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Labor Law - Union's Duty of Fair Representation - Apportionment of Damages Between an Employer and a Union in a Hybrid Section 301 Suit

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Recent Decisions

LABOR LAW—UNION'S DUTY OF FAIR REPRESENTATION —APPORTIONMENT OF DAMAGES BETWEEN AN EMPLOYER AND A UNION IN A HYBRID SECTION 301 SUIT—The Supreme Court of the United States has held that a union may be liable to a discharged employee for a portion of his lost wages when the union breaches its duty of fair representation.

Bowen v. United States Postal Service, 103 S. Ct. 588 (1983).

On February 21, 1976, the petitioner, Charles V. Bowen, an employee of the United States Postal Service (Service) was indefinitely suspended pending an investigation of an alleged assault on another employee.[1] The Postmaster notified Bowen of his termination on March 30, 1976.[2] Bowen then filed a grievance with the local of the American Postal Workers Union, AFL-CIO (Union), which was his representative for collective bargaining purposes.[3] The grievance was processed through the grievance procedure to the Union's national office where a determination was made not to pursue the complaint.[4]

Bowen then sued both the Service and the Union in the United States District Court for the Western District of Virginia.[5] The

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1. Bowen v. United States Postal Serv., 103 S. Ct. 588, 590 (1983). The employee testified at trial that he did not report the incident because he considered it insignificant. Brief for Petitioner at 5, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

2. Brief for Petitioner at 5, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

3. *Id.*

4. 103 S. Ct. at 591. According to the petitioner, the apparently meritorious grievance was recommended for arbitration by the Union official who submitted it to the national office. An official at the national level, who was reviewing a backlog of cases after returning from a two week Union meeting in Las Vegas, disregarded the recommendation for arbitration made in the lower steps of the procedure. After reviewing Bowen's file for approximately fifteen minutes, the official decided to drop Bowen's complaint. Brief for Petitioner at 6, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

5. 103 S. Ct. at 591. Bowen alleged that the Service had breached the collective bargaining agreement by discharging him unjustly and that the Union had breached its duty of fair representation. *Id. See* Bowen v. United States Postal Serv., 470 F. Supp. 1127 (W.D. Va. 1979).

jury, sitting as an advisory panel,[6] returned special verdicts against both defendants.[7] The district court, in accordance with the jury's findings, apportioned the compensatory damages between the Service and the Union.[8] The court ordered the Service to pay $22,954.12 and the Union $30,000.00, the sum of which represented Bowen's lost benefits and wages from February 21, 1976.[9] The court set aside the jury's award of punitive damages against both defendants, indicating that it would be unfair to assess such damages against the Union while the Service's claim of sovereign immunity would preclude its liability.[10]

On appeal by both defendants, the Court of Appeals for the Fourth Circuit[11] accepted the district court's findings of fact but held, as a matter of law, that the Union could not be held liable for Bowen's lost wages.[12] Additionally, the court of appeals refused to increase the judgment against the Service to reflect its order vacating the assessment of damages against the Union.[13] The Supreme Court granted certiorari[14] and reversed the decision of the court of appeals.

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6. 103 S. Ct. at 591. *See* 28 U.S.C. § 2402 (1976). "Any action against the United States under section 1346 shall be tried by the court without a jury . . . ." *Id.*

7. 103 S. Ct. at 591. One question of the special verdict asked the jury to determine the compensatory damages to which Bowen would be entitled should the jury find that the Union breached its duty of fair representation and/or that the Service discharged Bowen unjustly. A subsequent question asked the jury to apportion the compensatory damages between the Union and the Service. Despite the Union's objection to any type of question which would permit the jury to find the Union liable for back wages, the district court suggested to the jury that the hypothetical arbitration date, August, 1977, could be used as a basis for the apportionment of damages. *Id.* at 591 & nn.2-3.

8. *Id.* at 591-92. The district court held that the Service had discharged Bowen without cause and that the Union handled Bowen's complaint in an arbitrary fashion. Additionally the court noted that Bowen could not have pursued his complaint without the Union and that had Bowen's complaint been arbitrated, he would have been reinstated. *Id. See* 470 F. Supp. at 1130-31.

9. 103 S. Ct. at 592. The district court noted that the case presented a problem of apportionment, not one of liability. *Id. See* 470 F. Supp. at 1131.

10. 103 S. Ct. at 590 n.4.

11. *See* Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981), *rev'd*, 103 S. Ct. 588 (1983).

12. 103 S. Ct. at 592. The court of appeals, citing Vaca v. Sipes, 386 U.S. 171 (1967), stated, without explanation, that the Service was exclusively liable for lost wages. 642 F.2d at 82.

13. 103 S. Ct. at 592. The court of appeals, in a footnote added after the opinion was filed, said that Bowen's failure to file an appeal on the judgment against the Service precluded a revision of the judgment against the Service. 103 S. Ct. at 592 n.7. *See* 642 F.2d at 82 n.6.

14. 103 S. Ct. at 588.

