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COMPETING MODELS OF FAIR REPRESENTATION: THE PERFUNCTORY PROCESSING CASES†

ROSS E. CHEIT*

The duty of fair representation was created by the U.S. Supreme Court in 1944 to prevent unions from practicing racial discrimination in the negotiation of collective bargaining agreements.[1] Since then, the scope of the duty has been vastly expanded. Courts now scrutinize union activities in the negotiation, administration, and arbitration of collective bargaining agreements not only for racial discrimination, but for bad faith, hostility, and any other acts that might be deemed "arbitrary" or "perfunctory."[2] With this expansion comes criticism of both the theoretical assumptions that underlie the duty of fair representation and the practical problems that its implementation engendered.[3] This article examines the duty of fair representation, in the context of processing employee grievances, taking as given the U.S. Supreme Court decisions in the area and exploring the extent to which these cases leave unanswered important questions about the scope of the duty.[4]

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[1] Steele v. Louisville & N. R.R., 323 U.S. 192, 202-04 (1944).

[2] Vaca v. Sipes, 386 U.S. 171, 190 (1967).

[3] *See, e.g.*, Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 809 (1973) [hereinafter cited as Feller]; *Symposium, The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973) [hereinafter cited as Clark].

[4] The duty of fair representation implicates so many aspects of collective bargaining that an analysis of the duty can easily expand into a treatise on labor law. One commentator has successfully undertaken this ambitious task. *See* Feller, *supra* note 3. Professor Feller used a Second Circuit fair representation case to examine all of the assumptions underlying the duty of fair representation. This approach is much easier to admire than to duplicate. In approaching this potentially massive topic, I chose to limit this article's scope of inquiry in two respects. It is so limited in an effort to make sense of the existing case law and to suggest reforms that are realistic within that framework. While this approach has certain advantages, the reader should be aware of its limitations.

First, this article contains two major theoretical assumptions. Specifically, it assumes the proposition, articulated in recent Supreme Court cases, that unions should have some degree of

The starting point for this inquiry is *Vaca v. Sipes*, a 1967 U.S. Supreme Court decision which held that unions must not process grievances in a manner that is "arbitrary, discriminatory, or in bad faith."[5] Courts have invoked this holding repeatedly, but in such an inconsistent and confusing manner that this area of the law is practically impossible to understand.[6] A number of verbal formulas have been suggested in an effort both to clarify this area of the law and to make it more equitable.[7] A popular view among commentators, for example, is that the use of traditional common law negligence concepts would

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discretionary power in administering the collective agreement and, in particular, the grievance mechanism. Vaca v. Sipes, 386 U.S. 171, 191 (1967). Accepting this proposition, the article considers the extent to which that discretion should be limited. It has been argued, however, that individuals would have the sole right to prosecute and settle claims against their employers. *See, e.g.*, Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362, 376-81 (1962) [hereinafter cited as Summers]. Others have argued that unions should have considerable discretion to decide whether to prosecute a claim. *See, e.g.*, Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625-27 (1956) [hereinafter cited as Cox]. This article also assumes the prevailing viewpoint that when appropriate a court in which a fair representation suit is brought can resolve the merits of the underlying claim and, more importantly, award appropriate relief including, possibly, monetary damages rather than merely compelling the union and employer to arbitrate the grievance. This proposition follows directly from *Vaca v. Sipes*, 386 U.S. 191, 196 (1967). Yet, this proposition is also not without its opponents. Professor Feller took exception to this point both when he argued *Vaca* before the Supreme Court and when he wrote his comprehensive article on the subject. He argued that the only consequence of a union's breach of the duty of fair representation should be an order to compel the union to proceed with an employee's grievance. Feller, *supra* note 3, at 813-17.

Second, this article examines the duty of fair representation in only one context: the processing of employee grievances. The duty of fair representation exists, however, in many other contexts, including union negotiation of a collective bargaining agreement or arbitration of an employee grievance. The duty of fair representation was even extended recently to a union's monitoring of the employer's pension funds. Brown v. UAW, 512 F. Supp. 1337, 1359-61 (W.D. Mich. 1981). Although court decisions in all of these situations invoke language identical to that used when the controversy is one of grievance administration, it is widely recognized that these contexts are logically separable. For a discussion of the distinctions between the duty of fair representation in the contexts of contract negotiation and administration see, Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1476 (1963); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Union Official and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391 (1964) [hereinafter cited as Rosen]; Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 254-58 (1977). For a discussion of the distinctions between the duty of fair representation in grievance administration and arbitration see, Feller, *supra* note 3. *Accord* Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 567 (1976).

[5] 386 U.S. 171, 190 (1967).

[6] In 1979, the NLRB's General Counsel stated in an official memorandum that the "extremely broad approach" taken by some courts in deciding fair representation cases had "operated to adversely effect national labor policy." Memorandum 79-55, 48 U.S.L.W. 2081 (July 31, 1979) [hereinafter cited as NLRB Memo]. The memo attempted to clarify the Board's interpretation of the scope of the duty of fair representation. *See infra* note 126 and accompanying text.

[7] A variety of common law concepts have been used in the effort to lend meaning to the duty of fair representation. The third party beneficiary, the fiduciary, and the "constituent" of a legislator are but a few examples of the legal analogies that have been imported into fair representation decisions. As Professor Summers so wisely noted, however: "The problem presented is not [after all] one of choosing theories, for we can draw from them only the contents which we have placed in them. The problem is one of policy — what rights *should* an individual have under a collective bargaining agreement." *See* Summers, *supra* note 4, at 240-41.

make fair representation law more equitable.[8] Another commentator developed an elaborate thesis that the duty of fair representation would be clearer if viewed as a requirement of "rational decisionmaking."[9] Many judges, however, simply argue that the duty of fair representation is a "term of art," not susceptible to further definition.[10]

The confusion in the case law, however, is not due to the inexactitudes of language or to the failure to invoke negligence concepts. The confusion arises because *Vaca*, a fair representation suit challenging the validity of a union's reasons for failing to process a grievance, gave way to a new type of fair representation suit which I call the "perfunctory processing" cases.[11] Instead of focusing on the substantive issues behind the union's decision, these cases directly challenge the process provided by the union in arriving at its decision not to pursue a grievance. Thus, these fair representation challenges are substantially different from those brought before *Vaca*. Regrettably, the courts have not yet agreed on a consistent approach for deciding them.

Two fundamentally different approaches to the duty of fair representation can be found within the perfunctory processing cases. One approach resembles traditional tort law because it relies primarily on the concepts of proximate cause and provable damages. The other emphasizes notions of due process in the regulation of union proceedings. Because these approaches embody conflicting assumptions about the purpose of the duty of fair representation, it is not surprising that the cases are confusing and often conflicting.

The main purpose of this article is to identify and compare the two competing models of fair representation in the perfunctory processing cases. Recognition of the existence of and the differences between these models — one based on tort principles, the other on notions of due process — help explain the confusion in the case law. The article also suggests a path towards reformulating the duty of fair representation. The first part of this article traces the evolution of the duty of fair representation. The second part explains the characteristics of the perfunctory processing cases and briefly analyzes the sources of the confusion that surrounds the duty of fair representation in these cases. The third part sets forth the two models of fair representation that explain the perfunctory processing cases. Finally, it is submitted that the due process-regulation model can best balance the union's interest in preserving the

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[8] *See, e.g,* Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee,* 8 SUFFOLK U.L. REV. 1096, 1146-51 (1974) [hereinafter cited as Flynn & Higgins]. *Accord* Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence,* 65 CORNELL L. REV. 624, 657 (1980).

[9] Clark, *supra* note 3, at 1155-77. Clark's "rational basis" analysis has been cited with approval by the Ninth Circuit on a few occasions. *See* Atwood v. Pacific Maritime Ass'n, 657 F.2d 1055, 1058 (9th Cir. 1981) and cases cited therein. The NLRB, however, has expressly reserved deciding whether to adopt the "rational basis" standard. General Truck Driver's Local 315 (Rhodes & Jamieson, Ltd.), 217 N.L.R.B. 616, 618 n.9 (1975).

[10] *See, e.g.,* Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975); Griffin v. UAW, 469 F.2d 181, 182 (4th Cir. 1972).

[11] For a more complete definition of the term perfunctory processing, see *infra* text accompanying notes 76-85.

autonomy of the collective bargaining agreement and the individual employee's interest in having his grievance treated fairly.

Since discussion of the duty of fair representation often dwells on abstract words and theories, a helpful way to preface this analysis is with a few examples that illustrate the kind of actual problems that underlie the verbiage. Consider the plight of two employees, Ms. R and Mr. C.

Ms. R is a reservation agent for a major airline. She suffers from migraine headaches and, as a result, has taken an extraordinary number of sick days over the past few years. When she is on duty her speech is sometimes slurred, her writing illegible and her work marred by mistakes. Her employer gave her a personal leave to deal with the problem, but when her problem persisted she was discharged. The employer did not violate the collective bargaining agreement by taking this action. Still, Ms. R filed a grievance with her union. The union represented her through the grievance procedure and eventually negotiated a settlement under which she could return to work for a probationary period. Ms. R rejected the company's settlement and requested the union to take the matter to arbitration. The union declined and Ms. R subsequently sued the union for failing to inform her that it would not take her claim to arbitration if she rejected the company's offer.

Mr. C is an assembly line worker for a major manufacturer. He has worked in the plant for five years, all without incident. Information provided to a company security man, however, implicated Mr. C in recent instances of vandalism at the plant. Mr. C was questioned along with some other employees, all of whom were asked to take a lie detector test. Upon advice from the union, all of the employees declined to take the test. Subsequently, Mr. C was discharged for "failing to cooperate" with an official investigation. It is questionable, however, whether the employer's actions were sanctioned by the collective bargaining agreement. Mr. C filed a grievance with his union. The union represented Mr. C through the early stages of the grievance procedure and, after the grievance was denied, agreed to take his claim to arbitration. Due to a clerical mistake on the part of the union, however, the notice of intent to arbitrate was filed late and, in accordance with the collective bargaining agreement, the case was dropped at that point. Mr. C then filed suit against his union for breaching the duty of fair representation.

Should either of these employees have a cause of action against the union for violating the duty of fair representation? It might seem intuitive that Mr. C should have a cause of action and Ms. R should not. After all, Mr. C's employer appears to have violated the collective bargaining agreement and Mr. C's union was responsible for his seemingly valid grievance being dropped. Ms. R's union, in contrast, negotiated a settlement for her even though her employer acted within its rights under the collective bargaining agreement in discharging her. Yet, in the cases on which these examples are based, Mr. C was not allowed to proceed against his union, while Ms. R was. In *Robesky v. Qantas Empire Airways*,[12] Ms. Robesky was permitted to proceed

[12] 573 F.2d 1082 (9th Cir. 1978).

against her union because its failure to inform her that her grievance would not be arbitrated was in the view of the court "without rational basis."[13] On the other hand, in *Coe v. United Rubber, Cork, Linoleum and Plastic Workers*,[14] Mr. Coe was prohibited from proceeding against his union[15] because the court determined that the mistake of the union which doomed Mr. Coe's grievance was merely an "error" not an "arbitrary" action.[16]

The apparent contradiction between these cases is not the result of a misapplication of existing law. The law itself is not clear. The contradiction arises because the conclusions in these cases were deduced from unarticulated, but differing, assumptions about the duty of fair representation. In short, these cases reflect a fundamental disagreement over the very nature and purpose of the duty of fair representation.

I. THE EVOLUTION OF THE DUTY OF FAIR REPRESENTATION

The duty of fair representation is a creation of the courts. It was conceived by the U.S. Supreme Court in 1944 in order to prevent unions acting under the authority of the Railway Labor Act from negotiating contracts that discriminated against black employees.[17] The Court, in *Steele v. Louisville & N. R.R.*,[18] noted that Congress empowerd the union to be the exclusive bargaining agent for a craft or class of railway employees.[19] The Court reasoned that Congress, by implication, must have intended the union to exercise that power "fairly" and "on behalf of all those for whom it acts."[20] The *Steele* decision did not spe-

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[13] *Id.* at 1089.

[14] 571 F.2d 1349 (5th Cir. 1978).

[15] *Id.* at 1350.

[16] *Id.* at 1350-51.

[17] Steele v. Louisville & N. R.R., 323 U.S. 192, 202-04 (1944).

[18] *Id.*

[19] *Id.* at 200.

[20] *Id.* at 202-03. *See also* Wallace Corp. v. Labor Bd., 323 U.S. 248, 255-56 (1944). Turnstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 211 (1944) (federal courts have jurisdiction because duty of fair representation arises from federal statutory scheme). While this hidden purpose may not have been equally visible to all, the line of reasoning allowed the Court to leave unanswered the question whether union discrimination could be prohibited on constitutional grounds. The *Vaca* court, referring to its opinion in *Steele,* maintained that the *Steele* court recognized that:

> The congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination.

Vaca v. Sipes, 386 U.S 170, 182 (1967) (citing Steele v. Louisville & N. R.R., 323 U.S. 192, 198-99 (1944)). It is difficult to see, however, why racial discrimination poses such a "grave" constitutional question, even in the context of union actions. The likely answer is that an equal protection approach would raise questions in areas other than just racial discrimination. Would unions, for example, have to avoid all "hostile discrimination?" An equal protection approach would require the courts to decide under the Constitution which differentiations and distinctions in union procedures are permissible and which are "plainly irrelevant." *See* Givens, *Federal Protections of Employee Rights Within Trade Unions,* 29 FORDHAM L. REV. 259, 266 (1960). Some commentators have suggested the possibility of federal due process limitations on union procedures. *See* Flynn & Higgins, *supra* note 8, at 1100 n.15; Rosen, *supra* note 1, at 425-27 (1964). Professor Summers has also stressed the significance of "elemental notions of due process" in grievance

cifically prohibit anything other than racial discrimination in the negotiation of collective bargaining agreements under the Railway Labor Act. Nevertheless, the case has been cited widely for the proposition that unions must act "without hostile discrimination, fairly, impartially, and in good faith."[21]

This proposition was soon relied upon to expand the scope of the duty of fair representation. The duty of fair representation was imposed on unions acting under the jurisdiction of the National Labor Relations Act[22] and it was extended beyond the negotiation stage to cover actions taken during both grievance administration and arbitration.[23] Throughout these early developments, however, the duty of fair representation was always restricted in one sense: it proscribed hostile and invidious discrimination only.[24]

This restriction on the duty of fair representation was challenged in *Ford Motor Co. v. Huffman*.[25] The case was brought by union members who lost seniority because their union negotiated a contract that gave certain preferences to veterans.[26] The U.S. Supreme Court refused to strike down such "discrimination." It reasoned that various kinds of unequal treatment were inevitable in the negotiation of collective bargaining agreements,[27] and concluded that departure from strict seniority to give preferential treatment to veterans was "within reasonable bounds of relevancy."[28] The Court retained the view, first articulated in *Steele,* that the duty of fair representation is basically a requirement of "good faith" action on the part of the union.[29] Stated in these terms, the duty of fair representation proscribed union decisions that could be characterized as "hostile" or in "bad faith," but allowed those based on considerations deemed "relevant" to the union's decision. There was no clear determination of the considerations which would be considered "relevant" or proper. Such a determination, however, did not seem necessary. The law appeared to allow anything that was not "hostile" or in "bad faith."

The initial cracks in this simple dichotomy for judging union behavior appeared in *Humphrey v. Moore,*[30] a case in which union members alleged that a

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administration, but he did not specifically invoke the Constitution in support of this idea. *See* Summers, *supra* note 4, at 394.

The majority in *Steele* decided, however, to avoid any constitutional questions by basing their decision on statutory interpretation. Indeed, there were many good reasons for doing so. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435, 1445-47 (1963). Professor Blumrosen argues that the statutory approach used by the Court in *Steele* provided "[m]ore flexibility and versatility than any direct application of the Constitution to trade unions." *Id.* at 1447.

