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Breaching the Duty of Fair Representation: The Union's Liability, 17 J. Marshall L. Rev. 415 (1984)

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COMMENTS

BREACHING THE DUTY OF FAIR REPRESENTATION: THE UNION'S LIABILITY

INTRODUCTION

A labor union has a duty to fairly represent all members of the elective work unit[1] during the negotiation, administration and enforcement of a collective bargaining agreement.[2] This duty has created a vast amount of commentary in the past several decades. Although the Labor Management Relations Act[3] (LMRA) governs many of the complex issues arising within the realm of labor law, the LMRA does not provide specific guidance for determining what constitutes "fair representation."[4] The

1. Only those employees having a substantial mutuality of interest in wages, hours, and working conditions should be grouped in a single unit. 14 NATIONAL LABOR RELATIONS BOARD ANNUAL REPORT 32-33 (1949). *See also* Labor Management Relations Act of 1947, § 9, 29 U.S.C. § 159 (1976).

2. For a discussion of the statutory inception of the duty of fair representation, see *infra* note 4.

3. 29 U.S.C. §§ 141-187 (1976). The Labor Management Relations Act (LMRA), also referred to as the Taft-Hartley Act, was originally passed in 1947. The LMRA added symmetry to labor relations by amending the National Labor Relations Act (NLRA) which was passed in 1935. The NLRA was considered a pro-labor statute because it not only was the first legislation to recognize collective bargaining rights, but it also only listed employer unfair labor practices. The LMRA balanced the scale by adding union unfair labor practices, along with numerous other amendments, to the NLRA. For a general discussion of the history of labor relations legislation, see R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1-7 (1976).

4. Over the years, the National Labor Relations Board, as well as the courts, have relied on several provisions to impose such a duty. Section 8(b)(1)(A) of the Act provides in relevant part: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title." Labor Management Relations Act of 1947, § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976).

Section 7 of the Act provides that

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement

concept of the duty of fair representation has evolved from its origin in the United States Supreme Court decision of *Steele v. Louisville & Nashville Railroad*.[5] In *Steele*, the Court reasoned that such a duty was concommitant with the union's status as exclusive bargaining representative.[6] The duty was imposed pursuant to the Railway Labor Act.[7] Shortly after it decided *Steele*, the Supreme Court, in *Wallace Corporation v. National Labor Relations Board*,[8] suggested that the same reasoning should create such a duty under the National Labor Relations Act (NLRA). It was not until a decade later, however, that the

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requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

Id. at § 157. The National Labor Relations Board ruled that this provision "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2nd Cir. 1963).

Suits alleging a breach of the duty of fair representation have also been brought under section 301 of the Act. Section 301 provides that

[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (1976).

The difference between bringing an action under section 8 or section 301 is beyond the scope of this comment. For a discussion of the preemption issues surrounding these provisions, see Vaca v. Sipes, 386 U.S. 171, 177-88 (1967). *See also infra* note 27.

For a general discussion of the development of the duty of fair representation, see Walther, *The Duty of Fair Representation*, 30 N.Y.U. CONF. ON LABOR 201 (1977).

5. 323 U.S. 192 (1944) (union negotiated seniority clauses that, in effect, put black employees at the bottom of the seniority list).

6. *Id.* at 201. The Act establishes that the union is the exclusive representative for all employees within the bargaining unit, and provides in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Labor Management Relations Act of 1947, § 9(a), 29 U.S.C. § 159(a) (1976).

7. 45 U.S.C. §§ 161-163 (1934). The Railway Labor Act (RLA) was an important impetus in the development of the National Labor Relations Act. The RLA created a mediation board appointed by the President which assisted in the settling of railway labor disputes. For a discussion of the role of the RLA in the development of labor law, see D. BOK, A. COX & R. GORMAN, LABOR LAW, CASES AND MATERIALS 69-77 (9th ed. 1981).

8. 323 U.S. 248 (1944) (union failed to admit certain employees and the company discharged them).

Court officially recognized that the NLRA imposed the duty of fair representation.[9]

Notwithstanding this recognition, for approximately thirty years the issues of the liability and ramifications of a union's breach of this duty have received little attention. In the recent decision of *Bowen v. United States Postal Service*,[10] however, the United States Supreme Court was squarely confronted with these issues. In *Bowen*, the union was required to pay a substantial portion of the employee's lost earnings as a consequence of the union's breach of its duty of fair representation. This comment will analyze the effect of the *Bowen* decision and discuss whether that decision was correct. This article will also examine the factors considered in imposing liability for a union's breach of its duty of fair representation and what that duty encompasses within the context of current labor relations.

THE DUTY OF FAIR REPRESENTATION

The collective bargaining system is designed to give priority to the collective interest of all members of a bargaining unit rather than the interests of individual employees.[11] The goal underlying the imposition of a duty of fair representation, on the

9. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The Court recognized that a "statutory obligation to represent all members of an appropriate unit requires [the bargaining representative] to make an honest effort to serve the interests of all of those members, without hostility to any." *Id.* at 337.

10. 103 S. Ct. 588 (1983) (union refused to take grievance to arbitration although supervising union official encouraged arbitration throughout steps of grievance).

11. Vaca v. Sipes, 386 U.S. 171, 182 (1967). The Court noted that the only way to promote industrial peace in the improvement of wages and working conditions was to subordinate individual interests to the collective interests of all employees. *Id.* This was consistent with the Court's recognition that a union representative was not barred from entering into contracts that were unfavorable to some members of the bargaining agreement. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944). The courts and the National Labor Relations Board have displayed deference to the union's actions, reasoning that the interests of the majority of employees must prevail. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964) (dovetail seniority lists of two merging companies putting employees that had worked longer at the base company out of work); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (giving seniority credit to employees for military service even though they did not previously work for the employer); Aeronautical Lodge 727 v. Campbell, 337 U.S. 521 (1949) (granting union officials seniority preference over employees with longer service to employer in layoff situation); Goodin v. Clinchfield R.R., 229 F.2d 578 (6th Cir.) (initiation of pension and retirement plans even though job rights of older employees built up through years of service were eliminated), *cert. denied*, 351 U.S. 953 (1956); Armored Car Chauffers Local 820, International Bhd. of Teamsters, 145 N.L.R.B. 225 (1963) (incorporating into the bargaining agreement a provision preventing the transfer of employees from one job category to another); Millwrights Local 1102, 144 N.L.R.B. 798 (1963) (classification of employees by permanent residence and distance from work).

other hand, is to prevent the individual employee from suffering invidious, hostile treatment at the hands of the majority of his coworkers.[12] A historical overview of the duty of fair representation serves to facilitate an understanding of the duty.

The doctrine of fair representation arose from a concern for union conduct involving racial discrimination.[13] Racial minorities were being denied the right to challenge detrimental decisions made by their employers. *Steele v. Louisville & Nashville Railroad*[14] recognized that when a labor organization was chosen to be the exclusive bargaining representative of a class of employees the organization must represent *all* of its members and not just the majority.[15] The Court reasoned that without such a duty, employees outside the majority would be denied the right to pursue a livelihood or to protect their employment interests.[16]

The next major case to affect the doctrine of fair representation was *Ford Motor Co. v. Huffman*.[17] In *Huffman*, the United States Supreme Court extended the application of the duty of fair representation from racial discrimination to other areas pertaining to employment conditions.[18] The Court imposed upon the union an obligation to represent all members of an appropriate unit with "an honest effort to serve the interests of all . . . without hostility to any."[19]

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12. R. GORMAN, BASIC TEXT OF LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 696 (1976).

13. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). The Court noted:

> Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

Id. at 199.

14. 323 U.S. 192 (1944).

15. *Id.* at 200.

16. *Id.* at 201-02. For constitutional ramifications, see Fanning, *The Duty of Fair Representation*, 19 B.C.L. REV. 813, 824-30 (1978).

17. 345 U.S. 330 (1953).

18. *Id.* at 333-39. In *Huffman*, an employee brought suit for a declaratory judgment on the validity of a seniority provision. The union had negotiated and obtained a provision which credited veterans with seniority time for the period of their military service prior to being employed by the Ford Motor Company. *Id.* at 334. The plaintiff had not served in the military prior to being employed by the company and claimed that the provision violated his seniority rights by allowing employees who had worked for the company a lesser number of years to acquire a greater seniority standing. *Id.* at 334-35.

19. *Id.* at 337. The Court, however, cautioned that the bargaining representative must be given a "wide range of reasonableness" in fulfilling this obligation. *Id.* at 338.

As labor organizations gained power in the 1960's, the emphasis changed from protection of individual rights to expansion of the union's discretion in implementing the collective bargaining agreement.[20] The decision of the Supreme Court in *Humphrey v. Moore*[21] illustrated the changing trend in the courts. In *Humphrey*, the Court held that a union did not breach its duty of fair representation merely by taking a position contrary to that of some members of the bargaining unit.[22] The Court's recognition of the inevitability of differences among employees allowed the union to carry out its day-to-day internal affairs without fear of breaching its duty of fair representation.

The Supreme Court continued its development of the duty of fair representation in the landmark decision of *Vaca v. Sipes*.[23] In *Vaca*, the Court attempted to resolve many questions that had developed concerning the extent and nature of the duty of fair representation, and suggested a new approach to the union's duty of fair representation. The employee in *Vaca* had been discharged for medical reasons.[24] Most of the evidence produced at trial was concerned with whether the employee was medically fit at the time of the discharge. In holding that the union had not breached its duty of fair representation, the Court noted that the issue was not whether the employee was fit at the time of discharge, but whether the union's conduct was arbitrary or in bad faith.[25] The Court recognized the neces-

20. *See* Note, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1120 (1973).

21. 375 U.S. 335 (1964). *Humphrey* involved the takeover of an older company by a newer company and the resulting displacement of junior employees of the newer company when the seniority lists were dovetailed (combined). The employees had been assured by their union representative that their seniority would not be affected by the takeover; however, as a result of the dovetailing, the complainants were laid off.

22. *Id.* at 349. The Court reasoned that "[j]ust as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes." *Id.*

23. 386 U.S. 171 (1967).

24. *Id.* at 175. *Vaca* involved an employee who took a leave of absence from employment in order to go into the hospital. After being certified to return to work by his family physician, the company doctor examined the employee and recommended that the employee not be reinstated. *Id.* at 174. The employee later obtained a second authorization, returned to work, and was then discharged on the ground of poor health. *Id.* at 175. The union had processed the employee's grievance several steps into the grievance process when it was decided, by a vote of the union executive board, not to take the grievance to arbitration. This decision was founded on the employee's examination by a doctor retained at the union's expense. *Id.* The employee brought the cause of action claiming the union had acted "arbitrarily, capriciously and without just or reasonable reason or cause." *Id.* at 173.

25. *Id.* at 193.

sity for union discretion and flexibility in bargaining and grievance situations, but also recognized that union actions would be limited when the union abused its power.[26] In its decision, however, the Court interpreted the federal common law duty of fair representation to confirm the existence of a cause of action against the union under section 301 of the Labor Management Relations Act.[27]

ESTABLISHING A BREACH

The *Vaca* decision put to rest questions concerning when a union owed a duty of fair representation. The more difficult question of the kind of conduct constituting a breach of that duty still remained. Although the Court noted that the duty was breached only when the union's conduct was "arbitrary, discriminatory, or in bad faith;"[28] the Court failed to elaborate on the exact kind of conduct required to violate this standard. While the union may not ignore a meritorious grievance, or process a grievance in a perfunctory manner, the Court reasoned that an individual does not have an absolute right to arbitration.[29] The union must be given considerable latitude in settling grievances in an attempt to further the interests of labor law.[30]

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26. *Id.* at 191.

27. *Id.* at 187. The *Vaca* Court also put to rest many of the preemption issues surrounding the duty of fair representation which are beyond the scope of this article. The Court in *Vaca* assumed, without deciding, that the National Labor Relations Board had the power to remedy breaches of the duty of fair representation and also upheld the jurisdiction of the courts to hear such cases. *Vaca*, 386 U.S. at 186-87. One scholar noted that if exclusive jurisdiction was extended to the NLRB in suits to enforce the duty of fair representation, it would interfere with federal labor legislation. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 610 (1962).

Much of the preemption issue stems from the differing view of whether the breach of the duty is an unfair labor practice. If viewed as such, the National Labor Relations Board should have exclusive jurisdiction. If, however, the breach of the duty to fairly represent is viewed as a breach of the collective bargaining agreement, federal and state courts must be granted jurisdiction. THE DEVELOPING LABOR LAW 737-40 (C.J. Morris ed. 1971). For a more detailed discussion of the preemption issue, see R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 766-86 (1976).

28. Vaca v. Sipes, 386 U.S. 171, 190. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The standards the courts have used to determine whether a breach has occurred have taken several forms over the years. *See, e.g.*, Conley v. Gibson, 355 U.S. 41 (1957) (irrelevant and invidious discrimination); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) (no hostile discrimination); Cunningham v. Erie R.R. Co., 266 F.2d 411 (2d Cir. 1959) (something akin to factual malice).

29. *Vaca*, 386 U.S. at 191.

30. The settlement procedure puts an end to frivolous grievances prior to timely and costly arbitration and provides precedent in assuring the

The susceptibility of the *Vaca* standard to broad interpretation was exemplified in *Amalgamated Association of Street Electric Railway and Motor Coach Employees of America v. Lockridge*,[31] where the Court, in *dicta*, combined the *Vaca* language with a contradictory statement from *Humphrey v. Moore*:[32] "For such a [duty of fair representation] claim to be made out, [the employee] must have proved 'arbitrary or bad-faith conduct on the part of the [u]nion.' *Vaca v. Sipes, supra*, 386 U.S. at 193. There must be a 'substantial evidence of fraud, deceitful action or dishonest conduct.' *Humphrey v. Moore, supra*, 375 U.S. at 348."[33] The difference between the statements in *Lockridge* becomes apparent when considering the standard of proof required by each of the statements. While the *Vaca* standard may be proved by an objective analysis, the *Humphrey* standard requires an insight into the union representative's mental state.[34]

The difficulty in applying the *Vaca* standard is readily apparent from the contradictory approaches taken by the federal circuit courts.[35] Although the need for a showing of bad faith has dissipated,[36] the requirement of arbitrariness continues to

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union and the employer that problems will be handled in similar ways. The interests of the union in representing employees in the enforcement of the bargaining agreement are also furthered by the settlement process. *Id.* Forcing the union to take all grievances to arbitration, in lieu of settlement, would have the effect of raising costs to a height that would prevent successful functioning of the grievance machinery. *Id.* at 192.

31. 403 U.S. 274 (1971) (union procured employee's discharge after employee had forfeited his good standing membership by dues arrearage).

32. 375 U.S. 335, 348 (1964).

33. *Lockridge*, 403 U.S. at 299.

