Labor Arbitration, the Duty of Fair Representation, and "Union Negligence"

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INTRODUCTION

Under the nation's labor relations statutes, a union certified as bargaining agent for a group of employees is granted exclusive authority to represent them in the negotiation and administration of collective bargaining agreements.1 In response to occasional abuse

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1 National Labor Relations Act § 9(a) [hereinafter cited as NLRA], 29 U.S.C. § 159(a) (1976); Railway Labor Act § 2 [hereinafter cited as RLA], 45 U.S.C. § 152 (1976). Section 9(a) of the NLRA provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (emphasis added). A number of state labor relations statutes also provide for exclusive representation in collective bargaining. See, e.g., MASS. GEN. LAWS ANN. ch. 150A, § 5(a) (West 1971); MICH. COMP. LAWS § 423.211 (1978) (public employees); N.Y. LAB. LAW § 705(a) (McKinney 1977).

Section 9 of the NLRA, 29 U.S.C. § 159 (1976), also provides that the National Labor Relations Board shall have the power to investigate employee petitions requesting representation for the purpose of collective bargaining. If the Board, after a hearing, finds that a valid question concerning representation exists, an election by secret ballot is ordered and conducted by Board officials. Id. § 159(c)(1) (1976). In the event that a union is victorious in this election, it is certified by the Board as bargaining representative. Id. A labor organization so certified enjoys an irrebuttable presumption of continued majority support for a period of 12 months. NLRA § 9(c)(3), 29 U.S.C. § 159(c)(3) (1976); see Pioneer Inn Assocs. v. NLRB, 578 F.2d 835, 838 (9th Cir. 1978); Burns Int'l Security Servs., Inc. v. NLRB, 567 F.2d 945, 949 (10th Cir. 1977). The precise employee group to be represented by the union, the "bargaining unit," is decided upon at the hearing conducted by the Board during its investigation of the petition. See 29 U.S.C. § 159(b). Guidelines for determining an "appropriate unit" developed through amendments to § 9(b) of the NLRA, 29 U.S.C. § 159(b) (1976), to § 9(c)(3), 29 U.S.C. § 159(c)(3) (1976), and through case law, see, e.g., NLRB v. Metropolitan Life Ins. Co., 390 U.S. 438, 441-42 (1965); Mallinckrodt Chem. Works, 162 N.L.R.B. 387, 397 (1966); Retail Assocs., Inc., 120 N.L.R.B. 388, 393-94 (1958). See generally, J. ABODEELY, THE NLRB AND THE APPROPRIATE BARGAINING UNIT (1971).

The employer's duty to bargain with the chosen representative encompasses most labor-
of this broad power, the courts have developed a rule of law requiring the union to represent all unit employees fairly: no individual may be treated in an "arbitrary, discriminatory, or bad faith" manner. 2 One area of union activity in which this duty of fair representation has special relevance is the adjustment of employee grievances. 3 Where an employee claims that the provisions of the collective bargaining agreement have been breached, the labor contract typically provides that the union and the employer are to process the dispute through a series of informal conferences. 4 Should the claim remain unresolved after these preliminary steps, the last stage of the contractual scheme is usually the union’s submission of

management issues. See, e.g., Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-91 (1965) (hours); NLRB v. Huttig Sash & Door Co., 377 F.2d 964, 967-68 (8th Cir. 1967) (wages); Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), cert. denied, 338 U.S. 960 (1949) (pensions and retirement age); Miller Brewing Co., 166 N.L.R.B. 831, 833 (1967), enforced, 408 F.2d 12 (9th Cir. 1969) (work rules); 29 U.S.C. § 158(d) (1976). Since the bargaining power of the union is exclusive, only the union may negotiate with the employer on the terms and conditions of employment. For example, direct communication by the employer with individual employees may constitute an unfair labor practice if the employer is seeking to persuade the individuals to break ranks with their union during contract negotiations. See NLRB v. J.H. Bonck Co., 424 F.2d 634, 639 (5th Cir. 1970). Similarly, an employer may not bargain collectively or engage in grievance adjustment with a minority of the unit employees if doing so would circumvent the authority of the majority union. Emporium Capwell Co. v. Western Additional Community Organization, 420 U.S. 50, 62-70 (1975). Moreover, notwithstanding that NLRA § 9(a) gives individuals the right to present their grievances directly to the employer, this right ordinarily is sacrificed under the terms of the collective bargaining agreement.


the grievance to final, binding arbitration. Provided the process was conducted fairly, the decision reached in the grievance procedure is not judicially reviewable.\textsuperscript{5} If the union fails to render an employee fair representation, however, either by not acting on his claim or by inadequately representing him at a hearing, the result reached through the grievance machinery may be disregarded in a breach of contract action by the employee against his employer.\textsuperscript{8}

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Notwithstanding the existence of a strong presumption that, because of his expertise and broad discretion, the arbitrator correctly applied the provisions of the collective bargaining agreement, \textit{see id.} at 597-99, there are limits to the extent of the courts’ deference to decisions of the arbitrator. For example, the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1976), sets forth certain irregularities, including fraud and partiality or corruption by the arbitrator, which constitute grounds for vacating the award. \textit{Id.} § 10. The arbitrator, moreover, may not order a party to violate state law or public policy, \textit{see UAW Local 985 v. W.M. Chance Co., 262 F. Supp. 114, 118 (E.D. Mich. 1966),} although he does have considerable freedom to fashion appropriate remedies, \textit{see United Steelworkers v. Enterprise Wheel & Car Corp.,} 363 U.S. 593, 597 (1960); United Steelworkers v. United States Gypsum Co., 492 F.2d 713, 729-32 (5th Cir.), \textit{cert. denied,} 419 U.S. 998 (1974). Nor can the arbitrator exceed any limitations placed upon his authority given by the labor contract. \textit{See Local 278, Int’l Bhd. of Elec. Workers v. Jetero Corp., 496 F.2d 661, 663 (5th Cir. 1974); ILGWU v. Ashland Indus., Inc., 488 F.2d 641, 644 (5th Cir.), \textit{cert. denied,} 419 U.S. 840 (1974); Local 791, Int’l Bhd. of Elec. Workers v. Magnavox Co., 286 F.2d 465, 468 (6th Cir. 1961).