[21] 323 U.S. 192, 204 (1944). *See, e.g.,* Feller, *supra* note 3, at 809; Lewis, *Fair Representation in Grievance Administration*: Vaca v. Sipes, 1967 SUP. CT. REV. 81, 107 (1967).

[22] 29 U.S.C. §§ 151-169 (1970). *See* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944).

[23] Syres v. Oil Workers Local, 23, 350 U.S. 892 (1955).

[24] *See* Clark, *supra* note 3, at 1121.

[25] 345 U.S. 330 (1953).

[26] *Id.* at 331-35.

[27] *Id.* at 338.

[28] 345 U.S. at 342.

[29] *Id.* at 338.

[30] 375 U.S. 335 (1964).

joint employer-employee "conference committee" had adopted an unfair plan for consolidating the seniority lists from two companies.[31] The U.S. Supreme Court relied on largely, but not entirely familiar language in deciding that the union did not violate its duty because it "took its position honestly, in good faith and without hostile or arbitrary discrimination."[32] The Court also noted that the union had "acted upon wholly relevant considerations not capricious or arbitrary ones."[33] The addition of the word "arbitrary" in this formulation, used by the court in more than one critical passage in the opinion, suggested the possibility of a significant change in the duty of fair representation. Were relevant considerations now to be identified by contrast to "arbitrary," as well as "hostile," ones? This question is of much more than semantic importance. A proscription against "arbitrary" actions clearly would be more encompassing than one against "hostile" actions.[34] Yet whether the opinion was intended to prevent arbitrary union actions was by no means clear. On the one hand, it

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[31] *Id.* at 340. The Court treated the "conference committee" as if it were an arbitration panel. For a discussion of the problems with this approach see, Feller, *supra* note 3, at 836-38.

[32] 375 U.S. at 350.

[33] *Id.*

[34] The National Labor Relations Board (NLRB) had already discovered, in *Miranda Fuel Co.*, that the word "arbitrary" carried with it a host of implications that would significantly alter the meaning of fair representation. *See* 140 N.L.R.B. 181, 185 (1962). The NLRB's decision to expand the duty of fair representation accordingly was extremely controversial. Admittedly, this was in large part because the case was brought as an unfair labor practices claim. In fact, the Second Circuit refused to enforce the NLRB's position for that very reason. NLRB v. Miranda Fuel Co., 326 F.2d 172, 179-80 (2d Cir. 1963). Two years later, however, the Fifth Circuit reached the opposite conclusion, deciding, in Local 12, United Rubber Workers v. NLRB, that the NLRB was correct in finding that any "arbitrary" union action could constitute an unfair labor practice as a violation of the duty of fair representation. 368 F.2d 12, 19-20 (5th Cir. 1963), *enforcing* 150 N.L.R.B. 312 (1962).

Since *Miranda Fuel,* there has not been complete agreement, however, among the members of the Board that a breach of the duty of fair representation motivated by other than hostility toward non-union members should constitute an unfair labor practice. *See, e.g,* General Truck Drivers Local, 692 (Great Western Unifreight System), 209 N.L.R.B. 446, 449-50 (1974) (Member Fanning, concurring). Nevertheless, the majority of the Board clearly agrees that it should. *Id.* at 447.

The status of the duty of fair representation as an unfair labor practice is still being debated today. A committee of the American Bar Association's Section on Labor and Employment Law is currently considering two drafts of proposed amendments to the National Labor Relations Act dealing with remedies for union breach of the duty of fair representation. Both drafts include provisions for eliminating the NLRB's jurisdiction over fair representation cases, and both would limit the power of federal courts to ordering the union to proceed with arbitration in those cases in which a breach is found. This argument over the extent to which the NLRB should have jurisdiction over fair representation cases will, for the purpose of this article, be left aside and the NLRB cases will be considered only for their substantive contribution to the scope of the duty itself. AMERICAN BAR ASSOCIATION, RECOMMENDATION AND REPORT OF THE SECTION OF LABOR AND EMPLOYMENT LAW, DRAFT 5/10/82, 3633c (May 5, 1982); AMERICAN BAR ASSOCIATION, RECOMMENDATION OF THE SECTION OF LABOR AND EMPLOYMENT LAW, DRAFT 10B 5/10/82, 4619c (May 5, 1982) [hereinafter cited as DRAFTS].

It should be noted that there are many ways in which the Board's application of fair representation law differs from that of the federal courts. The main differences are in the structuring of remedies. *See generally* Note, *The NLRB and the Duty of Fair Representation: The Case of the Reluctant Guardian,* 29 U. FLA. L. REV. 437, 446-49 (1977). The Board has, in its own words, "adopted and applied the doctrine ... as developed by the Federal courts". General Truck Drivers Local 315 (Rhodes & Jameison Ltd.), 217 N.L.R.B. 616, 617 (1975).

did not openly embrace the concept of "arbitrariness" as an element in defining breaches of the duty of fair representation. On the other hand, it implied that the concept had been adopted.[35]

The U.S. Supreme Court's next major decision in this area, *Vaca v. Sipes*,[36] addressed whether the concept of "arbitrariness" should be used as a standard for defining possible breaches of the duty of fair representation. The case arose as a challenge to a union's decision to drop the claim of an employee who had been discharged for health reasons.[37] The union had processed the claim through four steps of the grievance procedure before deciding not to pursue it further.[38] The Supreme Court had to decide when, if ever, the decision not to take a grievance to arbitration would be considered a violation of the duty of fair representation. The question carried with it strong philosophical implications. The individual rights theory dictated that the union be held in breach whenever it dropped or settled a grievance that the worker wanted to pursue further.[39] The union control theory would allow for compromise and discretion on the part of the union, subject to some kind of limitation against hostile and "arbitrary" actions.[40]

The Missouri Supreme Court determined that the union did not have to pursue all grievances to arbitration, but supported the individual rights theory to a large extent, holding that if a grievance were deemed "meritorious" by the

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[35] The word "arbitrary" was used more than once in the opinion, but since the court concluded that the union did not breach the duty of fair representation it did not have to commit itself to any specific application of the word. It is not clear whether the court intended to give the word "arbitrary" its own meaning or simply intended it to cover all those situations in which the union did not act honestly or in good faith. The court stated at the end of its opinion, for example, that: "As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination." Humphrey v. Moore, 375 U.S. 335, 350 (1964).

[36] 386 U.S. 171, 189-95 (1966).

[37] The facts in *Vaca,* as distilled from the printed record at the U.S. Supreme Court by Feller, *supra* note 3, at 701-02, are as follows: The grievant in *Vaca* suffered from heart disease. Following a period of hospitalization his employer refused to let him return to work, even though his doctor certified that he was fit for work. Vaca v. Sipes, 386 U.S. 171, 175 & n.3 (1967). The employer maintained that it would not reconsider its position unless more medical evidence was collected. The union sent Owens to a specialist who determined that he should not return to work. *Id.* at 175. The union then dropped the grievance. *Id.* Owens brought an action in state court. *Id.* at 176. He died of a "cardiovascular accident due to hypertension" during the pendency of the appeal. *Id.* at 174. For the published opinions in *Vaca* see, 59 L.R.R.M. (BNA) 2165, 397 S.W.2d 658 (Mo. 1965), 386 U.S. 171 (1967).

[38] Vaca v. Sipes, 386 U.S. at 175 & n.3. Grievance procedures exist "in almost every collective bargaining agreement." Feller, *supra* note 3, at 742 & n.350. Arbitration is usually the final step in the grievance procedure. Most collective bargaining agreements provide for a series of less intensive steps building up to arbitration. As Professor Feller described these procedures:

> The grievance procedure normally consists of steps. First, the aggrieved employee, or the union, raises the problem with the immediate supervisor. If the matter is not resolved, the union can appeal to the next higher level of supervision. Depending upon the size and complexity of the enterprise, the procedure may have three, four, or even five steps. If the union fails to appeal from management's decision at any step, the matter is considered settled based on the decision last made.

Id. at 743. *See also* J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT: THE POWER OF INDUSTRIAL WORK GROUPS 6-9 (1961).

[39] *See generally* Summers, *supra* note 4, at 369.

[40] *See generally* Cox, *supra* note 4, at 604-05.

court or jury, then the decision not to take it to arbitration would be, by definition, a violation of the duty of fair representation.[41] The U.S. Supreme Court agreed that unions should be able to settle claims short of arbitration, but sided more with the union control theory, holding further that the refusal of a union to process a "meritorious" grievance should not automatically be a violation of the duty. The Court suggested that a union's ability to settle claims in good faith would be "substantially undermined"[42] if a decision of a union that a particular grievance lacked sufficient merit to justify further processing could be deemed a violation of the duty of fair representation whenever a judge or jury disagreed with the determination.[43] The Court balanced the individual's interest in taking a grievance to arbitration against the union's interests as coauthor of the collective bargaining agreement and concluded that a prohibition against "arbitrary" union actions would adequately protect individuals even if the duty of fair representation were not defined entirely by judicial review of the underlying grievance.[44]

Unfortunately, the Court was much clearer in specifying what does not constitute a breach of the duty of fair representation than in explaining what does. The Court tried to define the content of the union's duty in grievance administration in portions of *Vaca* that have since been interpreted as a "conscious expansion" of the doctrine.[45] Exactly how far the Court expanded the duty is difficult to determine from the opinion. The general requirement that the union avoid "arbitrary" treatment could, if *Vaca* were strictly construed, be applied solely to situations in which the individual challenges the union's decision not to take a grievance to arbitration.[46] That was, after all, the basic fact pattern in *Vaca*. The prohibition against "arbitrary conduct" potentially could be applied to a much broader class of cases, however, if *Vaca* were considered a general guide to fair representation cases. It could even be applied in cases in which the union never took the grievance to the first step in the grievance procedure. Since the language in *Vaca* is much more expansive than restrictive, it should not be surprising that certain phrases in the decision are susceptible to more than one interpretation.

The most significant of these statements, for the purposes of this article, is the proposition that "a union may not arbitrarily ignore a meritorious

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[41] 397 S.W.2d 658, 665 (Mo. 1966).

[42] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[43] *Id.* at 193.

[44] *Id.* at 190-91.

[45] Griffin v. UAW, 469 F.2d 181, 182 (4th Cir. 1972).

[46] *See infra* text accompanying notes 71-72. The Court in *Vaca* considered three major issues, each of which was left unclear. First, the Court addressed the contention that duty of fair representation claims should be in the exclusive jurisdiction of the NLRB. Vaca v. Sipes, 386 U.S. 171, 177-88 (1967). The Court decided that they should not be, without ever stating whether the duty of fair representation is properly considered an unfair labor practice. *Id.* at 177-88. Instead, the Court simply "assume[d] for present purposes that a breach of the duty is an unfair labor practice." *Id.* at 186. Second, the Court considered the scope of the duty of fair representation, discussed in this article. *Id.* at 188-95. Third, the Court addressed the difficult question whether damages should be recoverable and, if so, how they should be apportioned between the union and the employer in fair representation cases. *Id.* at 195-98. The court did not

grievance or process it in a perfunctory fashion."[47] This sentence has been the source of considerable confusion for two reasons. First, it added yet another word to the vocabulary of fair representation law: perfunctory. Courts are divided as to whether this word adds new substance to the duty of fair representation or is just another way of conveying what the word "arbitrary" already encompasses.[48] Second, it relies on a word — meritorious — that can be interpreted in more than one fashion. The implications of these differing definitions are very significant. While the word "perfunctory" might extend the *scope* of the duty of fair representation, certain interpretations of the word "meritorious" lead to a whole new *class* of fair representation cases.

The most common interpretation of *Vaca* is that it established a two-prong test for determining whether a union's treatment of a specific grievance constitutes a breach of the duty of fair representation.[49] First, the union's conduct must be deemed arbitrary or in bad faith.[50] This prong of the *Vaca* test represents a new approach to an old problem. The Court abandoned the simple approach that had been used to analyze union actions. No longer could the union be assured of passing the fair representation test simply by taking action in good faith and without hostility. Such actions could be deemed "arbitrary." Unfortunately, the decision did not define adequately the term "arbitrary," prompting Justice Black to chide the majority for failing to explain "what is meant by this vague phrase and how trial judges are intelligently to translate it to a jury."[51]

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decide anything more specific, however, than its remark that damages should be apportioned according to "fault." For a discussion of the problems with this formulation, see 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). For a criticism of the decision to allow damages in fair representation cases, see Feller, *supra* note 3, at 774-824.

The sweeping coverage of the decision and its attendant ambiguities prompted Justice Fortas to characterize the majority opinion as a "complex and necessarily confusing guidebook" to the duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 203 (1967).

[47] Vaca v. Sipes, 386 U.S. at 191.

[48] See *infra* note 60.

[49] This two-prong approach has been articulated more often by commentators than by courts. *See, e.g.*, Flynn & Higgins, *supra* note 8, at 1114; *The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances*, U. PA. L. REV. 1036, 1056 (1970); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81, 108 (1967). *See also* Miller v. Gateway Transp. Co., 616 F.2d 272, 275-6 (7th Cir. 1980) ("[plaintiff] may maintain an action . . . only if he can show both that the underlying grievance was meritorious and that the union breached its duty of fair representation."); Fizer v. Safeway Stores Inc., 586 F.2d 182, 184 (10th Cir. 1978) ("Plaintiff must clearly show a breach of duty by the Union . . . and that his discharge was wrongful.")

[50] Vaca v. Sipes, 386 U.S. 171, 193 (1967).

[51] *Id.* at 210. The majority's use of the word arbitrary is so confusing that there has been some disagreement as to whether the court even adopted this as a new required element of the duty of fair representation. Some courts have held that *Vaca* required nothing more than honesty and good faith by the union. *See infra* notes 64-65. This view is supported by statements in the opinion that "we [do not] see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration." Vaca v. Sipes, 386 U.S. 171, 192 (1967). Statements to the contrary are overwhelming, however. The majority states in no uncertain terms that "(a) breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the

The second prong of the *Vaca* test is that the employee's underlying grievance must be deemed a "meritorious" one for the union to be held liable for breach of the duty of fair representation. This part of the *Vaca* test is, to say the least, much more elusive than the first. It has engendered at least three interpretations. Many courts apply the duty of fair representation and commentators discuss it without mentioning the significance of the merits of the underlying grievance.[52] Yet to some, proof of a meritorious grievance is half the task in proving a breach of duty of fair representation.[53] Even then, there are competing interpretations of the "meritorious" requirement, with some courts requiring that the grievance ultimately be a winner, and others simply requiring that it have some merit. Why the discrepancy? The simple explanation is that *Vaca* contains passages supporting both of the latter two views.

One of the most commonly quoted sentences in *Vaca* is that " a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[54] This statement is the origin of the so-called second prong. While it seems clear from this statement that the duty of fair representation can only be breached when the underlying grievance is meritorious,[55] it is not clear what that should mean when the underlying grievance is of less than obvious merit.

The majority in *Vaca* seemed to take a very broad approach. They opined that "in a case such as this," when the grievant supplied evidence supporting his position, "the union might well have breached its duty had it ignored [the] complaint or . . . processed it in a perfunctory manner."[56] This sentence is most troublesome because the Court never had to reach the question whether the underlying grievance in *Vaca* was "meritorious." The sentence suggests, however, that the union owes a duty even when the underlying grievance is not ultimately deemed meritorious. In fact, in *Vaca* there was considerable evidence that the underlying grievance was not a winner.[57] This interpretation of the meritoriousness requirement is contradicted, however, elsewhere in the

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collective bargaining unit is arbitrary, discriminatory, *or* in bad faith." *Id.* at 190 (emphasis added).

[52] *See infra* note 60.

