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William C. Martucci

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EMPLOYER LIABILITY FOR UNION UNFAIR REPRESENTATION: THE JUDICIAL PREDILECTION AND UNDERLYING POLICY CONSIDERATIONS

WILLIAM C. MARTUCCI*†

I. INTRODUCTION

The representative designated by a majority of the employees in an appropriate bargaining unit has a duty to bargain fairly in behalf of all em-

*Office of the Judge Advocate General, United States Navy, Washington, D.C. B.A., 1974, Rutgers College; J.D., 1977, University of Arkansas.

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ployees, union members and nonmembers alike. When an employer and a union agree to a collective bargaining agreement the interests of the individual employee are affected significantly. The employee's right to fair representation is a judicially created safeguard which the law affords individual workers against a union's abuse of power.

This Article discusses the origins of the duty of fair representation and the judicial efforts to effectuate appropriate remedies to fully compensate the individual worker when the employer has breached the collective bargaining agreement by wrongful discharge of the worker and the union has failed in its duty of fair representation. Particular consideration is extended to the competing interests which adhere in this context and how the courts apportion liability between the employer and the union to accommodate these interests in fashioning an appropriate remedy. Only when the competing interests are identified and evaluated can the law be fairly judged as socially desirable. The aim of this Article is to assist in that evaluation.

II. HISTORICAL PERSPECTIVE: THE GENESIS, EVOLUTION, AND THEORETICAL UNDERPINNINGS OF THE DUTY OF FAIR REPRESENTATION

Prior to the congressional enactments of the Norris-LaGuardia Act in 1932[1] and the National Labor Relations Act in 1935,[2] concerted employee

1. Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (current version at 29 U.S.C. §§ 101-115 (1976)). In 29 U.S.C. § 102 (1976), entitled "Public policy in labor matters declared," it is stated:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

2. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current ver-

activities in support of demands for higher wages or better working conditions were met with criminal prosecution. In the early nineteenth century, such activities were characterized and treated as common law conspiracies. Later, the civil injunction was utilized as a far more effective weapon against labor activities.[3]

The Norris-LaGuardia Act marked a new direction with its declaration that the public policy of the United States was to ensure employees full freedom to organize and to bargain collectively without employer interference. In order to effectuate that goal, the Act severely limited the issuance of injunctions in labor disputes.[4] Even today, the Act's restriction of injunctions remains viable.[5]

The National Labor Relations Act of 1935 (NLRA) expressly established one of the cardinal principles of American labor law: exclusive representation by the majority. Section 9(a) of the Act provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be *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 . . . .[6]

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sion at 29 U.S.C. §§ 151-169 (1976 & Supp. II 1978)) [hereinafter referred to as NLRA].

3. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1-6 (1976); H. WELLINGTON, LABOR AND THE LEGAL PROCESS 38-46 (1968).

4. 29 U.S.C. § 101 (1976) provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

5. *See, e.g.*, Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976). The Supreme Court ruled that the *Boys Markets* exception to the Norris-LaGuardia Act was limited to arbitrable disputes concerning the meaning of the provisions of the collective bargaining agreement. Therefore, the Norris-LaGuardia Act does not permit the enjoining of disputes other than those narrowly excepted from its prohibition in Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). For a discussion of how a *Boys Markets* injunction may be utilized against an employer, see Note, Boys Markets *Injunctions Against Employers*, 91 HARV. L. REV. 715 (1978). *See generally* Relias, *The Developing Law Under* Boys Markets, 23 LAB. L.J. 758 (1972); Project, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 192-211 (1970); Comment, *Labor Law—Availability of Injunctive Relief to Restrain Sympathy Strikes*, 43 MO. L. REV. 503 (1978).

6. 29 U.S.C. § 159(a) (1976) (emphasis added).

Thus, the NLRA adopts the principle of majority rule which has been a fundamental component of America's political decision-making process and tradition.

In addition to exclusivity and majority rule, the NLRA premises national labor policy upon an acceptance of the practice and procedure of collective bargaining.[7] Collective bargaining becomes the means by which industrial strife is to be resolved. Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."[8]

The growth of labor unions in modern industrial society is in large part attributable to the national labor policy of encouraging collective bargaining.[9] This policy is predicated on the belief that majority representation is the most efficient and effective means by which employees' benefits are enhanced and industrial stability achieved.[10] Underlying this policy is the

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7. *Id.* § 151, which states in relevant part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

8. *Id.* § 158(a)(5).

9. It should be noted that in recent years the percentage of union members in the total work force has declined. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 2044, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS (1980).

10. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975). In *Emporium*, the NLRB dismissed a complaint alleging the employer violated § 8(a)(1) of the NLRA by discharging two black employees who picketed, handbilled, and attempted to bargain with their employer over allegedly racially discriminatory employment practices. The Board concluded the employees' conduct undermined the ongoing collective bargaining agreement and the principle of exclusivity by attempting to circumvent their elected representative to engage in such bargaining. Emporium and Western Addition Community Organization, 192 N.L.R.B. 173 (1971), *rev'd*, 485 F.2d 917 (D.C. Cir. 1973), *rev'd sub nom.* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975).