\textsuperscript{8} Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 566-68 (1976); Vaca v. Sipes, 386 U.S. 171, 186-87 (1967). The individual’s right to bring an action against his employer is based upon § 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1976). In \textit{Smith v. Evening News Ass’n}, 371 U.S. 195 (1962), the Court held that, in addition to actions brought by the union, § 301 authorizes federal court jurisdiction over suits by individual workers against their employers to enforce the collective bargaining contract. \textit{Id.} at 200. An action by an employee is subject to the bar created by the results of the contractual grievance machinery, however, and, like a plaintiff union, the employee-plaintiff must find a theory for avoiding it. A finding that the duty of fair representation has been breached will defeat this obstacle. In \textit{Hines v. Anchor Motor Freight, Inc.,} 424 U.S. 554 (1976), the Court discussed this process in depth. Reasoning that Congress intended to encourage grievance adjustment by arbitration, the Court reiterated that a fair hearing in the grievance process would bar the employee’s breach of contract action. Where the employee successfully carries his burden of proving that his union had not represented him fairly, the Court held that Congress did not intend to prevent him from having his day in court on the contract claim. \textit{Id.} at 566; \textit{see Vaca v. Sipes,} 386 U.S. 171, 186 (1967). Clearly, where the employee has been unfairly represented and thus deprived of a hearing in the one forum to which he is limited, it would be inequitable to refuse him access to the federal courts under § 301.
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The union, moreover, will be liable for that portion of the breach of contract damages attributable to its failure to represent the employee fairly.7

Because the union must present the individual’s grievance, and because the employee often is blocked from alternative avenues of redress,8 the union’s role in processing grievances will have a decisive effect upon the fate of the claim. Thus, the duty of fair representation plays an important role in insuring union accountability for egregious conduct in this process. Expanding the union’s obligation to include liability for negligent representation, however, may present a serious threat to the future of grievance arbitration, the preferred means of settling labor contract disputes.9 If a union,

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7 See Vaca v. Sipes, 386 U.S. 171, 187, 197-98 (1967). The liability of both the employer and the union will be apportioned according to the damage caused by their respective wrongful acts. Id. See generally Lindsey, 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).

8 Restricted to the contractual grievance machinery for the resolution of workday grievances such as vacation pay disputes or temporary work assignment controversies, the employee-grievant has no other means of remedying his claim against the company. See note 5 and accompanying text supra. Those employee rights secured by statute or by the Constitution are distinct, however, in that the employee may reach the goal of a fair hearing through means other than arbitration. One example is the grievance of a discharged employee who claims that he has been victimized for his union activism. Under NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3), it is an unfair labor practice for an employer to penalize an employee for exercising his right to engage in concerted worker action protected by NLRA § 7, 29 U.S.C. § 157 (1976). The discharged employee may thus initiate unfair labor practice proceedings in addition to invoking arbitration, although it has been sometimes suggested that, in such a case, the NLRB will defer to the findings of the arbitrator. See National Radio Co., 205 N.L.R.B. 1179, 1179-80 (1973); Atleson, Disciplinary Discharges, Arbitration and NLRB Deference, 20 BUFFALO L. REV. 355, 367-60 (1971). Similarly, where an employee charges that he was discriminated against on the bases of race or sex, the broad remedial provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5-2000e-6 (1976), are available in addition to arbitration based upon a contract clause prohibiting discrimination or requiring cause to be shown for a discharge. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974).

out of fear of breaching its duty through negligence, is discouraged from abandoning meritless claims or foregoing questionable arguments when claims are brought, the effect upon the institution of labor arbitration could be devastating. Moreover, large awards of compensatory damages against the union for negligence could serve to impair its ability to provide the very representation mandated by its legal duty.10

This Note will trace the origins of the duty of fair representation and the standard used to determine whether a union has breached it, culminating with the Supreme Court's landmark decision in Vaca v. Sipes.11 Later interpretations of the duty will be analyzed with special attention given to the question whether the standard has become so broad as to pose an unwarranted threat to the stability of the arbitral system.12 An examination of the current state of the duty, including specific examples of conduct that have been held to create liability on the part of the union, also will be provided.13

**Development of the Vaca Standard**

The idea that a union owes its constituents a duty of fair representation was first articulated in response to incidents of racial discrimination.14 In Steele v. Louisville & N.R.R. Co.,15 the Supreme Court held that a railroad union had breached its duty by negotiating an agreement that provided for gradual replacement of black locomotive firemen by whites.16 The Court determined that the union's exclusive agency authority17 implies a reciprocal duty to represent all members of the unit "without hostile discrimination, fairly, impartially, and in good faith."18 One of Congress' aims in providing for exclusive representation and collective bargaining,
declared the Court, was to secure equal treatment and benefits for all employees in a unit.\(^9\)

The union’s obligation of fair representation subsequently was expanded to areas other than racial policy.\(^2\) For example, in negotiating for a collective bargaining agreement, the union was required “to make an honest effort to serve the interests of all [employees] without hostility to any” because of the broad ramifications that substantive contract terms have on the rights of employees.\(^2\) Extension of the duty of fair representation to handling of grievances was the logical next step.\(^2\) In 1957, the Supreme Court

\(^9\) Id. at 199, 201. The Court determined that the employee benefits obtained by the exclusive bargaining representative are to be conferred equally on all members of the unit without regard to their union affiliation. Id. at 200-01. Analogizing the union’s power under the Act to that of Congress under the Constitution, the Court stated that the union had “at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.” Id. at 202.

The Court also noted that the exclusive agency provisions of the National Labor Relations Act, 29 U.S.C. § 159(a) (1976), similarly impose a duty to represent fairly the employees in the bargaining unit. 323 U.S. at 200, 202 n.3. This extension of the fair representation doctrine was suggested in Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944), and seemed to be implicit in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), where the Court applied fair representation rules to an employee and union within NLRA jurisdiction. It was not until Syres v. Oil Workers Local 23, 350 U.S. 892 (1955) (per curiam), however, that the Supreme Court held that an NLRB-certified union could violate the duty of fair representation.


\(^2\) Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). In Ford Motor Co., the company and union agreed as part of their contract to give seniority credit for military service. Id. at 331. The Court held that the union had not violated its duty to fairly represent the non-veterans in the work force. Id. at 339-43.

\(^2\) The Steelworkers Trilogy of cases established the principle that arbitration clauses in labor contracts presumptively cover all disputes arising under the agreement and that judicial review of the results of the grievance process is available only in extremely limited circumstances. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 585 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960). This rule leaves many unsuccessful grievants without any means of obtaining judicial review and undoubtedly militated in favor of applying fair representation rules to the grievance process.