[53] *See supra* note 49. While the word "meritorious" has been given more than one meaning, *see infra* notes 90-125 and accompanying text, its use in these cases refers only to grievances that were in fact based on violations of the collective bargaining agreement. *See, e.g.*, Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 892 (4th Cir. 1980); Fox v. Mitchell Transp., Inc., 506 F. Supp. 1346, 1351 (D. Md. 1981).

[54] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[55] *Id.* Some courts have avoided the problem of deciding what meritorious means by applying the duty of fair representation without discussing whether the underlying grievance was meritorious. *See infra* note 60. These cases are in direct contradiction to the clear intent of *Vaca* to include that term in the doctrine of fair representation and accordingly have been harshly criticized by some commentators. *See, e.g.*, Flynn & Higgins, *supra* note 8, at 1119.

[56] Vaca v. Sipes, 386 U.S. 171, 194 (1967).

[57] *See generally* Feller, *supra* note 3, at 700. A specialist of the Union's own choosing agreed that he should not return to work for medical reasons. Moreover, Owens died of the diagnosed condition during the pendency of this litigation. *Id.* at 700-01. Even Justice Black, whose dissent in *Vaca* was based on a concern that meritorious grievances would be left unremedied by the majority's opinion, would only go so far as to say that Owens' grievance was "not frivolous." Vaca v. Sipes, 386 U.S. at 209.

opinion.[58] In particular, this interpretation runs afoul of the fault-based damages concept in *Vaca*.

Indeed, the strongest case for adherence to the second prong comes from *Vaca's* holding that damages can be an appropriate remedy for a breach of the duty of fair representation so long as they are assessed "according to the damages caused by the fault of [the employer and the union]."[59] From this statement of "fault" principles, it follows that the underlying grievance must be deemed meritorious before the union can be held liable for breaching the duty of fair representation. If the underlying grievance is meritorious, then the grievant clearly was injured and the union's failure to process the claim might have added to the damages. If the grievance is not meritorious, however, then it is impossible to award damages consistent with the fault principle.

The ambiguities inherent in *Vaca's* two-prong test and the controversy over whether *Vaca* should be considered a guidebook to all fair representation cases are manifest in the confused state of the case law. Most courts use an "arbitrariness" test in evaluating union conduct that passes the good faith hurdle.[60] The cases reveal, however, that a prohibition as open-ended as that against "arbitrary" action has resulted in tremendous inconsistencies.[61]

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[58] In discussing damages, for example, the opinion assumes that a union can only be held liable if there are already damages "attributable solely to the employer's breach of contract." Vaca v. Sipes, 386 U.S. at 197. Obviously, there must be more than *some* merit to a claim before it rises to the level of contractual breach.

[59] *Id.* at 197.

[60] There is still disagreement over the significance that should be placed on a union's motivations in taking the challenged actions. All courts will accept evidence about the union's motives, but some require evidence of bad faith or hostile motives before finding breach of the duty. This approach was given significant support by the U.S. Supreme Court when, four years after *Vaca,* it decided Amalgamated Ass'n of Street Employee v. Lockridge, 403 U.S. 274 (1971). The Court, in *Lockridge,* held that NLRB jurisdiction preempted an employee's suit against his union for having him discharged. *Id.* at 301. The suit conceivably could have involved the duty of fair representation but the Court, in its anxiousness to preserve the preemption doctrine, argued that such contract claims can usually be separated from fair representation claims which "carry with [them] the need to adduce substantial evidence of discrimination that it is intentional, severe, and unrelated to legitimate union objectives." *Id.* at 301. The case does not, however, hold this position consistently. *Vaca* is quoted at one point for the proposition that a party must have proved "arbitrary" *or* "bad faith" conduct on the part of the union to make out a claim. *Id.* at 299 (quoting *Vaca v. Sipes,* 386 U.S. 171, 193 (1967)).

Most courts and commentators agree that *Lockridge* does not alter the scope of the duty of fair representation established in *Vaca. See, e.g.,* Beriault v. Local 40 Super Cargoe & Checkers, 501 F.2d 258, 263-64 (9th Cir. 1974); Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973); Woods v. North Am. Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973); *See also* Clark, *supra* note 3, at 1124-26 (1973). This view has not been adopted by all courts, however. The Eighth Circuit has invoked *Lockridge* on a number of occasions in requiring a finding of racial discrimination, personal animosity, or hostility based on union activity to support a breach of the duty. Florey v. Air Line Pilot's Ass'n, 575 F.2d 673, 676 (8th Cir. 1978); Anderson v. United Transp. Union, 557 F.2d 165, 169-70 (8th Cir. 1977). The Seventh Circuit recently followed suit in Hoffman v. Lonza, Inc., 658 F.2d 519, 520 (7th Cir. 1981).

[61] For practically any fact pattern in which fair representation claims arise it is possible to find a pair of decisions that reach different conclusions as to whether the union's actions were "arbitrary." In United Steelworkers (Interroyal Corp.), 223 N.L.R.B. 1184, an employee lost his job as a result of typographical error made on his employment record by a union representative. *Id.* The Board deemed the union's actions "arbitrary." However, in Coe v. United Rub-

Moreover, while many courts examine the merits of the underlying claim before determining liability,[62] others have not followed this formulation of fair representation law.[63] Many courts have been reluctant to rely entirely on fault principles. Sometimes damages are awarded in cases in which the union is deemed to have acted "arbitrarily" with regard to a grievance that was not meritorious.[64] At other times, the "requirement" that the underlying grievance be a meritorious one has been either twisted or overlooked.[65]

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ber, Cork, Linoleum & Plastic Workers, 571 F.2d 1349 (5th Cir. 1978), the typographical error that rendered a union appeal of the employee's grievance untimely was considered "nonarbitrary." *Id.* at 1350-51. In NLRB v. Gen. Truck Drivers, 545 F.2d 1173 (9th Cir. 1976), the union's decision to leave the status of a seniority grievance to the vote of the membership was deemed "arbitrary." *Id.* at 1176. However, in Steelworkers Local 7748 (Eaton Corp.), 102 L.R.R.M. (BNA) 1141 (1979), a similar decision was deemed by the Board to be "not arbitrary." *Id.* at 1143. In Fox v. Mitchell Transp. Inc., 506 F. Supp. 1346 (D. Md. 1981), the union was deemed not to have breached the duty of fair representation by merely representing three employees asserting seniority rights contrary to the plaintiff. *Id.* at 1153-54. However, in Smith v. Hussman Refrigerator Co., 619 F.2d 1232, 1237 (8th Cir. 1980), the union was held in breach for representing four employees asserting seniority rights contrary to the two plaintiffs. In Minnis v. UAW, 531 F.2d 850, 854 (8th Cir. 1975), the union was held in breach of the duty of fair representation for failing to represent an employee who the company could, under the terms of the collective agreement, legally discharge. However, in Buchanan v. NLRB, 597 F.2d 388, 394 (4th Cir. 1979), the union was deemed not to have breached the duty of fair representation when it refused to insist that an employee be reinstated pending arbitration, even though that right was contained in the collective agreement. In Service Employees Local 579 (Convacare of Decatur), 229 N.L.R.B. 692, 695 (1977), the union was held in breach of the duty of fair representation for failing to seek out the grievant's version of the story. However, in Printing & Graphic Communications Local 4 (S.F. Newspaper Printing Co.), 104 L.R.R.M. (BNA) 1050, 1052 (1980), the union was not held in breach for failing to obtain the discharged employee's version of the incident.

[62] *See, e.g.*, Fizer v. Safeway Stores, Inc., 586 F.2d 182, 184 (10th Cir. 1978).

[63] *See, e.g.*, Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978) (discussed in text accompanying notes 12-13 *supra*). A more incredible result was reached in Kaiser v. Local No. 83, with the Ninth Circuit holding that a valid cause of action against a union may exist even though "plaintiff admitted that his discharge was not based on any of the improper grounds contained in the collective bargaining agreement." Kaiser v. Local No. 83, 577 F.2d 642, 645 (9th Cir. 1978).

[64] If this situation is difficult to imagine, consider the possibility of deciding a case by the flip of a coin, or by a vote of the union membership, or for purely political reasons. *See generally* R. JAMES & E. JAMES, HOFFA AND THE TEAMSTERS 167-85 (1965) (political use of grievance mechanism).

[65] In Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972), and in Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970) the courts assessed damages against the union for breaching the duty of fair representation without ever addressing the question whether the underlying grievances were meritorious. In Local 26, Am. Newspaper Guild (Buffalo Courrier-Express, Inc.), 220 N.L.R.B. 79 (1975), the Board went so far as to say that "it is not the function of the Board to decide the merits of a grievance." Instead, and without further explanation, the Board decided that it was sufficient in duty of fair representation cases to determine simply whether the underlying grievance was not "clearly frivolous." *Id. Accord* Service Employees Local 579 (Convacare of Decatur), 229 N.L.R.B. 692, 696 (1977). In many cases, the Board has simply assumed that the grievance would have been found meritorious and awarded damages accordingly. *See, e.g.*, P.P.G. Industries Inc., 229 N.L.R.B. 713, 717 (1977); Local 485, Elec. Radio & Mach. Workers (Automative Plating Corp.) 183 N.L.R.B. 1286 (1970). As one commentator put it, this result "would seem [to violate] the principles of apportionment in [*Vaca*]." Comment, *Unfair Representation and the National Labor Relations Board: A Functional Analysis*, 37 J. AIR L. & COMM. 89, 106 (1971).

There are, of course, cases that accurately reflect the apparent intent of *Vaca* to restrict

II. THE PERFUNCTORY PROCESSING CASES

Some of the inconsistencies in the case law may simply reflect the difficulties inherent in developing standards for regulating decisionmaking processes. Thus, it may be inevitable, as Professor David Feller has argued, that the scope of the duty of fair representation remains somewhat ill-defined[66] and, by extension, somewhat inconsistent. This is a strong argument insofar as it relates to the kind of fair representation case which *Vaca* can be viewed as typifying: cases challenging the reasoning or motive of the union in determining whether to press a grievance.[67]

This is not, however, the only kind of fair representation case brought in the context of grievance administration. There are cases that do not involve the union's reasoning or motives at all. Instead, they challenge the union's processing (or lack thereof). These are the "perfunctory processing" cases. In some of these cases, the duty of fair representation has been applied so that it covers certain unintentional acts of union officials.[68] In other cases, the duty has been used to impose liability on the union when the court determines that the union's procedures lacked "fairness."[69] The old yardsticks of union behavior, namely good faith and non-arbitrariness, are referred to in these cases. These terms, however, have been applied in such an inconsisent manner that they have lost any unified meaning or purpose.[70]

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the union's liability to cases in which (1) the underlying claim is meritorious and (2) the union added to the grievant's damages. *See supra* note 49. Still, even among those cases purporting to apply *Vaca,* there is an obvious reluctance to allow the union to escape liability in every case in which the underlying grievance was not meritorious. The suggestion was made in Kaiser v. Local 83, for example, that even though the employee could not recover from his employer, this did not imply that he did not have "a valid cause of action against his union." Kaiser v. Local 83, 577 F.2d 642, 645 (9th Cir. 1978). Similarly, in Ruzicka v. General Motors Corp., the court hinted that the union might be liable even if the grievance were found to be without merit. Ruzicka v. General Motors Corp., 523 F.2d 306, 315 n.7 (6th Cir. 1975). A less onerous approach to punishing unions that act arbitrarily in regard to a non-meritorious grievance is to award nominal damages and costs. *See, e.g.,* Alexander v. International Union of Operating Eng., 624 F.2d 1235, 1241 (5th Cir. 1980).

[66] *See* Feller, *supra* note 3, at 812.

[67] *See, e.g.,* Atwood v. Pacific Maritime Ass'n, 657 F.2d 1058 (9th Cir. 1981). There is evidence from the administrative law context that it is difficult, if not impossible, to devise a substantive standard for reviewing decisionmaking that yields consistent results. Standards for review based on such concepts as "arbitrariness" or "reasonableness" ultimately raise the same question: was there an acceptable or legitimate link between a decision and the ostensible reason for taking it? Of course, few, if any, decisions are ever truly "arbitrary" — that is, made without *any* principle or reason. Thus, unless this type of review is applied so that virtually every decision is upheld, its scope will depend on subjective factors that are bound to yield unpredictable results.

Should it be considered legitimate for a union to choose to abandon one grievance in exchange for concessions on another? There is no principled way to make such a determination based on anything other than one's assessment of the individual merits and of the balance that should obtain between workers, unions and employees. Saying that the union must not act "arbitrarily" adds nothing to this inquiry. *See, e.g.,* ILWU, Local 13 v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972). *See also* Clark, *supra* note 3, at 1174-77.

[68] *See infra* text accompanying notes 151-53.

[69] *See infra* text accompanying notes 167-69.

[70] *See supra* note 61.

The second prong of *Vaca* is also most often twisted or overlooked in the perfunctory processing cases. This is because the varying interpretations of the "requirement" that the underlying grievance be meritorious reflect a deeper ambivalence about the extent to which *Vaca* should be considered the foundation of all fair representation cases. *Vaca* involved a rather narrow issue. The court had to decide whether a judicial determination that an underlying grievance was meritorious was sufficient to support a claim against the union for not taking the grievance all the way to arbitration. Yet, the decision contains general statements that led Justice Fortas to characterize it as a "confusing guidebook" to the duty of fair representation.[71] It is open to question, however, whether *Vaca* really is, or should be, considered a "guidebook" to all fair representation cases. Arguably, the second prong should apply only when the grievant is challenging the union's decision on the merits. *Vaca* might also be limited to cases in which the union has taken the grievance through all steps of the grievance procedure but arbitration.

Nevertheless, virtually all fair representation cases routinely invoke general statements from *Vaca*, even while reaching results that appear to break away from its rationale. These cases demand a better explanation than the explanation offered by those who claim that the duty of fair representation must always remain somewhat vague and undefined. In fact, the inconsistencies both in the case law and in the commentary can be explained by the failure to recognize that *Vaca* is not the only kind of fair representation case brought in the context of grievance administration. *Vaca* did much more than simply add the concept of arbitrariness to the scope of the duty of fair representation. It opened the door to an entirely new type of fair representation case. Specifically, the majority in *Vaca* "accept[ed] the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[72] This statement added yet another word, perfunctory, to a list of ambiguous words that already cluttered the fair representation cases.[73] Like certain phrases in *Steele*[74] and *Humphrey*,[75] this language in *Vaca* had the potential for stretching the duty of fair representation well beyond its apparent scope.

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[71] Vaca v. Sipes, 386 U.S. 171, 203 (1967) (Fortas, J., concurring).

[72] *Id.* at 191.

[73] There has been an irrepressible tendency in the case law to add both new terms and new qualifications to those words already used to describe the duty of fair representation. *See, e.g.*, International Chem. Workers Local 190 (FMC Corp.), 251 N.L.R.B. 1535, 1544 (1981) ("cavalier, perfunctory handling"); Ruzicka v. General Motors Corp., 523 F.2d 306, 315 (6th Cir. 1975) (McCree, J., concurring) ("capricious" and "superficial" processing). *See also* Truck Driver's Local 692, 209 N.L.R.B. 446, 450 (1974) (Fanning, Member, concurring). Member Fanning expressed, in his concurring opinion, frustration with the increasing reliance on "terms such as 'irrelevant,' 'unfair,' and 'invidious' [which] cannot be helpful in deciding what the law permits and what it prohibits." *Id.*

[74] Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944) ("without hostile discrimination, fairly, impartially, and in good faith").

[75] Humphrey v. Moore, 375 U.S. 335, 350 (1964) ("wholly relevant considerations, not . . . capricious or arbitrary").