34. Savner, *The Application and Meaning of the Duty of Fair Representation: Representing the Wrongfully Discharged Worker*, 13 CLEARINGHOUSE REV. 13 (1979) (provides an insight to the complexity of proving a union's breach of the duty to fairly represent its members and focuses on the problems a union faces when it either fails to pursue a grievance, fails to properly investigate the grievances, or inadequately presents the grievance).

35. *See infra* notes 36-40 and accompanying text. Section 301 of the Act gives the federal courts jurisdiction over suits involving violations of contracts between an employer and a union. Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185(a) (1976). The Supreme Court has held that state courts also have jurisdiction but must apply federal law. Vaca v. Sipes, 386 U.S. 171, 174 (1967). *See also* Price v. Southern Pac. Transp. Co., 586 F.2d 750 (9th Cir. 1978) (determination of appropriate state statute of limitations is federal question).

36. Savner, *supra* note 34, at 16. *See also* Beriault v. Local 40, 501 F.2d 258 (9th Cir. 1974) (movement away from a rigid bad faith standard); Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974) (bad faith is not universally required to support an employee's claim against his union); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.) (court relied solely on whether there was arbitrary conduct), *cert. denied*, 400 U.S. 877 (1970). For cases demonstrating an application of the standard

be a major concern. The confusion lies within what is considered arbitrary. While a majority of the circuits have avoided any reference to whether negligence is sufficient to constitute a breach of the union's duty,[37] the Sixth Circuit, in *Ruzicka v.*

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of bad faith, see Simberlund v. Long Island R.R. Co., 421 F.2d 1219 (2d Cir. 1970) (charge that union had conspired to deprive union members of back pay and seniority was sufficient to raise issue of bad faith); St. Clair v. Local No. 515, Int'l Bhd. of Teamsters, 422 F.2d 128 (6th Cir. 1969) (testimony of what union official told employer about discharged employee was admissible to ascertain bad faith); Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) (union's action must be undertaken with malice and bad faith).

37. The First Circuit does not include a duty of due care as part of a union's duty of fair representation. De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). The union is required, however, to investigate or express some judgment on the merits of the case. Failure to do so is evidence of arbitrary conduct. *Id.* In attempting to "clarify" what a union must do, the Court of Appeals for the First Circuit has held that the only burden on the union is to act fairly and in good faith. Sarnelli v. Amalgamated Meat Cutters & Butcher Workmen of N. Am., 457 F.2d 807 (1st Cir. 1972). The court noted that this was "something considerably less than a duty of support measured with reference to the member [of the bargaining unit]." *Id.*

While the Second Circuit has held that there is no requirement of ill will or malice to find a breach of the union's duty, Ryan v. N.Y. Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451, 455 (2d Cir. 1979), the court has defined arbitrary in an equally abstract manner. The court has interpreted arbitrary as synonymous with irrational conduct. *Id. See also* Jones v. Trans World Airlines, Inc., 495 F.2d 790, 797 (2d Cir. 1974) (union's denial of request to process a grievance based on union membership deemed irrational).

The Fifth Circuit has avoided reference to negligent conduct as well. The Court of Appeals for the Fifth Circuit has held that a union's action is not arbitrary if it is based on relevant union factors which exclude the possibility of it being motivated by personal animosity or political favoritism, a rational result of consideration of those factors, and inclusive of fair and impartisan consideration of the interests of all employees. Seymour v. Olin Corp., 666 F.2d 202, 208 (5th Cir. 1982); Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976).

The Ninth Circuit has held that conduct exemplifying reckless disregard of the employee's rights is a breach of the duty of fair representation. Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982). *See also* Wheeler v. International Woodworkers of Am., 92 L.R.R.M. 2332, 2336 (Ore. Sup. Ct. 1976). The cases demonstrate a "calculated broadening of the fair representation standard," 92 L.R.R.M. at 2335, and *Tenorio* specifically required the union to conduct some minimal investigation of grievances brought to its attention. 680 F.2d at 601.

The Tenth Circuit has interpreted an arbitrary act as one done without adequate principle or an act done according to no reason or judgment. Foust v. IBEW, 572 F.2d 710, 714 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979).

The Court of Appeals for the District of Columbia has found actions that are hostile, discriminatory or arbitrary violate the duty of fair representation. Warehouse Union, Local 860 v. NLRB, 652 F.2d 1022, 1024 (D.C. Cir. 1981). This vague statement of the standard has only been clarified to the extent that a union's conduct does not have to be intentional to constitute unfair representation. *Id.* at 1025. In *Warehouse*, the court reasoned that the action, although not intentional, may be so egregious that the union

General Motors Corp.,[38] has held that negligent conduct will suffice.[39] On the other hand, a substantial minority of the circuits have expressly stated that a mere showing of negligence is not enough to constitute unfair representation.[40]

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falls far short of the minimum standards of fairness, thus being arbitrary. *Id.* The minimum standards referred to are never defined or delineated by the court.

38. 523 F.2d 306 (6th Cir. 1975).

39. *Id.* at 310 (union negligently failed to file an unadjusted grievance statement). *See also* Milstead v. International Bhd. of Teamsters, 580 F.2d 232, 235 (6th Cir. 1978), *aff'd on rehearing*, 649 F.2d 395 (6th Cir. 1981) (negligent handling of a grievance due to ignorance of a collective bargaining agreement provision constitutes unfair representation); *cf.* Farmer v. ARA Services, Inc., 660 F.2d 1096, 1103 (6th Cir. 1981) (something more than simple negligence is required to constitute arbitrary and perfunctory conduct).

40. The Third Circuit has defined the test of breaching the duty of fair representation as being whether the union dealt with an employee's claim in bad faith or in an arbitrary manner. Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970). The determination of the breach has no relation to whether the claim was meritorious and, therefore, the court has reasoned, negligence or the exercise of poor judgment is not enough to establish unfair representation. *Id.* As long as there is some objective justification for the union's conduct, the duty of fair representation has not been breached. *See* Deboles v. Trans World Airlines, Inc., 552 F.2d 1005, 1016 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

While the Fourth Circuit has not required a showing of intentional conduct, liability for breach of the duty has not been predicated upon simple negligence. Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980). The union's conduct must reach an undefined degree of culpability. *Id.* The union must conform its behavior to each of three different standards. First, the union must treat all factions of its membership without hostility or discrimination. Second, the union's broad discretion must be exercised in complete good faith and with all honesty. Third, the union must avoid arbitrary conduct. *Id.* at 890. (The author points out that although several courts have adopted or referred to the third standard, it seems peculiar to separately delineate this standard when the court is trying to provide guidelines to a determination of "arbitrariness" in the first place.) The Fourth Circuit has further held that a union's decision not to pursue a grievance may not be done without reason. Griffin v. International Union, United Auto., Aerospace & Agricultural Implement Workers of Am., 469 F.2d 181, 183 (4th Cir. 1972). *Cf.* Lewis v. American Postal Workers Union, 561 F. Supp. 1141 (W.D. Va. 1983) (missing a grievance deadline due to honest mistake not actionable).

The Seventh Circuit has been clear in its mandate that mere negligence or error in judgment will not be enough to support a claim of unfair representation. Rupe v. Spector Freight Sys., Inc., 679 F.2d 685, 692 (7th Cir. 1982); Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 294 (7th Cir. 1975). To prove arbitrary or discriminatory treatment, the Seventh Circuit has required an employee to show intentional, invidious conduct on the part of the union directed at that particular employee. 524 F.2d at 293.

