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Cynthia Grant Bowman
Cornell Law School, cgb28@cornell.edu

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Recommended Citation

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Northwestern University Law Review

Printed in U.S.A.
Vol. 76, No. 3

Smith v. Hussmann Refrigerator Company: Fair Representation and the Erosion of Collective Values

A multitude of men are made one *person when they are by one man or one person represented, so that it be done with the consent of every one of that multitude in particular. . . . And it is the representer that bears the person, and but one person; and* unity *cannot otherwise be understood in multitude.*[1]

The problem of reconciling the individual and the group, of combining personal rights with the power which comes from collective action, is one which has plagued modern political philosophy.[2] It is a problem with no ultimate conceptual solution, except to recognize the antinomies involved and to strike a balance appropriate to the immediate circumstances and to the values at stake. A similar theoretical and practical dilemma arises in the arena of contemporary labor relations. Central to the American scheme of collective bargaining is the notion that the individual employee is exclusively represented by the bargaining agent elected by the majority of employees in the bargaining unit.[3] Hence a union potentially exercises vast power over its members. Although this power is subject to abuse, its exercise has been deemed necessary for the union to present a united front to its powerful adversary.[4]

In recognition of the quasi-governmental power unions exercise and the vital nature of the individual interests affected, courts have been attempting since 1944 to reconcile the two by means of the doctrine of fair representation.[5] Under this doctrine, the rights of the individual employee are protected by the imposition of an obligation that the union represent all members of the bargaining unit without discrimination, in good faith, and in a nonarbitrary fashion.[6] The application and expansion of this doctrine has resulted in the development of a standard which is no more adequate for the reconciliation of indi-

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[1] T. HOBBES, LEVIATHAN, pt. I, ch. 16 (M. Oakeshott ed. 1962) (emphasis in original).

[2] *See, e.g.*, G. SABINE, A HISTORY OF POLITICAL THEORY 483 (4th ed. 1973).

[3] J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). In *Case*, the Court held that once a union had become the representative of the employees in a bargaining unit, the employer is no longer free to sign private contracts with the employees.

[4] *See* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62-63 (1975). *Emporium Capwell* involved a situation where minority group employees attempted to bypass their union and bargain directly with the employer. In holding that the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979), did not protect concerted activity by a group of employees in circumvention of their elected representative, the Court emphasized Congress' intent to secure to all members of the unit the benefits of their collective strength and bargaining power. *Id.* at 63-64, 70.

[5] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); *see* text accompanying notes 39-40 *infra*.

[6] Vaca v. Sipes, 386 U.S. 171 (1967). *See* text accompanying notes 45-49 *infra*.

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vidual and collective interests than that enunciated by Hobbes in 1651.[7]

Smith v. Hussmann Refrigerator Co.[8] is a case which demonstrates the continuing difficulty the judiciary has when addressing this problem. The *Hussmann* case displays not only the general confusion over the standard by which a union's representation is to be judged, but also the undesirability and impractibility of following the arbitrariness standard established in *Vaca v. Sipes*[9] to its logical extreme.[10] This Note will employ a critique of the *Hussmann* decision in order to suggest a more satisfactory fair representation standard.

To do so, the history and reasoning of the *Hussmann* case will first be described.[11] In order to show how *Hussmann* relates to the evolving fair representation standard, the Note will briefly trace the development of that doctrine[12] and then examine *Hussmann*'s potential impact upon the developing law. It will describe the new procedural requirements which *Hussmann* would impose on unions,[13] and will discuss the judicial interference with internal union affairs which would follow from *Hussmann*'s expansion of the substantive standard by which a union's conduct is measured.[14] This Note will argue that, to accommodate the interests of both the individual and the group in the grievance process, the arbitrariness standard should be limited to cases involving severance from the bargaining unit and the consequent inability of the employee to pursue intra-union political remedies.[15]

THE *HUSSMANN* DECISION

The Facts

The dispute which led to the case under consideration arose in a plant manufacturing refrigeration equipment near St. Louis, Missouri. In the spring of 1975, the Hussmann Refrigerator Company posted an-

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[7] *See* text accompanying note 1 *supra*.

[8] 619 F.2d 1229 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980).

[9] 386 U.S. 171 (1967). *See* text accompanying notes 46-49 *infra*.

[10] *Hussmann* has given rise to a good deal of discussion, controversy, and criticism. *See* Bernstein, *Breach of the Duty of Fair Representation: The Appropriate Remedy*, in NATIONAL ACADEMY OF ARBITRATORS, [1980] PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING (BNA) 88; Friedman, *Breach of the Duty of Fair Representation—One Union Attorney's View*, in NATIONAL ACADEMY OF ARBITRATORS, [1980] PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING (BNA) 95; *On trial: A union's fairness*, BUS. WEEK, Aug. 13, 1979, at 76; Address by B. Aaron, *Seniority Grievances and the Union's Duty of Fair Representation*, S. Cal. Law Symposium (Apr. 25, 1980) (published by Labor Law Section, Los Angeles County Bar Ass'n); Address by R. Coulson, President, Am. Arbitration Ass'n (Apr. 23, 1979), *reprinted in* [1979] 85 DAILY LAB. REP. (BNA) D-4 (May 1, 1979); Address by J. Webster, *Fair Representation in the Arbitration Hearing*, Attorneys Conference, United Food & Commercial Workers Int'l Union (1980).

[11] *See* text accompanying notes 16-38 *infra*.

[12] *See* text accompanying notes 39-68 *infra*.

[13] *See* text accompanying notes 69-91 *infra*.

[14] *See* text accompanying notes 92-110 *infra*.

[15] *See* text accompanying notes 111-14 *infra*.

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nouncements of four openings for positions as maintenance pipefitters, a coveted classification in which there had been no vacancy for thirteen years.[16] The collective bargaining agreement governing promotions at the plant contained a modified seniority clause which provided that both seniority and skill would be considered in promotions and that, where skill and ability were substantially equal, seniority would govern.[17] Smith and two other junior employees, Pasley and Serini, bid for the new job classification. The company's maintenance foreman divided all applicants into groups based on seniority and determined that Smith, Pasley, and Serini were the most skilled in the first group.[18] When the positions were awarded to Smith, Pasley, and Serini, employees senior to them filed a grievance with Local 13889 of the United Steelworkers of America, the bargaining agent at the plant.[19] The union pursued the senior employees' grievance through a four-step grievance procedure and subsequently to arbitration, arguing that the senior employees' skill and ability were substantially equal to that of the junior employees awarded the position.[20] The junior employees were not invited to attend any of the hearings; their position was put forward by the company rather than the union.[21]

The Arbitrator's award named six employees to the new job classification, the junior employees among them.[22] Since there were only four positions available, however, the award was not entirely responsive to the senior employees' grievance. The union thus objected to it, and the grievance was resubmitted to arbitration. A supplemental decision awarded the classification to the four senior employees within the group of six.[23] Smith, Pasley, and Serini asked the local to challenge the award, but the union refused to process their grievance on the grounds that the arbitration was final.[24] The junior employees then charged the union with failing to represent their interests in the arbitration process, and sued the local for breach of the duty of fair representation and the company for breach of the contract's modified seniority

[16] Brief for Appellee & Cross-Appellant Hussmann Refrigerator Co. at 12, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980) [hereinafter cited as Company Brief].