That potential was soon realized. From this ambiguous language in *Vaca* came the "perfunctory processing" cases. Unfortunately, there seems to be little recognition of the fact that these cases exist as a distinct subset of fair representation claims.[76] Instead, the term "perfunctory" has been treated as just another word in the vocabulary routinely used by courts in fair representation decisions, and these cases are considered in the same class as the traditional challenges to union reasoning.

These cases, however, are different. The perfunctory processing cases have nothing to do with union reasoning or union motivations. Instead, they challenge the union's processing. In many cases, the crux of the challenge is that the union made no decision.[77] Sometimes this seems to be due to an inadvertent act or omission, while other times it appears to be a conscious but misguided decision. Both of the examples in the introduction to this article were perfunctory processing cases.

The perfunctory processing cases contain very similar fact patterns. In most of the cases, an employee challenges a union's handling one or more of the following steps of grievance administration: (1) filing the proper papers in a timely fashion, (2) notifying the grievant of certain information during the process, (3) investigating the allegations, and (4) representing the grievant before the proper body. The claims against the union in these situations seem quite similar. The union forgets to mail the grievant notice that her claim has been dropped.[78] A typographical error results in the rejection of a claim as untimely.[79] The shop steward handling a grievance neglects to interview a witness to the incident at issue.[80] A cursory reading of the collective bargaining agreement leads the union representative to assert a faulty argument or to overlook a good one.[81] It should not be surprising that cases of this nature abound in both the federal reporters and on the docket of the NLRB[82] because the union representative handling grievances is usually overworked, underpaid and faced with many politically sensitive issues.[83] Nor is it surprising that cases of this

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[76] Note, *IBEW v. Foust: A Hint of Negligence in the Duty of Fair Representation,* 32 HASTINGS L.J. 1041 (1981) [hereinafter cited as Note, *A Hint of Negligence*]. The author separated the cases into categories of conduct, with "procedural" errors constituting one of the categories. He considered these cases, however, to fall within the "vague contours of *Vaca.*" *Id.* at 1064, 1066. Clark, *supra* note 3, at 1137, considered an inquiry into the union's procedures to constitute a "type of analysis" to be used in determining whether the actions were rational.

[77] *See infra* notes 78-82 and accompanying text.

[78] *See, e.g.,* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1085 (9th Cir. 1978).

[79] *See, e.g.,* Coe v. United Rubber, Cork, Linoleum and Plastic Workers, 571 F.2d 1349, 1350 (5th Cir. 1978).

[80] *See, e.g.,* Service Employees Local 579 (Convacare of Decatur), 229 N.L.R.B. 692, 694 (1977).

[81] *See, e.g.,* Denver Stereotypers v. NLRB, 623 F.2d 134, 137 (10th Cir. 1980).

[82] According to a draft report of the ABA's Section on Labor and Employment Law, there were 388 opinions reported by the BNA between 1976 and 1981 in which a breach of the duty of fair representation was alleged. Undoubtedly, the total volume of litigation is much larger. *See* DRAFTS, *supra* note 34.

[83] J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT: THE POWER OF INDUSTRIAL GROUPS 15-18, 44-49 (1961).

nature have become questions of fair representation given the language in *Vaca*.

More surprising, however, is the scant attention which the phrase "perfunctory processing" has received. The phrase itself can easily be considered to hold the answer to two important questions left unanswered by *Vaca*. First, how much discretion does the union have in processing and settling grievances? *Vaca* held that a union's discretionary power to supervise the grievance machinery includes the authority to settle grievances short of arbitration even if a reviewing court might later find that the grievance was "meritorious."[84] This power is limited, however, by the prohibition against "arbitrary" or "perfunctory" actions. The manner in which courts are to apply these general labels for characterizing union behavior is not obvious. It is unclear whether the union must always have a reason for taking the challenged action in order to avoid a finding that it has acted arbitrarily. Additionally, it is unclear whether a finding of arbitrariness is possible only in those cases in which a decision on the merits has been reached. The *Vaca* decision did not clearly state whether the standards for reviewing the union's actions were subjective or objective. While the opinion does not suggest that objective standards should be used, neither does it eliminate the possibility.[85]

Also left unclear by *Vaca* is the relationship between the standards of union behavior and the significance of the merits of the underlying grievance.[86] Must the underlying grievance always be deemed a meritorious one in order to hold the union liable or can a union's actions be "arbitrary" enough to constitute a breach of the duty of fair representation even if the underlying grievance is not meritorious?[87] While the fault-based compensation principle in *Vaca*[88] supports an argument for a meritorious grievance requirement, even the *Vaca* opinion indicated a concern that grievances with *some* merit be accorded certain protections.[89] The question is of tremendous import since grievances do not fall conveniently into the categories of "meritorious" and "frivolous."[90] A vast majority of the cases that reach the courts are in the middle of the spectrum, where a rule is hard to apply but of great necessity. Herein lies the problem of the somewhat meritorious grievance.[91] Has the union breached its duty of fair

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[84] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[85] Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81, 107 (1967).

[86] *See supra* text accompanying notes 52-58.

[87] *See* Vaca v. Sipes, 386 U.S. 171, 197 (1967).

[88] *Id.*

[89] *See infra* text accompanying notes 170-73.

[90] Commentators have been strangely reluctant to address this problem directly. Clark, for example, argued that "the union should have to offer stronger reasons when it refuses clearly meritorious grievance." Clark, *supra* note 3, at 116. Similarly, Feller has argued that it is clear that a union cannot abandon a "justified grievance" in return for an agreement that other workers will be given a pay raise. Feller, *supra* note 3, at 812. It seems, however, that these statements border on the obvious. Unfortunately, it is equally obvious from the fair representation cases that the "clearly meritorious" and "justified" grievance is a rare creature. Quite simply, the fair representation doctrine raises the most difficult problems when the grievance is *not* clearly meritorious or justified.

[91] The validity of the somewhat meritorious grievance often turns on questions of

representation if it acts arbitrarily or unreasonably in relation to a grievance and the merits of which are unclear?

The phrase "perfunctory processing" does not offer clear answers to these questions. It does, however, offer the proverbial hook on which to hang one's hat. Actually, it provides more than one hook.[92] Some courts have emphasized the word "perfunctory," which leads them into a flexible, case-by-case evaluation of union behavior that borders on the concept of negligence. This inquiry is generally consistent with fault principles and the remedies provided usually depend on the merits of the underlying grievance. Other courts have apparently placed more emphasis on the word "processing," writing opinions that lean toward the use of objective criteria for evaluating union procedures without regard for the merits of the underlying grievance. These decisions stress the need for certain absolute procedural protections in grievance administration.[93]

This split in the courts reflects more than just the juxtaposition of two words. The split reflects the disagreement over whether *Vaca* should be the "guidebook" to all fair representation cases. Those courts which defer to *Vaca* consider the duty of fair representation to be founded in fault principles and based upon case-by-case determinations, whether the plaintiff is challenging a union decision or simply an omission of some sort. Those courts which favor a different approach view the problems in the perfunctory processing cases as different from the problems present in *Vaca*. In the view of these courts, the perfunctory processing cases are evidence of the need for basic procedural protections that were never at issue in *Vaca*. Unfortunately, these two viewpoints have not been expressed clearly or distinctly. A brief examination of two of the better known perfunctory processing cases illustrates the pressing need for such clarification.

Smith v. Hussman Refrigerator Co.[94] is, in parts, an example of the process-based approach to these cases.[95] In *Smith*, the plaintiffs challenged actions

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veracity or conflicting expert testimony. In Hines v. Anchor Motor Freight, Inc., for example, the company discharged the plaintiffs for alleged "dishonesty." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 557 (1976). The company asserted that the plaintiffs had sought reimbursement for motel expense in excess of actual charges. The company presented the motel receipts as evidence. Plaintiffs alleged that the motel clerk recorded less on the receipts than was actually paid, "retaining for himself the difference between the amount receipted and the amount recorded." *Id.*

Similarly, in Minnis v. United Auto Workers, the plaintiff was discharged for having falsified a medical form. Minnis v. United Auto Workers, 531 F.2d 850, 853 (8th Cir. 1975). The attending physician denied making the alleged changes on the medical form, but a nurse testified that she, not the plaintiff, made the changes at the request of the doctor. *See also* Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980) (conflicting testimony of doctors).

[92] In the effort to lend meaning to this word some have resorted to dictionary definitions. Not surprisingly, this effort has yielded minimal results. *See, e.g.*, Ethier v. United States Postal Service, 590 F.2d 733, 736 (8th Cir. 1979).

[93] *See infra* text accompanying notes 166-72.

[94] 619 F.2d 1229, *cert. denied,* 449 U.S. 839 (1980).

[95] Actually the opinion seems to employ both approaches to the perfunctory processing cases. It uses the case-by-case approach in deciding one issue. *See infra* text accompanying note 103. The case is noteworthy, however, for its use of a due process approach to the other issue. *See infra* text accompanying notes 104-08.

taken by their union in resolving a seniority dispute. The case arose when the employer exercised its prerogative under a modified security clause to fill two new positions on the basis of "superior skill and ability" instead of straight seniority.[96] The union subsequently processed grievances filed by unsuccessful applicants who had greater seniority than the two men chosen by the company. These grievances were processed through the five-step grievance procedure to arbitration where the arbitrator decided that two of the unsuccessful applicants should be promoted.[97] The award appeared to grant these promotions without ordering that any other employees be demoted. This result was beyond the authority of the arbitrator and, in addition, the arbitration decision contained some technical errors. The union sought "clarification" of the award.[98] A meeting between the union, the company and the arbitrator resulted in the demotion of the two employees chosen by the company in the first place.[99] The demoted employees were not notified of the meeting.[100] They subsequently filed grievances that the union refused to process.[101] The demoted employees then filed suit in federal court against the union for violating the duty of fair representation in the handling of their grievances. The employees alleged that (1) the union did not properly investigate the issues before deciding to side with the workers that had the greatest seniority, and (2) the union failed to notify them of the meeting with the arbitrator.

Smith is a classic perfunctory processing case. The case did not involve a challenge of the union's ultimate decision to process the grievances based solely on seniority, rather it involved a challenge of the "perfunctory dismissal" of the plaintiffs' claims and the failure to notify them of a key hearing date. In other words, the challenge was based on process, not substance.[102]

The decision in *Smith* is also characteristic of many perfunctory processing cases: it is vague and confusing. The court seemed to apply different theories of fair representation to the notice and investigation claims. The court, without adopting a *per se* rule, held that failure to notify the plaintiffs of the arbitration hearing constituted a violation of the duty of fair representation. It seemed to say that such an omission on the union's part constitutes a breach of the duty of fair representation only if the employee is "prejudiced by not having notice."[103] This assertion is consistent, of course, with *Vaca's* purported second prong, the "requirement" of a meritorious claim.

The court's resolution of the other issue — challenging the union's decision to go forward with grievances filed by the most senior applicants — was

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[96] Smith v. Hussman Refrigerator Co., at 1233.

[97] *Id.* at 1234.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1234-35. The case involved another important issue that will not be considered in detail here because it involved a peripheral issue: when, if ever, can a union defend a fair representation claim by alleging that a given employee was "represented" by the employer? *Id.* at 1229, 1242.

[103] *Id.* at 1241.

completely different. In this portion of the opinion the court concluded, with almost no analysis, that the union had violated the duty of fair representation. The court simply termed the union's decision to side with the senior-most employees as "perfunctory"[104] and noted that the union's review of the plaintiffs' skills and ability was "superficial."[105] The court concluded that the union did not insure a "fair" resolution of the dispute.[106] The dissent surmised that under the majority opinion a union violates the duty of fair representation whenever it takes an internal position without conducting trial-like hearings.[107] The majority opinion could be read to reach an even more outrageous result: that the union can never side with *either* party in a seniority suit without violating the duty of fair representation because taking sides in such disputes necessarily involves the subordination of certain claims.[108]

Most courts have shied away from an interpretation of perfunctory processing that is process-based. Courts avoiding a process analysis utilize a comparative, case-by-case evaluation of union decisionmaking. The scope of this evaluation is less than clear, but courts refer to such factors as the "skill of the actors" involved[109] and the "prevailing practice" of the union.[110] In practical terms, however, these factors leave courts with nothing more than the yardsticks of "reasonableness" and "arbitrariness", in those cases in which bad faith is not an issue. The result of this situation is that many courts end up asking whether "negligence" is "arbitrary" or "unfairness" is "perfunctory."[111] That this situation is regrettable is best evidenced by the disparate results obtained from this endeavor.[112]

This line of cases is typified by the Sixth Circuit's decision in *Ruzicka v. General Motors Corp.*[113] The union in *Ruzicka* failed to file the statement required by the collective bargaining agreement in order to invoke arbitration of the plaintiff's grievance.[114] The union did, however, file the necessary notice of ar-

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[104] *Id.* at 1239.

[105] *Id.* at 1240.

[106] *Id.*

[107] *Id.* at 1247-53 (Henry, J., dissenting).

[108] The majority stressed that "[t]he union is the agent of all employees in the union," and claimed that the union in this case "not only abandoned the plaintiffs but took an adversary attitude toward them..." *Id.* at 1239. How a union could avoid this "adversary attitude" in a seniority dispute — where any position will, by definition, be adverse to some members — was never explained.

Fortunately, other courts faced with seniority disputes have taken a more realistic approach, allowing the union discretion to decide which employees to represent. *See, e.g.*, Fox v. Mitchell Transp., Inc., 506 F. Supp. 1346, 1354 (D. Md. 1981).

[109] Denver Stereotypers Local 13 v. NLRB, 623 F.2d 139 (10th Cir. 1980).

[110] Ruzicka v. General Motors Corp., 649 F.2d 1207, 1212 (6th Cir. 1981).

[111] *See, e.g.*, ITT Arctic Serv. Inc., 238 N.L.R.B. 116, 116 n.1 (1978) (union actions "not merely perfunctory" but "in fact arbitrary"); Service Employee Local 579 (Convacare of Decatur), 229 N.L.R.B. 692, 695 (1977) ("there comes a point" where negligence is arbitrary); Truck Drivers Local 692 (Great Western Unifreight), 209 N.L.R.B. 446, 447-48 (1974) ("negligence" is not "arbitrary").

[112] *See supra* note 43. Vaca v. Sipes, 386 U.S. 171, 197 (1967).

[113] 649 F.2d 1207 (6th Cir. 1981).

[114] *Id.* at 1208. Ruzicka was discharged for being intoxicated on the job and for using threatening and abusive language toward his superiors at work. *Id.* His grievance did not dispute

bitration and twice received an extension for filing the accompanying statement.[115] The union offered no explanation for its failure to file the statement.[116] In *Ruzicka I* the Sixth Circuit reversed the District Court's finding that there was no breach of the duty of fair representation, holding that "such negligent handling of the grievance, unrelated as it was to the merits of the [employee's] case, amounts to unfair representation."[117]

The holding of the Sixth Circuit was unclear for many reasons. First, although the court applied an arbitrariness standard it never came to grips with what the term "arbitrariness" would mean. Second, a concurring opinion suggested that only "gross negligence" would amount to a breach of the duty.[118] Finally, whatever clarity this case may have added to the content of the duty of fair representation was more than lost when one considers the problem of remedies. The case seems to adopt a tort approach in the very same sentence that it rejects a fundamental element of tort law, namely, provable damages.[119]

Matters were confused further after the District Court decided on remand that the union's "malfeasance amounted to unfair representation."[120] The Sixth Circuit reversed that decision as well, holding, in *Ruzicka II,*[121] that the District Court should have considered evidence concerning the "past prevailing practice" of the union.[122] In other words, the Sixth Circuit apparently added an affirmative defense akin to "industry custom"[123] to its already unclear negligence test. The controversy surrounding that doctrine in tort law may well manifest itself as *Ruzicka III.*

Ruzicka and *Smith* are both part of a new and largely unrecognized area of fair representation law. These cases attempt to address some important questions left unanswered by *Vaca.* Although they invoke similar words and arise

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the facts, but alleged that the discharge was "unduly harsh." *Id. See generally* Morgan, *Fair is Foul, and Foul is Fair — Ruzicka and the Duty of Fair Representation in the Circuit Courts,* 11 TOL. L. REV. 335 (1980).

