proviso to section 9(a) does not give the individual employee the *absolute right* to present his grievance directly to the employer. It may be argued that the position of the Court indicates an intention only to preclude arbitration by an individual employee. Thus, the individual grievant may take his claim directly to the employer, but he cannot compel arbitration of that claim. If this were the Court's

92. *Id.* at 790.
93. *Cf.* Black-Clawson Co. v. Int'l Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962).
94. 386 U.S. 171 (1967).
95. *Id.* at 190.
96. *Id.* at 191.
97. *Id.*, "we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion . . . ." *See also id.* at 193.

position, it would certainly be a myopic approach. It would surely be a futile gesture to permit the employee to process his own grievance but to deny him recourse to the most important stage in the procedure—arbitration. It is more likely that the Court went further. The intent was undoubtedly to isolate the employer from direct approaches by the individual grievant.

The Court offers a number of arguments in support of its position.[98] Section 203(d) of the Labor-Management Relations Act is set forth[99] as an indication of national policy:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.[100]

The Court then suggests that its approach ensures settlement of frivolous grievances short of arbitration, consistency in grievance processing, and that more intensive emphasis will be placed on major collective bargaining problems.[101] An additional reason is that "the settlement process furthers the interest of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of the agreement."[102] As a final buttress for its position, the Court enumerates the deleterious consequences which would follow if the individual employee could unilaterally invoke processing of his grievance. It would undermine the settlement procedures set forth in the collective bargaining agreement, destroy "the employer's confidence in the union's authority and . . . [relegate] the individual grievant to the vagaries of independant and unsympathetic negotiation." The Court argues further that it would "overburden arbitration processes and encourage deletion of detailed grievance procedures in future contracts."[103]

In announcing that unions are to be granted a broad discretion in selecting which grievances may be presented, the Supreme Court has cast new light on national labor policy. Two stages in collective bargaining may be distinguished: negotiation and administration. The *negotiation* of a collective bargaining agreement involves the adjustment of conflicts within the union so that the generalized expectations of the employees might be incorporated into the new contract. The *administration* of the agreement differs in that the individual's claim is rooted in an existent union-management contract and broad policy considerations might not be at stake.[104] Professor Blumrosen contends that in the negotiation of a new contract "only the most important interests of

98. *Id.* at 191-92.
99. *Id.* at 191.
100. 61 Stat. 154 (1947), 29 U.S.C. § 173(d) (1964).
101. Vaca v. Sipes, 386 U.S. at 191.
102. *Id.*
103. *Id.* at 191-92.
104. *See* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 1476 (1963) for a detailed outline of the differences.

the employees are entitled to protection" whereas in the administration of a contract "considerations relating to the stability of contractual rights dictate that the balance be struck more favorably to the [individual]."[105] By vesting exclusive control over grievance processing with the union, the Supreme Court has permitted administration and negotiation to be governed by the same policies. That is, just as "politics" play a major role in the negotiation stage of collective bargaining, this consideration will surely become decisive in the administrative stage.[106]

It is interesting to note that the question whether an individual employee has the absolute right to have his grievance processed might have been avoided by the Court. In addition to a jurisdictional question,[107] the only issue properly before the Supreme Court was whether the Missouri Supreme Court[108] had applied the correct standard in holding that the union had breached its duty of fair representation.

B. Duty Of Fair Representation: A Revised Standard

The *Vaca* case originated as a duty of fair representation suit in the Circuit Court of Jackson County, Missouri. Plaintiff, Benjamin Owens, a union member, had been discharged from his employment at the Swift & Company packing plant on the grounds of poor health. The company doctor had determined that Owens was not fit for heavy work because of high blood pressure. The union filed a grievance with the company on Owens' behalf, after he assured the union that his family physician had certified that his blood pressure had been reduced. The collective bargaining agreement provided for arbitration as the last step in a five stage grievance procedure. After unsuccessful prosecution of the grievance through the first four steps—Swift had persisted in its assertion that Owens' blood pressure was dangerously high—the union sent Owens to another doctor for an examination. The report indicated high blood pressure and consequently the union refused to take Owens' grievance to arbitration. Owens sued the union alleging that "he had been discharged from his employment . . . in violation of the collective bargaining agreement then in force . . . and that the union had 'arbitrarily, capriciously and without just or reasonable reason or cause' refused to take his grievance with Swift to arbitration. . . ."[109] The jury returned a verdict for Owens, but the trial judge set

105. *Id.* For arguments *contra*, *see* Cox, *supra* note 83, at 622, who suggests that the union's duty is similar in both situations.

106. An example of a political consideration: a union refuses to prosecute an individual's grievance concerning overtime pay due, because the union feels that repeated pestering of management with petty grievances will foster antagonism. The union might prefer the maintenance of amicable relations with management so that major grievances will be received in a sympathetic atmosphere.

107. *See supra* notes 41-47 and accompanying text for a brief discussion of the Supreme Court's holding on the question of whether the courts are preempted from considering fair representation cases.

108. Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965).

109. Vaca v. Sipes, 386 U.S. at 173.

it aside and entered judgment for the union, deciding that the court had no jurisdiction over the dispute.[110] The Kansas City Court of Appeals affirmed. On further appeal the Missouri Supreme Court reversed and ordered the jury's verdict reinstated.[111] Since the jury found that Owens had been wrongfully discharged by Swift,[112] the court held that the union had breached its duty of fair representation by refusing to process Owens' claim through the final stage of the grievance procedure.[113] Thus, the Missouri court determined that the union was liable even though it had in good faith and non-arbitrarily decided to terminate its efforts on Owens' behalf.

The United States Supreme Court granted certiorari[114] on both the jurisdictional question—whether the National Labor Relations Board had exclusive jurisdiction over breach of fair representation suits—and the question as to whether the Missouri Supreme Court had applied the proper standard in holding the union liable. After deciding that the Missouri courts had jurisdiction and that the preemption doctrine did not apply,[115] the Court turned to the second issue. The Court declared that since the duty of fair representation was derived from a federal statute,[116] a state court decision must be consistent with federal law.[117] In addition, a state court must apply federal standards when determining whether the union breached its duty. The Supreme Court reversed the Missouri high court holding that its finding of liability did not comport with federal standards. It was held that since the union refused to process Owens' grievance in good faith and non-arbitrarily, it had not breached its duty of fair representation even though a jury later found the grievance to be meritorious.[118] Thus, the Court introduced a new standard: "that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious . . . ."[119]

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110. The court applied the *Garmon* preemption doctrine. *See supra* note 46.

111. Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965).

112. *Id.* at 665. The Missouri Supreme Court indicated that the trial judge had instructed the jury that to hold the union liable one of the elements which must be found was that Swift discharged Owens wrongfully. The court also indicated that the evidence Owens presented at trial signified that he was fit for work and did not have high blood pressure. The court concluded that the jury must have found that Owens was medically fit and therefore wrongfully discharged by Swift.

113. *Id.*

114. Vaca v. Sipes, 384 U.S. 969 (1966).

115. Vaca v. Sipes, 386 U.S. at 176-88. *See supra* notes 41-47 and accompanying text.

116. *Id.* at 177, *citing* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The *Huffman* Court, 345 U.S. at 337, quoted LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964) which authorizes a labor organization selected by a majority of employees in a bargaining unit to be the exclusive bargaining representative of all the employees in the unit. The *Huffman* Court held that this statutory authority carries with it an obligation to represent the members of the unit fairly.

117. Vaca v. Sipes, 386 U.S. at 177.

118. *Id.* at 192-93.

119. *Id.* at 195.

C. The Harsh Implications

The ramifications of the *Vaca* decision will undoubtedly produce harsh practical consequences for the individual employee. In dissent, Justice Black was critically aware of this. He remarked that the majority's decision "entirely overlooks the interests of the injured employee, the only one who has anything to lose."[120]

What are the avenues of relief available to an employee with a grievance when his union refuses to process his claim through the grievance procedures established in the collective bargaining agreement? If the union's constitution or by-laws provide for internal appeal, he may seek relief in this direction.[121] However, what occurs if the union persists in its denial? As indicated above,[122] the *Vaca* Court has taken the position that unless the collective bargaining agreement so provides, the individual may not compel processing of his grievance by presenting his claim directly to management.[123] The employee does have recourse to the courts; he may sue the union for breach of its duty of fair representation,[124] or he may sue the employer for breach of the collective bargaining contract under section 301 (a) of the Labor-Management Relations Act.[125] Yet, as a result of the *Vaca* case, the individual grievant may nevertheless be left without a remedy.

In the fair representation suit against the union, claimant will be denied relief so long as the union acted in good faith and non-arbitrarily.[126] *Vaca v. Sipes* closes this door even further, for in this case the union's good faith conduct was absolved even though a jury had found the grievance to be meritorious.[127] Thus, under governing federal principles the union has not violated its duty to an employee when it refuses in good faith to process an employee's grievance. And under *Vaca* this remains true even though it is later determined that the employee's grievance did in fact result from a breach of the collective bargaining agreement by the employer.[128]

Furthermore, as a result of the *Vaca* decision, the employee will often lose in his breach of contract suit against the employer. Established labor law principles dictate that an employee must exhaust the grievance procedures

120. *Id.* at 209.

121. *See generally Report of Committee on Improvement of Administration of Union-Management Agreements, 1954*, 50 Nw. U.L. Rev. 143, 156 (1955) for a discussion of the problems inherent in the internal appeals approach.

122. *See supra* Part IV(A), pp. 176-78.

123. Vaca v. Sipes, 386 U.S. at 191.

124. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

125. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

126. *See, e.g.*, cases cited *supra* note 52.

127. 386 U.S. at 195.