[17] "Seniority, skill and ability to perform the work required shall be considered by the Company in making promotions, transfers, layoffs and callbacks. Where skill and ability to perform are substantially equal, seniority shall govern." Smith v. Hussmann Refrigerator Co., 619 F.2d at 1233 n.4.

[18] Company Brief, *supra* note 16, at 13.

[19] Smith v. Hussmann Refrigerator Co., 619 F.2d at 1233.

[20] Brief for Appellants & Cross-Appellees Smith, Pasley, and Serini at 11, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980) [hereinafter cited as Smith Brief].

[21] Smith v. Hussmann Refrigerator Co., 619 F.2d at 1233.

[22] *Id.* at 1234.

[23] *Id.*

[24] *Id.*

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clause.[25]

At the trial before the United States District Court for the Eastern District of Missouri, a jury awarded substantial damages to the plaintiffs. The judge, however, issued a judgment notwithstanding the verdict, holding that the plaintiffs had failed to demonstrate that the union had acted arbitrarily, discriminatorily, or in bad faith.[26] The United States Court of Appeals for the Eighth Circuit reversed and reinstated the jury award, initially in a panel opinion issued in January of 1979 and subsequently in a rehearing en banc in January of 1980.[27]

The Holding

This Note will concentrate upon those portions of the *Hussmann* decision relating to the union's breach of its duty of fair representation.[28] The court of appeals supported its decision on three grounds. First, it held that the jury could have found that the union breached its duty when it abandoned representation of the junior employees to the company and took an adversary position to them, based on "blind adherence" to seniority.[29] The court found that a union, instead, must be able to show that it consciously assessed the competing interests and evaluated the plaintiffs' claim of superior skill in assessing the merit of the senior employees' grievance.[30] Second, the court held that the jury could have found a breach of the duty of fair representation in the union's failure to notify the plaintiffs about the hearings and to invite them to attend, provided that there was evidence that their absence prejudiced their position.[31] Finally, the court found a possible breach

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[25] *Id.* at 1232.

[26] Smith v. Hussmann Refrigerator Co., 442 F. Supp. 1144, 1147 (E.D. Mo. 1977), *rev'd*, 619 F.2d 1229 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980). In a previous trial, the district court ruled that the evidence did not show that the conduct of either the union or the employer was motivated by racial discrimination; Pasley was black. Smith v. Hussmann Refrigerator Co., 433 F. Supp. 690, 692 (E.D. Mo. 1977).

[27] Smith v. Hussmann Refrigerator Co., 100 L.R.R.M. 2238 (1979), *aff'd on rehearing en banc*, 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980).

[28] The case also dealt with the company's breach of the collective bargaining contract. The court described the modified seniority clause as creating vested rights in the junior employees, for which the union was then the fiduciary. *See* Smith v. Hussmann Refrigerator Co., 619 F.2d at 1238. Another question for decision was whether and under what circumstances it is appropriate to reopen an arbitration award. The court found that resubmission was appropriate when it involved merely a clarification of the previous decision, rather than a substantial change. *See id.* at 1242.

[29] *Id.* at 1239-40.

[30] *Id.* at 1240.

[31] *Id.* at 1241-42. It is a matter of some dispute in the briefs and between the majority and minority as to whether the plaintiffs' absence prejudiced their case. Indeed, one plaintiff testified that there were no facts which the foreman did not reveal. Brief for Appellees & Cross-Appellants United Steelworkers of America at 31, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980) [hereinafter cited as Steelworkers Brief]. If such is the case, the dispute is reduced to the question of whether their personal presentation would

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of the union's duty in its failure to accept and process the plaintiffs' grievance after the second arbitration award, and questioned the union's good faith in offering the finality of arbitration as the reason for its refusal.[32] Since the jury could have found a breach on any of these grounds, the majority of the court reinstated the jury's award of damages to the plaintiffs.[33]

This conclusion is considerably qualified, however, by the fact that it was rendered by only a three-judge plurality. Three concurring judges denied that any breach had occurred in connection with the first arbitration, and agreed with the result reached by the majority only on the grounds that the resubmission to arbitration without notice to the plaintiffs reflected bad faith on the part of the union.[34] The two dissenting judges emphasized their belief that, in the Eighth Circuit, proof of bad faith was required in order to establish a violation of the duty of fair representation.[35] The dissenting judges also concluded that the plaintiffs' position had been adequately presented—by the company, not the union—and that the union had acted reasonably in choosing the course it did.[36]

Five of the eight judges—two dissenting and three concurring—therefore did not find any breach of the duty of fair representation in the union's behavior during the initial stages of the grievance procedure. The same five judges concluded that it was necessary to prove bad faith as well as arbitrary conduct in order to find a breach of the duty of fair representation.

The confusion resulting from this divided opinion led the court to issue a brief clarification in connection with its denial of a petition for rehearing on March 26, 1980. In this clarifying opinion, the court specified that no breach of the duty of fair representation had been found in connection with the union's advocating promotion of the senior employees at the first arbitration. The court held, however, that the union's subsequent collaboration with the employer to obtain a modification of the award without notice to the plaintiffs constituted sufficient evidence of such a breach.[37]

The "clarification," however, increased rather than reduced the confusion caused by the initial opinion. The court's subsequent statement may have reflected concern either at the controversy which their

have been more efficacious than that of the foreman. The company did have a substantial incentive to present the plaintiffs' position forcefully, though, since the company would face substantial back-pay awards if the plaintiffs did not prevail. *See* text accompanying notes 87-91 *infra*.

[32] Smith v. Hussmann Refrigerator Co., 619 F.2d at 1243.

[33] *Id.* at 1246.

[34] *Id.*

[35] "[I]mproper motivation is . . . an essential element in fair representation actions." *Id.* at 1247 n.1.

[36] *Id.* at 1248, 1251.

[37] *Id.* at 1253.

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opinion had evoked or at the amount of dissension among the members of the court; but it bore little relationship to the substance of the opinion handed down in January. Moreover, to the extent that it represented a narrowing of the previous holding, it then became impossible to identify the theory on which the jury had based its general verdict. The union filed a petition for certiorari on the ground that a new trial should have been ordered to determine the exact grounds on which it had incurred liability. The Supreme Court denied certiorari.[38]

The disposition of the *Hussmann* case has left many questions unanswered, thus adding to the general uncertainty about the extent of the duty of fair representation. It is unclear whether another court would find that the failure to represent junior employees can itself constitute a breach of the union's duty. The *Hussmann* case does illustrate the general trend toward judicial expansion of the duty of fair representation. Yet the case fails to explicate precisely what a union must do in order to show that it has adequately weighed the claims of junior and senior employees.