Justice Powell, writing for the majority,[15] first reviewed the Court's holding in *Vaca v. Sipes.*[16] He stated that *Vaca* permits an employee to recover damages from both the employer and the union where the employer breaches the collective bargaining agreement and the union breaches its duty of fair representation.[17] As to apportionment of these damages, Justice Powell indicated that *Vaca* does not permit the employer to be assessed for increased damages caused by the union's failure to fairly represent the employee.[18] He admitted that the lower courts have applied *Vaca*'s governing principle inconsistently, but he disagreed with the dissenting Justices' assertion that the courts of appeals have unanimously rejected the majority's method of apportionment.[19]

Justice Powell then considered the Union's interpretation of *Vaca.*[20] The Union contended that where a union breaches its duty of fair representation, *Vaca* merely permits the employee to sue the employer on the contract.[21] Justice Powell stated that the Union's argument attempted to equate a collective bargaining agreement with that of common law employment which is terminable at will.[22] He distinguished the two and noted that a collective

15. Chief Justice Burger and Justices Brennan, Stevens and O'Connor joined in the majority opinion.

16. 103 S. Ct. at 593. *See* 386 U.S. 171 (1967).

17. 103 S. Ct. at 593. Justice Powell quoted the following language from *Vaca:*

> The governing principle, then, 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.

Id. (quoting 386 U.S. at 197-98).

18. 103 S. Ct. at 593.

19. *Id.* at 593 & n.8. Justice Powell indicated that only one case cited by the dissent failed to apportion damages after fully considering the issue. *Id.* n.8. *See* Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982). He noted that other appellate decisions which rejected apportionment had minimally considered the issue. 103 S. Ct. at 593 n.8. *See* Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981), *cert. denied*, 454 U.S. 896 (1982) and Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981), *rev'd*, 103 S. Ct. 588 (1983). Some decisions had expressed conflicting rationales, *see* Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980) and DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1980), while some courts of appeals had recognized apportionment, *see* Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); St. Clair v. Local 515, 422 F.2d 128 (6th Cir. 1969). 103 S. Ct. at 593 n.8.

20. 103 S. Ct. at 593-94.

21. *Id.* at 594. The Union indicated that it would be liable for the employee's expenses incurred in litigating his claim. *Id.* at 593.

22. *Id.* at 594.

bargaining agreement implicates the federal common law of labor policy.[23]

The Court noted that one of the issues decided in *Vaca* was whether an employee could sue his employer for breach of the collective bargaining agreement where the union has the sole power to process the grievance to arbitration and has chosen not to do so.[24] The Court observed that *Vaca* had recognized that the employer, the union and the employee have important but different interests in a properly functioning grievance procedure.[25] Thus, in a situation where both the employer and the union have breached their respective duties, the Court maintained, *Vaca* resolved the conflicting interests by holding that the employee's interest becomes primary and the bar against suing the employer is lifted.[26]

Justice Powell stated that the interest analysis used in determining when an employee may sue his employer despite the presence of a grievance procedure also provides a guiding principle for apportioning damages between the employer and the union.[27] He explained that the *Vaca* Court believed that the employer should be responsible for the consequences of his wrongful act but recognized that the union's breach increased the damages by preventing the grievance procedure from rectifying the employer's breach.[28] As to apportionment of damages, Justice Powell stated that the union's breach which triggers the employee's right to sue his employer also implicates the union's responsibility for damages flowing from its breach.[29] He noted that it would be unfair to hold the employer responsible for damages suffered by an employee as a result of a union corrupting an arbitrator.[30] Justice Powell concluded that *Vaca*'s governing principle, reflecting an allocation of responsibili-

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23. *Id.*

24. *Id.* Justice Powell noted that Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) held that the employer must attempt to utilize the grievance procedure due to "[C]ongress's express approval of contract grievance procedures as a preferred method of settling disputes, the union's interest in actively participating in the continuing administration of the contract, and the employer's interest in limiting the choice of remedies available to the aggrieved employees." 103 S. Ct. at 594 n.10. *See* 379 U.S. 653. Justice Powell identified the employee's interest as his "right to vindicate his claim." 103 S. Ct. at 594.

25. 103 S. Ct. at 594.

26. *Id.* at 594-95.

27. *Id.* at 595.

28. *Id.*

29. *Id.* To illustrate the union's responsibility for damages resulting from its breach, Justice Powell referred to Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), which held that a union's breach of its duty of fair representation would trigger the employee's right to sue despite a final decision by an arbitrator. 103 S. Ct. at 595.