Another factor contributing to the application of the duty to grievance adjustment was the ruling of the NLRB that certain instances of breach of duty in grievance situations violate NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976), which prohibits a union from coercing an employee in the exercise of his rights. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962); see Independent Metal Workers, Local 1, 147 N.L.R.B. 1573, 1574-75 (1964). In view of the special deference given to NLRB interpretations of the Labor Act, see International Bhd. of Elec. Workers v. NLRB, 487 F.2d 1143, 1170 (D.C. Cir. 1973), aff’d, 417 U.S. 790 (1974), the Board’s holding that fair representation rules were applicable to grievance adjustment carried great weight.
held that an arbitrary refusal to pursue an employee grievance could amount to a breach of duty.\textsuperscript{23} Clarifying the duty, the Court, in \textit{Humphrey v. Moore},\textsuperscript{24} found that where the union considers the merits of a grievance and decides not to prosecute, its decision should not be disturbed if reached “honestly, in good faith and without hostility or arbitrary discrimination.”\textsuperscript{25}

Further elaborating on the requirements for establishing a breach of the duty of fair representation, the Court decided the landmark case of \textit{Vaca v. Sipes}\textsuperscript{26} in 1967. \textit{Vaca} involved a medical discharge of an employee who claimed he was fit for work. After considering conflicting medical opinions from different physicians, processing the claim unsuccessfully through several steps of the contractual grievance procedure, and reaching a compromise with the company that was rejected by the grievant, the union decided not to arbitrate the grievance.\textsuperscript{27} The employee then brought a damage action against the union for his wrongful discharge, claiming that the union had breached its duty of fair representation by failing to arbitrate his claim.\textsuperscript{28}

The employee allegedly aggrieved by a breach of duty may invoke NLRB unfair labor practice proceedings against his union under \textit{Miranda Fuel} or commence an action under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1976); see note 6 and accompanying text supra. See Czosek v. O’Mara, 397 U.S. 25, 27-28 (1970). Although the \textit{Miranda Fuel} ruling did not survive a judicial enforcement action, see 326 F.2d 172, 180 (2d Cir. 1963), the decision nevertheless will control in any proceeding brought before the Board. See Independent Metal Workers, Local 1, 147 N.L.R.B. 1573, 1574-75 (1964); R. Gorman, supra note 3, at 700. The overwhelming majority of fair representation plaintiffs have chosen the judicial forum. See Tobias, \textit{Individual Employee Suits for Breach of the Labor Agreement and the Union’s Duty of Fair Representation}, 5 Univ. of Tol. L. Rev. 514 (1974). This is perhaps attributable to such factors as the convenience of joining both defendants in a single action and the possibility of a jury trial.

\textsuperscript{23} Conley v. Gibson, 355 U.S. 41, 46 (1957).
\textsuperscript{24} 375 U.S. 335 (1964).
\textsuperscript{25} Id. at 350. In \textit{Humphrey}, plaintiffs objected to the decision of a Joint Conference Committee to dovetail the seniority lists of two companies after the sale of one firm’s business to the other, but the union declined to proceed on their behalf. “Dovetailing” is the combining of seniority lists without regard to the place of employment. “Endtailing,” on the other hand, is the compiling of seniority lists by placing employees of the absorbed firm on the bottom. Dovetailing arrangements frequently give rise to breach of duty claims by employees desiring endtailing, and vice versa. See Post-Vaca Standards, supra note 3, at 906-07. The \textit{Humphrey} Court scrutinized the manner in which the union policy was formulated and allowed it to stand, noting that if the union were held liable merely for resolving workplace issues in favor of certain employees in good faith, union decisionmaking would be paralyzed. 375 U.S. at 249-50. \textit{But see} Smith v. Hussman Refrig. Co., 100 L.R.R.M. 2238, 2245 (8th Cir. 1979).
\textsuperscript{26} 386 U.S. 171 (1967).
\textsuperscript{27} 386 U.S. at 174-76.
\textsuperscript{28} Id. at 173. The plaintiff apparently did not seek redress against the company.
Finding that an employee does not have an absolute right to have his claim arbitrated, the Court held that the union's mere refusal to arbitrate a meritorious grievance did not constitute a breach of the duty of fair representation.\(^2\) The *Vaca* Court declared that a breach of the duty "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."\(^3\) In applying these standards to union conduct in the grievance process, the Court enunciated the rule that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."\(^3\) Although it found no breach of duty on the facts presented,\(^3\) the *Vaca* Court unfortunately offered little guidance concerning the meaning of these standards, thus leaving it to the lower courts to fix the precise parameters of the union's obligation.

### The *Vaca* Standard and Union Conduct of Grievances

While *Vaca* is recognized universally as the preeminent exposition of the proper standard for judging union handling of employee grievances,\(^3\) the courts often differ on its proper interpretation. The exact types of union conduct that may result in union liability and in voiding the outcome of the grievance process remain unclear.

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\(^3\) The *Vaca* Court first disposed of a then serious jurisdictional issue, holding that the federal and state courts have jurisdiction over suits based on a breach of the duty of fair representation. The Court rejected the argument that the NLRB had exclusive jurisdiction. 386 U.S. at 176-88.

Addressing the argument that the union has an absolute duty to take employee grievances to arbitration, *see Murphy, The Duty of Fair Representation under Taft-Hartley*, 30 Mo. L. Rev. 373, 389 (1965); *Summers, Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 402 (1962), the Court first noted that the congressional determination that the contractual grievance machinery is the preferred method of labor dispute settlement contemplated a corollary good faith effort to settle short of a full arbitration hearing. 386 U.S. at 191. The Court then opined that to enable every employee to compel full arbitration of any claim would overburden the grievance process and make it exceedingly costly. *Id.* at 192. Moreover, the employer would be forced to deal increasingly with the individual, signalling a return "to the vagaries of independent and unsystematic negotiation." *Id.* at 191.

\(^3\) 386 U.S. at 190 (citing Humphrey v. Moore, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 348 U.S. 330 (1953)).

\(^1\) *Id.* at 191.

\(^2\) *Id.* at 192-93.

"Bad Faith" and "Discrimination"

The bad faith and discrimination bases of liability have been invoked only to remedy the most egregious union conduct. Findings of bad faith generally have been limited to situations in which the union has made affirmative misrepresentations to, or has actively concealed information from, the individual and, in so doing, has interfered in a concrete manner with the chances of successfully resolving the grievance. The discrimination basis of liability has played a significant role in the prevention of unfair union conduct toward racial minorities, women, non-union members, and others who may require protection from the power of the majority. Discrimination findings, however, have not been as common in the grievance area as they have been in other areas of union activity. One contributing factor may be the rule that proof of mere disparate treatment of similarly placed grievants does not establish actionable discrimination by the union. While recent decisions may

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In Robinson v. Marsh Plating Corp., 443 F. Supp. 811 (E.D. Mich. 1978), the union first represented to the plaintiff employee that his grievance was being pursued when in fact it had been abandoned. Later, the union informed the plaintiff that the bargaining committee had unanimously decided to drop his grievance, but at least one member was prepared to testify that he had never been polled. Accordingly, the court denied a motion to dismiss the breach of duty action. Id. at 815. But cf: Marietta v. Cities Serv. Oil Co., 414 F. Supp. 1029 (D.N.J. 1976) (union did not act in bad faith by taking the grievance through several steps without consulting the grievant).