EVOLUTION OF THE FAIR REPRESENTATION STANDARD

Before Vaca v. Sipes

The disagreement among the judges on the United States Court of Appeals for the Eighth Circuit reflects the general controversy concerning the standard by which a union's conduct is to be measured in the fair representation context. To comprehend the uncertain status of that doctrine today, it is necessary briefly to survey its evolution.

The doctrine of fair representation originated in *Steele v. Louisville & Nashville Railroad*.[39] In *Steele*, the Supreme Court concluded that it was unlawful for a union to negotiate a contract which in effect abolished the jobs held by black employees within the bargaining unit. The Court inferred that, in granting the union exclusive representation under the Railway Labor Act, Congress had thereby also imposed a correlative duty to exercise that power fairly and without hostile discrimination.[40]

The early cases thus forbade union conduct based on invidious distinctions. Nevertheless, these cases emphasized the necessity for ensuring broad discretion to unions bargaining on behalf of their members. For example, in *Ford Motor Co. v. Huffmann*,[41] a leading case involving a collective bargaining contract giving seniority credit to returning veterans for pre-employment military service, the Court emphasized that a union's authority in negotiation depended upon its

[38] Steelworkers Local 13889 v. Smith, 449 U.S. 839 (1980).
[39] 323 U.S. 192 (1944).
[40] *Id.* at 204.
[41] 345 U.S. 330 (1953).

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representatives being free to weigh proposals and to make concessions when necessary, even where their decisions would benefit some members and hurt others.[42] The Court thus spoke of allowing the union, within its duty of fair representation, a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose."[43]

The original focus of the fair representation standard thus was on discriminatory or bad faith motivation, and the doctrine was applied primarily in the context of contract negotiation. In 1957, the Supreme Court explicitly extended the doctrine to administration of the contract as well.[44] In the grievance process, for example, a union may take a position contrary to the interests of some of the individuals or groups within it, so long as it does not act from hostile, discriminatory, or bad faith motives.[45]

In the 1967 decision of *Vaca v. Sipes*,[46] the Court articulated an expanded definition of fair representation. In that case an employee discharged for poor health claimed that the union had violated a duty owed to him by not pressing his grievance all the way to arbitration.[47] The Court held that "[a] breach of the statutory duty of fair representa-

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42 *Id.* at 338.

43 *Id.* It has been pointed out that *Huffmann*'s "wide range of reasonableness" also implied a narrow range of unreasonableness, a move in the direction of the arbitrariness standard. Jones, *The Origins of the Concept of the Duty of Fair Representation*, in NATIONAL CONFERENCE ON THE DUTY OF FAIR REPRESENTATION 25, 34 (J. McKelvey ed. 1977). Jones sees *Huffmann* as the first case in the trend away from invidious distinctions as the focus of inquiry and toward evaluation by the judiciary of the reasonableness of union decisions. *Id.*

44 Conley v. Gibson, 355 U.S. 41 (1957). In *Conley*, black railroad employees had been discharged and their jobs filled by whites. The Court held that, if the employees' allegations could be proven, then the union's failure to protect them against discriminatory discharge would constitute a violation of their right to fair representation, emphasizing that a contract impartial on its face might be unfairly administered. *Id.* at 46. It is generally felt that less discretion should be allowed in the administration than in the negotiation of the contract, both because there is less need for flexibility and because the situation involves an identified individual, the protection of whose interest is now wholly under union control. *See* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1155 (1973); Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?* 126 U. PA. L. REV. 251, 257 (1977).

45 Humphrey v. Moore, 375 U.S. 335 (1964). *Humphrey* involved the merger of two trucking companies whose employees were represented by the same union. The union supported "dovetailing"—integrating—the seniority lists of the two carriers, and an employee of the company with less seniority sought to enjoin the union and the employer from carrying out the agreement. In holding that the union had not breached its duty of fair representation by signing the agreement, the Court cited its previous decision in Ford Motor Co. v. Huffmann, 345 U.S. 330 (1953), in support of the union's broad discretion in bargaining. The Court also stressed that the union had made the choice to dovetail the merged companies' seniority lists on the basis of relevant considerations rather than arbitrary or capricious factors. Humphrey v. Moore, 375 U.S. 335, 350 (1964). This emphasis can be seen as another step toward the arbitrariness standard ultimately pronounced in Vaca v. Sipes, 386 U.S. 171 (1967).

46 386 U.S. 171 (1967).

47 *Id.* at 173. The union did investigate the employee's claim extensively, and pressed it for a long time. The Court found that the union had not breached its duty. *Id.* at 193.

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tion occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[48] The *Vaca* test thus added to the former bad faith standard the requirement that the union not handle a grievance in an arbitrary or perfunctory fashion.[49]

The Duty after Vaca: *Controversy and Confusion*

The addition of the word "arbitrary" to the former bad faith standard raised more questions than it resolved. In the years since *Vaca*, courts have remained uncertain about the precise requirements of the new test. Some courts found that arbitrary action alone could constitute a breach of the duty of fair representation;[50] other courts, including the United States Court of Appeals for the Eighth Circuit, continued to require proof of a discriminatory or bad faith motive.[51] In 1971, the Supreme Court itself seemed to draw back from the new *Vaca* standard to one based on malicious discrimination.[52]

In 1976, however, the Supreme Court reaffirmed its adoption of

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[48] *Id.* at 190.

[49] *Id.* at 191.

[50] *See, e.g.*, Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972) (union filed grievance with the very individual with whom plaintiff was involved in the fight which led to his discharge); De Arroyo v. Sindicato de Trabajadores Packing House, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) (failure to investigate grievance of discharged employee).

[51] This fact explains some of the disagreement among the judges in the *Hussmann* case, who seemed unclear about what the standard was in their own circuit. Seemingly, it had been usual to require a showing of bad faith, and several Eighth Circuit cases had explicitly stated that proof of improper motivation was required to establish a breach of the duty of fair representation. *See, e.g.*, Florey v. Air Line Pilots Ass'n Int'l, 575 F.2d 673 (8th Cir. 1978) (refusal of Air Line Pilots Association to certify sobriety of pilot on mandatory leave for alcohol rehabilitation did not constitute bad faith motivation necessary to breach of duty of fair representation); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) (wrongful refusal to process a grievance based on sex discrimination where steward himself opposed the assignment of women to formerly male jobs). Many of their other cases involved elements of bad faith and personal antagonism. *See, e.g.*, Richardson v. Communications Workers, 443 F.2d 974 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973) (failure to process grievance of discharged employee who had withdrawn from union out of concern for union misuse of funds).

A few, however, do not seem to fit the bad faith mold. *See, e.g.*, Minnis v. UAW, 531 F.2d 850 (8th Cir. 1975) (union violated duty of fair representation by total failure to investigate grievance based on discharge for falsification of medical excuse); Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5 (8th Cir. 1975) (union pursued grievance of similarly situated plaintiff as test case rather than pursue grievance on behalf of plaintiff).

At any rate, in 1979, between the panel and en banc hearings of the *Hussmann* case, the Eighth Circuit seems explicitly to have embraced the broader standard, holding that in an appropriate case, improper motivation was not required for a breach of the duty of fair representation. Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979) (union lost grievance due to failure to file within the required time).