30. 103 S. Ct. at 595.

ties, mandates that the employer be held liable for damages resulting from his breach and that the union be held liable for any increase in those damages as a consequence of its failure to fairly represent.[31]

Justice Powell then examined the principle of apportionment in the context of federal labor policy.[32] He emphasized the importance of the grievance procedure in the federal labor policy since the grievance procedure promotes settlement through negotiation rather than strife and assists in defining the parties' relationship under the agreement.[33] Justice Powell described the union's role in the grievance procedure as pivotal.[34] He opined that since the union is an employee's exclusive representative, the employer should be able to rely on the union's determination not to proceed with an employee's complaint as though the employee himself had waived his claim.[35] Justice Powell indicated that the employer's reliance is justified by the fact that the union actively pursues exclusive bargaining rights and therefore must accept the corresponding duty to represent fairly.[36] He expressed doubt that the grievance procedure could perform its function in the federal labor policy if the employer could not rely on the union's decision.[37]

The Court then stated that *Vaca*'s governing principle recognizes the rights and duties of the parties to a collective bargaining agreement.[38] The Court reasoned that assessing damages according to fault would provide incentive for performance of the parties' obligations, and that a rule placing liability solely upon the employer could inhibit the placement of arbitration clauses in future agreements.[39] The Court contrasted the finite nature of compensatory

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31. *Id.* Justice Powell added that the employer would still be secondarily liable for damages attributable to the union since "*Vaca* made clear that the union's breach does not absolve the employer of liability." *Id.* at 595 n.12.

32. *Id.* at 597. Justice Powell noted that federal common law defines the relationship created by a collective bargaining agreement. *Id.* at 596. *See* USW v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); USW v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

33. 103 S. Ct. at 596.

34. *Id.* "[T]he union plays a pivotal role in the process since it assumes the responsibility of determining whether to press an employee's claim." *Id.*

35. *Id.* at 597.

36. *Id.*

37. *Id.* Justice Powell noted that the dissenting members of the Court would not permit an employer to rely on an union's withdrawal of a complaint, thereby making reinstatement of an employee the only method of limiting its liability. *Id.* n.15. He stated that "[i]f this were the rule, the very purpose of the grievance procedure would be defeated." *Id.*

38. *Id.* at 597.

39. *Id.*

damages with the unpredictability of punitive damages and noted that the assessment of compensatory damages against the union is not inconsistent with *International Brotherhood of Electrical Workers v. Foust*,[40] which held that an assessment of punitive damages against a union is contrary to federal labor policy.[41] Additionally, the Court believed that the standard required to prove a breach of the union's duty to fairly represent employees serves to protect a union's discretion in processing complaints.[42]

Justice Powell then addressed the Union's contention that the majority's interpretation of *Vaca* was inconsistent with *Czosek v. O'Mara*,[43] in which employees of the Erie Lackawanna Railroad were furloughed and not recalled.[44] He reviewed the facts in *Czosek* and noted that the employees had brought suit against the railroad for wrongful discharge and the union for breach of its duty to fairly represent.[45] The claim against the railroad was dismissed by the district court since the employees had failed to seek their administrative remedies under the Railway Labor Act.[46] The district court also dismissed the claim against the union, noting that the union's duty was absolved because the employees could seek the administrative remedies without the aid of the union.[47] The court of appeals affirmed as to the railroad, but held that the union still had a duty to represent fairly the employees despite the existence of alternative remedies.[48]

Justice Powell stated that in affirming the court of appeals, the *Czosek* Court held that the union was liable only for the additional expenses incurred by the employees in their attempt to collect damages from the employer.[49] Justice Powell distinguished *Czosek*,

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40. 442 U.S. 42 (1979).

41. 103 S. Ct. at 597-98 & n.16. In emphasizing the fairness of the imposition of compensatory liability on the Union, the Court indicated that the assessment "[w]ill provide an additional incentive for the union to process its members' claims where warranted. This is wholly consistent with a union's interest. It is a duty owed to its members as well as consistent with the union's committment to the employer under the arbitration clause." *Id.* at 598 (citations omitted).

42. *Id.* at 597-98 n.16.

43. 397 U.S. 25 (1970).

44. 103 S. Ct. at 598.

45. *Id.*

46. *Id. See* 45 U.S.C. § 153 (1976). The Railway Labor Act permits an employee to pursue a remedy from the National Railroad Adjustment Board if he is unsuccessful in the grievance procedure. 103 S. Ct. at 598 n.18.

47. 103 S. Ct. at 598.

48. *Id.*

49. *Id.* The *Czosek* Court stated:

Assuming a wrongful discharge by the employer independent of any discriminatory

reasoning that in *Czosek* the union's breach of its duty did not affect the employees' right to pursue immediately their administrative remedies and thus did not increase the railroad's damages.[50] Justice Powell concluded that *Czosek's* holding is consistent with *Vaca's* principle which provides for assessment of damages according to fault.[51] Thus, the Court reversed the court of appeals and ordered the case remanded for the apportionment of damages against both the Service and the Union.[52]

Justice White dissented from the majority's decision to hold the Union liable for lost wages which had accrued after the hypothetical arbitration date.[53] Justice White indicated that prior decisions, equitable principles and national labor policy support his belief that an employer is primarily liable for lost wages.[54]

Justice White argued that where an employee institutes a suit against his employer for breach of the collective bargaining agreement under section 301 of the Labor Management Relations Act,[55] and that agreement does not contain an arbitration clause, the employer is certainly liable for all back pay.[56] In addition he cited the rule adopted in *Republic Steel Corp. v. Maddox*,[57] noting that a provision for arbitration in an agreement requires an employee to exhaust his contractual remedies before bringing a section 301 suit

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> conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages for the union are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.

397 U.S. at 29.

50. 103 S. Ct. at 599.