The reason for the relative dearth of cases centering explicitly on the "bad faith" theory may be that it is easier for a plaintiff to challenge union action on the grounds that it is not rationally explainable and thus "arbitrary." Where the employee claims that his case has been singled out for unfair treatment for a particular reason, however, "arbitrariness" is technically an improper theory. Under the traditional interpretation, arbitrary conduct is that which is engaged in without reason. See note 43 infra.


See Turner v. Air Transport Dispatchers' Ass'n, 468 F.2d 297, 300-01 (5th Cir. 1972).
indicate a liberalization of bad faith and discrimination standards, perhaps the greatest importance of the bad faith and discrimination bases is that their conservative application makes the proper scope of the concept of arbitrariness an issue of paramount significance.

“Arbitrariness” — The Early View

One apparent effect of Vaca’s addition of arbitrariness as a possible means of breaching the duty is that the employee need not show evidence of common-law malice or a particular hostile motive on the part of the union. Indeed, arbitrariness exists where there is no reason for a party’s conduct. Since processing grievances is one of the union’s most significant and demanding responsibilities, there is considerable support for the requirement that the union have a legitimate explanation for each of its actions in the area. There is substantial controversy, however, whether a union must act intentionally against the grievant’s inter-

A classic form of discrimination would seem to occur where the union representation of union members surpasses representation of nonmembers. See Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 199 (4th Cir. 1963); Del Casal v. Eastern Airlines, Inc., 465 F. Supp. 1254, 1258-59 (S.D. Fla. 1979). In the Turner case, however, the court held that where an employer had treated the grievances of union members more favorably than those of nonmembers and had refused to press the grievance of the plaintiff nonmember, the union had not violated its duty. 468 F.2d at 300-01.

The seventh circuit’s decision in Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978), may promote the use of the discrimination theory. In Archie, the union’s duty was held to have been breached when it settled a black employee’s grievance by having him sign an extremely strict agreement with management guaranteeing that he would carry out his duties in an error-free manner. Id. at 213. No white employee had ever been subject to such an arrangement under similar circumstances. Id. at 220. The court expressly narrowed its decision strictly to a discrimination theory, noting that a finding of bad faith was not essential to maintenance of the action and was not the theory underlying the decision. Id. at 219.

See Ryan v. New York Newspaper Printing Pressmen’s Union, 580 F.2d 451, 455 (2d Cir. 1979); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974). Vaca has been viewed by the courts as an intentional enlargement of the area of union liability. Beriault v. Local 40, Super Cargoes & Checkers, 501 F.2d 258, 264 (9th Cir. 1974). Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Retana v. Apartment, Motel, Hotel and Elevator Operators Union, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972).

BLACK’s LAW DICTIONARY (4th rev. ed. 1968) defines the term “arbitrary” as “without adequate determining principle; . . . not done or acting according to reason or judgment.” Id. at 134. “Arbitrariness” is defined as “[c]onduct or acts based alone upon one’s will, and not upon any course of reasoning and exercise of judgment.” Id.


See Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); GORMAN, supra note 3, at 714.
est in order to breach its duty, or whether negligent conduct may suffice to constitute a violation of the obligation.\footnote{Post-Vaca Standards, supra note 3, at 888-90; Baer, supra note 33, at 28, col. 3.}

It might be imagined that the liberalized Vaca standard would have opened the door to a marked increase in judicial regulation of union activity in the grievance process. Until quite recently, however, most courts were reluctant to use arbitrariness as an independent ground for finding a breach of duty.\footnote{For examples of cases that refused to invoke arbitrariness as a separate ground for finding a breach, see Dill v. Greyhound Corp., 435 F.2d 231, 238 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970); Whitmore v. Eastern Greyhound Lines, 383 F. Supp. 46, 49 (E.D. Mich. 1973).}

In most early cases where plaintiffs urged an expansive reading of Vaca, its standard was interpreted narrowly as an absence of reasoned decisionmaking so egregious that hostility to the grievant or his claim could be inferred.\footnote{See Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Balowski v. UAW, 372 F.2d 829 (6th Cir. 1967).}

An example of this view of Vaca is the decision of the third circuit in Bazarte v. United Transportation Union,\footnote{429 F.2d 868 (3d Cir. 1970).} wherein the plaintiff was discharged, after a hearing, for absence without permission. Faced with unfavorable evidence and proof that the plaintiff had violated other company rules, a union representative decided not to pursue the matter further.\footnote{Id. at 870.} The court held that even if the union had acted "negligently or exercised poor judgment," a claim of "arbitrary conduct" was not established, since a good faith effort to obtain the plaintiff's reinstatement had been made.\footnote{Id. at 872.}

These cases evince a tendency to focus on whether the union had intentionally inflicted harm on the individual's chances for redress. Considerable authority for such a requirement of conscious harm can be found in the Supreme Court's decision in Motor Coach Employees v. Lockridge.\footnote{403 U.S. 274 (1971).} In Lockridge, the Court stated that to establish arbitrariness or bad faith, a breach of duty claimant must produce "'substantial evidence of fraud, deceitful action or dishonest conduct.'"\footnote{Id. at 299 (quoting Humphrey v. Moore, 375 U.S. 335, 348 (1964)).} The duty was developed, according to the
Lockridge Court, to forbid "intentional, severe" discrimination and to prevent "invidious, hostile treatment" of workers by their unions.\(^{54}\)

This limited construction of the Vaca standard does not impose breach of duty liability where only negligence is shown; it requires proof that the union consciously used its exclusive agency capacity to work against the individual employee's interests.\(^{55}\) It is submitted that the Vaca Court intended such an interpretation. In Vaca, the Court recognized that the union is entitled to exercise broad discretion in its handling of grievances and that the union is the best judge of how to use its own finite resources of time and funds to prosecute employee claims.\(^{56}\) Given this recognition, it does not seem that the Court meant to authorize a finding of breach of duty where the union makes an error of judgment, even an unreasoned one, without any intent to harm the interests it is charged with protecting.\(^{57}\) In ruling that the union could breach its duty by "arbitrary" conduct, it is suggested that the Vaca Court meant to impose liability for activity that had no identifiable motive, as opposed to a discriminatory or bad faith motive, but is nev-

\(^{54}\) 403 U.S. at 301.

\(^{55}\) See Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975); Dente v. Masters Local 90, 492 F.2d 10, 12 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974); Reid v. UAW Dist. Lodge 1093, 479 F.2d 517 (10th Cir.), cert. denied, 414 U.S. 1076 (1973). The requirement of intentional harm, however, is entirely separate from the issue whether the harmful act is done without reason and thus is "arbitrary." In the normal course of events, for example, a union could consciously decide to abandon a grievance, thus intentionally harming the grievant's chances for relief, but still not be guilty of breach of duty if its infliction of this harm is supported by a rational consideration of policy or of convenience. See notes 100-103 and accompanying text infra.