The Eighth Circuit has held that conduct displaying mere negligence or poor judgment will not satisfy the burden of proof required for showing a breach of the duty of fair representation as long as the union acts with complete good faith, honesty of purpose and not in a perfunctory manner. Minnis v. International Union, United Auto. Workers of Am., 531 F.2d 850 (8th Cir. 1975). The court, however, has not clearly defined what is necessary. In Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980), the court admitted that the scope of the duty of fair representation "is a legal term of

LIABILITY FOR A BREACH

After an employee has demonstrated that the union breached its duty of fair representation, a remedy must be provided. In *Vaca*, the United States Supreme Court held that the courts were free to fashion any remedy they deemed appropriate.[41] Since this authorization, the courts have used a wide variety of remedies, including injunctive relief,[42] compensatory damages,[43] punitive damages,[44] allowance for attorneys' fees[45] and even damages for mental distress.[46] All of the remedies that have been chosen by the courts, except punitive damages, are designed to fulfill the same purpose; specifically, to make the employee whole.[47] The assessment of damages also entails a determination of which party, the employer or the union, is responsible for payment of the damages.

In *Vaca*, the United States Supreme Court held that damages attributable to the employer for its breach of the union con-

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art, incapable of precise definition." *Id.* at 1236 (quoting Griffin v. International Union UAW, 469 F.2d 181, 182 (4th Cir. 1972)). The union must act within its "permissible range of reasonableness." 619 F.2d at 1237.

41. Vaca v. Sipes, 386 U.S. 171, 187 (1967). Because it held that the union had not breached its duty of fair representation, the Court did not have to expound on what damages it thought appropriate.

42. *E.g.*, Local 112, United Bhd. of Carpenters v. NLRB, 574 F.2d 457 (9th Cir.) (injunction order to cease picketing), *cert. denied*, 439 U.S. 981 (1978), *aff'd sub. nom.*, Summit Valley Indus. Inc. v. Local 112, United Bhd. of Carpenters, 456 U.S. 717 (1982); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963) (injunctive relief is appropriate to force the employer to arbitrate).

43. *E.g.*, Soto Segarra v. Sea-Land Serv. Inc., 581 F.2d 291 (1st Cir. 1978) (employee awarded back wages including calculation for salary increases).

44. *See* Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975) (punitive damages are necessary remedy to prevent malicious and utter disregard for employee's rights), *cert. denied,* 425 U.S. 958 (1976). *But see* IBEW v. Foust, 442 U.S. 42 (1979) (threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations).

45. Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974) (court apportioned liability for attorney fees, two-thirds to employer and one-third to union), *aff'd in part, rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). *But see* Summit Valley Indus. Inc. v. Local 112, United Bhd. of Carpenters, 456 U.S. 717 (1982) (ordinarily a statutory right to damages does not include an authorization of attorney's fees).

46. De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.) (in *dictum* court states that such an award may be appropriate against either employer or union), *cert. denied*, 400 U.S. 877 (1970). *See also* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 298 (1st Cir. 1978) (compensation for mental distress warranted only in extreme misconduct). For a general discussion of remedies, see R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 721-25 (1976); THE DEVELOPING LABOR LAW 747-56 (C.J. Morris ed. 1971).

47. The decision to compensate, however, is ancillary to deciding how such compensation should be apportioned. Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach?*, 1981 WIS. L. REV. 155, 174.

tract, through a wrongful discharge, should not be charged to the union.[48] The Court further held that increases to the employer's damages caused by the union due to the breach of the duty to fairly represent the employee, could not be attributed to the employer.[49] The enunciation of this governing principal was *dictum*, however, because the Court determined that the union had not breached its duty of fair representation.[50]

Three years later, in *Czosek v. O'Mara*,[51] the Court again commented on the apportionment of damages. The Court did not, however, have the opportunity to apply the apportionment principles set out in *Vaca*. The only issue before the Court was whether the plaintiff had stated a cause of action.[52] The Court cautioned that on remand only those damages that flowed from the union's conduct could be assessed against the union.[53] The Court noted "damages against the union *for loss of employment are unrecoverable* except to the extent that its refusal to handle the grievances added to the *difficulty and expense of collecting from the employer*."[54] This language, relied upon by several circuit courts,[55] gives the impression that where there is a wrongful

48. *Vaca*, 386 U.S. at 197-98.

49. *Id.* Although this principle appears feasible, its application has resulted in diverse rulings. *See infra* notes 69-74 and accompanying text. The *Vaca* Court seemed to be requiring an apportionment of damages according to fault: "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each." 386 U.S. at 197.

50. *Id.* at 195. The Court, in *dictum*, however, pointed out that even if the union had breached its duty of fair representation, it was the employer that had prompted the controversy by breaching the collective bargaining contract. The Court further indicated that the employer could not hide behind the union's wrongful conduct to avoid liability. *Id.* at 197. This language would appear to mandate that full back wage liability lies with the employer.

51. 397 U.S. 25 (1970) (furloughed employees had actually been discharged in favor of pre-merger employees).

52. The Court, however, discussed apportionment of damages to give guidance on remand to the appellate court. The union was concerned with being liable for all damages because the complaint against the employer had been dismissed for failure to state a cause of action. *Id.* at 28-30.

53. *Id.* at 29.

54. *Id.* (emphasis added). This statement implies that the Court is referring to attorney fees.

55. *E.g.*, Seymour v. Olin Corp., 666 F.2d 202, 213 (5th Cir. 1982) (citing *Czosek* to support award of attorney fees); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 298 (1st Cir. 1978) (showing that attorney fees award was proper); Milstead v. International Bhd. of Teamsters, 580 F.2d 232, 236-37 (6th Cir. 1978), *aff'd on rehearing*, 649 F.2d 395 (6th Cir. 1981) (limiting union liability to those out-of-pocket expenses made by employee), *cert. denied*, 454 U.S. 896 (1982); NLRB v. Local 485, International Union of Elec. Workers, 454 F.2d 17, 23 n.11 (2d Cir. 1972) (citing *Czosek* to deny a shift of major portion of lost earnings to union).

discharge the employer, and not the union, will be liable for all lost earnings.

In *Hines v. Anchor Motor Freight, Inc.*,[56] the United States Supreme Court was faced with a situation where both the employer and the union were subject to liability. After holding that both the union and the employer were properly before the Court,[57] the case was remanded to determine whether there had been an erroneous discharge and a subsequent breach of the union's duty to fairly represent. The only guideline the Court provided the circuit court to assess damages was a statement that the employee could be "entitled to an appropriate remedy against the employer as well as the Union."[58]

The real importance of *Hines*, with respect to the apportionment issue, is found in the concurring opinion of Justice Stewart.[59] Stewart reasoned that though the majority of the Court had decided that the employer was not immune from liability, it did not follow that the employer would be responsible for the entire backpay award.[60] In his view of apportionment, the union would be liable for lost earnings accruing between the time of the "tainted" decision or the parties' settlement and a court's subsequent final decision that there had been a wrongful discharge.[61] The employer would pay only those back wages accruing between the time of the discharge and the "tainted" decision.

The next apportionment case heard by the Supreme Court was *International Brotherhood of Electrical Workers v. Foust*.[62] The lower courts in *Foust* had awarded the aggrieved employee both compensatory and punitive damages.[63] By the time the case reached the Supreme Court, the only issue remaining was whether an award of punitive damages could be assessed

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56. 424 U.S. 554 (1976) (employee discharged on grounds of falsifying motel expenses and union made no attempt to ascertain truth of charges).

57. *Id.* at 572. The issue before the Court was whether a suit against an employer was properly dismissed when the complaint against the union for breach of the duty of fair representation withstood the union's motion for summary judgment. *Id.* at 556.

58. *Id.* at 572.