[52] In Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), which involved discharge for late payment of dues where there was a union security agreement, the Court said "there must be substantial evidence of fraud, deceitful action or dishonest conduct." *Id.* at 299 (citing Humphrey v. Moore, 375 U.S. 335, 348 (1964)).

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the arbitrariness standard in *Hines v. Anchor Motor Freight, Inc.*[53] In that case, the union had failed to investigate the charges which led to a discharge. The Court held the union liable for contributing to the erroneous outcome of an arbitration hearing.[54] Thus, a union's duty of fair representation definitively extends beyond good faith or nondiscriminatory efforts on behalf of its members.

Sinces *Hines* arbitrariness has been firmly established as a distinct and independent element of the doctrine of unfair representation; yet many questions remain as to what constitutes arbitrary conduct by a union.[55] A primary question is whether arbitrariness is a procedural or a substantive concept—that is, whether the court will inquire solely into the adequacy of the union's procedures in handling the grievance or whether the court will evaluate the union's substantive reasons for its decision as well.

The procedural model is manifested in a profusion of cases which emphasize the necessity for a union to prove that it has considered adequately the merits of a grievance.[56] Yet this model presents immediate

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[53] 424 U.S. 554 (1976). For commentary on *Hines*, see Jacobs, *Fair Representation and Binding Arbitration*, 28 LAB. L.J. 369, 373-79 (1977); Comment, *The Union's Duty of Fair Representation: Group Membership Interests v. Individual Interests*, 16 DUQ. L. REV. 779, 784-95 (1978). The concept of adequate representation has even been extended to include effective presentation by the union attorney. Holodnak v. Avco-Lycoming Div., 381 F. Supp. 191, 199 (D. Conn. 1974), *aff'd in part*, *rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). In *Holodnak*, the employee was discharged for publishing an article critical of the company and union in the union newspaper. The union attorney representing the employee in the arbitration proceeding failed to raise a first amendment defense. For a summary of other cases on inadequate representation, see R. GORMAN, A BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 717 (1976).

[54] The employees in *Hines* were discharged for seeking reimbursement for motel expenses in excess of the actual charges. The motel receipts entered into evidence against them were false, and the union had failed to look for evidence to controvert the receipts' validity. Hines v. Anchor Motor Freight, Inc., 424 U.S. at 557.

[55] Courts are divided over whether arbitrariness includes negligence. In Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975), the court held the union representative had violated the duty of fair representation when he failed to file within the required time period a statement protesting the harsh penalty—discharge—imposed on the plaintiff. The court found no evidence that the inaction was wilful or motivated by hostility. *But see* Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335 (6th Cir. 1975), *cert. denied*, 425 U.S. 981 (1976), where the same court held that the union was free to refuse to arbitrate a discharge because it had a good faith belief that the grievance was without merit, and emphasized that negligence or poor judgment alone would not support a breach of the duty of fair representation; Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970), where the court held that the union had the discretion to decide not to press a discharge grievance it had previously accepted, even though the union might have acted negligently in doing so.

[56] In *Hines* the union made no effort to ascertain the validity of the charges of dishonesty which led to the plaintiff's discharge. Hines v. Anchor Motor Freight, Inc., 424 U.S. at 557. In *De Arroyo*, the union appeared to be so involved in an NLRB proceeding seeking to prevent the company from contracting out work that the union failed to investigate the plaintiffs' seniority claims at all. De Arroyo v. Sindicato de Trabajadores Packing House, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). In *Ruzicka*, the union failed to file a required statement during

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problems. For one thing, the only due process presently required in the private sector is that provided in the contract.[57] Moreover, Congress in 1947, rather than intrude upon unions' internal processes, specifically rejected an amendment to the National Labor Relations Act which would have imposed internal procedural requirements on unions.[58]

Another suggestion is that a union may within its discretion refuse to process a grievance or choose to handle it in a particular manner, but that it may not do so without a reason.[59] Such a position illustrates the problems inherent in this supposedly procedural approach. First, it is not at all clear what is required in order to demonstrate that the union's conduct is not arbitrary. No set of procedures has been delineated as necessary for a union to pass "due process" muster. Conceivably, the mere fact that a union official could articulate some reason for his choice might fulfill the requirement.[60] On the other hand, the door is opened for a court to evaluate those reasons and to find certain reasons acceptable and others not. This would be tantamount to substantive judicial review of the union decision.

It is this approach which the court in *Hussmann* used in its scrutiny of the union local's conduct.[61] Professor Julia Clark calls this the "rational decision-making" model and recommends it as providing for judicial review of a union's decisionmaking process without substantive review of a union's choice.[62] The court's inquiry would focus on whether the union had given a grievance fair consideration—assessed it on its merits and investigated factual claims—and whether the union

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the time allowed for grieving a discharge. Ruzicka v. General Motors Corp., 523 F.2d 306, 308 (6th Cir. 1975).

57 Scoble v. Detroit Coil Co., 96 L.R.R.M. 2733, 2735 (E.D. Mich. 1977). The plaintiff in *Scoble* was discharged without notice and mounted a constitutional defense based on the due process clause, asserting that she had a property interest in her job and must therefore be given an opportunity to be heard before she was deprived of it. The court rejected this argument. Employment in the public sector, on the other hand, may include formal due process protection, such as the requirement of notice and a hearing. *See* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 239-45 (1980).

58 The House version of the Labor Management Relations Act of 1947 included a declaration that it was a basic employee right to have union affairs conducted in conformity with the will of the majority of its members. The minority House report rejected this suggestion as inviting control of internal union affairs by the federal government. The Senate did not adopt a similar provision, and it was deleted in conference. Finkin, *supra* note 57, at 202-03.

59 Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972). The plaintiff in *Griffin* was discharged after a physical fight with a manager. The union representative filed a grievance with that same manager, who recommended to the union that the grievance be withdrawn. The court held that filing the grievance with a hostile person was the equivalent of arbitrary treatment. *Id.* at 184. In the court's opinion, even had the union acted in good faith, its action was unreasonable. *Id.*

60 Clark, *supra* note 44, at 1166, suggests that this would be an appropriate demonstration that the decision had been made on rational grounds.

61 Smith v. Hussmann Refrigerator Co., 619 F.2d at 1239.

62 Clark, *supra* note 44, at 1132.

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based its decision on rational factors.[63] Although this model has been described as falling into the procedural approach,[64] it does invite the court to evaluate the factors on which the union based its decision, weighing and judging the union's reasons for its actions.[65]

Most courts reviewing claims of unfair representation do, in fact, evaluate the union's judgment about the matter under consideration. For example, in *Deboles v. Trans World Airlines, Inc.*,[66] the United States Court of Appeals for the Third Circuit held that the union representing TWA employees at the Kennedy Space Center did not breach its duty to the employees by negotiating a contract which did not contain system-wide seniority, since the different treatment of the two groups of employees was based on what the court styled a "relevant difference." The court adjudged the employer's desire for a stable work force to be a sufficient reason to treat the Space Center employees differently from TWA employees elsewhere, thus decreasing mobility throughout the system.[67] Yet this case merely indicates the subjective nature of such judgments, since the stability of the work force clearly was not the only value to be maximized in the situation; another court might have regarded the employees' expectations as paramount. To say, under such circumstances, that to be nonarbitrary is to make a decision grounded on "relevant differences" thus rests the distinction between what is arbitrary and what is rational upon the court's own judgment of relevance.