\(^{56}\) 386 U.S. at 191-92.

\(^{57}\) The Court's two major post-Lockridge pronouncements on the duty of fair representation deal only in passing with the issue of the proper standard for liability, but are nevertheless susceptible to the interpretation that only intentional conduct can breach the duty. In Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), the Court held that a breach of duty finding removes the bar to an employee's breach of contract suit against his employer. Id. at 567 (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)); see note 21 supra. The Court defined the duty as the union's obligation of "complete good faith and honesty of purpose in the exercise of its discretion." 424 U.S. at 564. No mention was made of a due care requirement.

In International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979), the Court ruled punitive damages improper in fair representation actions. The majority's remarks on a union's standard of conduct were confined largely to quotations from Vaca and other leading cases. Id. at 46-48. It is suggested, however, that the Court's reasoning on the propriety of punitive damages is relevant to the standard of conduct question. The Court recognized that the threat of large punitive damage awards could inhibit union decisionmaking and encourage unions to "process frivolous claims or resist fair settlement." Id. at 51-52. This rationale seems equally applicable to compensatory damage awards for simple negligence.
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Nevertheless intentional. A key consideration may have been the need to assure relief to an employee who can demonstrate that his union had intentionally caused his grievance to fail yet cannot prove that the act arose from animus directed personally against him. It is significant that, rather than addressing the issue of negligence, the Court linked arbitrariness closely with discrimination and bad faith, terms that call for some manner of purposeful anti-grievant design.55

"Arbitrariness" and "Negligence"

Despite the internal logic of the "intentional harm" cases, substantial momentum has grown behind a line of decisions finding arbitrariness even where the union has not acted consciously to deprive an employee of the opportunity for redress. In one of the first cases employing this approach, Figueroa de Arroyo v. Sindicato de Trabajadores Pachinghouse,59 employees claimed that they had been laid off in breach of their contract and that the union's refusal to take their claim through the grievance process constituted a breach of duty.60 The union defended its position by relying on a previously commenced NLRB proceeding challenging the employer action which resulted in the dismissals. Affirming a verdict for the plaintiffs, the first circuit held that the union should have known that the NLRB action would not protect the claimants' rights, and would have known this had the grievance been given more than "arbitrary and perfunctory" treatment. No bad faith, hostility, or intent to thwart the grievants' efforts was found; rather, the union's "inexplicable" error provided the basis of liability.62

A possible consequence of the Figueroa de Arroyo approach is increased judicial willingness to screen union conduct for due care and reasonableness even where the task is the delicate one of deciding whether to pursue a contract grievance. Whereas the conscious harm standard assesses the union's attitude toward the individual employee and scrutinizes the union's actions for implications of an intent to undermine the grievance, the first circuit's due care analysis evaluates the representation actually rendered and searches for the level of negligence that, in the court's

60 425 F.2d at 283-84.
61 Id. at 285.
62 Id. at 284.
view, constitutes arbitrary or perfunctory handling of a grievance. A similar approach is discernable in *Holodnak v. Avco Corp.*, where the plaintiff was discharged for violating a shop rule forbidding “false, vicious, or malicious statements” about the firm. The union attorney assigned to represent the plaintiff at the arbitration hearing made “at best a misguided attempt to plead for mercy from the arbitrator.” The attorney did not challenge the validity of the company rule under the first amendment, and the arbitrator upheld the discharge. The court vacated the arbitration award and granted the plaintiff damages against both the company and the union, holding that the failure to challenge the rule rendered the union representation “perfunctory” and “arbitrary.”

*Holodnak* raises the possibility that even where a grievance is pursued to the arbitration stage, the award may be vacated and the union held liable if the court determines that the union erred in its choice of tactics. Such a result would have been unthinkable under the earlier “conscious harm” view.

The sixth circuit’s oft-cited decision in *Ruzicka v. General Motors Corp.* has extended union liability for negligent conduct even further. In *Ruzicka*, an employee filed a grievance challenging his discharge for drunkenness and for using abusive language toward his superiors. The union failed to take timely action required to invoke arbitration, and the grievance was lost. In the discharged employee’s suit against the union and the employer, the district court held that the union’s failure to comply with the requirements of the grievance process was negligent but was not actionable, because there was no showing that it was prompted by bad faith.

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64 381 F. Supp. at 194. The plaintiff in *Holodnak* published an article highly critical of company and union policies in the newsletter of a radical political group.
65 Id. at 200.
66 Id. at 195-96. Since the employer did a considerable amount of work for the Department of Defense, the firing was viewed as “state action,” and the court thus scrutinized the company rule for the first amendment violations. Id. at 202-04.
67 Id. at 200-01. The court may also have been influenced by the impromptu nature of the union attorney’s preparations for the arbitration hearing. Id. at 195-96.
69 523 F.2d at 308.
70 Id.
71 Id. at 308-09.
The court of appeals reversed, finding that the union's conduct was "a clear example of arbitrary and perfunctory handling of a grievance" and that arbitrary or discriminatory union action "need not be motivated by bad faith to amount to unfair representation." The court distinguished the "conscious harm" approach by explaining that bad faith is required only when the employee's challenge relates to the union's decision that his grievance lacks merit. In *Ruzicka*, rather than reaching any decision on the substance of the employee's grievance, the local neglected to follow a procedural step necessary to resolve it.

The concurring opinion asserted that the union's conduct was not arbitrary or perfunctory, because these "are adjectives characterizing intentional conduct that is capricious or superficial." Nevertheless, notwithstanding the absence of intent, the concur- rence concluded that the duty of fair representation had been breached. While not all negligent acts should result in union liability, the concurring opinion maintained, a complete failure to fulfill the prerequisites to arbitration, in addition to the conduct proscribed by *Vaca*, should constitute a breach.

Neither the majority nor concurring opinion in *Ruzicka* appears to capture the meaning of *Vaca*. The majority strained to find support in established precedent for its statement that simple negligence can constitute a breach of duty. Its argument that the standard for union conduct becomes more exacting where a hearing on the merits is lost through neglect is not convincing. To impose liability on the union for neglect in its ministerial duties will do little to prevent the wrongful union conduct toward individuals that the Court in *Vaca* and *Lockridge* sought to discourage. The concurring opinion, on the other hand, although apparently recognizing that the Supreme Court aimed primarily at culpable, "intentional" conduct, consciously disregarded this mandate in an attempt to create a completely new class of breach. A more rational course would have been to preserve, in its original form, the Supreme Court's requirement of intent, and submit the case to the trier of fact for a finding whether the union intentionally had ignored its obligation to represent in good faith.