59. *Id.* (Stewart, J., concurring).

60. *Id.* at 572-73 (Stewart, J., concurring).

61. *Id.* This view has been labeled the Stewart approach. *See Apportionment of Damages, supra* note 47, at 167. Stewart based his reasoning on the employer's reliance on the grievance proceeding. 424 U.S. at 573 (Stewart, J., concurring). *But see infra* text accompanying notes 101-02.

62. 442 U.S. 42 (1979).

63. The jury had awarded the employee $40,000 actual damages and $75,000 punitive damages. The United States Court of Appeals for the Tenth Circuit remanded to determine whether the punitive damages were excessive. 572 F.2d 710 (10th Cir. 1978).

against the union for a breach of its duty of fair representation.[64] The decision's precedential value pertains to punitive damages,[65] but the Court, in *dicta*, implied that the union could not be liable for back wages. The Court pointed out that the actual damages attributable to the union are generally *de minimis*,[66] and that an employee could "recover in full from his employer for its breach of contract."[67]

Considering the paucity of guidance provided by the Supreme Court in the cases discussed above, it is not surprising that the circuit courts have differed in their interpretation of *Vaca*'s "governing principle." The circuits following the *Vaca* approach[68] generally hold that unless a union participates in the employer's breach of the collective bargaining agreement,[69] the union cannot be held liable for contract damages which, ordinarily, are lost wages.[70] The reasoning provided by the courts that have accepted this approach usually centers on the principle that it was the employer that caused the discharge in the first place.[71] Conversely, a number of courts have adopted the Stew-

64. *Foust*, 442 U.S. at 46.

65. The Court held that punitive damages were not recoverable against a union in an action for breach of the duty of fair representation. The Court based its decision on general labor policy disfavoring punishment. *Id.* at 52. *But see* Note, *Punitive Damages in Fair Representation Actions*, 64 MARQ. L. REV. 224 (1980) (article supports award of punitive damage in order to provide further protection of individual rights).

66. 442 U.S. at 48 *citing* Harrison v. United Transp. Union, 530 F.2d 558, 563 (4th Cir. 1975) (union liable for portion of lost earnings because of conspiracy with employer), *cert. denied*, 425 U.S. 958 (1976); St. Clair v. Local Union No. 515, Int'l Bhd. of Teamsters, 422 F.2d 128, 132 (6th Cir. 1969) (recovery of lost wages from union denied because union did not participate in procurement of discharge).

67. 442 U.S. at 49. The Court noted that damages imposed on a union should be limited. The limitation on union liability attempts to provide a remedy to employees for injuries caused by union misconduct without taking limited funds away from the collective interests of union members. *Id.* at 50.

68. For a discussion of the *Vaca* approach, see *Apportionment of Damages, supra* note 47, at 166-70. Although this approach is not mandated by *Vaca*, the courts adopting this approach rely heavily on the language in *Vaca*. *Id.* at 166 n.76.

69. *See* Segarra v. Sea-Land Serv., Inc., 581 F.2d 291 (1st Cir. 1978).

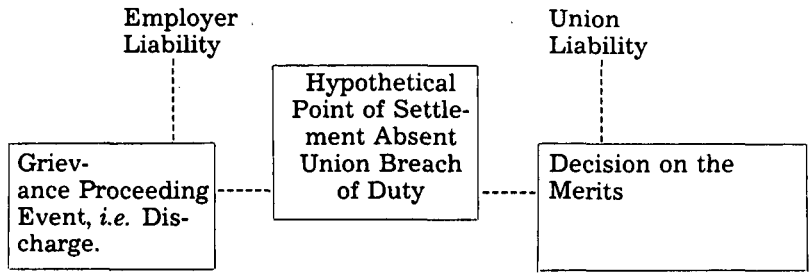
70. *See supra* note 68.

71. Milstead v. Local Union No. 957, Int'l Bhd. of Teamsters, 580 F.2d 232, 236 (6th Cir. 1978), *aff'd on rehearing*, 649 F.2d 395 (6th Cir. 1981) (award of lost wages would be contrary to law), *cert. denied*, 454 U.S. 896 (1982); Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 298 (1st Cir. 1978) (union liable only for proportionate amount flowing from its own conduct and not the employer's wrongful discharge); Richardson v. Communication Workers of Am., 443 F.2d 974 (8th Cir. 1971) (a union's breach involves only a failure to process a grievance and its share of damages is usually *de minimis*), *cert. denied*, 414 U.S. 818 (1973). *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 671-72 (1973).

art approach. Under this approach, the court must ascertain a "hypothetical arbitration settlement date" by which the grievance would have been decided had the union not breached its duty of fair representation.[72] Although not as definitive as the *Vaca* approach, the Stewart approach allows the employer to rely on the union's performance throughout the grievance procedure.[73]

Almost four decades after the duty of fair representation was judicially created, the United States Supreme Court finally took a position on how damages should be apportioned between the union and the employer. The Court, directly faced with the question of liability for back wages in *Bowen v. United States Postal Service*,[74] adopted the Stewart approach. In *Bowen*, the

72. The Stewart approach can best be described by diagram.



Under the Stewart approach, if the employee has won at the grievance or arbitration stages the union would obviously have no liability. When the employee loses, however, and resorts to the courts claiming the union breached its duty of fair representation, the Stewart approach requires the court to pick a hypothetical date by which time the employee would have been properly redressed. After this point, the union has complete liability. *See Apportionment of Damages, supra* note 47, at 171.

73. While no case had applied the exact formula of the Stewart approach until Bowen v. United States Postal Service, 103 S. Ct. 588 (1983), several circuits have used it in theory. *E.g.*, Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 892-93 (4th Cir. 1980) (damages can be apportioned when the union increases the employee's loss beyond that for which the employer could be charged); Smart v. Ellis Trucking Co., 580 F.2d 215, 219 n.6 (6th Cir.) (trial court directed to determine limitation on employer's liability, if any, for employer's reliance on arbitration proceeding), *cert. denied*, 440 U.S. 458 (1978); Battle v. Clark Equip. Co., 579 F.2d 1338, 1349 (7th Cir. 1978) (employer cannot be held liable when it relies in good faith on union actions), *overruled*, 679 F.2d 685, 690 (7th Cir. 1982) (overruled on exhaustion requirement); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977) (the employer shall not be required to police union actions), *overruled*, 679 F.2d 685, 690 (7th Cir. 1982) (overruled on exhaustion requirement).

74. 103 S. Ct. 588 (1983). In *Bowen*, an employee was suspended without pay and subsequently discharged. The employee filed a grievance alleging he had been discharged without just cause. The union refused to take his grievance to arbitration although the responsible union officer had suggested arbitration through all other steps of the grievance. *Id.* at 590-91.

employee's complaint alleged a wrongful discharge by the employer and a breach of the duty of fair representation by the union. After a jury trial, the court entered judgment for Bowen and against both the employer and the union.[75] The district court awarded Bowen $52,954 in lost wages and apportioned them along the lines suggested in the Stewart approach.[76] The Court of Appeals for the Fourth Circuit affirmed the findings of fact but held that as a matter of law the union could not be held liable for back wages.[77]

The Supreme Court first pointed out that of primary importance was the employee's right to be made whole after being injured by both the employer's and the union's breach.[78] The Court recognized that the employer should not be shielded by the union's wrongful conduct. Moreover, it also recognized that the same fault that removed the bar to arbitration finality[79] required the union to bear some of the liability for increases in the employee's injuries.[80] By requiring the union to pay lost wages accruing after the hypothetical arbitration settlement date, the Court noted that it was implementing *Vaca*'s governing principle of attributing to the union any *increases* in damages.[81]

The Court found that the Stewart approach in apportioning damages was consistent with national labor policy which

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75. *Id.* at 591. The jury was instructed that if compensatory damages were to be awarded, the jury was to determine what amount should be attributed to the union and the amount that should be attributed to the employer. *Id.*

76. *Id.* at 592. In applying the Stewart approach, the district court determined that the employee would have been reinstated by August 1977 had the union taken Bowen's grievance to arbitration. The employer was held liable for back wages up to that time, and the union from August 1977 until the final decision on the merits. *Id.* at 592 n.6.