51. *Id.*

52. *Id.*

53. *Id.* (White, J., dissenting). Justices Marshall, Blackmun, and Rehnquist concurred with Justice White's opinion on the issue of the Union's liability for back wages. *Id.*

54. *Id.* at 599-600 (White, J., dissenting). Justice White stated that: "In addition to the opinion below in the present case . . ." two courts of appeals have rendered "square holdings on the issue." *Id.* at 599 n.1 (White, J., dissenting). *See* Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982); Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981), *cert. denied*, 454 U.S. 896 (1982).

55. Labor Management Relations Act § 301, 29 U.S.C. § 185 (1976). Justice White noted that in Smith v. Evening News Ass'n, 371 U.S. 195 (1962), the Court held that an employee could sue his employer under section 301 for breach of the collective bargaining agreement. 103 S. Ct. at 600 (White, J., dissenting). Justice White added that as an employee of the United States Postal Service, "Bowen's action technically arises under § 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b) (1976), which is identical to § 301 in all relevant respects." 103 S. Ct. at 600 n.2 (White, J., dissenting).

56. 103 S. Ct. at 600 (White, J., dissenting). *See* Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

57. 379 U.S. 650 (1965).

and thereby increases the difficulty in maintaining the suit for backpay.[58] Justice White observed that *Vaca* did permit an employee to sue his employer for breach of contract despite the presence of a grievance procedure where the union breached its duty of fair representation and stood as the sole body which could process the complaint through the procedure.[59] He argued, however, that *Vaca's* only effect on the employer was that the union's breach could be raised by the employee to defeat an employer's contention that the employee failed to exhaust contractual remedies.[60] Justice White believed that the Court's subsequent decision in *Hines v. Anchor Motor Freight, Inc.*[61] emphasized the position taken by the Court in *Vaca* that the union's breach of duty does not insulate the employer from liability for his breach of the agreement, but acts only to remove the bar to the bringing of a section 301 action.[62]

With respect to the union's liability, Justice White indicated that the union is liable for the natural consequences of its breach but stated that the damages attributable to the union are of a different nature than those of the employer.[63] He believed that the Court had examined the nature of the union's liability in *Czosek* and had limited the damages against the union to damages which reflect the additional expense of collecting from the employer as a result of the union's breach.[64]

Justice White contended that in *Electrical Workers v. Foust*,[65] the Court had accepted the fact that under the *Vaca-Czosek* rule, the union's liability may be minimal.[66] According to Justice White, the *Foust* Court, in addition to having insulated the union from punitive damages, had recognized that the major portion of dam-

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58. 103 S. Ct. at 600 (White, J., dissenting). *See supra* note 24.

59. 103 S. Ct. at 600 (White, J., dissenting).

60. *Id.*

61. 424 U.S. 554 (1976).

62. 103 S. Ct. at 601 (White, J., dissenting). In *Hines*, the Court held that an employee could maintain a section 301 suit despite a final decision by an arbitrator where the arbitrator was wrongfully influenced by the Union. 424 U.S. at 569. Justice White noted that because the employer had initiated the dispute by discharging the employee, the *Hines* Court had rejected the employer's contention that it should be able to rely on the arbitrator's decision. 103 S. Ct. at 601 (White, J., dissenting).

63. 103 S. Ct. at 602 (White, J., dissenting).

64. *Id.* According to Justice White, "*Czosek* reassured unions that they would not be forced to pay damages 'for which the employer is wholly or partly responsible.'" *Id.* (quoting Czosek v. O'Mara, 397 U.S. 25, 28-29 (1970)).

65. 442 U.S. 42 (1979).

66. 103 S. Ct. at 602 (White, J., dissenting). *See supra* note 41 and accompanying text.

ages in an unfair representation action would be the employer's responsibility.[67] He opined that both *Vaca* and *Foust* had stressed the importance of the union's financial stability at the expense of the deterrent effect of a damage award.[68] Accordingly, Justice White reasoned that the majority had abandoned the *Vaca* principle.[69]

Justice White then expressed his concern that the bulk of damages in a hybrid section 301-breach of duty of fair representation suit would be imposed upon the union since the hypothetical arbitration date would approximate one year after the improper discharge, while a court decision would take much longer.[70] He noted that such a damage award would not reflect the union's culpability compared to that of the employer and that the union could not realistically limit its liability to the employee once it had breached its duty to represent fairly, as only the employer could reinstate the employee.[71] Justice White added that the damages caused initially by the employer's improper discharge increase as long as the employer refuses to reinstate and that the union's conduct in no way lessens the employer's culpability.[72] He reasoned that traditional contract law is applicable in the situation, thereby making the employer liable for all backpay.[73] Justice White emphasized the fact that the union's conduct does not hamper an employer's effort to reinstate.[74] He concluded that the employer is solely liable for back wages because the employer alone has the duty to pay wages.[75]

Justice White then attacked the majority's assumption that a collective bargaining agreement creates in the employer a right to rely upon a union to correct the employer's wrongful conduct

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67. 103 S. Ct. at 602 (White, J., dissenting).