128. Breach of the duty of fair representation is considered an unfair labor practice by the NLRB. *See supra* notes 41-47 and accompanying text. The NLRB will undoubtedly adhere to the standards set forth by the Supreme Court in *Vaca*. It therefore seems unlikely that claimant in our example would be any more successful before the NLRB than he would be in an unfair representation suit before a court.

contained in the collective bargaining agreement before suing the employer for breach of contract.[129] At one point in the *Vaca* decision, the Court introduces a rule which is an amplification of the exhaustion doctrine: an employee can sue his employer for breach of the collective bargaining agreement "in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."[130] This rule will eliminate section 301 (a) as a means of relief in many instances. Under the *Vaca* rule claimant can only avoid the defense of failure to exhaust contractual remedies by proving that he not only attempted to do so, but that he was frustrated in his attempt by the union's bad faith conduct. If it is shown that the union refused to process his grievance in good faith and nonarbitrarily, then claimant's suit against the employer will result in dismissal.

The net result of the *Vaca* decision is that it may lead to grave consequences for the individual employee. The problem will be most acute in situations where an employee's critical job interests are at stake. If an employee is wrongfully discharged by the employer and if the union in good faith, nonarbitrarily, and believing the claim to be without merit, refuses to process the grievance, then the employee has lost his employment and may be without judicial remedies.[131]

An obvious way to avoid these perverse results would be to restrict the union's freedom of action when presented with an employee's claim involving critical job interests. That is, the union should be held to more than just the good faith standard when it refuses to process an employee's grievance. This has long been Professor Blumrosen's plan for the protection of critical job interests.[132] He maintains that:

> The good faith discretion test does not adequately protect the employee's basic relation to his job. Discharge and seniority cases . . . should be heard on their merits in some impartial forum. The employee should be allowed to prove that his claim is meritorious. The union would then be required to demonstrate why it rejected his claim, in light of its decision to process other claims. This pattern of proof might make the duty of fair representation more meaningful.[133]

This plan would undoubtedly counter the harsh implications of the *Vaca* decision. The union would not lightly refuse to prosecute an employee's griev-

129. *See, e.g.*, Republic Steel v. Maddox, 379 U.S. 650 (1965); Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958); Rowan v. McKee, Inc., 262 Minn. 366, 114 N.W.2d 692 (1962); Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958). *Cf.* Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960).

130. 386 U.S. at 186.

131. The union in the *Vaca* case refused to process Owens' grievance because it considered his claim to be without merit. An unanswered question is whether the union has breached its duty of fair representation if it already knows that the individual's grievance is meritorious.

132. Blumrosen, *supra* note 104, at 1484-85.

133. *Id.* at 1485.

ance. However, if this were the case, there would be an increased probability that the union would be found to have breached its duty of fair representation. Furthermore, the employee would not be prevented from suing the employer for breach of the collective bargaining agreement. Claimant could oppose the exhaustion defense because he could now show that the union thwarted him in violation of its duty of fair representation.

V. Conclusion

In the interests of preserving the union's statutory role as bargaining representative, the Supreme Court has severely limited the individual's rights in grievance processing. As a result of the Court's pronouncements in *Vaca v. Sipes*, it is possible that a wrongfully discharged employee may be stripped of his job and left without judicial relief. It is interesting to note that the majority of the *Vaca* Court was seemingly unconcerned with these untoward consequences. Only Justice Black expressed alarm: "[This decision] . . . puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy."[134]

Gary H Feinberg

THE DEDUCTIBILITY OF EDUCATIONAL EXPENSES: ADMINISTRATIVE CONSTRUCTION OF STATUTE

I. Introduction

Section 162(a) of the Internal Revenue Code of 1954 provides that "all the ordinary and necessary expenses" of a business shall be deductible. Personal expenses[1] and capital expenditures[2] are clearly not deductible, although the latter are generally depreciable under section 167 of the Code. Whether a particular cost item is a business expense rather than a personal or capital expenditure is a frequently litigated question, and is the primary issue in the present concern over educational expense deductions. Although some courts have characterized expenses for educational pursuits as personal,[3] other courts have stated that such expenses are similar to capital expenditures[4] and have denied deductibility on that ground while refusing to allow capital depreciation and amortization.[5]

134. Vaca v. Sipes, 386 U.S. at 210.

1. Int. Rev. Code of 1954, § 262.
2. *Id.* § 263.
3. *E.g.*, Jack B. Wheatland, 23 CCH Tax Ct. Mem. 579 (1964); Daniel Kates, 21 CCH Tax Ct. Mem. 1396 (1962).
4. *E.g.*, Welch v. Helvering, 290 U.S. 111 (1933); Richard H. Lampkin, 11 CCH Tax Ct. Mem. 576 (1952); James M. Osborn, 3 T.C. 603 (1944).
5. *See, e.g.*, Huene v. United States, 247 F. Supp. 564 (S.D.N.Y. 1965); Nathaniel A. Denman, 7 CCH 1967 Stand. Fed. Tax Rep. ¶ 7419 (June 26, 1967).