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7 Id. at 310.
8 Id.; see notes 42-58 and accompanying text supra.
10 523 F.2d at 315 (McCree, J., concurring) (emphasis omitted).
11 Id. at 316 (McCree, J., concurring).
Several recent cases have continued the trend towards negligence liability. The *Ruzicka* holding that negligence in failing to meet procedural deadlines constitutes breaches of the duty, has been adhered to on several occasions.\(^7\) Recent decisions have also found breach in cases where unions failed to exercise due care in presenting a grievance to an adjustment committee\(^8\) and in keeping the grievant informed of the progress of his claim.\(^9\) Moreover, an expanded willingness has been shown to scrutinize the reasonableness of union decisions on the merits of grievances.\(^8\) In general, the idea of negligence liability has gained acceptance in a number of courts, and cases premising union liability on negligence are no longer the rare exception.

It must be noted, however, that this trend has not proceeded unopposed. A guiding principle for many courts remains that no breach of duty will be found if any contract interpretation or any organizational consideration can be found to support the challenged union act.\(^4\) Additionally, some courts remain faithful to the

\(^7\) E.g., *Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710 (10th Cir. 1978), rev'd in part on other grounds, 442 U.S. 42 (1979). In that case, the tenth circuit found breach of duty where the negligence involved was even less egregious than in *Ruzicka*. In *Foust*, the employee presented his grievance to the union 4 days before the applicable deadline, which the union then missed by 2 days. The court, noting several dilatory aspects of the union's internal procedures, held that the jury could properly treat this conduct as arbitrary. 573 F.2d at 715-16.

\(^8\) E.g., *Milstead v. International Bhd. of Teamsters Local 957*, 580 F.2d 232 (6th Cir. 1978). In *Milstead*, the union representative assigned to prosecute the claim was apparently unfamiliar with the controlling agreement with management. The court found that the union's "ineptness" in presenting the merits at a first-stage conference breached its duty of fair representation. *Id.* at 234-36.

\(^9\) E.g., *Robesky v. Quantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1978). In *Robesky*, the plaintiff employee rejected the employer's settlement offer after the union had failed to notify her that a decision had been made not to arbitrate her wrongful discharge grievance. The court found that the duty of representation would have been breached even if the failure to notify her of the decision was the result of negligence, for the union's conduct was "egregious" and showed "reckless disregard" for the grievant's interest. *Id.* at 1089-90.

\(^4\) E.g., *Smith v. Hussmann Refrigeration Co.*, 103 L.R.R.M. 2321 (8th Cir. 1980). *Smith* involved union adherence to the principle of seniority in the processing of grievances. The court held that the union had breached its duty of fair representation by deciding to accept the claims of senior employees aggrieved by promotions given to more junior workers on the basis of their "skill and ability." The court would require unions to base any such decision to support one group of employees at the expense of another on "an informed, reasoned judgment regarding their merits of the claims in terms of the language of the collective bargaining agreement." See generally Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251 (1977).

\(^\) For cases relying on contract interpretation, see *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 766-67 (9th Cir. 1977); *Bernard v. McLean Trucking Co.*, 429 F. Supp. 284, 287 (D.
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requirement of intent as created by earlier cases.\textsuperscript{82}

Potential Impact of the Negligence Standard

The\textit{ Vaca} Court intended to preserve and strengthen labor arbitration. It has been suggested that, by regulating union conduct,\textit{ Vaca} "wished to prevent the most patent injustices from being shielded from judicial intervention without altering the basic system."\textsuperscript{83} It is submitted that the inevitable result of the use of a negligence standard would be to threaten the viability of the arbitral system by opening union activity in the grievance process to full judicial review. Such scrutiny of union conduct might also conflict with the long-standing federal policy of non-intervention in internal union affairs.\textsuperscript{84} While the negligence cases recognize that\textit{ Vaca} was a step forward since it eliminated the requirement that a specific hostile motive be proven,\textsuperscript{85} they seem to overlook the Su-

\textsuperscript{82} See Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 293-94 (7th Cir. 1975); Kovalski v. Wisconsin Steel Works of Int'l Harvester Co., 433 F. Supp. 314, 316-17 (N.D. Ill. 1977). Cannon is an excellent example of the intent requirement in operation. The plaintiff, a truckdriver, was involved in an accident and refused to submit to a sobriety test at the time he reported the mishap to the company's local terminal. 524 F.2d at 292. After being discharged, the employee filed a grievance claiming that he was unaware of the consequences of refusing to take the test and that the rule requiring him to do so was not properly promulgated.\textit{Id.} at 293. The union representative at the first-stage hearing pleaded plaintiff's good record and asserted the unlikelihood of plaintiff being intoxicated at 11:00 A.M. when the accident occurred.\textit{Id.} at 293-94. The district court held that the union had breached its duty by not challenging the validity of the rule requiring the sobriety test.\textit{Id.} at 293. Reversing, the seventh circuit held that "[t]o prove arbitrary or discriminatory treatment, the plaintiff must show that the Union's conduct was intentional, invidious and directed at that particular employee."\textit{Id.} at 293; accord, Del Casal v. Eastern Airlines, Inc., 101 L.R.R.M. 2059, 2062 (S.D. Fla. 1979); Barhitte v. Kroger Co., 99 L.R.R.M. 2663, 2670-71 (W.D. Mich. 1978); see Ryan v. New York Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451 (2d Cir. 1979),\textit{ discussed in} Baer, supra note 33, at 28, col. 3.


\textsuperscript{84} See, e.g., Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964). See also Newman v. Local 1101, Communication Workers, 570 F.2d 439, 446 (2d Cir. 1978).

\textsuperscript{85} Beriault v. Local 40, Super Cargoes & Checkers, 501 F.2d 258, 264 (9th Cir. 1974).
Supreme Court's indications that the duty of fair representation was
developed primarily to prevent disparate treatment of unit employ-
ees and intentional union wrongdoing.88

Nor does the nature of the union-employee relationship lend
itself to due care scrutiny. The union is the statutory agent not of
the individual but of the entire bargaining unit;87 its responsibility
is to exercise good faith in representing the unit as a whole. Recogn-
izing the collective nature of this obligation, the Vaca Court ruled
that the union should have wide discretion in administering the
grievance process, subject only to no individual being singled out
for unfavorable treatment.88 Indeed, the Supreme Court has never
gone so far as to hold that a union has a duty to use due care with
respect to individual grievances. Unlike the traditional agent-prin-
cipal or professional-client relationships, the union-employee bond
is unique in that it should not entitle the employee to expect any
particular level of skill from his union. For example, were a union
to negotiate a contract calling for a wage settlement lower than
that which could have been obtained had the union officials been
more adamant or resourceful, no one would suggest that individual
employees could maintain an action for a money judgment. The
dependent nature of the union's ability to represent its constituents
vigorously is another unique factor. The union necessarily must
rely on its money and manpower, but these resources vary widely
among unions and invariably are scarcest during a union's forma-
tive stages when employee expectations are at their highest. A
union's strength also varies with the depth of the support it re-
receives from the workers themselves. Whereas the agent in a tradi-
tional fiduciary relationship may call upon the full cooperation of
his principal, this support cannot be compelled under the National
Labor Relations Act.88