68. *Id.*

69. *Id.*

70. *Id.* at 603 (White, J., dissenting).

71. *Id.* Justice White described the majority's view that a union may transfer a portion of the backpay liability to the employer by giving the employer notice of the union's breach as "disturbingly vague." *Id.* at 603 n.8. Furthermore, he questioned the union's willingness to admit to a breach since it would be exposing itself to greater liability in the form of attorney's fees and other collection costs. *Id.* at 605 n.12. (White, J., dissenting).

72. *Id.* at 603 (White, J., dissenting).

73. *Id.* Justice White said, "[t]here is no reason why the matter should not be governed by the traditional rule of contract law that a breaching defendant must pay damages equivalent to the total harm suffered, 'even though there were contributing factors other than his own conduct.'" *Id.* (quoting 5 A. Corbin, Corbin on Contracts § 999 (1964)).

74. 103 S. Ct. at 603-04 (White, J., dissenting).

75. *Id.* at 604 (White, J., dissenting).

through the grievance procedure.[76] In Justice White's view, an agreement does not obligate the union to pursue a grievance but merely gives it the right to do so.[77] Further, he submitted, the union's duty of fair representation and pursuit of meritorious claims is a duty owed to the employee, not the employer.[78] Justice White saw the majority's creation of an implied right in the employer as effectively requiring the union to indemnify the employer, a requirement for which he believed the employer should have to bargain.[79] In order to escape this newly imposed liability to the employer, Justice White stated a union would be inclined to appeal unworthy grievances to arbitration, a practice which would adversely affect the ability of the grievance procedure to resolve disputes.[80]

Justice White did recognize that a union would be jointly and severally liable with the employer in a situation where the union affirmatively induced the employer to breach the agreement.[81] Additionally, he indicated that he would hold the union secondarily liable where the union had breached its duty to fairly represent, but had not caused the discharge, and where the employer was unable to pay the damages to which the employee was entitled.[82] Justice White believed that the principle of primary and secondary liability as it applied to a trust situation was also applicable to apportioning damages in the instant case.[83] He cited with approval

76. *Id.*

77. *Id.*

78. *Id.* Justice White described the union's duty of fair representation as a "statutory duty — implied by the judiciary." *Id.* at 604 & n.9. *See* Steele v. Louisville & Nashville Ky. Co., 323 U.S. 192 (1944).

79. 103 S. Ct. 604-05 (White, J., dissenting). Justice White asserted: "[t]he Court's holding therefore inserts a new substantive term into the agreement, which is precisely what we have forbidden the lower courts from doing in our previous holdings." *Id.* at 605 n.11 (White, J., dissenting). *See* UMW Health & Retirement Funds v. Robinson, 455 U.S. 562, 576 (1982).

80. 103 S. Ct. at 605 (White, J., dissenting).

81. *Id.*

82. *Id.* at 605-06 (White, J., dissenting).

83. *Id.* at 606 (White, J., dissenting). Justice White warned that common law principles are not always applicable to situations governed by federal labor law, but believed it proper under the present circumstances. *Id.* In applying the trust principle in the context of the instant case, Justice White noted:

> [A] trust beneficiary may sue to enforce a contract entered into on his behalf by the trustee if, but only if, the trustee "improperly refuses or neglects to bring an action against the third person." If the beneficiary is able to collect in full from the primary obligor, the trustee should not be monetarily liable. However, the trustee must pay if his wrongful action causes a loss to the beneficiary, such as where the claim was originally enforceable, but the obligor has become insolvent, or where the claim has be-

the decision rendered by the Court of Appeals for the Fourth Circuit in *Harrison v. Transportation Union*,[84] in which the court held the union liable for lost wages where the union's breach of its duty to the employee resulted in the employee's claim against his employer becoming time-barred.[85] Justice White noted, however, that he failed to see how such an exception was applicable in the instant case, and concluded that he would affirm the court of appeals' holding as to the Union's liability.[86]

In part IV of his dissent, Justice White agreed with the majority's view that the court of appeals erred by having refused to increase the Service's damage assessment to reflect Bowen's total lost wages after it had held that damages in the form of lost wages could not be assessed against the Union.[87] Justice White indicated that the court of appeals had based its decision on Bowen's failure to file a cross-appeal against the Service for $30,000 which was the amount the district court had assessed against the Union.[88] He noted that an important aspect of *Vaca* was its recognition of the need for an effective remedy to make an employee whole, and that the court of appeals had deprived Bowen of his effective remedy.[89] Since the Union's wrongful conduct had no bearing on the initial discharge, Justice White stated that the Union was not jointly and severally liable and thus Bowen did not have cause to appeal.[90] He concluded that a contrary ruling would impose an additional burden on the courts of appeals in the form of appeals from favorable decisions.[91]

Justice Rehnquist wrote a separate dissenting opinion in which he expressed doubt regarding the Court's and Justice White's position on the issue of Bowen's failure to cross-appeal.[92] Since the majority had reversed the court of appeals, thereby holding the Union liable for back wages, Justice Rehnquist believed that the language in the opinions relating to Bowen's failure to appeal constituted

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come barred by the statute of limitations.