[115] Ruzicka v. General Motors Corp., 649 F.2d at 1208.

[116] *Id.*

[117] Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975).

[118] *Id.* at 315-16 (McCree J., concurring). The absurd results that can obtain from this effort to distinguish between "types" of negligence are best illustrated by the statement in Seeley v. General Motors Corp., 526 F. Supp. 542, 545 (E.D. Mich. 1981) that union liability attaches "somewhere between negligence and gross negligence — but closer to gross negligence than to negligence." *Id.*

[119] The court said that "[s]uch negligent handling of the grievance, unrelated as it was to the merits of [the] case, amounts to unfair representation." Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975). It is difficult to be sure of what the court meant by its reference to the merits. Is negligent handling permissible if it *is* related to the merits? It would seem that negligent handling would always, by definition, have to be "unrelated" to the merits since a "relationship" with the merits would require something more than unintentional acts associated with negligent behavior. The court's failure to clarify the significance of the underlying merits is more troublesome, however, when the issue of remedies is considered. The court never discussed the implications of the fact that Ruzicka admitted that the reasons for this discharge were true. They obviously considered this fact unimportant, hinting in a footnote that the union might be liable even if the grievance were ultimately deemed nonmeritorious. *Id.* at 315 n.7.

[120] 649 F.2d 1207, 1209 (6th Cir. 1981).

[121] *Id.* at 1211.

[122] *Id.*

from similar fact patterns, they reach widely differing results. Many of the perfunctory processing cases are much harder to explain, or even understand, than *Ruzicka* and *Smith.*[124] The NLRB General Counsel, in an unusual move, and partly in response to the confused state of the case law,[125] issued a memorandum attempting to clarify the Board's policy on the duty of fair representation.[126] Even that memo is largely unhelpful, however, because it fails to recognize that from the words "perfunctory processing" have come two different approaches to the same problem. These two approaches are so fundamentally different that the case law will not be consistent until these differences are recognized and addressed.

III. Models of Fair Representation

The perfunctory processing cases display widely differing answers to two important questions. The first question is how one determines whether a

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[123] As Prosser noted, if an actor "does only what everyone else has done, there is at least an inference that he is conforming to the community's idea of reasonable behavior." W. Prosser, Law of Torts § 33, at 166 (4th ed. 1971). The reference to this concept in *Ruzicka* is confusing for two reasons. First, it seemed to refer only to this union's past conduct. In traditional tort law, however, such evidence "is commonly called 'habit' rather than custom [and] is not evidence of any standard of reasonable care. . . ." *Id.* at 168. Second, there are exceptions in traditional tort law for a variety of professional activities. *Id.* at 165. Whether union officials, whose role is similar to an attorney's, should be granted this leeway is not clear.

[124] In Griffin v. UAW, for example, the plaintiff was discharged by a depot manager after he injured the warehouse manager in a fight at a local hockey game. Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). Plaintiff alleged that the union breached its duty by filing his subsequent grievance with the warehouse manager whom he had assaulted. *Id.* at 182. The only other person with whom the grievance could have been filed, however, was the depot manager who had fired him in the first place. *Id.* at 184. Nevertheless, the court decided that the union acted "arbitrarily," without satisfactorily explaining how the union could have avoided the problem. *Id.* In an unpersuasive passage, the court suggested that the filing of the grievance with the depot manager, who actually discharged the aggrieved employee, would have been permissible because he was not as "high tempered" as the warehouse manager. *Id.* at 184-85. The court dismissed as irrelevant the fact that the depot manager actually refused the grievance after it was reinstated. *Id.* at 185.

The problem of reaching a result without an adequate explanation is best illustrated in Robesky v. Qantas Empire Airways Ltd., one of the cases discussed in the introduction to this article. Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978). In *Robesky,* the plaintiff claimed that she turned down the company's final settlement offer because she believed that the union would still take her grievance to arbitration. *Id.* at 1085-87. The alleged violation of the duty of fair representation was in failing to notify the plaintiff that the union had agreed to the settlement that was later offered to the plaintiff. *Id.* If the reasoning of the court was clear in the case — for example, if the court had required notice of settlement agreements — then the decision might have served as a guide for union behavior in similar circumstances. In finding the union in breach of the duty of fair representation, the court tossed in so many amorphous abstractions as to make any understanding of their rationale quite unlikely. In the court's words: "Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee, and so unrelated to legitimate union interests as to be arbitrary." *Id.* at 1090. The court noted that a trier of fact reasonably could conclude that all three of these "elements" were present in this case without specifying how to identify their presence or whether any combination less than three would suffice. *Id.* at 1090-91.

[125] The memo could be interpreted as a direct response to *Robesky* because that is the only case cited in the memo. *See* NLRB memo, *supra* note 6. For a discussion of *Robesky,* see *supra* note 124.

[126] *See* NLRB memo, *supra* note 6. For a discussion of the unusual nature of this memo,

union's actions are in breach of the duty of fair representation. While the cases employ the same labels to characterize union actions, courts rely on different approaches in analyzing them. Many courts examine the union's behavior on a case-by-case basis, evaluating in light of what appears reasonable under the circumstances other courts seem to require certain procedural safeguards regardless of the circumstances. The second question is whether the underlying grievance must be meritorious before a union will be held liable for breach of duty of fair representation. Again, a full spectrum of answers have been suggested. Some courts consider meritoriousness a prerequisite to recovery, but vary in their views of what constitutes a meritorious grievance. Meritoriousness is construed narrowly by some courts; that is, only those grievances found to have actual merit are considered meritorious. Other courts which view meritoriousness as a prerequisite to recovery have adopted a more liberal construction. These courts are willing to consider any grievance with some merit to the meritorious. Still others apparently think that merit is irrelevant. Unfortunately, few cases directly address these questions, and even fewer recognize the relationship between them.[127]

These important questions can be answered in two consistent ways. These approaches are based upon very different assumptions about the purpose of the duty of fair representation. The approaches should, if applied consistently, often lead to different outcomes. Regrettably, these approaches have not been clearly defined or applied.[128] Rather, they have been mixed together indiscriminately, often in different portions of the same opinion. These theories of fair representation are distinct, however, and must be separated in order to understand the current confusion in the case law.

A. *The Tort-Compensation Model*

One theory of the perfunctory processing cases is based on concepts that appear in tort law. The union's actions are evaluated in the context of what other unions might do under the circumstances. So long as the union's behavior is deemed reasonable, there is no breach of the duty. Reasonableness is not, however, confined in application to those cases in which the unions' acts were intentional. As in the general tort law, there is no requirement of specific intent, just volitional activity. So the reasonableness standard can be applied to inadvertent acts and intentional acts alike.[129] Nor is reasonableness ascertained

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see Peck, *The Administrative Procedure Act and the NLRB General Counsel's Memorandum on Fair Representation Cases: Invalid Rulemaking?*, 31 LAB. L.J. 76 (1980).

[127] *See generally* cases cited *supra* note 60.

[128] The main contention of this article is that there are two models of fair representation that explain the perfunctory processing cases. These models are separate and must be distinguished. They are not, however, explicitly stated in the cases. Nor are they necessarily mutually exclusive. Conceivably, for example, the tort-compensation principles could be applied in certain types of cases, and due process-regulation concepts in others. The models set forth in this article, however, are speculative. It would be premature to start suggesting various combinations and permutations of these models before the models themselves are scrutinized. So for the purpose of this article, the two models are examined separately, keeping in mind the possibility that they might be useful together.

[129] *See, e.g.*, Baldini v. Local Union No. 1095, 581 F.2d 145 (7th Cir. 1978); Hughes v.

by reference to any fixed standards or expectations of what procedures a union should provide. Thus, whether a union's failure to notify a grievant of the specific terms of a settlement agreement constitutes a violation of the duty of fair representation depends on a variety of factors, including the past practice of the union, the practice of other unions and the specific facts of the case.

Ordinary negligence concepts, often suggested by commentators as an improvement in the duty of fair representation, fit this part of the tort-compensation model well. There are, however, an array of possibilities along the spectrum of negligence. Consistent with this model of fair representation the union could, for example, be held to a gross negligence standard.[130] The difference in these possible standards implies correspondingly different balances between the relative strength of unions and employees. The difference has been discussed extensively in the literature with a strong consensus that ordinary negligence standards should prevail.[131] The different possible types of negligence are important to consider, but are not nearly as significant in shaping the duty of fair representation as the interpretation of the word "meritorious." That subject has received practically no attention, however, in the commentary.[132]

The question of how to evaluate the merits of the underlying grievance cannot, however, be avoided entirely because the tort-compensation model requires an implicit, if not an explicit, consideration of the merits. The traditional fair representation suit is basically based, of course, on the claim that the merits of the underlying grievance are stronger than the union's reasons for not pursuing it further. The tort-compensation model simply extends that notion to cases in which the union's procedures, rather than its decision, are at issue. But even if the court does not consider the merits of the underlying grievance explicitly, they are considered indirectly. In deciding, for example, whether a union breached its duty by misinterpreting the collective bargaining agreement, the court looks to what a reasonable union official would do under the

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International Bhd. of Teamsters, Local 683, 554 F.2d 365 (9th Cir. 1977). *See also* Wyatt v. Interstate Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980) ("To sustain a member's action against his union . . . it is not necessary that the union's breach be intentional.")

[130] This approach was suggested by Judge McCree's concurring opinion in Ruzicka v. General Motors, 523 F.2d 306, 310 (6th Cir. 1975). *See supra* note 118. It was also suggested by the NLRB General Counsel in a memorandum on the duty of fair representation. *See* NLRB memo, *supra* note 6. *See also* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978) ("egregious" behavior, "reckless disregard").

[131] *See infra* note 144.

[132] Typical of the treatment of this problem is Clark, *supra* note 3, at 1139: "Neither of these prohibitions — whim or improper motive — requires a court to decide whether the union made the right decision. In cases that lie between the poles, however, courts may have to consider the merits." *Id.* Similarly, Feller, *supra* note 3, at 811, wrote that a court should not review the action on the basis of its view of the merits of the underlying grievance unless "it finds that the action was . . . patently unreasonable."

Both of these statements are exceedingly vague as to the extent to which courts should scrutinize the underlying grievance. While both commentators seem to prefer no judicial review of the merits, they argue for it in certain "obvious" cases. Whether such cases can be easily identified or agreed upon, however, is doubtful. *See supra* note 91.

circumstances.[133] One of the circumstances, possibly the most important one, is the merits of the underlying grievance.

A reasonable union obviously decides which grievances to advance largely on the basis of their merit. While some meritorious grievances may be overlooked in the process — a key reason why the duty of fair representation exists — it is unlikely that unions pursue many non-meritorious grievances, except possibly for fear of being held in breach of the duty of fair representation. Since a major goal of fair representation law is to allow unions to avoid processing frivolous grievances without incurring liability,[134] a court would not find under the tort-compensation approach that a union had breached the duty of fair representation unless the underlying grievance had at least some merit.

There is, of course, a marked difference between a meritorious grievance — one adjudged to be correct on the facts — and a grievance that has some merit.[135] Presumably, any case that results in litigation involves a grievance that has some merit. Proving that a grievance should be deemed meritorious is much more difficult. Whether union liability should depend on the existence of a truly meritorious grievance depends on how one views the larger philosophy of fair representation law. The merits of the underlying grievance are extremely important if the purpose of the duty of fair representation is to compensate individuals for damages caused by employer breaches of the collective bargaining agreement. Thus under the tort-compensation model, plaintiffs recover damages only if their underlying claim is meritorious.

The tort-compensation model is, in short, a coherent approach for resolving the perfunctory processing cases. The rights of individuals are defined, under this model, by a standard of union behavior based on the behavior of other unions in similar circumstances and by reference to the merits of the underlying grievance. Thus, a union is not considered in breach of the duty of fair representation unless its behavior is deemed to have been, say, negligent.[136] Even then, the union will incur liability only if it has contributed to damages as defined by the collective bargaining agreement,[137] a result which will occur only if the underlying grievance is meritorious. This model of fair representation appears quite similar to the two-prong test attributed to *Vaca*. Under *Vaca's* two prongs, a union would incur liability only if, first, its conduct was arbitrary or in bad faith, and, second, the employee's underlying grievance was meritorious.[138] The tort-compensation model differs from *Vaca*,

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[133] *See, e.g.*, Denver Stereotypers & Electrotypers Union v. N.L.R.B., 623 F.2d 134, 137 (10th Cir. 1980).

[134] For a discussion of the union control theory, see *supra* note 1. *See also* Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[135] *See supra* note 91 and accompanying text.

[136] Ordinary negligence need not be the standard that is relied upon. Variations of this standard have been suggested in many cases. There are so many possibilities that courts agreeing on a "subjective" approach cannot agree on its substance. *See supra* note 118 and accompanying text.

[137] This is the second prong of the two-prong test often attributed to *Vaca*. *See supra* note 53-58 & 60 and accompanying text.

[138] For a discussion of the two-prong test attributed to *Vaca*, see *supra* text accompanying notes 49-59.

however, in that the former explicitly incorporates the comparative approach into the first prong. The tort-compensation approach looks beyond the union's reasoning, allowing for a finding of breach even in cases of inadvertent acts or omissions. Rather than trying to limit the first prong to intentional acts — something that many courts have done without a principled explanation — this model extends the reasonableness approach to include other situations. In short, it keeps the conventional interpretation of *Vaca,* but removes limitations that appear inconsistent with that approach. Since compensation is the overriding goal of this model, punitive damages are not allowed even if the union acts in bad faith. This too is consistent with existing doctrine.[139] Essentially, the duty of fair representation plays a "unique and subordinate role" which facilitates section 301 suits against employers.[140] It has no role or content of its own other than as a mechanism for proceeding against an employer in cases in which the union, for whatever reason, does not do so.

This approach emphasizes union autonomy in two ways. First, it significantly limits the union's potential liability. In most cases of breach the union will avoid substantial liability because the bulk of the damages will be assessed against the employer.[141] Moreover, the union will avoid all liability if

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[139] The U.S. Supreme Court, in IBEW v. Foust, 442 U.S. 42, 52 (1979), recently announced this policy. The majority in *Foust* explained that the "compensation principle" in *Vaca* was intended "not only to gauge the sufficiency of relief but also to limit union liability." *Id.* at 49. Four concurring justices, however, disagreed with this statement. They felt that *Vaca* "stands only for the proposition that a union not chargeable with compensatory damages may not be taxed with punitive damages either." *Id.* at 55.

[140] Fox & Sonethal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage,* 128 U. PA. L. REV. 989, 996 (1980).

[141] The compensation principle enunciated in *Vaca* is that the employer should be responsible for all damages attributable solely to its breach of contract. The union is only liable for "increases if any in those damages caused by the union's refusal to process the grievance." As it appears from the opinion in *Vaca,* this amount would often be little or nothing. The Court hypothesized that even if the union had been held in breach of the duty of fair representation "all or almost all of the [plaintiff's] damages would [have been] attributable to the employer." Vaca v. Sipes, 386 U.S. 171, 198 (1967). This reasoning has been applied similarly in other cases. In *DeArroyo v. Sindicato de Trabajadores Packing,* the court reasoned that

> [i]n a case such as ours, where there has been no suggestion that the Union participated in the company's improper discharge and where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date, we conclude that the union's conduct cannot be said to have increased or contributed to the damages attributable to the company's discharge.