Moreover, it is important to consider the impact of negligence

88 Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971); Humphrey v. Moore,
89 NLRA § 9(a), 29 U.S.C. § 159(a) (1976); see Humphrey v. Moore, 375 U.S. 335, 349-
50 (1964); Prudential Ins. Co. v. NLRB, 412 F.2d 77, 84 (2d Cir.), cert. denied, 396 U.S. 928
90 See 386 U.S. at 191, 194.
shall have "the right to refrain from any or all [concerted] activities." Id. Additionally,
NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976), makes it unlawful for a union to coerce
an employee in the exercise of his § 7 rights, and NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2)
(1976), similarly makes it unlawful for the union to cause the company to discriminate
against non-union workers.
liability on the union's ability to give the desired fair representation in arbitration proceedings. The practical effect of large damage awards will be to make it more, not less, difficult for unions to represent all grievants fairly. Where a union is negligent, it is submitted that a more fruitful remedy for all concerned would be a resort by the employees to NLRB election procedures with the aim of securing a more responsible bargaining agent. This remedy, of course, may not be completely satisfactory from the point of view of the individual grievant harmed by union negligence. Nevertheless, the aggrieved individual often will be able to take advantage of intra-union corrective remedies set forth in the labor organization's constitution or by-laws. Nor should it be forgotten that a majority of unit employees normally have assented to a contractual provision giving their union exclusive, discretionary control over the grievance process; perhaps it may be said that the employees have effectively waived any future claims of negligence. In carrying out their role in the grievance process, union officers must screen out frivolous claims, familiarize themselves with the merits of numerous cases, and allocate their resources to the considerable ministerial tasks involved, always keeping in mind the interests of the unit as a whole. Errors in this process are unavoidable, and it does not appear to be unreasonable to impute knowledge of this fact to the employees who have placed their grievances in their union's hands. Basing union liability on negligence in research or preparation is particularly disturbing, since it is unavoidable that fledgling union locals or unions undergoing financial difficulties or internal strife may not have the resources or personnel to avoid such errors even when acting in the best of faith.

Finally, it is conceivable that a wave of negligence cases will require unions to foolproof their internal procedures, formalize rela-

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Where the union is negligent and the unfair representation plaintiff has alleged no union animus against him, there would seem to be no reason to believe that the union would deny him a private remedy. The intra-union remedies offered by larger unions can often make the claimant whole. See Harrison v. Chrysler Corp., 558 F.2d 1273, 1275 (7th Cir. 1977).

Under NLRA § 9(a), 29 U.S.C. § 159(a) (1976), each employee has the right to present grievances directly to the employer without the intervention of the union, provided the presentation does not conflict with any provisions of the collective bargaining agreement. Where the agreement states that grievances must be forwarded through the union, therefore, this exclusivity provision is enforceable against every person in the unit. See Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962); Woody v. Sterling Aluminum Prods., Inc., 243 F. Supp. 755 (E.D. Mo. 1965), aff'd, 365 F.2d 448 (8th Cir. 1966), cert. denied, 386 U.S. 957 (1967).
tions with individual grievants, and use any and all conceivable theories to support a claim in order to avoid liability. It is easy to imagine that the end product of this process would be a movement away from the use of arbitration by unions—a result contrary to established congressional and judicial policy. Thus, it is submitted that the most important factor for courts to consider in future fair representation cases is the potential impact upon the viability of labor arbitration, and that if this approach is adopted, the tide towards negligence liability will be stemmed.

The Substantive Duty—Its Current Status

The severity with which the duty of fair representation will be applied to a particular claim of breach is dependent upon a number of factors, including the jurisdiction in which the action is brought. Notwithstanding attitudinal differences among the circuits, however, certain general principles can be gleaned from the fair representation standards currently applied. An important consideration in discerning these principles is that the standards vary according to the stage of the grievance procedure in which the challenged activity occurred.

81 See note 9 and accompanying text supra.
82 Compare Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) with Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir.), cert. denied, 100 S. Ct. 49 (1979). See generally Dinges, supra note 68, at 1781-82. One of the courts which has afforded unions a broad range of discretion is the second circuit. The court has been particularly reluctant to disturb settlements reached by the union and employer. See Suisse v. American Export Lines, Inc., 507 F.2d 1343 (2d Cir. 1974); Simberlund v. Long Island R.R., 421 F.2d 1219 (2d Cir. 1970); Pyzynski v. New York Cent. R.R., 421 F.2d 854 (2d Cir. 1970). While it is true that the court has held that “bad faith” is not an essential element of the breach of duty action, see Ryan v. New York Newspaper Printing Pressmen’s Union No. 2, 590 F.2d 451, 456 (2d Cir. 1979); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974), the court seems to give the union the benefit of the doubt when reviewing a union decision not to arbitrate a particular grievance, see, e.g., Bartles v. New York Lithographers’ Union No. One-P, 431 F.2d 1205 (2d Cir. 1970) (per curiam). But see Steinman v. Spector Freight System, Inc., 441 F.2d 599 (2d Cir. 1971). Recently, in a case that arose outside the grievance process, the second circuit showed a strong policy favoring union discretion where the challenged activity concerned seniority adjustments following a merger of two businesses. See Ryan v. New York Newspaper Printing Pressmen’s Union No. 2, 590 F.2d 451 (2d Cir. 1979).
83 See notes 95-119 infra. The standards applied by the courts generally become stricter as the grievance machinery proceeds. One possible explanation for this phenomenon is that as the union becomes progressively more familiar with the facts of a particular case and the employer’s attitude towards the claim, a higher standard of conduct is required. It is submitted, however, that if the union is motivated by bad faith or discrimination or has decided arbitrarily to work against the grievant, this is more likely to manifest itself early in the grievance process. In addition, where good faith is demonstrated by accepting the claim for processing and by embarking upon the delicate task of presenting it for adjustment, the
The union's duty at the investigative stage has not been interpreted stringently. In view of the volume of employee claims and the time-consuming nature of investigatory activity, the union must necessarily have wide discretion in this area in order to conserve its resources. While an unreasoned refusal to investigate will amount to "arbitrariness," the reported cases nevertheless set a fairly generous standard for the union. One court, for example, recently found no breach of duty where the investigation conducted by the union amounted to only brief conversations with the grievant and one employer representative. Similarly, the failure to interview witnesses, even important ones, will not always constitute a breach.