Id. at 606 & n.14 (White, J., dissenting) (citations omitted).

84. 530 F.2d 558 (4th Cir. 1976), *cert. denied*, 425 U.S. 958 (1976).

85. 103 S. Ct. at 606 (White, J., dissenting).

86. *Id.*

87. *Id.* Justices Marshall and Blackmun concurred with Justice White's position on this issue. *See supra* note 13.

88. 103 S. Ct. at 607 (White, J., dissenting).

89. *Id.*

90. *Id.*

91. *Id.* Justice White noted that "neither the facts of this case nor the concerns of national labor policy required [the claimant] to appeal to protect his judgment." *Id.*

92. *Id.* at 607 (Rehnquist, J., dissenting).

dicta.[93] Furthermore, he noted that the cases cited by both the majority and Justice White revealed that the idea of holding a union liable for back wages was a tenuous proposition, and suggested that plaintiff's counsel should have filed a conditional cross-appeal to increase the judgment against the Service should the Union's liability have been denied on appeal.[94] Justice Rehnquist concluded that the majority's and Justice White's disposition of the appeal issue appeared to be contrary to *United States v. American Railway Express Co.*[95] and related authorities.[96]

The history of an employee's right to bring a suit alleging both a breach of the union's duty to represent fairly and a breach of the collective bargaining agreement by the employer involves the separate evolution of the two components and their subsequent convergence.[97] The roots of a union's duty of fair representation are found in *Steele v. Louisville & Nashville Railroad.*[98] In *Steele,* the Court interpreted the Railway Labor Act[99] to impose upon a union the duty to exercise its representative power fairly and without discrimination.[100] Twelve years later the Court found that the National Labor Relations Act[101] subjected unions operating under the Act to a duty of fair representation.[102]

The history of an employee's right to enforce a collective bar-

93. *Id.*

94. *Id.* at 607-08 (Rehnquist, J., dissenting). Justice Rehnquist stated that "[t]he decisions of the Courts of Appeals discussed both by Justice White's opinion and the Court's opinion show at the very least that there was substantial doubt that a union could be held liable for damages such as those awarded by the District Court." *Id.*

95. 265 U.S. 425 (1924).

96. 103 S. Ct. at 608 (Rehnquist, J., dissenting). In United States v. American Ry. Express Co., the Court stated that "[an] appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." 265 U.S. at 435.

97. For discussions of the evolution of the union's duty of fair representation, see Aaron, *The Duty of Fair Representation: An Overview* in THE DUTY OF FAIR REPRESENTATION 8 (J. McKelvey ed. 1977); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663 (1973).

98. 323 U.S. 192 (1944).

99. 45 U.S.C. §§ 151-188 (1976).

100. 323 U.S. at 202-03.

101. 29 U.S.C. §§ 151-187 (1976).

102. Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir. 1955), *rev'd & remanded per curiam,* 350 U.S. 892 (1956). The Court, citing *Steele v. Louisville & Nashville R.R.,* reversed the appellate court and permitted an injunction to issue against racial discrimination in the application of a collective bargaining agreement. 350 U.S. 892. *See* Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Tunstall v. Brotherhood, 323 U.S. 210 (1944).

gaining agreement began with *Textile Workers v. Lincoln Mills,*[103] in which the Court held that a union could sue an employer to enforce the terms of a collective bargaining agreement under section 301 of the Labor Management Relations Act.[104] *Smith v. Evening News Association*[105] extended the right to enforce a collective bargaining agreement under section 301 to an individual employee. In *Smith,* the employer had contended that an individual's contract suit should be governed by state law; the Court, however, cited the importance of uniformity in the meaning to be given to contract terms and noted the possibility that such terms could be given different meanings under state or federal law.[106] Thus, under *Lincoln Mills* and *Smith,* either the union or an individual employee could sue an employer to enforce the terms of a collective bargaining agreement, such suits being controlled by federal law.

The propriety of an individual employee's combining of section 301 action against an employer for breach of the bargaining agreement with an action against the union for breach of its duty to represent fairly was recognized implicitly by the Court in *Humphrey v. Moore.*[107] In *Humphrey,* an employee, Moore, had sought an injunction against the union and the company to prevent a joint employee-employer committee from implementing a decision to dovetail two separate seniority lists, a decision which would have resulted in Moore's lay-off.[108] Moore had alleged that

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103. 353 U.S. 448 (1957).

104. In *Textile Workers v. Lincoln Mills,* an employer had refused a union's request to submit several grievances to arbitration despite the fact that the collective bargaining agreement contained an arbitration provision. *Id.* at 449. The *Lincoln Mills* Court upheld the district court's order to the employer to comply with the agreement noting that section 301(a) authorizes "[f]ederal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under the collective bargaining agreements." *Id.* at 450-51.

105. 371 U.S. 195 (1962).

106. *Id.* at 200-01. Furthermore, the employee in Smith v. Evening News Ass'n had alleged a violation of the collective bargaining agreement which concededly was also an unfair labor practice under the National Labor Relations Act. *Id.* at 197. The Court, however, denied the employer's contention that the National Labor Relations Board had exclusive jurisdiction, holding that the courts' jurisdiction over a contract violation under section 301 was not destroyed by the Board's authority over an unfair labor practice. *Id.* at 197.