DeArroyo v. Sindicato de Trabajadores Packing, 425 F.2d 281, 289-90 (1st Cir. 1970). *See also* Kesner v. N.L.R.B., 523 F.2d 1169, 1175 (7th Cir. 1976) ("the Union's failure fully and fairly to represent Kesner did not cause him to suffer any loss of earnings").

The U.S. Supreme Court appears to have modified this position, deciding recently in Bowen v. U.S. Postal Service that the union was liable for $30,000 of the $52,954 awarded in a fair representation suit. 51 U.S.L.W. 4051 (U.S. Jan. 11, 1983). The 5 to 4 decision states that the union is liable for wages lost from the time that a case would have gone to arbitration. Whether this means that the court really intended to alter the union's duty of fair representation accordingly is unclear. The only issue in the case was the proper allocation of liability. In dissent, Justice White termed the majority's formulation "bizarre" because in many cases it would result in the union paying damages larger than those assessed against the company that improperly discharged the employee.

the underlying grievance is not meritorious.[142] Second, this model respects union autonomy by avoiding the use of standards originating outside the collective bargaining process. Instead of imposing abstract standards deemed appropriate by the courts the emphasis is on adopting comparative standards of union behavior. There is room, of course, for variation in the stringency of this standard — the two most common approaches being "ordinary negligence" and "gross negligence"[143] — but the premium is on flexible, comparative standards. Purely external standards are avoided.

The idea of relying on comparative standards of union behavior to decide perfunctory processing cases has already received considerable attention from those advocating the use of negligence concepts.[144] Much of this discussion has, unfortunately, been ill-conceived. For example, *Robesky* and *Ruzicka* are often cited as cases that exemplify the negligence approach.[145] While these cases do invoke negligence language, they fall short on negligence theory. The courts in both cases were so preoccupied with the standard for evaluating the union's actions that they lost sight of the issue of injury and damages. *Ruzicka I* concentrated exclusively on whether allowing a filing date to lapse constituted such negligent handling of a grievance as to amount to unfair representation.[146] *Ruzicka II* continued along those lines, adding the question whether such actions might nevertheless be excused because they were the union's "prevailing practice."[147] If the courts had applied the compensation principle, however, these questions would have been unnecessary because the court in *Ruzicka I* had determined that the underlying grievance was not meritorious.[148] The court in *Ruzicka I* concluded that the aggrieved employee was intoxicated on the job, as charged, and that his discharge was a permissible penalty.[149] In other words, there was no injury in this case. In tort law, "negligent" acts do not, in and of themselves, give rise to a cause of action unless they cause actual damages.[150] Taking a strict tort view, one must conclude that Ruzicka suffered no damages.

Unlike the court in *Ruzicka,* the court in *Robesky* apparently recognized this problem. Nonetheless, the *Robesky* Court decided to overlook it, explaining in a

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[142] *Id.*

[143] *See supra* note 118 for an illustration of the extremes to which this spectrum can be applied.

[144] *See, e.g.*, Note, *A Hint of Negligence, supra* note 76, at 1055-70; *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence,* 65 CORNELL L. REV. 634 (1980); Flynn & Higgins, *supra* note 8, at 1148-52. *See also,* NLRB memo, *supra* note 6, at 2081 (Rejecting a negligence approach but arguing that "there could be cases where negligence is so gross as to constitute reckless disregard of the interests of the employee.").

[145] *See* Note, *A Hint of Negligence, supra* note 76, at 1042 n.5; Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence,* 65 CORNELL L. REV. 634, 637 n.21 (1980).

[146] Ruzicka v. General Motors Corp., 523 F.2d at 310.

[147] Ruzicka v. General Motors Corp., 699 F.2d at 1211-12.

[148] Ruzicka v. General Motors Corp., 523 F.2d at 308.

[149] *Id.* at 313. The court in *Ruzicka I,* however, remanded the case to the district court for a fact determination as to whether the discharge was unduly harsh or arbitrary. *Id.*

[150] W. PROSSER, LAW OF TORTS § 30, at 143-44 (4th ed. 1971).

footnote that "[s]ince appellant's claim does not depend on her grievance, the strength or weakness of the grievance is irrelevant."[151] This explanation is baffling. If any kind of fault or compensation principles are applicable, how can a claim for unfair representation in grievance proceedings "not depend" on the validity of the grievance. The answer, of course, exists in the second model of fair representation: the due process-regulation model. But *Robesky* was not decided under the rubric of due process — although whether it should have been will be discussed later — it was decided under the guise of *Vaca* fault principles. In short, both *Robesky* and *Ruzicka* illustrate one problem with the poorly articulated doctrine of fair representation: it has lead to results that ignore basic principles of law. In both of these cases, causes of action were allowed when the connection between the union's actions and the plaintiff's injuries were never proven.

Robesky points out the second defect in many of the cases that have relied on negligence language: they contain little more than meaningless verbal formulas. The union's actions in *Robesky* were ultimately characterized as "arbitrary." Quite literally, of course, the union did not have a "reason" for its actions. Yet, the evidence indicated that its actions were *unintentional*. In trying to fit unintentional acts into the "arbitrariness" pigeonhole, the court created some serious problems. Is the union liable whenever an unintentional act results in a case not being processed further, or are some unintentional acts more arbitrary than others? Whatever the case stands for is, as Judge Kennedy generously put it in a separate opinion, "not clear."[152]

The tort-compensation model offers an approach to the perfunctory processing cases that would minimize union liability for the handling of meritless grievances, and protect individuals with valid grievances from inadvertent, but not necessarily "arbitrary," union acts. The model would repair what some commentators consider a glaring hole in the existing scope of the duty of fair representation — that it does not give rise to liability for "negligent" acts of the union.[153] It would also, if properly applied, clarify the confusion surrounding the second-prong of *Vaca*. Under the tort-compensation approach, only those with meritorious grievances could ultimately recover against their union for breaching the duty of fair representation.

B. *The Due Process-Regulation Model*

The purpose of the tort-compensation model — to compensate individuals for losses aggravated by the union — may seem so obvious that it is hard to imagine any other. But it is possible to view the duty of fair representation primarily as a method of regulating union behavior. The due process-regulation model of the perfunctory processing cases takes this view. This model has as its main goal the regulation of union behavior through judicially-imposed procedural requirements. So viewed, the regulatory goals of the law

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[151] Ruzicka v. General Motors Corp., 573 F.2d 1082, 1085 n.4 (9th Cir 1978).

[152] *Id.* at 1091 (Kennedy, J., concurring).

[153] *See, e.g.*, Flynn & Higgins, *supra* note 8, at 1147.

can overshadow the compensatory ones. The duty of fair representation is imposed to assure certain protections to all individuals as much as it is to address specific cases.

Under this due process-regulation approach, the union is required to provide certain minimal procedural safeguards to all grievants. This model has not been applied as widely or explicitly as the tort-compensation model, but it appears that the right to be heard and the right to be notified of the hearing are the primary elements in this approach.[154] Most fundamental, however, is the right to have one's grievance be considered. In other words, the union is expected to make a reasoned decision in every case.[155] This requirement has been imposed by many courts.[156] The extension of this model to include additional procedural requirements depends on how courts assess the relative value, cost, and gravity of other interests involved.[157] The due process-regulation approach does not condition a finding of breach on the meritoriousness of the underlying grievance. To the contrary, the whole idea of the due process approach is that there are certain procedures that any grievant should be afforded.

The due process-regulation approach satisfies two concerns. First, it deals with the apparent inequity of requiring procedural safeguards only when the underlying grievance is meritorious.[158] All grievants are assured certain procedural protections, even if they cannot meet the burden of proving that their grievance was meritorious. This approach assures that no one will have the grievance procedure end with the announcement that the union, well within the boundaries proscribed by law, "lost" or "misplaced" the grievance.[159]

Second, the due process-regulation model avoids the danger that courts will exercise "too much substantive supervision over the merits of collective bargaining decisions."[160] One of the major indictments of the tort-compensation model is that it results in judicial intrusions into the collective bargaining agreements. In deciding whether the union breached its duty the court must assess the merits of the underlying agreement. In the process, it is

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[154] *See infra* notes 215-27 and accompanying text.

[155] It remains to be seen whether a general requirement of "reasoned decisions" can be implemented without detailing more specific procedural duties. For a persuasive argument in favor of such a standard, see Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through A Reasons Requirement,* 44 U. CHI. L. REV. 60 (1976) [hereinafter cited as Rabin]. It seems likely that this objective would evolve into a requirement of a short statement of reasons. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

[156] *See* cases cited *infra* note 172. *See also* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1080, 1092 (9th Cir. 1978) (Kennedy, J., concurring) ("we should inquire whether the union decisions lacked a rational basis, or whether by perfunctorily processing a grievance so that a reasoned decision was not made, the union foreclosed the grievance").

[157] This approach was suggested in Goldberg v. Kelly, 397 U.S. at 262-77. *See infra* notes 212-27 and accompanying text.

[158] That is, after all, the practical effect of both the *Vaca* approach and the tort-compensation model.

[159] *See* Hoffman v. Lonza, Inc., 658 F.2d 519, 523 (7th Cir. 1981). For a discussion of the extent to which decisions on the merits of individual grievances affect the overall meaning of the collective bargaining agreement, see Cox, *supra* note 4, at 605-16; Feller, *supra* note 3, at 704-45.

[160] Rosen, *supra* note 4, at 424.

argued, the court becomes entangled in questions of contract interpretation with effects well beyond the individual case. Such intrusions are not properly part of the collective bargaining process. Under the due process approach, however, the courts would have no occasion to examine the collective bargaining agreement to determine whether a grievance is meritorious, since all grievances would be accorded certain procedural protections. Admittedly, this approach would result in procedural requirements that are not presently contained in most collective bargaining agreements,[161] but the autonomy of the agreement would still be respected on all substantive issues. There is no danger that a fair representation case would have the effect of reinterpreting the substance of the collective agreement.[162]

Since the due process-regulation model intends to assure that certain procedures are followed in the processing of a grievance, courts would assess damages against the union if the procedures were not followed. Courts would not assess damages as compensation for injuries as defined by the collective bargaining agreement. While they might use a worker's lost wages as a measuring stick for the appropriate amount of damages, they would not be bound, in assessing the amount of damages, to an amount fixed under the collective bargaining agreement.[163] The possibility of punitive damages is definitely consistent with the regulatory goal of this model.[164]

Support for the idea of using due process concepts in deciding fair representation cases is widespread,[165] albeit not widely recognized. The U.S. Supreme Court suggested the idea in *Humphrey v. Moore.*[166] After deciding that the union had taken its position in good faith, the Court went on to consider whether the plaintiff was deprived of a "fair hearing."[167] The Court merely stated that the result of the hearing would not have been different even if the matter had been presented differently.[168] (This statement does not mean that

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[161] Basic procedural requirements of the kind that this model would impose are not likely to be contained in the collective bargaining agreement because they involve the relationship between the employee and the union at the stage of grievance administration before the employer is ever involved. If this model infringes on existing rules, it would be internal union rules that would be affected.

[162] For a discussion of the extent to which decisions on the merits of individual grievances affect the overall meaning of the collective bargaining agreement, see Cox, *supra* note 3, at 605-16; Feller, *supra* note 3, at 740-45.

[163] The appropriate remedy depends in part on whether the employer is also a party to the suit. This area of fair representation law is generally unsettled. It has not been decided, for example, whether employers should be an indispensable party in fair representation suits and if they are, how damages should be apportioned. *See generally* 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. 662 (1979). *See also* Bowen v. U.S. Postal Service discussed at *supra* note 141. Exploring this problem or suggesting the proper measure of damages is beyond the scope of this article.

[164] Justice Blackmun was joined by three other justices in IBEW v. Foust in urging that punitive damages be allowed in duty of fair representation cases in order to "deter egregious union conduct." 442 U.S. 42, 60 (1978) (Blackmun, J., concurring in result).

[165] *See, e.g.*, cases cited *infra* note 172.

[166] 375 U.S. 335 (1963).

[167] *Id.* at 350.

[168] *Id.* at 352.

the hearing was necessarily "fair.") The Court's treatment of this issue confused substance with procedure. Justice Goldberg, however, was not so confused. He saw the possible implications of the "fair hearing" issue, even though the issue was ultimately overlooked by the majority. Goldberg seemed concerned that an inquiry into the fairness of union procedures might lead to trial-like hearing standards which would hinder employer-union relationships.[169]

Vaca, of course, belied these concerns by holding that individual employees have no absolute right to have their grievances arbitrated.[170] The *Vaca* decision, however, should not necessarily be read as a total repudiation of the "fair hearing" idea. On the contrary, the opinion in *Vaca* suggested that some minimal safeguards might be required for every grievant. The reference is somewhat obscure, but nevertheless it was cited by the Supreme Court some years later in *Hines v. Anchor Freight Motors.*[171] Numerous other cases since *Vaca* have also taken this lead and examined the "fairness" of union procedures in analyzing fair representation claims.[172] Many courts and commentators are apparently reluctant to overlook behavior that appears unfair, even if the merits of the underlying grievance are dubious.[173]

Cases that have emphasized the necessity of a "fair hearing," much like those purporting to adopt negligence theory, suffer from serious conceptual problems. None of the cases explicitly adopts a due process approach. Ironically, many of these cases stand under the banner of negligence.

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[169] *Id.* at 359.

[170] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[171] 424 U.S. 554, 569 (1976) (citing *Vaca* for the proposition that "the Union might well have breached its duty had it ignored [the employee's] complaint or had processed the grievance in a perfunctory manner." Vaca v. Sipes, 386 U.S. at 194).

[172] *See, e.g.,* Connally v. Transcon Lines, 583 F.2d 199, 203 (5th Cir. 1978) ("Even if negligent conduct may under some circumstances breach the duty of fair representation, the Union's presentation here was not so poor as to deprive the plaintiffs of a fair hearing"); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1080, 1092 (9th Cir. 1978) (Kennedy, J., concurring) ("We inquire whether the discretion granted has been abused by a failure to make a reasoned decision."); General Truck Drivers Local 315 (Rhodes & Jamieson), 217 N.L.R.B. 616, 619 (1975) ("The violation consists, however, in the lack of fairness in its decisionmaking process"); E.L. Mustee & Sons, Inc., 215 N.L.R.B. 203, 209 (1974) ("The union's subsequent neglect ... deprived Williams of the due process which is included in the concept of fair representation"). *But see* Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (7th Cir. 1981) ("[A]n action based on a duty to fairly represent cannot be based solely on some action or omission by the union that results in an employee not receiving a 'fair' hearing. . .").

[173] This idea has been expressed in many different ways. In some cases, the "requirement" of a meritorious grievance is simply overlooked or ignored. *See supra* note 65. In the context of the existing "arbitrariness" approach it has been suggested that "the union should have to offer stronger reasons when it refuses clearly meritorious claims than when it rejects or abandons claims of a questionable or frivolous nature." Clark, *supra* note 3, at 1166. There is also a popular notion that cases of the most serious consequence (i.e., discharge as opposed to discipline) should be held to this higher standard. *See, e.g.,* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1080, 1092 (9th Cir. 1978) (Kennedy, J., concurring). These sentiments are not, however, consistent with the second prong of *Vaca.* The premise of this article is that these concerns can be addressed in a manner that is sound and consistent, only through a new approach to fair representation.

In *Minnis v. UAW*,[174] for example, the plaintiff was discharged when General Motors determined that he had falsified certain medical forms.[175] The union processed the grievance through the three steps established by the collective bargaining agreement and decided not to take the case to arbitration.[176] The plaintiff charged that the union failed to make even a minimal effort to investigate the claim and process the grievances.[177] One of the union's defenses was that General Motors could, under the terms of the collective bargaining agreement, discharge the plaintiff without any reason because he was a temporary employee.[178] The Eighth Circuit held that "although it may be that in this case the union could have declined to pursue the grievance," nevertheless the union's decision to represent the plaintiff created a duty of uncertain dimensions.[179] The idea that every grievant deserves a minimal level of procedural protection helps explain the outcome of this case. The decision indicates that this minimal level of protection is required only in those cases in which the union comes close to providing protection. Unfortunately, the decision creates a perverse incentive for unions. If a union declines to pursue a grievance, it need not provide any procedural protections. However, if it agrees to represent a grievant, then the union must provide certain procedures. Faced with such a situation, many unions might decline to take grievances that they would otherwise pursue.