77. Bowen v. United States Postal Serv., 642 F.2d 79, 82 (4th Cir. 1981). In holding that the union was not liable for any back wages as a matter of law, the circuit court relied on the fact that an employee's compensation is at all times payable by the employer and not the union. *Id.* The circuit court, however, affirmed the award as to the employer. This had the effect of giving the employee only part of the back wages the jury had deemed appropriate. This indicates that the circuit court had affirmed the district court's apportionment of fault. 103 S. Ct. at 592.

78. 103 S. Ct. at 595.

79. As a general rule, arbitration decisions are final and binding. *See* Waldman, *The Duty of Fair Representation in Arbitration*, 29 N.Y.U. CONF. ON LABOR 279 (1976). *See also infra* note 111.

80. 103 S. Ct. at 595.

81. *Id.* The Court stated, " '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* Vaca v. Sipes, 386 U.S. 171, 197-98 (1967)) (emphasis in original).

evolved from the federal common law.[82] Emphasis was placed on the union's acquisition of the exclusive bargaining right for the employee and with that right, the union's assumption of a certain duty upon which the employer, as well as the employee, could rely.[83] If the employer was unable to rely on the union's decision to process or not to process a grievance, the grievance procedure would lose much of its role in preserving industrial peace.[84]

Bowen and Its Ramifications

Although the majority opinion in *Bowen* seems fair on the surface, the decision was close and the dissent is worthy of consideration.[85] The basis for the dissent's opinion stems from a different view of the *Vaca* decision. Justice White, writing for the dissenters in *Bowen*, noted that the Court in *Vaca* had explicitly stated that the union's violation of its statutory duty of fair representation in no way exempted the employer from any of the damages for which it normally would have been responsible.[86] With respect to the employer, the only consequence of the union's breach was to remove the bar to the employee's right to bring suit.[87] Justice White noted that a closer inspection of the *Vaca* decision supported such an application.[88] The *Vaca* Court held that all of the employee's damages would be attributable to the employer and not the union.[89] The facts in *Vaca* indicate

82. 103 S. Ct. at 596. The Court rejected application of ordinary contract principles to collective bargaining agreement situations. *Id. But see infra* note 99 and accompanying text.

83. *Id.* at 597.

84. *Id.* The majority of the *Bowen* Court viewed the union as having the pivotal role in the grievance process. The Court further reasoned that just as the employer may accept an employee's waiver of any challenge to a discharge, the employer must be able to accept a waiver by the employee's exclusive representative. *Id.* at 596-97.

85. The decision in *Bowen* was 5-4. Justice Powell delivered the opinion for the majority with Chief Justice Burger, Justice Brennan, Justice Stevens and Justice O'Connor joining. The dissent was written by Justice White joined by Justice Marshall, Justice Blackmun and in all but Part IV, Justice Rehnquist. Justice Rehnquist also wrote a separate dissenting opinion. It is interesting to note that Justice White wrote the opinion of the Court in *Hines* and dissented in *Bowen*. This would seem to indicate that *Hines* was to be interpreted as the dissent in *Bowen* argues and not according to Justice Stewart's concurring opinion in *Hines* which was adopted by the *Bowen* majority.

86. Bowen v. United States Postal Serv., 103 S. Ct. 588, 601 (1983) (White, J., dissenting) (citing Vaca v. Sipes, 386 U.S. 171, 196 (1967)).

87. 103 S. Ct. at 600 (White, J., dissenting) (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976)). See discussion of finality *infra* note 111 and accompanying text.

88. 103 S. Ct. at 601 (White, J., dissenting).

89. Vaca v. Sipes, 386 U.S. 171, 198 (1967).

that the employee was fired in 1960 and the Court rendered its decision in 1967. Had the union taken the initial grievance to arbitration the decision probably would have been rendered in 1961.[90] Justice White pointed out that the *Vaca* Court's statement as to damages does not reflect an intention to require the union to pay back wages.[91] Under the Stewart approach, the union would have been liable for well over half of the damages.

Requiring the employer to pay for the employee's loss of back wages does not relieve the union of liability. As the dissent pointed out, "[t]he damages that an employee may recover upon proof that his union has breached its duty to represent him fairly are simply of a different nature than those recoverable from the employer."[92] This is consistent with the United States Supreme Court's holding in *Czosek v. O'Mara*.[93] The Court in *Czosek* noted that the union was liable for those damages that the employee incurred due to the union's wrongful actions which added to the difficulty and expense of collecting from the employer.[94] The Court further stated that lost wages were not a part of this recovery.[95] A contrary ruling would have the consequence of holding a union liable for a discharge for which it was not initially responsible while the employer is allowed to hide behind the union's subsequent misconduct.[96]

Consistent with this assertion is the dissent's consideration of the practical consequences the *Bowen* majority implements, and the injustice to the union in those consequences. Allowing the employer to escape liability for further backpay after a hypothetical arbitration date would seem to be unjustified in light of the fact that the employer is the one who can stop this accumulation of back wages by simply reinstating the employee. The employer has the continuing ability to right the initial wrong.[97] The *Bowen* decision shifts the majority of liability to the union. This is true even though the initial cause of the injury was the

90. 103 S. Ct. at 601 n.4 (White, J., dissenting).

91. *Id.* at 601-02 (White, J., dissenting).

92. *Id.* at 602 (White, J., dissenting).

93. 397 U.S. 25 (1970).

94. *Id.* at 28-29.

95. *Id.* at 29. For a similar interpretation of *Czosek*, see *1975-1976 Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. INDUS. COM. L. REV. 1041, 1054 (1976) [hereinafter cited as *Annual Survey*].

96. *See Annual Survey, supra* note 95, at 1059-60. (Congress could not have intended an employer to evade liability for the natural consequences of his breach by such a fortuitous circumstance).

97. Bowen v. United States Postal Serv., 103 S. Ct. 588, 603 (1983) (White, J., dissenting).

employer's wrongful conduct.[98] The dissent noted that there was no explanation why damages should not be assessed according to traditional rules of contract law. These principles would require a breaching defendant (the employer) to pay damages equivalent to the total harm suffered even though there are contributing factors.[99] The employer caused the initial breach, the wrongful discharge. The breach continues until the employee is reinstated. The union has done nothing to prevent the employer from reinstating the employee. The majority's holding in *Bowen* seems peculiar and allows the employer to escape liability by arguing, in effect, "you [the union] should be liable for all damages flowing from my wrong from and after a certain time, because you should have caught and rectified my wrong by that time."[100]

The Court's assertion that the union's liability for back wages is consistent with labor policy assumes that the employer may rely on the union to bring any wrongful discharge to the employer's attention through the grievance procedure.[101] This assumption is not well-founded. Collective bargaining agreements provide a union with a right to raise grievances, not an obligation to do so.[102] The duty of fair representation is owed to

98. "But for the employer's breach of contract, there would be no occasion for *anyone* to reimburse the plaintiff for lost wages accumulated either before or after a hypothetical arbitration." *Id.* (White, J., dissenting) (emphasis in original).