107. 375 U.S. 335 (1964).

108. *Id.* at 336. The employees of two companies were represented by the same union local. Part of the companies' business involved the transportation of new cars from a Ford Motor Co. assembly plant, and Ford notified the two that there was room for only one of them in the area. The companies negotiated an agreement whereby Dealers Transport Co., a newer company with younger employees, would remain in the area while E & L Transport Co., an older company with older employees, would concentrate its activities outside the

the decision of the joint committee was influenced by dishonest union conduct.[109] Although the Court found that the joint committee's decision was valid, the opinion noted that if the union had breached its duty, then the employer's authority to implement the layoffs based on the joint committee's decision would be undermined.[110] Thus the Court implied that an employer's conduct, in accordance with a joint employer-union decision, could be in breach of the collective bargaining agreement, if the union, in making the joint decision, breached its duty of fair representation to employees affected by the decision.

Vaca expressly recognized that a suit against the employer, to enforce the terms of a collective bargaining agreement based on section 301, could be combined with a suit against the union, for breach of its duty to represent fairly, to form a single (hybrid) action.[111] The *Vaca* Court noted that courts may be compelled to decide if a union has breached its duty of fair representation to determine if an employer has breached a collective bargaining agreement, and that a combination of the actions facilitates the employee's case.[112]

During the period when the hybrid suit was developing, the Court emphasized the importance of industrial self-government and the grievance procedure in the framework of federal labor policy.[113] Consistent with this emphasis, the Court in *Republic Steel Corp. v. Maddox*[114] held that an employee must attempt to utilize the contract grievance procedure before instituting a hybrid suit where the parties have agreed that arbitration is the exclusive remedy.[115] Two years after *Republic Steel*, the *Vaca* Court, recognizing the union's discretion to supervise the grievance procedure and to

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area. *Id.* at 336-37. The joint committee decided that the two separate seniority lists of the companies should be sandwiched, or dovetailed, so that the employees with the most seniority would work for the remaining company. The practical result of the decision would have been the layoff of younger employees from Dealers to make room for older E & L employees. *Id.* at 337.

109. *Id.* at 342.

110. *Id.* at 343.

111. 386 U.S. at 186-87.

112. *Id.* at 187.

113. *See* USW v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); USW v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); USW v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

114. 379 U.S. 650 (1965).

115. *Id.* at 652. "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the common law of the plant." *Id.* at 653.

appeal grievances to arbitration, stated that an individual employee does not have an absolute right to have his grievance heard by an arbitrator.[116]

Vaca further defined the relationship between the grievance procedure, an employee's right to bring a section 301 suit, and the union's duty of fair representation.[117] Justice White, writing for the *Vaca* majority, stated that before bringing a section 301 suit, the employee must attempt to exhaust the exclusive grievance procedure provided in the bargaining agreement.[118] Justice White noted that an employee would be relieved of the exhaustion requirement where, contractually, the union had the sole power to appeal the grievance to the higher steps of the procedure and wrongfully failed to pursue the grievance.[119] Thus, an employee who was discharged unjustly may sue his employer for breach of the contract without having to exhaust the grievance procedure if he can prove that the union breached its duty of fair representation when it failed to appeal his grievance.[120]

After *Vaca,* the apportionment of damages in a hybrid suit remained an area of uncertainty.[121] *Bowen,* in holding that a union may be held liable for lost wages, emphasized the fundamental nature of the grievance procedure in federal labor policy.[122] This policy recognizes that a collective bargaining agreement attempts to create a system of self-government, the heart of which is the grievance procedure.[123] Solutions to varying problems are molded into a private law through arbitration, which in turn gives content to the

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116. 386 U.S. at 191. The Court noted that "through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedure." *Id.*

117. *See* Aaron, *supra* note 97, at 14-15.

118. 386 U.S. at 184. Since the employee's claim is grounded in the breach of the collective bargaining agreement, he must first attempt to utilize the remedial measures which the agreement provides. *Id.*

119. *Id.* at 185. If the employer's conduct amounted to a repudiation of the contract, however, he may be estopped to rely on the defense of the employee's failure to exhaust the grievance procedure. *Id.*

120. *Id.* at 186. *Cf.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (establishing that the bar of finality accorded an arbitrator's decision by the courts could be lifted if the union's breach of duty seriously undermined the arbitral process).

121. *See generally* Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach,* 1981 Wis. L. Rev. 155. Another area of uncertainty centers on the standard necessary to prove a union's breach of the duty of fair representation. *See generally* Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?,* 126 U. Pa. L. Rev. 251 (1977).

122. *See* 103 S. Ct. at 596.