The Seventh Circuit followed suit in *Kessner v. NLRB*,[180] reasoning that "it is venerable tort law that purporting to take action where [no duty] exists creates in itself certain duties.[181] This is not only an arguable misstatement of tort law,[182] it is an unfortunate addition to fair representation law. If "venerable tort law" is to govern, then the problem of proximate cause shatters the logic of importing this concept into cases in which there is admittedly no causal relationship between the injury and the challenged action. Because the court's premise is that the union would otherwise have no duty to act in these cases, the conclusion is inescapable that the union cannot be considered a legal cause of the employee's discharge.

The due process-regulation model offers an alternative by allowing courts to focus the inquiry in fair representation cases on the fairness of union procedures. In many fair representation cases, it is apparent that courts are an-

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[174] 531 F.2d 850 (8th Cir. 1975).

[175] *Id.* at 853.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 854.

[179] *Id.*

[180] 532 F.2d 1169 (7th Cir. 1976).

[181] *Id.* at 1175.

[182] The only duty imposed on those taking action where no duty exists is the duty to avoid acts which make the situation worse. *See generally* W. PROSSER, LAW OF TORTS § 56, at 243-44 (4th ed. 1971). ("If there is no duty to come to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make the situation worse."). There are even exceptions to that statement. *Id.* In any case, the analogy to aiding those in peril is clearly inapposite since even the most half-hearted union efforts cannot possibly make the situation worse than it would be if the union decided to take no action.

xious to act when the union does not provide the fundamental elements of fair procedure. Courts are anxious to act even when the so-called second prong of *Vaca,* the requirement that the grievance be meritorious, has not been satisfied. Unfortunately, the duty of fair representation has not offered an obvious avenue for such action. The prevailing nomenclature of fair representation law is simply not adaptable to a due process approach. Thus, the inclination of the courts to assure basic procedural fairness in all cases has been relegated to passages of opinions that have the tone and persuasiveness of mere afterthoughts. The due process model offers courts the opportunity to undertake this inquiry into procedural fairness in a more principled manner.

IV. Reforming the Duty of Fair Representation

While the duty of fair representation has expanded beyond the point where all cases can still rely on the same theoretical model of fair representation advanced in *Vaca,* no obvious conclusions can be drawn about what direction the law should take in the future. Whether either one of the models described in this article is considered a desirable direction for fair representation law can be looked at more than one way. *Stare decisis* could, for example, be considered the guide by determining which model, if either, is closest to *Vaca.* However, the results of such an inquiry would not only be inconclusive,[183] they would beg the question whether it is appropriate to treat the perfunctory processing cases in the manner that most clearly resembles *Vaca.*

A deeper inquiry is necessary to determine the future dimensions of the duty of fair representation. This inquiry must encompass the kind of interest balancing that was present in *Vaca,* and characterizes the most respected commentary in this field.[184] It must also consider at the same time the extent to which a proposed model can yield consistent and predictable results.

A. *Basic Interests*

The duty of fair representation is a complex problem because it affects the interests of three distinct groups: the union, the employer, and the individual.[185] These interests are not only interrelated, but they interact differently depending on the context in which they exist. Unfortunately, lower courts seldom engage in any discussion of these interests or of the significance of the context in which they interact.[186] Such a discussion is necessary,

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[183] *See supra* text accompanying notes 44-65.

[184] Vaca v. Sipes, 386 U.S. 171, 191-93 (1967).

[185] *See generally* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435 (1963).

[186] One flagrant example of this problem is the application of the "wide range of reasonableness" language from Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), to perfunctory processing cases. *Huffman* was a decision pertaining to the negotiation process and it clearly implies a range of discretion that is not intended for grievance administration. *Id.* Nevertheless, this language is cited as authority in cases concerning grievance administration. *See, e.g.,* Printing & Graphic Communications Local 4 (S.F. Newspaper Printing Co.), 104 L.R.R.M. (BNA) 1050, 1052 (1980).

however, if the courts are to apply the various models of fair representation intelligently.

The interests of the union were explicitly discussed in *Vaca.*[187] The most obvious interest of the union is in attaining and promoting the collective strength of the organization. The union's interest in acting as the exclusive bargaining agent of employees in a certain employment context is basically an interest in union control. The ability of the union to achieve its goals in negotiating an agreement will be greatest if the union has complete control over its bargaining strategy. So too, if the union has maximum control over the grievance procedure, it will be in the best position to obtain interpretations of the agreement that are consistent with the original intent of the agreement. Additionally, the union has an economic interest in assuring that the grievance procedure runs efficiently. The union promotes this economic interest by screening out meritless grievances. If the union is able to predict the scope of the duty of fair representation, it also contributes to more efficient operations since the union will be able to rely on its expectations in making decisions. The union's exposure to liability obviously is minimized under such circumstances. Finally, the union is interested in the speedy operation of the grievance procedure. Grievances that drag on can be both an economic and political liability.[188]

Arguably, the employer's interests in the procedural, if not the substantive, elements of the grievance processing system are similar to those of the union. The employer is interested in assuring that the grievance mechanism runs smoothly and produces results that are consistent with the employer's intentions as signatory to the collective bargaining agreement. The employer is also interested, of course, in minimizing its potentional liability to Section 301 suits.

The third class of interests are the interests of the employees. These interests can be expressed in so many different ways that it is most helpful to think of the various subclasses of interests held by each group. Employees as a group have a collective interest in job opportunities.[189] Employees also have an interest in the lawmaking aspects of the grievance procedure. This interest can affect distinct groups of employees in both the present and the future. Some existing employees are directly affected by the outcome of a given grievance, for example, in disputes over seniority and promotions. Employees will also be affected in the future by whatever precedential value is created by a given case.

Finally, the most direct effect of the grievance mechanism is on the individual, or individuals, that are pressing the claim. The interest of such

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[187] Vaca v. Sipes, 386 U.S. 171, 191-99 (1967).

[188] There are other reasons, of course, why a union might want to "screen out" certain grievances. The union may simply disagree with the employee's interpretation of an admittedly open question. This situation is almost impossible to avoid when two groups of employees interpret a seniority provision differently. Or, the union might want to use the grievance procedure to "trade" away an otherwise worthy grievance for concessions in other cases. *See, e.g.*, ILWU Local 13 v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972).

[189] This interest is most prevalent in disputes over work preservation. *See* Cox, *supra* note

employees is in winning their suits. This interest may vary, however, in intensity and, possibly, in important legal rights. Some commentators have suggested that when so-called "critical job interests" are at stake — when a case involves discharge rather than some lesser complaint — the individual should receive greater protection from the duty of fair representation.[190] Such critical interests are always involved in discharge cases, while they may be less compelling in seniority suits. It has also been suggested that certain claims involve "vested rights" that should always be given protection by the court.[191] Finally, the individual also has an interest in knowing that her own grievance will be treated fairly and with dignity.[192] In short, employees have certain expectations about the grievance procedure that reflect both the legitimacy of collective bargaining and their willingness to support that system.

B. *Evaluating the Models of Fair Representation*

1. The Tort-Compensation Model

The success with which either model of fair representation can balance the interests of the union, the employer, and the employee and, at the same time, bring coherence and predictability to the case law depends on the type of perfunctory processing case in which it is applied. The use of the tort-compensation model appears desirable in the most basic type of perfunctory processing case: the failure of the union to file a timely or accurate grievance. Even here, however, the model is not completely successful, and it fares less well in other contexts.[193]

The tort-compensation model is likely to be applied most frequently in those cases in which the union fails to file a grievance in a timely fashion. The failure of the union to discharge such a simple task surely would give rise to a finding of negligence or "unreasonable" behavior under the circumstances. Assuming that the underlying grievance is a meritorious one, the grievant would be entitled to recover. This result is, in my view, substantively desirable. The individual's interest in such cases is particularly strong. First, the consequences of an untimely filing are often severe because the employer usually

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4, at 613-15.

[190] Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy,* 13 RUTGERS L. REV. 631 (1959). *See also* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1092 (9th Cir. 1978) (Kennedy, J., concurring).

[191] *See, e.g.,* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 162 (1968); Blumrosen, *supra* note 190, at 1494. The vested rights cases are not, however, perfunctory processing cases except in the unlikely event that the collective bargaining agreement contains specific procedural rights that are not provided by the union. "Vested rights" cases involve union decisions that allegedly violate clear provisions in the collective agreement. The concept of vested rights does not, in this context, add anything to the scope or meaning of the duty of fair representation. Like cases in the administrative law context decided under an "arbitrariness" standard, union actions that disregard clearly enunciated rules are obviously unjustified acts. *See* Summers, *supra,* note 4, at 267.

[192] *See generally* Tribe, *Structural Due Process,* 10 HARV. C.R.-C.L. L. REV. 269, 303-04 (1975).

[193] *See infra* text accompanying notes 199-205.

has, and will assert, the right to reject untimely grievances.[194] Second, the individual's interest in preventing subtle forms of discrimination and abuse is also compelling. If the union can, without judicial sanction, eliminate troublesome grievances by simply "forgetting" them, then the law will breed forgetfulness.[195] Moreover, the individual left with the burden of proving hidden motives in such cases would be at a serious disadvantage.[196]

The union, in contrast, appears to have a much smaller interest in these cases. Imposing a duty that requires unions to proceed in a timely fashion might raise union expenses. However, the courts could set a clear standard and the level of care and compliance required hardly seems burdensome. Strict compliance with the established deadlines established in the collective bargaining agreement would not require special training or significant resources. Surely unions would be at least marginally less "forgetful" if the courts held unions to these deadlines. Unions would, however, then bear the burden of hearing more grievances. In addition, they might well incur greater liability under this model than they incur under the present case law. Yet, because not all suits could meet this model's requirement of a meritorious grievance, many of the cases in which the union failed to file a grievance in a timely fashion would not reach the stage at which damages would be apportioned between the employer and the union. Moreover, the union's liability would not be very large even in those cases that do end in an award.[197] Finally, of course, the union could avoid such liability simply by filing papers in a timely fashion.

The tort-compensation approach respects union autonomy in one sense — the standard of care that the courts would apply is one that would be established in the first instance by the collective bargaining agreement. If union compliance with existing deadlines really is burdensome, then in all likelihood both the union and the employer would favor a change in the collective bargaining agreement.

The tort-compensation approach is, therefore, likely to yield more consistent and predictable results in these types of perfunctory processing cases. These results would be more predictable than those which follow from existing standards under which courts have not been able to agree whether the failure to file a grievance on time rises to the level of a breach.

The model does not, however, resolve the problem of the somewhat meritorious grievance. Of those grievances that the union filed inaccurately or past the filing deadline, only grievances later deemed meritorious would provide the basis for recovery for breaches of the union's duty of fair representation. More significantly, the courts would determine whether the grievance was

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[194] *See* Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260, 265 (1964).

[195] *See, e.g.*, Hoffman v. Lonza, Inc., 658 F.2d 519, 520 (7th Cir. 1981).

[196] Professor Summers has pointed out that the grievance procedure is "particularly susceptible to abuse" because it singles out workers individually. Summers, *supra* note 4, at 393.

[197] Under the apportionment principle in *Vaca,* damages are apportioned "according to the damage caused by the fault of each." Vaca v. Sipes, 386 U.S. 171, 197 (1967). As the court envisioned such an approach, "all or almost all of [a grievant's] damages [will] be attributable" to the employer that violates the collective bargaining agreement. *Id.* at 198.

meritorious. Thus, this model leaves the substance of the collective bargaining agreement open to interpretation by the courts.[198]

The tort-compensation model appears even less desirable in other kinds of perfunctory processing cases. The duty of fair representation could easily become overly burdensome if this model were applied in cases involving the alleged failure of the union to provide adequate notification to the grievant, to investigate the claim properly, or to argue the case competently before the proper committee. Such claims demand the kind of qualitative assessments that are sure to lead to inconsistent and unpredictable results.[199] Moreover, if expanded to cover such claims, the duty of fair representation could become significantly more burdensome to unions. The prospect of requiring an analogue to the right to counsel — something suggested by claims of inadequate investigation and representation — is staggering given that grievances are presently handled by unpaid, untrained stewards in many unions.[200]

Courts faced with cases challenging the adequacy of notification, investigation, or argument would, under the tort approach, initially have to consider how a reasonable union official would have acted under the circumstances.[201] The existing cases suggest that out of this inquiry would come significant inconsistencies.[202] A "reasonableness" or "negligence" test begins to look no better than the existing "arbitrariness" test. Of course, this kind of uncertainty is inherent in tort law, but its implications are more serious in the context of collective bargaining where the parties' willingness to agree on private grievance mechanisms depends on the extent to which these grievance mechanisms are likely to yield predictable results.[203] Courts, for example, have been unable to agree upon the degree of knowledge about the collective bargaining agreement that a union official must exhibit in processing grievances.[204] Surely they would not be able to agree upon the quality of

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[198] The court in *Vaca* clearly assumed as much. The majority noted that "even if the union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge." *Id.* at 198. One commentator has argued, however, that liability insurance might be beyond the financial means of small unions, possibly leading to their financial collapse. Adomeit, *Hines v. Anchor Motor Freight: Another Step in the Seemingly Inexorable March Toward Converting Federal Judges (and Juries) into Labor Arbitrators of Last Resort,* 9 CONN. L. REV. 627, 634-35 (1977). I can see no justification for this conclusion so long as fault and apportionment principles are applied according to *Vaca.* Bowen v. U.S. Postal Service, *supra* note 141, recently decided by the Supreme Court, adds considerable uncertainty to this issue.

[199] *Compare* Service Employees Local 579 (Convacare of Decatur) 229 N.L.R.B. 692, 695 (1977) (failure to interview grievant constitutes breach) *with* Printing & Graphic Communications Local 4 (S.F. Newspaper Printing Co.) 104 L.R.R.M. (BNA) 1050, 1052 (1980) (failure to interview grievant not a breach).

[200] See *supra* note 83.

[201] *See generally* W. PROSSER, LAW OF TORTS § 32, at 149-66 (4th ed. 1971) (discussion of reasonableness standard).

[202] *See infra* note 204 and accompanying text.

[203] Vaca v. Sipes, 386 U.S. 171, 191-93 (1967).

[204] *Compare* Milstead v. International Bhd. of Teamsters, Local 957, 580 F.2d 232, 236 (6th Cir. 1978) (failure to properly apply seniority provision constitutes breach); *with* Denver Stereotypers and Electrotypers Union, Local 13 v. NLRB, 623 F.2d 134, 137 (10th Cir. 1980) (overruling the Board's determination that the union breached its duty by interpreting the agreement incorrectly).

representation that an official should provide before a grievance committee.[205] Thus, the tort-compensation approach holds the very real danger of perpetuating, if not increasing, uncertainty in the case law. Unions would encounter difficulty in predicting the consequences of their actions. While the consequences of the most obvious types of negligence — forgetting to file papers on time, for example — would be predictable; uncertainty would still loom large in relation to other tasks in grievance administration.