In sum, courts have been struggling to define the *Vaca* arbitrariness standard for some thirteen years. Yet neither the judiciary nor the substantial volume of academic commentary has succeeded in producing a common, workable definition. Their attempts have resulted either in the importation of procedural requirements not heretofore demanded of unions or in the imposition of substantive, value-laden standards for union decisions. As such, the judicial trend is reminiscent of the pre-New Deal substantive due process standard, involving major intervention by the judiciary into the institutions of private dispute settlement.[68]

HUSSMANN: FAIR REPRESENTATION OF NONGRIEVANTS?

The authors of the *Hussmann* opinion sought to apply the rational

[63] *Id.* at 1132, 1166.

[64] Finkin, *supra* note 57, at 199-204.

[65] Clark, *supra* note 44, at 1163, 1166, speaks of "good" reasons and "stronger" reasons for a union to settle or waive a grievance.

[66] 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

[67] *Id.* at 1015.

[68] One commentator has analogized this type of inquiry to the substantive due process standard rejected by the Supreme Court early in the New Deal. Lewis, *Fair Representation in Grievance Administration:* Vaca v. Sipes, 1967 SUP. CT. REV. 81, 121.

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decisionmaking model described above. Yet their conclusions about the procedures necessary to assure fair representation in a case arising under a modified seniority clause substantially expand the procedural requirements placed upon unions. They reach these conclusions through the consideration of precedents which are misapplied to a situation where the claims are those of nongrievants. Moreover, if the procedures *Hussmann* appears to mandate were generally required, the standard for a union's duty to its members would be quite unworkable. It would also be highly undesirable from the points of view of both unions and management.

In support of their position the *Hussmann* court cited numerous cases; yet none of these cases are really apt in the situation under consideration. To evaluate the procedures followed by the union, the court imported notions of adequate representation derived primarily from cases where a grievant's claim had been perfunctorily ignored or processed.[69] Yet one of the most striking facts in *Hussmann* is that the union did not refuse to take a grievance.[70] The union was faulted instead for *taking* a grievance on behalf of the senior employees without weighing the merits of the junior employees' claims. Hence, most of the case law on inadequate representation and inadequate investigation of claims was simply not on point, since those cases involved requirements imposed on a union once it resolved to process a grievance.[71]

Only one of the cases cited by the court in *Hussmann* can be said to be directly on point—*Bond v. Local 823, International Brotherhood of Teamsters.*[72] There a union chose to process a test case instead of the similarly situated plaintiff's case. The plaintiff's position, therefore, was analogous to that of Smith, Pasley, and Serini in *Hussmann* in that the union had chosen to process the grievance of another of its members. In *Hussmann*, however, the plaintiffs had not even presented a grievance at that point. Moreover, unlike *Hussmann*, where the court was not concerned with the union's motivation, the *Bond* decision rested heavily on numerous indications of bad faith in the union's choice of which grievance to pursue.[73] The situation presented in *Hussmann*, in short, was sui generis.

There is no logical reason why a union's duty of fair representa-

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[69] *See, e.g.*, Minnis v. UAW, 531 F.2d 850 (8th Cir. 1975), *described in* note 51 *supra*; De Arroyo v. Sindicato de Trabajadores Packing House, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

[70] The junior employees neither had a grievance nor asked the union to pursue one on their behalf until after the second arbitration. The union's failure to do so at that point apparently figured very little in the court's conclusion.

[71] Clark, *supra* note 44, at 1170, sees the minimal standards of representation as applying only when the union has decided to pursue a grievance.

[72] 521 F.2d 5 (8th Cir. 1975).

[73] The local union president told Bond that the union, not the company, was blocking his efforts to secure another job. *Id.* at 9.

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tion should not be extended so as to impose an obligation to consider the interests of nongrievants affected by the decision to take a complaint. As Archibald Cox pointed out in a 1956 article, any grievance potentially affects interests other than those of the individual grievant, including the interests of the union as an organization, of the employees as a group, of future employees and unions affected by the precedent, and of other present and competing employees.[74]

It is quite true, as the *Hussmann* court points out, that the duty of fair representation is owed to all employees within the unit and that the decision to process the senior employees' grievances had obvious implications for the junior employees' interests.[75] These facts, however, do not necessarily compel the conclusion that the duty of fair representation should be extended so as to require a union to prove that it has considered all of the interests in any particular case, since more than mere logic is involved. To mandate such an extension marks a considerable expansion of the requirements placed on a union by the fair representation standard, an expansion which is both undesirable and unworkable in the realities of industrial life.

If unions are required to represent the interests of nongrievants in a case like *Hussmann*, it is not clear what procedures they must follow in order to fulfill this responsibility. The dissenting judges in *Hussmann* see the majority as requiring

> that if a union is party to a collective bargaining agreement containing a modified seniority clause, it cannot represent senior employees as against junior employees who have been tentatively selected by the Company for their skill and ability unless it first conducts an internal hearing or an intensive investigation to determine whether, in fact, the senior employees' skill and ability is substantially equal to that of the junior employees.[76]

This would certainly mark the imposition of major new procedural requirements on unions. Although the majority disclaims any requirement that a union hold internal hearings to investigate the merits of every grievance brought before it,[77] one has difficulty envisaging how a union would otherwise be able to prove that it had fulfilled its obligation to "fairly represent both groups of employees and . . . take a position in favor of one group only on the basis of an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement."[78]

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74 Cox, *Rights under a Labor Agreement*, 69 HARV. L. REV. 601, 615 (1956).

75 Smith v. Hussmann Refrigerator Co., 619 F.2d at 1236-37.

76 *Id.* at 1250.

77 *Id.* at 1240.

78 *Id.* at 1237. One commentator has suggested that unions protect themselves by including a formal statement to the arbitrator that they have reviewed the skill of the affected nongrievants but urging him to call them as witnesses if he has any doubts. This would shift any blame about who caused an unfavorable outcome onto the arbitrator. B. Aaron, note 10 *supra*.