99. 5A CORBIN, CORBIN ON CONTRACTS § 999 (1964). *See also* Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving a Union's Breach of Its Duty of Fair Representation*, 30 MERCER L. REV. 661 (1979). The appropriate question to ask is: "But for the union's breach of its duty of fair representation, would the employee have been spared part of the damage?" *Id.* at 673. Handling the suit as a contract action recognizes the principles of third party beneficiary contracts. The theory of third party beneficiary contracts follows *A* to enter into a contract with *B* for the benefit of *C*. *C* tenders no consideration and has no obligation under the contract. The courts, however, permit *C* to bring an action against *B* for damages for failure to render benefit to *C*. Morris, *Duty of Fair Representation—An Employer's Perspective*, 29 N.Y.U. CONF. ON LABOR 297, 300 (1976). Inserting the parties of a labor dispute into the theory permits the union (*A*) to enter into a collective bargaining agreement with the employer (*B*) for the benefit of the employee (*C*). The employee is then allowed to bring a suit against the employer for damages for failure to render the requisite benefits to the employer. *But see* Edwards, *Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?* 27 LAB. L.J. 686, 687 (1976) (author views problem as one in tort because of the union's breach of a duty).

100. *Bowen*, 103 S. Ct. at 604 (White, J., dissenting) (citing Seymour v. Olin Corp., 666 F.2d 202, 215 (5th Cir. 1982)). In asserting this argument, the *Bowen* dissent is pointing out that not only does the employer have the sole duty to pay back wages, but he also holds the key to righting the wrong by reinstatement. 103 S. Ct. at 604 (White, J., dissenting).

101. *Id.* (White, J., dissenting).

102. *Id.* (White, J., dissenting).

employees, not the employer. The majority in *Bowen* pointed out that the entire grievance machinery will be affected by not requiring the union to pay back wages because a contrary rule will affect the employer's willingness to agree to arbitration clauses as customarily written.[103] The Court, however, fails to note the havoc that such a requirement will create in forcing the union to pursue many unmeritorious grievances.[104] Instead of requiring the employer to bargain for any advantage in the grievance procedure, the Court has effectively inserted an indemnification provision into the collective bargaining agreement.[105]

Moreover, it should be noted that Congress has specified that grievance disputes should be settled by a method agreed upon by the parties.[106] Although the exact steps often differ, collective bargaining agreements generally set out a specific procedure for filing and deciding grievances. The legislative mandate appears to require the parties to follow the grievance procedure set out in the collective bargaining agreement. In *Hines v. Anchor Motor Freight, Inc.*,[107] the United States Supreme Court, however, held that when a union unfairly represents an employee in this process, the employer is estopped from relying on any provisions requiring disputes to be settled by the procedures enumerated in the agreement.[108] This is a logical result because requiring the employee to go through the grievance

103. *Id.* at 597. *See also* Edwards, *supra* note 99, at 691-92. The author points out that the calculation of who caused what damages presents practical problems. For one, the risk involved may force the employer to ignore union representatives and deal with the employee directly. *Id.* at 687. The effect may also be that an employer will bargain for a broad indemnity clause. *Id.* at 691-92.

104. 103 S. Ct. at 605 (White, J., dissenting).

105. On this point, the dissent in *Bowen* notes that it is a basic tenet of labor policy that if neither the collective bargaining process nor its end product violates federal legislation, a court has no authority to modify the substantive terms of the agreement. *Id.* at 604-05 (White, J., dissenting) (citing Mine Worker Health & Retirement Funds v. Robinson, 102 S. Ct. 1226, 1234 (1982)).

106. Section 203(d) of the LMRA provides in relevant part that: "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." Labor Management Relations Act of 1947, § 203(d), 29 U.S.C. § 173(d) (1976).

107. 424 U.S. 554 (1976).

108. *Id.* at 567. The Court noted that even where the employer relies in good faith on the union's conduct, the bar to finality must be removed. The Court further indicated that the focus was not on why the union failed to act but whether there is substantial reason to believe that the union's breach contributed to the erroneous decision reached by the arbitrator. *Id.* at 571. It is important to note the distinction between *Vaca* and *Hines* in relation to the finality issue. *Vaca* involved a suit where the union had not taken the

steps would be fultile. When the duty of fair representation has been breached, the entire grievance process is undermined and tainted.[109] The only forum in which the employee can be assured of a fair chance to present his claim is a judicial court.[110]

Once the finality rule[111] is lifted, the question arises as to when the employer can be sure that he will not be subjected to another lawsuit. The protection afforded the employer from multiple litigation,[112] according to the *Hines* Court, is the employee's heavy burden of proof.[113] In allowing the employee to bring suit against the employer despite a "final arbitration decision," the Supreme Court seems to have taken the position that the employer's interest in not having to relitigate is outweighed by the employee's interest in being fairly represented in a claim against the employer.[114] The goal in requiring resolution of dis-

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grievance to arbitration. In *Hines*, however, the union had pursued the grievance through arbitration.

109. *Id.* at 567.

110. *Annual Survey, supra* note 95, at 1046 (article discusses the impact of *Hines*). Requiring an employee to exhaust grievance procedures when the union has breached its duty of fair representation would leave the employee remediless. The employer would be in the position of benefiting from his wrongful conduct since the union has either refused to contest, or contests haphazardly, the employer's action. The Supreme Court recognized this injustice when it stated: "We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." Vaca v. Sipes, 386 U.S. 171, 186 (1967). Since the alleged breach of fair representation is grounded upon federal statutes, federal law governs the cause of action. *See supra* note 35.

111. The finality rule is the product of a trio of Supreme Court decisions often referred to as the *Steelworkers Trilogy*. The cases making up the *Steelworkers Trilogy* are: United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (the review by a court of the merits makes meaningless the provisions that the arbitrator's decision is final); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (it is for the arbitrator to decide to interpret the collective bargaining agreement); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (courts should not usurp functions the parties have entrusted to the arbitrator tribunal).

112. Justice Rehnquist stated in his dissent in *Hines* that the Court has "established a new policy of encouraging challenges to arbitration decrees by the losing party on the ground that he was not properly represented." *Hines*, 424 U.S. at 574 (Rehnquist, J., dissenting). *But see* Coulson, *Vaca v. Sipes' Illegitimate Child: The Impact of Anchor Motor Freight on the Finality Doctrine in Grievance Arbitration*, 10 GA. L. REV. 693 (1976) (article presents a narrower interpretation of *Hines*).

113. The employee must prove the employer breached the collective bargaining agreement, *e.g.*, discharging the employee without just cause, and demonstrate the union's breach of its duty of fair representation. *Hines*, 424 U.S. at 570.

114. *Annual Survey, supra* note 95, at 1049. The authors indicate that in *Hines* three distinct and competing interests were involved: "the employees' interest in obtaining a fair forum . . .; the employer's interest in free-

putes through agreed grievance procedures, that of maintaining industrial peace,[115] will be better served by such an approach.

Requiring the union to pay a substantial portion of back wages in such an action, however, may have an adverse impact on the very nature of the arbitration process. Generally, the rights of the individual employee are determined through the grievance process *via* the union and the employer. The union determines whether to initiate the grievance process, how far to pursue it, and whether it is worthy of being taken to arbitration.[116] In recent years, however, the concern for individual rights has become more apparent.[117] This rising concern discourages any early dismissal of unmeritorious grievances. Coupled with the great liability imposed by the *Bowen* decision, the union will have to be extremely cautious in its decision-making process. The result of the union's caution may be a substantial increase in the number of cases taken to arbitration. The consequences of deciding too early whether a grievance is meritorious are unpredictable. It would be much easier, and safer, for the union to go to arbitration and allow the arbitrator to decide.[118]

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dom from multiple exposure to litigation; and the public interest in maintaining the legitimacy and usefulness of the collective bargaining process." *Id.* at 1047-48.