The union's preliminary judgment concerning the merits of a grievance, like the investigation preceding it, generally has been treated fairly liberally by the courts. For the most part, the union's decisions will be upheld if supported either by a rational reading of the collective bargaining agreement or by the union's practical need to limit the number of grievances prosecuted. Indeed, it has been held that in determining whether to process a grievance, the union is entitled to consider whether the claim will justify the time and expense involved. Moreover, there seems to
exist something in the nature of a presumption that a union’s findings on the merits of a claim will be based on a good faith view of the situation and the labor contract. It is submitted, therefore, that despite the Vaca Court’s statement that “a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances,” an unfair representation plaintiff whose grievance has not been accepted by his union will be forced to rely on a “bad faith” or “discrimination” theory, with all the concomitant problems of proof. Only if the union refuses to process the claim without evaluating its worth will a plaintiff be likely to succeed on the basis of “arbitrariness.”

Once the union decides that the grievance is meritorious, it will be held to stricter standards throughout the remainder of the process. For example, although the circuits differ, there is a marked trend towards finding arbitrariness from an unexplained failure to file a grievance timely. Similarly, the union’s presenta-

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tion of the merits before the grievance committees, and eventually before the arbitrator, is regulated closely. The union is required to be adequately familiar with relevant contract provisions, and breach of duty may be found where the union fails to capitalize, even through neglect, on a possible theory of recovery for the grievant. Furthermore, while the union is given discretion on such questions as whether to allow the admission of hearsay evidence, to pursue a group grievance individually or in one proceeding, or to demand a single arbitrator as opposed to a panel, the union will be liable for breach if its decision was made in disregard of the employee's best interests. One limitation on judicial regulation of the union's presentation of the merits, however, is that no breach of duty will be found where the grievant himself had an opportunity to remedy the defects in the presentation but failed to do so.

Another means by which a union can breach the duty of fair representation is through its failure to inform the individual of the progress of his claim. Notwithstanding the considerable amount of judicial resistance to this theory of liability, recent cases demonstrate that this type of breach is likely to become more important in the future.

Breach of duty liability also may be based upon an unfair settlement or abandonment of a grievance. The most common diffi-

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107 See Milstead v. International Bhd. of Teamsters Local 957, 550 F.2d 232 (6th Cir. 1977); note 78 and accompanying text supra.


112 Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972).


116 See Archie v. Chicago Truck Drivers Union, 585 F.2d 210 (7th Cir. 1978).
culty in this area concerns disparate settlements of similar claims. Where the grievant can show that he received a less generous settlement than a coworker due to discrimination, a breach of duty will be found. In contrast, the arrangement will be binding on the grievant if the union, in settling with the employer, is motivated by rational considerations. Similarly, should the grievant refuse to agree to a permissible settlement, the union may safely discontinue processing his claim.

Finally, there remain some unresolved questions concerning the mechanics of the employee’s breach of duty action, but full consideration of these questions is beyond the scope of this Note.


120 Determining the proper statute of limitations is one unsettled area. State law controls on federally created causes of action where Congress has not supplied a limitations period of its own. See, e.g., Campbell v. Haverhill, 155 U.S. 610, 618 (1895), the statute of limitations to be applied to the breach of contract action against the employer will be readily ascertainable in most jurisdictions, see, e.g., N.Y. Civ. PRAC. LAW § 213(2) (McKinney 1972 & Supp. 1978-1979). Which state limitations period, however, may be unclear in many states. Some courts apply state tort statutes, apparently on the theory that the union’s liability results essentially from its intentionally tortious act or failure to meet a standard of due care like that used in personal injury and property damage suits. See, e.g., Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978); Daniels v. Steamfitters Local 342, 95 L.R.R.M. 3290, 3291 (N.D. Cal. 1977); Howard v. Aluminum Workers Int’l Union, 418 F. Supp. 1058, 1059 (E.D. Va. 1976), aff’d, 559 F.2d 711 (4th Cir. 1977). Other courts, emphasizing the impliedly contractual nature of the union-employee relation, apply state contract limitations periods. See, e.g., Warren v. International Bhd. of Teamsters, 544 F.2d 334, 337 (8th Cir. 1976); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). Still others use statutes of limitations applicable to “statutory causes of action.” See, e.g., Heritage v. De La Warr Bd. of Educ., 447 F. Supp. 1240, 1243-44 (D. Del. 1978); DeVries v. Interstate Motor Freight Sys., 91 L.R.R.M. 2764, 2767 (N.D. Ohio 1976).

Controversy also surrounds the duty of an aggrieved employee to exhaust any internal procedures established by the union for possible restitution of wronged members. See Mills v. Long Island R.R., 515 F.2d 131, 131 (2d Cir. 1975); Larimer v. United Inter-Mountain Tel. Co., 428 F. Supp. 8, 10-11 (E.D. Tenn. 1976). It must be noted, however, that numerous exceptions to this rule have been recognized. See, e.g., Farmer v. Local 1064, United Catering Workers, 99 L.R.R.M. 2166, 2168 (E.D. Mich. 1978) (workers prevented from obtaining copy of union constitution explaining remedies); Patterson v. Bialystoker & Bikur Chollin, Inc., 95 L.R.R.M. 3115, 3116 (S.D.N.Y. 1977) (no reasonable chance of relief); Mar-
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CONCLUSION

In applying the duty of fair representation to the union's handling of grievances, the courts have been faced with the task of balancing the discretion necessary for effective union action against the need to protect the individual from abuse of exclusive agency power. A logical reconciliation of these conflicting considerations would be to impose liability only for intentional union conduct that wrongfully retards the progress of a grievance. This view comports with the standard established by the Supreme Court's seminal opinion in Vaca v. Sipes. Nevertheless, the lower courts continue to disagree on the scope of the duty of fair representation. A more definitive exposition of the law on this subject is thus necessary if the union, employer, and individual grievant are to know the full extent of their rights and obligations in grievance arbitration.

Alan Sorkowitz

Finally, another disputed question is whether attorney's fees are recoverable. Such awards are improper according to the general rule. See Cronin v. Sears, Roebuck & Co., 445 F. Supp. 277, 278 (E.D. Mo.), rev'd in part on other grounds, 588 F.2d 616 (8th Cir. 1978). However, fees incurred by the individual employee may be collectible from the union provided the employee can prove bad faith conduct by the union. See Richardson v. Communications Workers, 530 F.2d 126, 132 (8th Cir.), cert. denied, 429 U.S. 824 (1976); Negri v. Service Employees Local 87, 98 L.R.R.M. 2508 (N.D. Cal. 1978). Where there is no bad faith, an award of attorney's fees would seem to be barred by Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1976), wherein the Court held that attorney's fees may be awarded without statutory authorization only in extremely limited circumstances.