The implications of a tort approach in the perfunctory processing cases depends, of course, on a court's concept of remedies and its application of proximate cause. The tort-compensation model, if applied properly, requires two findings before a "negligent" or "arbitrary" action can result in union liability. First, the court must determine that the underlying grievance is meritorious. The grievants in *Ruzicka* and *Robesky* would lose on these grounds alone[206] because the plaintiffs in both cases failed to establish that the employer had violated the collective bargaining agreement. Second, as in any tort action,[207] the court must find that the union's actions are an actual cause of the individual's injury. Thus, even if the grievance were a meritorious one, the plaintiff must prove that the relationship between the union's actions and the claimed injury was not just a "mere possibility" or based solely on "speculation."[208] The tort approach, therefore, could leave the plaintiff unprotected in many of the perfunctory processing cases. Whether a more thorough investigation on the part of the union would have led to a favorable resolution of the plaintiff's grievance could easily be considered a speculative inquiry. The same reasoning could be applied to most cases of inadequate notice and of poor presentation by the union representative.[209]

In short, reformulating the duty of fair representation with tort concepts holds the promise of greater recovery by employees in some of the cases in which damages would otherwise be available under the collective bargaining agreement. This added protection would be limited, however, to cases involving meritorious claims in which recovery is now prohibited because intervening "negligent" acts of the union are held not to be in violation of the duty of fair

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[205] Despite statements to the contrary, the NLRB came very close to adopting such an approach in Service Employees Int'l Union, Local 579 (Convacare of Decatur), 229 N.L.R.B. 692 (1977). A footnote in the opinion disclaims "any implication that, in the informal, investigative, or bargaining stage of grievance, a collective bargaining representative's duty to an employee it represents is analogous to that owed by an attorney to a client." *Id.* at 692 n.2. Nevertheless, the Board held that the union was in violation for failing to inquire adequately into the validity of the grievance. *Id.* at 693. The Board completely obfuscated the decision by employing practically every nebulous term in the field. In the Board's words: "Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. There comes a point, however, when a union's action or its failure to take action is so unreasonable as to be arbitrary and thus contrary to its fiduciary duty." (citations omitted). *Id.* at 695.

[206] In both cases the plaintiff claimed that the employers' actions were too harsh, but in neither case did the court find a breach of the collective bargaining agreement.

[207] W. PROSSER, LAW OF TORTS § 41, at 145. *Id.* at 241.

[208] *Id.* at 241.

[209] *See supra* note 61.

representation. Employees would not, however, receive any greater protection in cases in which the underlying grievance is not deemed meritorious by the court.

The extent to which union acts that appear "negligent" would be redressed under this model depends on the manner in which the courts ascertain "meritoriousness." A liberal construction, allowing for recovery in borderline cases, would lead to greater protection for individual workers, but also would entail equally significant intrusions on the ability of the union and the employer to structure the terms of the collective agreement.[210] There is, therefore, a difficult trade-off associated with this model: the greater the protection for individuals, the lesser the autonomy of the collective agreement. In addition, uncertainty would arise in most cases regarding the kinds of actions which would constitute a breach on the union's part. The tort-compensation model offers no real assurance to those who worry that the duty of fair representation will become overexpansive.

While courts have scrupulously tried to avoid overreaching applications of *Vaca*,[211] it is clear that there is no principled method for assuring such results. The tort-compensation model is, quite simply, based on a qualitative evaluation process that in many contexts cannot be limited in a principled fashion. In the final analysis, it would add little that cannot be achieved through the existing reasonableness approach. Either approach involves considerable uncertainty and the danger that the courts will unduly intrude on the terms of the collective agreement.

2. The Due Process-Regulation Model

Predicting the effects of a due process model is difficult because the constructs of such a model are subject to more variables than the tort-compensation model. In addition, fewer courts have explicitly explored the possibility of applying due process requirements to the duty of fair representation. Nevertheless, there is a body of case law that is likely to provide some insights into the composition and workings of this model.

Beginning with *Goldberg v. Kelly*,[212] the U.S. Supreme Court decided a line of cases in the administrative law context that address problems that are, in some respects, similar to the problems addressed by the due process model of fair representation.[213] In both the administrative law context and the fair

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[210] *See supra* text accompanying note 198.

[211] The Supreme Court itself interpreted *Vaca* in a narrow fashion in *IBEW v. Foust*, holding that punitive damages are not permissible in fair representation cases. 442 U.S. 42 (1979). The concurring judges criticized the majority for this approach, claiming that the court had "read into *Vaca's* affirmative compensation policy a negative pregnant. . ." *Id.* at 54.

[212] 397 U.S. 254 (1970).

[213] There are, of course, major differences between the procedural due process cases and the possibility of using due process standards in deciding fair representation cases. Most importantly, it is built into the foundations of the duty of fair representation that the individual *has* a judicially recognized interest in the fairness of the union's actions. There is no need to embark on the confusing inquiry as to whether sufficient property or liberty interests exist.

representation context the court's role is to provide protection to an individual who must otherwise rely on an organization that is authorized to act on behalf of a much larger group of people.[214] How to provide the individual with an appropriate degree of protection without unduly infringing upon the larger group interests is the basic question; and in both contexts the court examines the organization's general procedures rather than the merits of individual cases.

The similarity between certain perfunctory processing cases and those in administrative law was evidenced in a recent memo on the duty of fair representation written by NLRB's general counsel. He opined, in words reminiscent of Justice White's statement in *Wolff v. McDonnell,*[215] that "some kind of a hearing" is required before a person can be deprived of a property interest, that no breach should be found in cases in which the union made "some inquiry into the facts."[216] This statement, of course, begs the question that has plagued administrative law since *Goldberg*: What process is due? The balance that would be struck between competing interests in order to answer this question would also determine the desirability of this model.

Deciding "what process is due" has, in the administrative law context, involved an interest balancing approach. In *Matthews v. Eldridge,*[217] for example, Justice Powell suggested that additional procedural safeguards are warranted so long as the increased accuracy obtained by these procedures, taking into account the gravity of the individual's interest, is more than the increased burden on the government.[218] The same calculus might be appropriate in the fair representation context since it involves an approach similar to that taken in *Vaca.*[219]

This approach can be criticized, however, for two reasons that might render it undesirable in fair representation cases. First, the interest balancing approach is so dependent on subjective factors that it might not yield consistent or predictable results. Whether a given procedure would be deemed unduly burdensome to the union or significantly helpful to the individual might be answered differently by different courts.[220] Second, a court applying the

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[214] As Rosen explained:

> In our contemporary mass society there is somewhat more of a tendency to recognize that the power exercised by labor unions and by many other such private associations is very like the political power of the state insofar as the exercise of such associational power greatly affects important interests of the subject individuals.

Rosen, *supra* note 4, at 394.

[215] 418 U.S. 539, 557-58 (1974).

[216] NLRB Memo, *supra* note 6, at 2081.

[217] 424 U.S. 319 (1976).

[218] *Id.* at 334-35, 348-49.

[219] The interests of individual employees were balanced against the interests of the union by the Court in *Vaca,* although not in as explicit a fashion as in the procedural due process cases. *See supra* text accompanying notes 36-44. The burden of requiring unions to take additional cases through the "costly and time consuming . . . grievance procedures" was decisive in the outcome. Vaca v. Sipes, 386 U.S. 171, 191 (1967). The Court did consider, albeit in a summary fashion, whether its formulation posed a "substantial danger to the interests of individual employee(s)." *Id.* at 192.

[220] In Service Employees Local 579 (Convacare of Decatur) 229 N.L.R.B. 692, 695 (1977), for example, the union was held in breach of the duty of fair representation for failing to

Eldridge approach is inclined to require extensive and burdensome procedural protections. In the due process framework, efficiency concerns rarely, if ever, weigh more heavily than equity concerns.[221]

It has been argued that if the courts incorporate due process standards into the duty of fair representation then the result would be overly burdensome procedural protections. Professor Feller, for example, qualified his recommendation that certain terms of the Administrative Procedures Act be applied in fair representation cases,[222] by noting that "the formal requirements of hearing and record" used in administrative law should not be made applicable to unions.[223] The danger that Professor Feller apparently anticipated is that procedural requirements could become so detailed as to defeat one major purpose of the duty of fair representation: to facilitate private grievance settlement through collective bargaining.[224] The procedural due process cases have been criticized precisely for the negative effect that they have had on the creation of alternative, innovative approaches to dispute settlement and decision-making.[225] It would be senseless for the courts to require unions, which already have a mechanism for dispute settlement, to adopt an approach resembling the judicial forum. The union is supposed to be able to avoid the cumbersome requirements of the judicial form by processing grievances fairly.

The legitimacy of the concern that due process standards would discourage private grievance settlement depends, of course, on the specific procedural requirements that would flow from this approach. Minimal procedural protections could, however, address two major concerns expressed in many of the perfunctory processing cases: (1) the failure of the union to provide any hearing for the grievant, and (2) the failure to give adequate notice when a hearing is provided. The procedural due process cases indicate that both the opportunity to be heard and the requirement of adequate notice are likely to be fundamental in any scheme of union due process.[226] Neither of these procedural protections would require significant expenditures by the union, while

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seek out the grievant's version of the facts at issue. However, in Printing & Graphic Communications Local 4 (S.F. Newspaper Printing Co.), 104 L.R.R.M. (BNA) 1050, 1052 (1980), the union was not held in breach for failing to obtain the discharged employee's version of the incident.

[221] Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

[222] Feller, *supra* note 3, at 811.

[223] It should be noted, however, that Professor Feller's recommendations concerning the requirements of the duty of fair representation are conditioned on the premise that breaches of the duty be remediable only in a suit to compel the union to proceed. *Id.* at 813-17.

[224] Vaca v. Sipes, 386 U.S. 171, 191-93 (1967).

[225] *See, e.g.*, Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1301-04 (1975).

[226] These two possible requirements have received the most attention by courts examining the fairness of union procedures. *See, e.g.*, Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978) (notice); General Truck Drivers, Local 315, 217 N.L.R.B. 616, 619 (1975) (opportunity to be heard). This is not the only way to envision basic procedural rights, however. Professor Rabin has argued that the "right to receive a meaningful explanation" is the core safeguard against arbitrary actions. Rabin, *supra* note 155, at 77-80. This requirement, proposed in the context of government employee dismissal cases might be useful in the context of the duty of fair representation. *See id.* at 74-87.

both have the potential for increasing the likelihood that the individual's version of the grievance would be heard. The opportunity to be heard requirement would redress most claims of perfunctory processing. Obviously, if the union failed to file a grievance on time, the employee was denied an opportunity to be heard. Moreover, some of the claims alleging inadequate investigation by the union — cases in which extending the duty of fair representation might appear to imply significant increases in union expenditures — involve nothing more than a claim that the union did not hear the grievant's side of the story.[227] A requirement involving only this much investigation would be much less burdensome than one requiring a hearing in which all possibly relevant witnesses are called.

A requirement that the union provide minimal procedural safeguards appears to have some distinct advantages over the tort approach for implementing the perfunctory processing language in *Vaca*. It could create clearer requirements for the union, while turning the judicial inquiry in these cases away from negligence and arbitrariness — concepts with limited relevance to the issues involved in assessing union procedures. Since the due process approach is tied to union procedures, not to the facts of the underlying grievance, outcomes in individual cases would have much stronger precedential effect. The decision, for example, that all grievants must have a hearing could not be distinguished away in future cases in which the union claimed that the underlying facts were different. The tort-compensation approach is inherently more susceptible to such claims and thus to more inconsistent results. Different jurisdictions might still come to different conclusions under the due process approach, but within any jurisdiction it would be easier to predict the outcome of future cases based on cases already decided. In addition, a process-oriented approach would be more consistent and predictable than one based on tort concepts since the union would know what is expected of it and could plan accordingly. Thus, in a seniority dispute, for example, the union would know that it must hear the claims of all those involved. The kind of confusion left in the wake of *Smith v. Hussman Refrigerator Co.*, as to what else the union could possibly do to insure fair procedures would be eliminated.[228] Finally, this approach offers a solution to the difficult problem of the partially meritorious grievance. No longer would courts have to stretch their interpretation of the word meritorious and, in the process, intrude on the substantive interpretation of the collective bargaining agreement. Assurance of minimal protections would provide the increased measure of fairness and legitimacy that individual workers have expected all along.

The right to certain investigatory procedures or to some specified level of representation skills is, however, quite different. Such procedures could in-

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[227] *See, e.g.*, Web Pressmen and Platemakers Local 4 (S.F. Newspaper Printing Co.), 249 N.L.R.B. No. 23; Service Employees Local 579 (Convacare of Decatur), 229 N.L.R.B. 692 (1977); Minnis v. UAW, 531 F.2d 850 (8th Cir. 1975).

[228] *See infra* text accompanying notes 94-103. The union in Smith v. Hussman Refrigerator Co., 619 F.2d 1229, *cert. denied,* 449 U.S. 839 (1980), of course, would not have been held in breach of the duty under this model.

volve much greater expense to the union than a notice and hearing requirement. Requiring union officials to interview potential witnesses to some incident, particularly if the case involves a dispute with a long history, could consume considerably more time than it would take to hear the grievant's version. Arguably, however, a court would conclude under the *Eldridge* approach that the increased burden of such procedures on the union exceeds the expected increase in accuracy. But that is part of the problem: there would be uncertainty and inconsistency in the requirements. The uncertainty involved in making such determinations and the disadvantages for the collective bargaining process could be avoided by a judicial determination that the same minimal protections are to be required in all cases.

In short, the due process model offers a desirable solution to two problems underlying the perfunctory processing cases. First, the model effectively addresses the inconsistencies of the case law and the uncertain expectations of those involved in grievance administration by establishing clear requirements for grievance processing. Second, the model provides protection for the grievant, assuring basic procedural protections for all while honoring overall integrity of the grievance administration system. The due process-regulation model would assure all grievants some minimal amount of fairness without intruding on the resolution of individual disputes under the collective agreement.

Conclusion

The duty of fair representation has expanded tremendously since its creation in 1944. It is now applied to such varying activities as negotiating a collective agreement, administering the grievance mechanism, overseeing pension fund management and taking grievances to arbitration. Since *Vaca* the duty to avoid the "perfunctory processing" of grievances has also been added. The relationship among employees, employers and unions varies greatly in these contexts. The theoretical framework of the duty of fair representation, however, has not adapted well to these differences. Although cases involving perfunctory processing should be treated differently from those in other contexts, often they are not. *Vaca* still is treated as the kind of "guidebook" to fair representation law that Justice Fortas feared it would be. Unfortunately, *Vaca* does not provide clear or consistent guidance for the perfunctory processing cases since these cases, unlike *Vaca,* challenge union procedures, not union reasoning.

It is time to recognize that the current theories of fair representation do not deal adequately with these cases. The two models of fair representation posed in this article, both stemming from concerns expressed in *Vaca,* can help explain these cases. The tort-compensation model is applied in those cases in which the union's negligent actions prevent a grievant from recovering damages under the collective bargaining agreement. The due process-regulation model is applied in those cases in which the procedural integrity of union processing is at issue. Both of these models offer a clearer view of the perfunctory processing cases than exists in the current cases.

Selecting the most appropriate path depends on how one completes the

calculus outlined in the last part of this article. It also depends, to a large extent, on how one views the philosophic question whether the union control theory or the individual rights theory is more desirable. The tort-compensation model is most consistent with the union control theory because, although it may expand the scope of the duty, it leaves to the union the task of deciding both in the collective bargaining agreement and as a matter of prevailing practice, what process is appropriate. The individual rights theory is more consistent with the due process-regulation model because it is based on the premise that all grievants have the right to certain procedures.

It has been said that the grievance process provides union members with "the opportunity for a meaningful democracy within the plant and local union."[229] The due process-regulation approach is the preferable approach because only it offers the assurance that this process will always carry with it the elements necessary to make that opportunity a meaningful one. The duty is, after all, one of "fair," not just reasonable or non-arbitrary, representation.

[229] KUHN, BARGAINING IN GRIEVANCE SETTLEMENT: THE POWER OF INDUSTRIAL GROUPS 184 (1961).

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