115. *Id.* at 1048. *See also Hearings on S. 2926: Hearings Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 47 (1935). In his opening statement Senator Wagner stressed that:

> [T]hose who have been interested in avoiding industrial strife and bringing about industrial peace and industrial democracy have advocated some board of mediation, conciliation, and arbitration when both parties submit. . . .
>
> The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the Government to give him that right, by protecting collective bargaining.

Id. at 47.

116. It is a recognized labor policy that the union does not have to take every grievance to arbitration and must be permitted to weed out those lacking in merit. Each employee, however, must be given equal access to the grievance process. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?* 126 U. PA. L. REV. 251, 279 (1977).

117. Comment, *The Union's Duty of Fair Representation—Fact or Fiction*, 60 MARQ. L. REV. 1116, 1125 (1977). This article points out that the employee's rights are frequently lost in the presence of the "giants of big business and big labor." *Id.* at 1126.

118. Waldman, *supra* note 79, at 289 (article explores the consequence of the duty of fair representation on the arbitration and grievance process). A growing concern is whether the union is expected to advance every possible argument to satisfy the union's duty. *E.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (duty breached when union failed to investigate lead advanced by discharged employee); Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part, rev'd in part*, 514 F.2d 285 (2d Cir.)

An additional effect of requiring the union to pay such a great damage award is the need for an attorney. In the past, grievance processes have been handled by laymen.[119] The issue arises whether a union may breach its duty of fair representation if it fails to have an attorney present its case. The tendency of the union is to react defensively and provide counsel in an attempt to prevent future liability.[120] With the complexity of the various standards used to determine what constitutes a breach,[121] *Bowen* may make the absence of counsel detrimental.

The process of "trading off" may also be thwarted by expanding the liability of the union. Trading off is an integral part of labor law and involves an agreement whereby the union drops a grievance involving a discharge if the company agrees to concede something to the union that benefits the majority of the employees.[122] This may lead to an increase in the backlog of cases. Inherent in the concept of trading off is the fact that the collective bargaining agreement cannot cover every situation or affect every employee in the same way.[123] The union and the employer are able to settle a vast number of grievances by simply trading off the more-or-less "open and shut" cases. With an expansion of the union's liability, the union will be less likely to engage in this process. An employee who receives an adverse resolution of his claim may assert that he was a victim of "trading off" and bring an action against the union.

The threat of being held liable for back wages also may have some practical effects on the way the union conducts its internal affairs. The union may be forced to take additional precautions to protect itself against a charge of unfair representation in the first place. Such measures might include encouraging a grievant to retain independent counsel, consulting with the international union in order to prevent the accusation of a decision being made solely for financial reasons, and requiring a vote of the membership to determine whether the grievance is worthy of pursuit.[124]

(duty breached when union failed to argue violation of constitutional right), *cert. denied*, 423 U.S. 892 (1975).

119. Management is generally represented by the personnel department and the union by its business representative or other union official. Waldman, *supra* note 79, at 290.

120. *Id.* at 291.

121. *See supra* notes 28-40 and accompanying text.

122. Morris, *supra* note 99, at 315.

123. Waldman, *supra* note 79, at 291-92.

124. Coulson, *supra* note 112, at 698. The author also supports the creation of a bilateral fact-finding step prior to arbitration. This procedure would include a joint investigation of the facts in an attempt to isolate the

CONCLUSION

The doctrine of fair representation has been applied to various situations[125] and has been held to cover a great range of union conduct.[126] The consequences of this expansion and the increase in union liability mandated by *Bowen* have not been fully realized and the changes within the labor law system have yet to become apparent. In adopting the Stewart approach, the *Bowen* Court may appear to have taken the more equitable and reasonable view. It is questionable, however, whether this approach adequately deals with the situation. Perhaps the answer should not lie in who actually caused what harm, or whether the governing law should be contracts, torts, or federal labor policy. Instead, the answer should be based upon consideration of the practical implications of such an approach. If the union is to be held liable for such an enormous amount of damages,[127] who is really going to be affected? The author asserts that the employee will suffer in the long run. Whether it be in higher union dues or lack of efficiency in the arbitration and grievance process due to the increased number of grievances filed, the employee is the one who is likely to feel the impact of the Supreme Court's decision in *Bowen v. United States Postal Service*.[128]

One benefit which the *Bowen* decision will have is to settle the discrepancies within the circuits. The actual influence this decision will have on labor law is yet to be seen, but its impact most certainly will be felt.[129] The union is now subject to greatly

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issues in controversy. A meeting between the parties would then be required before the case could be set for arbitration. *Id.* at 698-99.

125. *E.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (union refused to take grievance to arbitration); Steele v. Louisville & Nash. R.R. 323 U.S. 192 (1944) (union breached duty in negotiation stage); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966) (union failed to process grievance), *cert. denied*, 389 U.S. 837 (1967), *reh'g denied*, 389 U.S. 1060 (1968).

126. *See supra* notes 37-39 and accompanying text.

127. The result of the *Bowen* decision was to affirm the jury's award and apportion backpay. Of the $52,954 awarded, the union was required to pay $30,000. 103 S. Ct. 588, 592, 599. The dissent in *Bowen* pointed out that the union was fortunate that the case came to the Supreme Court as quickly as it did. *Bowen*, 103 S. Ct. at 603 (White, J., dissenting).

128. 103 S. Ct. 588 (1983).

129. Since the writing of this comment, the *Bowen* decision has only been cited a few times. Del Costello v. International Bhd. of Teamsters, 103 S. Ct. 2281, 2292 (1983) (cited for principle that union may be liable only for increases, if any, in employee's damages); Pitts v. Frito-Lay, Inc., 700 F.2d 330, 335 n.5 (6th Cir. 1983) (court refers to *Bowen* in a footnote to support remanding the case for affirmatively apportioning damages between the employer and union); Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 907 (6th Cir. 1983) (importance of compensating the individual employee for injuries caused by a violation of rights); McNaughton v. Dillingham Corp., 707 F.2d 1042, 1047 n.3 (9th Cir. 1983) (apportionment of damages between employer and union); Parker v. Baltimore & Ohio R.R., 555 F. Supp. 1182, 1185

increased liability if it breaches its duty of fair representation. With the increase in the type of conduct being considered violative of this duty, coupled with the consequences of a breach of the duty, more arbitration suits will be filed. The only way in which the union can protect itself is to follow through on every questionable grievance. The union is now at the whim of the employee.

The *Bowen* decision is consistent with the nation's growing concern of the expanding power of unions. Although an award of back wages is compensatory, requiring the union to pay this sum of money is almost punitive in nature. If the union fails to meet its duty of fair representation, the till will eventually be depleted.

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n.10 (D.D.C. 1983) (most an employee can recover from union is difference between cost of obtaining redress through grievance procedures and cost of obtaining redress in court); Lewis v. American Postal Workers Union, 561 F. Supp. 1141, 1146 (W.D. Va. 1983) (court notes in *dictum* that *Bowen* decision will forestall any allegation that union did not vigorously contest suit); Foster v. Bowman Transp. Co., 562 F. Supp. 806, 818 (N.D. Ala. 1983) (punitive damages are not recoverable).