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Yet a requirement that unions investigate all conflicting skill claims before accepting a grievance is clearly impracticable. At the Hussmann plant, 35,000 such bids are processed each year, and 2,000 jobs are awarded.[79] Under the dissent's reading of the majority's decision, each promotion would require that the union evaluate the qualifications of each unsuccessful bidder and compare them with those awarded the position, thus heavily burdening and possibly crippling unions' already strained grievance procedures.[80]

In any event, the court plainly states its intention "to compel a union to evaluate the individual capabilities of employees,"[81] a fact which has been greeted with alarm by employers, unions, and commentators.[82] Management has long viewed the selection of employees for promotion as its exclusive prerogative.[83] While unions have made inroads upon this prerogative by gaining acceptance for the seniority principle, collective bargaining contracts almost always vest the right to judge skill exclusively in the company.[84]

Unions, moreover, are not anxious to take on the responsibility of making these decisions. They are, by definition, not in the position of supervisory personnel, charged with evaluating the performance of their members. The foreman in the particular unit is in the best position to judge ability.[85] He is in daily contact with the employees as they perform their work. He is familiar with their performance and with production statistics, and it is his job to evaluate employees on behalf of management.

Unions, on the other hand, have not traditionally concerned them-

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79 Company Brief, *supra* note 16, at 11.

80 Steelworker lawyers estimate they spend one-third of their time on fair representation suits; to prepare a defense costs at least $2000, and attorneys' fees in cases they have lost have run as high as $25,000. BUS. WEEK, Aug. 13, 1979, at 76. *See also* J. Webster, note 10 *supra*, in which he points out that, if every promotion were grieved, the arbitrator would become the plant boss. More likely, employers would simply eschew any promotions on merit and follow seniority strictly. Another possible result might be that unions would become reluctant to accept seniority grievances under a modified seniority clause, in which case the number of grievances would be reduced rather than increased.

81 Smith v. Hussmann Refrigerator Co., 619 F.2d at 1240.

82 According to counsel for the Steelworkers, employers are even more alarmed at this prospect than are unions. Telephone Conversation with Daniel P. McIntyre (Sept. 8, 1980). *See also* B. Aaron, note 10 *supra*; J. Webster, note 10 *supra*.

83 *See* [1954] UNION CONT. CLAUSES (CCH) 481.

84 *See* H. DAVEY, CONTEMPORARY COLLECTIVE BARGAINING 123 (1951); S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 178-80 (1960) [hereinafter cited as SLICHTER]. Since these judgments are potentially subjective and viewed as such by the employees, management frequently prefers to promote by seniority nonetheless or to support its skill judgments with more objective criteria such as merit testing. SLICHTER, *supra*, at 183, 204-08.

85 SLICHTER, *supra* note 84, at 206, describes how management regards training foremen about promotions as critical to the system of selection by skill, since foremen will generally avoid problems by selecting the senior employee if they are not repeatedly sensitized to skill criteria.

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selves with such matters; to participate in this evaluative process would involve them in internal conflicts most would prefer to avoid. The union official deciding whether to process a grievance must always have an eye to his own reelection. It is therefore advantageous for him to remain neutral in disputes among members arising out of competing individual interests. The seniority principle allows union officials to do so, by providing an automatic method of deciding among claims without considering the specific individuals involved.[86]

The interests of both unions and management thus converge on the desirability of the employer making judgments about relative skill. The only way to accommodate this preference with a requirement that unions represent nongrievants' interests is to accept the argument that the junior employees' position may be adequately presented by the company.[87] Such acceptance would relieve the union of liability, since the law requires proof that a union's failure to represent the employee in fact caused the unfavorable outcome; if nothing could have been added to his case, the question of fair representation is moot.[88]

In the one state court case involving facts very similar to those in *Hussmann*, the Rhode Island Supreme Court held that a junior teacher had not been damaged by his union's failure to represent him rather than a senior employee, since the school officials arguing the case of the junior employee had a position co-extensive with his own.[89] Although there is some dispute over whether anything could have been added to the case of Smith, Pasley, and Serini,[90] the Hussmann company had

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[86] *See*, *e.g.*, Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1604 (1969).

[87] This was the argument put forward by both the union and the company in *Hussmann* but rejected by the court on the grounds that the union, not the company, had the duty to represent employees. Smith v. Hussmann Refrigerator Co., 619 F.2d at 1238-39; Company Brief, *supra* note 16, at 38; Steelworkers Brief, *supra* note 31, at 31.

[88] *See* Humphrey v. Moore, 375 U.S. 335, 351 (1964). The Court held that the plaintiffs had not been inadequately represented since there was no suggestion that what they could have added to the hearing by way of facts or theory would have led to a different outcome.

[89] Belanger v. Matteson, 115 R.I. 332, 346, 346 A.2d 124, 133 (1975), *cert. denied*, 424 U.S. 968 (1976). In *Belanger*, the plaintiff and defendant had both applied for a position as a department head in a school where promotions were governed by a modified seniority clause. The plaintiff was appointed to the post by the school committee, whereupon the defendant filed a grievance with the union. The grievance went to arbitration with the result that one year later the plaintiff was deprived of his promotion. When he then attempted to file a grievance, the union refused on the ground that the remedy sought would contradict a decision which resulted from a grievance they had filed. *Id.* at 334-36, 346 A.2d at 127-28. The court held that the union had acted arbitrarily in choosing sides without adequate investigation into the merits of both cases. *Id.* at 343-44, 346 A.2d at 132. The union thus had breached its duty; but it escaped liability since there was no evidence that its failure to represent the grievant had in fact caused the loss of the grievance at arbitration. *Id.* at 342-47, 346 A.2d at 133.

[90] The majority seemed convinced that the plaintiffs had outside work experience about which either the company representative did not know or which they could more effectively have related than he. Smith v. Hussmann Refrigerator Co., 619 F.2d at 1242. The dissent, however, rather persuasively documents the thoroughness of the arbitration hearing in this respect. *Id.* at 1248-50.

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every incentive to argue their position forcefully. The company stood to benefit from their superior skills, if so they were; and it was seeking to avoid back pay awards to the senior employees as well.[91] Under such circumstances, where the interest of the employer and employee are substantially identical, representation of the junior employee by the company is adequate and should merit the label "fair."

In sum, the *Hussmann* requirement that unions evaluate employees' competing claims for promotion based on skill is undesirable. The procedures necessary for unions to do so would potentially cripple their resources. Moreover, it is not in the interest of either unions or management for unions to make judgments about the comparative abilities of employees.

SENIORITY AS RELEVANT DIFFERENCE

When the *Hussmann* majority concluded that Local 13889's decision was arbitrary and perfunctory, the court seemed to be focusing on a procedural defect. The majority's conclusion, however, was a substantive one, masking a fair representation standard which is highly value-laden.

Indeed, the situation giving rise to the *Hussmann* case is not at all what either law or language usually terms "perfunctory." These same Eighth Circuit judges, in fact, have subscribed to a definition of perfunctory in the fair representation context as meaning "without concern, or solicitude, or indifferent."[92] Such was not the situation in *Hussmann*. The dispute was not one where a grievance had been lost or a filing deadline missed.[93] The union did not ignore the junior employees' interest out of indifference, but rather out of an intense concern for other values. Institutions and groups frequently treat certain questions "perfunctorily," not from lack of concern but because they have reached a settled conclusion about a whole category of cases and do not intend to examine each new one as though that closure had not been reached. The decision "perfunctorily" to follow seniority in deciding among claims was such a conclusion. The union local president's statement that "the union didn't represent anybody on skill and ability, the union only represented seniority,"[94] reflected a judgment about values. The judgment may be a good one, a relevant one, or not; but the answer to that question clearly involves substance, not procedure.