123. USW v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-81 (1960).

terms of the bargaining agreement.[124] A labor arbitrator, in making a decision, uses the common law of the industry in addition to the terms of the agreement.[125]

When a union breaches its duty of fair representation, the grievance procedure malfunctions.[126] The rights of the employer, union and employee, normally structured by a collective agreement, are changed by a breakdown of the procedure. The right of the employee to be made whole becomes paramount.[127] The union's breach opens the door to judicial intervention,[128] and the employer may no longer insist on arbitration as the exclusive remedy.[129] Furthermore, the employer's conduct may be reviewed by a judge or jury without knowledge of the common law of the industry.[130] In addition, *Bowen* subjects the union to substantial damages in the form of back wages as an incentive to comply with the grievance procedure.[131]

Bowen did not absolutely relieve the employer of all liability for lost wages accumulating after a hypothetical arbitration date, however. Since only the employer can rehire a discharged employee, Justice Powell was compelled to address the question of how a union could limit its liability for back wages once it had breached its duty to an employee who had alleged that he was discharged unjustly.[132] Justice Powell indicated that if the union had arguably committed a breach, it could notify the employer and the notification could be considered by the jury.[133] Presumably, notification could shift at least a portion of lost-wage liability back to the employer. Thus, the ability of an employer to rely on the union's initial decision not to appeal a grievance, which Justice Powell deemed critical to maintain an effective grievance procedure,[134]

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124. *Id.* at 581.

125. *Id.* at 581-82.

126. 103 S. Ct. at 595.

127. *Id.* That an employee's right to be made whole is not of paramount importance prior to the union's breach is established by the standard required to prove a union's breach of its duty of fair representation. For example, in a discharge case, it is not sufficient for an employee to establish a breach of the union's duty merely by convincing a jury that he was in fact unjustly discharged. The employee must also prove "arbitrary or bad-faith conduct on the part of the union in processing his grievance." *Vaca*, 386 U.S. at 193.

128. *See* Feller, *supra* note 97, at 706.

129. *See Vaca*, 386 U.S. at 196.

130. *See* Feller, *supra* note 97, at 706.

131. 103 S. Ct. at 597.

132. *Id.* at 597 n.15.

133. *Id.*

134. *Id.* at 596-97.

may be short-lived. Justice White, in his dissent, predicted that as a consequence of *Bowen*, unions will appeal unworthy grievances to arbitration to avoid potential liability,[135] a practice which could prove to be expensive for both parties.[136] Such action would also serve to undermine the effectiveness of the grievance mechanism which the *Bowen* majority sought to preserve.[137]

The *Bowen* opinions reflect the difficulty the Court faces in attempting to resolve the tangled interests while maintaining the bargained-for expectations of the parties to a hybrid suit.[138] *Bowen's* inherent uncertainty may prove to be the most valuable aspect of the decision, however, and may result in a substantial revision of grievance procedures. By subjecting unions to substantial damages, *Bowen* has caused union officials to review their grievance procedures.[139] Exposure to back pay liability should serve as a powerful incentive for a union to negotiate a contractual change in the grievance procedure to provide for review of a breach of duty claim within the grievance mechanism itself. As to the employer's willingness to negotiate a review procedure, *Bowen's* reference to notification has left the employer's liability uncertain.[140] Increased union pressure, nebulous liability, the possibility of an increasing number of unmeritorious grievances being appealed to arbitration and an employer's interest in preserving arbitration as the exclusive remedy for contract violations should temper an employer's resistance to an internal review procedure.[141]

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135. *Id.* at 605 (White, J., dissenting).

136. According to an AFL-CIO study, the union's half share cost of a single one day arbitration proceeding averaged $2200 a case. LAB. REL. YEARBOOK 1977 (BNA) 206.

137. 103 S. Ct. at 596-98. Appeals of unworthy grievances to arbitration could defeat the bargained for expectation of the employer, as it has been suggested that "an employer bargains for union power to screen out frivolous grievances." Comment, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1204 (1973).

138. *See* Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1541 (1981).

139. Executive Vice-President William H. Burrus of the American Postal Workers Union estimated that *Bowen* could expose the Union to as much as $500,000 a year in liability. BUS. WK., Feb. 14, 1983, at 130 E (industrial edition).

140. *See supra* notes 132-34 and accompanying text.

141. A private internal review of an employee's claim of a breach of the union's duty to represent fairly must protect certain interests of the employee if a court is to require the employee to exhaust the internal procedure. In Clayton v. UAW, 451 U.S. 679 (1981), the Court cited three relevant factors that would influence a court's exercise of discretion in ordering exhaustion of an internal union appeals procedure:

> [F]irst, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of inter-

The establishment of an internal review procedure would permit the parties to define their respective responsibilities through collective bargaining while protecting the employee's statutory and contractual rights. Imposition of reasonable time limits upon a publicized procedure would encourage an employee to bring notice of the union's breach before damages have accumulated to such an extent as to discourage settlement. Likewise, more timely investigation of an employee's claim would facilitate fact finding and objective decision-making and accordingly would allow for a more rapid recovery by the employee.

What steps unions and employers will take to deal with *Bowen's* apportionment of damages is uncertain. It is clear, however, that *Bowen's* imposition of back pay liability upon unions and the decision's failure to clarify employer liability in a hybrid suit puts the ball in the unions' and employers' court where it belongs.

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nal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

Id. at 689.