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[91] Company Brief, *supra* note 16, at 38.

[92] Ethier v. United States Postal Serv., 590 F.2d 733, 736 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979). *See* note 51 *supra*.

[93] *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. at 557; Ruzicka v. General Motors Corp., 523 F.2d 306, 308 (6th Cir. 1975), *described in* note 56 *supra*; De Arroyo v. Sindicato de Trabajadores Packing House, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

[94] Smith Brief, *supra* note 20, at 12.

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This tendency of the "arbitrary and perfunctory" standard to glide inexorably into substantive judgments is illustrated by the way in which the *Hussmann* majority treated the question of seniority: "The union's choice to process all grievances based on seniority discriminated against employees receiving promotions on the basis of merit. This conduct may be viewed as a perfunctory dismissal of the interests and rights of plaintiffs."[95] The majority of the court clearly did not regard seniority to be a relevant distinction upon which to make such choices, and consequently regarded any action taken on those grounds as "perfunctory."[96] The problems inherent in the "rational factors" or "relevant differences" approach[97] are clear in this context, the major one being how to decide which differences are relevant and which invidious.

That seniority is an instrument which furthers a union goal does not end the inquiry for the *Hussmann* court. Even though seniority enables the union to avoid disputes among employees, that goal would still not justify this means for the court. The judges are thus driven to evaluate both the ends and the means in question. And their attitude toward seniority, as well as their somewhat limited view of the purposes it serves,[98] lead them to reject it as a factor significant enough to justify the union's decision.

In order to demonstrate the role played by value judgments in this respect, it should be noted that one of the principal disagreements between the majority and minority in this case resulted from their differing assessments of the importance of seniority to the decision made by the union here and to American workers in general.[99] One indication of this disagreement may be the fact that the principal difference between the decisions of the 1979 panel and 1980 en banc court is the later opinion's omission of a long paragraph about seniority. The paragraph describes seniority as a value-laden principle:

> Contrary to the arguments of the union, seniority is not a 'neutral' principle. A seniority system is value-laden, embodying many salutary and legitimate expectations of labor. These systems promote job security and acknowledge the values of longer service, such as demonstrated loyalty and greater experience. However, not all of the values embodied in the principle of seniority favor the best interests of labor or society. The

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[95] Smith v. Hussmann Refrigerator Co., 619 F.2d at 1239.

[96] At one point, the majority speaks of the union's "blind adherence to a policy of favoring employees with seniority in order to avoid disputes among employees." *Id.* at 1240.

[97] *See* text accompanying notes 59-68 *supra*.

[98] Historically, seniority has served many functions for both employers and workers. It contributes to security of employment; it protects workers against discriminatory or subjective judgments by the employer; it contributes to employee morale; and its gives a security of expectations both to the worker and to management. *See* N. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 93 (1948); [1954] UNION CONT. CLAUSES (CCH) 447-49.

[99] Smith v. Hussmann Refrigerator Co., 619 F.2d at 1250.

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> use of seniority in making promotions may sometimes frustrate the basic purposes of congressional labor legislation and the united labor movement. It can diminish worker satisfaction and obstruct efficient production, thus lowering productivity. As a matter of common sense, verified by behavioral science, a company must be able to reward employees for superior ability and performance or face a loss of its most competent employees and an increase in worker frustration and indolence.[100]

It seems clear from the paragraph's references to decreased efficiency and worker frustration that the court itself was proceeding from a heavily value-laden perspective in measuring Local 13889's treatment of the plaintiffs.

The court's rather negative attitude toward seniority, moreover, conflicts with the significance attributed to the seniority principle not only by the Supreme Court,[101] but also by American unions.[102] Because of the importance unions attach to seniority, they usually grieve all bypass cases.[103] This fact has led one commentator to suggest that the junior and senior employees in a case like this are not—and should not be—on the same footing so far as the contract and the union's duty are concerned. The grievance of the bypassed senior employee is based on a provision the union fought to have included in the contract; while the junior employee's interest rests on a provision inserted at the insistence of management.[104]

Thus an examination of the court's use of the "relevant differences" approach to arbitrariness demonstrates that the question is inexorably reduced to one of "relevant to whom?" In the case of *DeBoles v. Trans World Airline, Inc.*,[105] the differences in treatment were justified by the employer's need for a stable work force. Yet relevance to the

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100 Smith v. Hussmann Refrigerator Co., 100 L.R.R.M. 2238, 2246 (1979), *aff'd on rehearing en banc*, 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980). The dispute over the word "neutral" seems rather mistaken. The panel maintains that seniority is not neutral since selection by seniority has certain consequences for workers and society. Their point seems directed at the frequent description of seniority as "objective." When this word is used in the literature about seniority and labor relations, however, the intent is to distinguish seniority as an impersonal, non-subjective method of promotion. *See, e.g.*, N. CHAMBERLAIN, *supra* note 98, at 94.

The Steelworkers' counsel regarded the omitted paragraph to be so indicative of the court's rather skeptical attitude toward the seniority principle that they included it in their petition for certiorari to demonstrate the policy underlying the panel's rationale. Petitioner's Brief for Certiorari at 9 n.5, Steelworkers Local 13889 v. Smith, 449 U.S. 839 (1980).

101 *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), in which the Court upheld a seniority plan in the face of a district court finding that the seniority system perpetuated the effects of past discrimination and thus violated Title VII of the Civil Rights Act.

102 "The union argues for strict seniority because most of its members desire it." R. Coulson, note 10 *supra*.

103 Murphy, *Due Process and Fair Representation in Grievance Handling in the Public Sector*, in NATIONAL ACADEMY OF ARBITRATORS, [1977] PROCEEDINGS OF THE THIRTIETH ANNUAL MEETING (BNA) 121, 140.

104 *Id.* at 139-40.

105 552 F.2d 1005, 1015 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977). *See* text accompanying note 67 *supra*.

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employer's needs is not the only standard possible. At least one court has articulated the standard as one of relevance to central union goals. In *Tedford v. Peabody Coal Co.*,[106] an employee took a leave of absence to pursue a union job and upon returning was denied the seniority he would have accrued had he not gone on leave. In finding that the union did not violate its duty of fair representation by subscribing to an interpretation of the contract which allowed this result, the court suggested a test for nonarbitrariness which would require asking whether the union's decision (1) was based on relevant, permissible union factors; (2) was a rational result of a consideration of those factors; and (3) included a fair and impartial consideration of the interests of all employees.[107]

The three-prong *Tedford* test was used by both sides in the *Hussmann* case. The Steelworkers relied heavily upon *Tedford* to defend the position of Local 13889 as based on a "relevant, permissible union factor"—seniority.[108] Yet the court ultimately held that the phrase "all employees" in the third prong required the union to have considered the interests of the junior as well as the senior employees.[109] Where the court and the union differed was in their understanding of the phrase "the interests of all employees." This difference reflects a significant difference in values. The court was primarily concerned with the interests of the senior employees as individuals, whereas the union emphasized the collective interest which every individual shares as a member of the union.

As a member of the group, each employee derives a value from the security of expectations offered by the application of the seniority principle; he or she can be fairly certain about the prospects for future employment, for layoffs, for promotion. Yet any given individual may be in a position to procure a better outcome for himself in a particular situation; one who is certain always to prevail when skills are compared, for example, would do better if seniority were not a factor in promotions. The union position, giving precedence as it does to the shared interest in the security principle over an individual interest in promotion by skill, comports with the spirit of the *Tedford* decision, with its strong statement that collective group interests should be paramount when they clash with individual expectations.[110]

The conflicting points of view represented by the majority and the union in *Hussmann* illustrate the continuing conflict between the indi-

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106 533 F.2d 952 (5th Cir. 1976).

107 *Id.* at 957.

108 Steelworkers Brief, *supra* note 31, at 18-24.

109 Smith v. Hussmann Refrigerator Co., 619 F.2d at 1237.

110 "The major goal of the duty of fair representation is to identify and protect individual expectations as far as possible without undermining collective interests. Where the individual and collective group interests clash, the former must yield to the latter." Tedford v. Peabody Coal Co., 533 F.2d at 956-57.

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vidual and collective rights approaches to the law of labor relations.[111] Individual rights advocates, like the majority here, focus on the need for protection of the individual against his union and liken the labor contract to other interactions among individuals—contracts of which the employees are third-party beneficiaries, trusts under which the unions have fiduciary duties.[112] The collective rights school, on the other hand, contends that the rights of individual workers are best protected by allowing broad discretion to the group which represents their common interests.[113] Adherents to the collective rights approach perceive rights under the collective bargaining agreement as different from those derived from other contracts in that they inhere in the group rather than in its members as individuals.[114]

The *Hussmann* majority, by regarding seniority as an "arbitrary" factor on which to base a union decision, essentially made a value judgment flowing from an individual rights perspective. By doing so, the court imposed its own values upon Local 13889, while masking the value judgment involved. Such value judgments should be made not by the court, but by the union, the political body through which workers define their common interests and act to protect them.

THE *VACA* STANDARD MUST BE LIMITED

The continuing controversy between the individual rights and collective rights perspectives is indicative of the fact that labor relations and its law involve a continuing accommodation between not only the interests of employers and unions, but also the interests of the individual and the group. Unions make decisions affecting the interests of their members in the context of a labor law which attempts to ensure that the constitutional rights of the individual are not totally ignored in the process. That is the goal of the doctrine of fair representation. The problem with which the courts have been wrestling is to design a standard which would enable them to monitor unions' responsibility to members without overruling unions' substantive decisions. The *Hussmann* case illustrates how the present standard does not accomplish this goal. If the arbitrariness standard is extended to require unions to give substantial consideration to the interests of all employees affected

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[111] For the individual rights approach, *see* Jacobs, *The Duty of Fair Representation: Minorities, Dissidents and Exclusive Representation*, 59 B.U.L. REV. 857 (1979); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975); Summers, note 44 *supra*. Much of this literature attacks the concept of exclusive representation and advocates an individual right of action against the employer. For the collective rights perspective, *see* Cox, note 74 *supra*; Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

[112] *See* 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 (1974).

[113] Cox, *supra* note 74, at 657.

[114] Feller, note 111 *supra*.

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by a grievance, the interest of the group as a whole will be swallowed up by that of the individual.

The American law of labor relations, however, involves a continuing accommodation between the interests of the individual and those of the group. An ultimate resolution of this uneasy tension is impossible; but any standard designed to address the problem should balance the competing interests in such a way as to take account of their relative weights in the particular situation. An extreme extension of the duty of fair representation does not recognize the group interests involved, nor does it take account of the practical necessity for flexibility, accommodation and unity in the collective bargaining process.

Rather than adopt the extreme individual rights approach, the courts should set out to strike a balance more appropriate to the dialectic of collective and individual interests. So long as the union decision does not involve discrimination violative of established equal protection norms, the courts should confine the arbitrariness prong of the *Vaca* standard to the facts which led to its enunciation—the discharge grievance.[115] A special rule for discharge grievances would allow unions to continue making collective value judgments for themselves while still acknowledging the greater weight to be assigned to the individual's interest where the consequences are not only serious for his economic welfare but also destructive of his capacity for continued participation in the union.

In situations which do not involve discharge, the individual employee remains a member of the bargaining unit and has a continuing opportunity to criticize the decision which his representative has taken. If the union regularly treats grievances perfunctorily or negligently, its members will not tolerate such behavior in the long run. And they do have alternatives—to overrule the officers at the monthly meeting, to elect new officers, or to decertify the union.

The merits of a particular grievance, moreover, depend upon the contract and the collective goals embodied in it. Local 13889's decision to represent on seniority rather than on skill reflected such a collective value. Employees who disagree with that judgment should not seek judicial intervention, but rather should undertake to convince the membership as a whole that representation of junior employees promoted for their skill is important to them all.[116] If aggrieved junior employees fail to convince a majority of the union, they will nonetheless receive the benefits of the union's representation of seniority claims as their own years of service accrue.

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[115] Such a limitation of the *Vaca* rule was suggested at the time of the decision. This suggestion was not subsequently followed by the courts. Lewis, *supra* note 68, at 124-25.

[116] In this respect, the gravamen of the charges against Local 13889 should have been their refusal to allow the plaintiffs to address the regular monthly meeting after the union refused to process their grievance. Smith v. Hussmann Refrigerator Co., 619 F.2d at 1234-35.

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Such an approach—to allow review of a union's decision for arbitrariness only in the case of a discharge grievance—provides for an appropriate and workable balance among the interests involved. The union's interest in flexibility, discretion and unity would yield to that of the individual employee only where the consequences of the union's conduct are very severe and where the employee has no alternative remedy. And a limitation of the arbitrariness standard would avoid the undesirable extension of judicial review into the system of private dispute settlement given such high priority by the Supreme Court.[117]

CONCLUSION

Hussmann—a case in the continuing development of the *Vaca* arbitrariness formula—shows the dangers inherent in following that formula to its extreme. To apply the arbitrary and perfunctory standard in a situation involving promotions under a modified seniority clause demonstrates the impracticality of expanding that standard to force unions to perform skill-evaluative functions for which they are ill-suited. The court's attempt to do so displays how such a review of unions' decisionmaking procedure inexorably leads to a substantive review of the union's decision and substitution of the court's judgment for the union's.

The expansion of the duty of fair representation should be halted by confining unions' liability—in the absence of proof of hostile motivation—to arbitrary and perfunctory conduct which results in the employee's severance from the bargaining unit. Thus the conflicts and dilemmas presented by the attempt to combine unity with diversity, like those noted by Hobbes,[118] will be returned for resolution to the ultimately political body from which they emerge.

Cynthia Grant Shoenberger

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117 *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

118 *See* text accompanying note 1 *supra*.

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