On appeal, the United States Court of Appeals for the District of Columbia reversed the Board's finding of a violation of the union's exclusivity. The court found protected concerted activity due to the involvement of racial discrimination and the statutory prohibition of such discrimination in Title VII of the Civil Rights Act of 1964. Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973), *rev'd sub nom.* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975).

subjugation of the individual employee's pursuit and advocacy of his interest to the expression of that interest collectively through a majority representative.

It was early held that an employer could not lawfully insist that the union bargain only for its members. Employers argued that to grant the union exclusive representation status on behalf of all employees would unduly hamper those employees who had voted against union representation. That argument was rejected. The courts reasoned that the NLRA overrode the preference of the minority within the unit and that the employer had to recognize the majority union as the sole spokesman for all employees within the bargaining unit.[11] Simply put, the rule now is that when the preference of the individual conflicts with the majority, it is the individual who must yield to the group's collective interest.

When an individual union member's actions endanger the interests of the group as expressed through its union representatives, the union has the authority to discipline the recalcitrant individual. This authority was recognized by the Supreme Court in *NLRB v. Allis-Chalmers Manufac-*

The Supreme Court reversed the court of appeals and found that attempts to engage in separate bargaining were proscribed by § 9(a) of the NLRA and not protected under § 7 of the NLRA. The Court recognized the role of Title VII by noting that a suit could be brought under that statute. Nonetheless, the discrimination suit was found to be a matter separate and apart from the employees' violation of the exclusivity principle. Thus, the Court favored the orderly collective-bargaining process contemplated by the NLRA. *See generally* Cassel, *The* Emporium *Case, Title VII Rights and The Collective Bargaining Process*, 26 HASTINGS L.J. 1347 (1975).

11. *See, e.g.*, NLRB v. Boss Mfg. Co., 107 F.2d 574 (7th Cir. 1939). This is not to imply that a minority employee (one who has voted against the majority union) relinquishes all rights. The proviso to § 9(a) of the NLRA states:

> [A]ny 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 agreement contract or agreement then in effect . . . .

Moreover, § 14(b) embodies the so-called "right to work." It provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Thus, the NLRA reserves to the states the prerogative to define their own law respecting union membership. *See generally* Youngdahl, *Thirteen Years of the 'Right to Work' in Arkansas*, 14 ARK. L. REV. 289 (1960). *See also* Hopson, *Whither Hurried Hence—The New Right to Work Amendment*, 8 KAN. L. REV. 18 (1959); Kovack, *National Right to Work Law: An Affirmative Position*, 28 LAB. L.J. 305 (1977); Comment, *Applicability of State Right-to-Work Laws:* Oil, Chemical and Atomic Workers v. Mobil Oil Corp., 18 B.C. INDUS. & COM. L. REV. 1078 (1977).

turing Co.[12] A statutory basis for union discipline is found in section 8(b)(1)(A) of the NLRA, wherein it is stated:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .[13]

Moreover, the union's power to discipline is inferred from and vital to its role as exclusive representative under the federal labor statutes.[14]

The principles of majoritarianism and exclusivity are subject to the competing interests of the minority within the unit. Accommodation of the competing interests is found in several limitations imposed upon the union.[15] The most significant limitation is the duty of fair representation.

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12. 388 U.S. 175 (1967). In *Allis-Chalmers*, the Court upheld the union's authority to fine union members who crossed a picket line set up by the union's striking members. The case raises the issue of priorities of union security and employee freedom. *See generally* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

Whether a union should be given such broad discretion in the imposition of rules upon its members has been questioned. *See* Browne, *The Labor Board Unsettles the Scales*, 42 NOTRE DAME LAW. 133, 148-49 (1966). Mr. Browne has elsewhere observed:

> Board decisions involve more than the relationship between management and unions. They also involve decisions relating to union control over its members. In 1959 Congress gave abundant recognition to the fact that the rights of unions carried commensurate responsibilities and obligations to act in the interest of their members and the public. The Board, however, when confronted with a choice between union power vis-à-vis individual rights, appears to side with the former.

Browne, *A Management View of NLRA Reform*, 12 GONZ. L. REV. 32, 57-58 (1976). *See also* Comment, *Fair Representation and Union Discipline*, 79 YALE L.J. 730 (1970).

13. 29 U.S.C. § 158(b)(1)(A) (1976).

14. This exclusivity is established in both the Railway Labor Act, 45 U.S.C. §§ 151, 152 (1976), and the Taft-Hartley Act of the NLRA, 29 U.S.C. §§ 151, 159(a) (1976).

15. Examples of the limitations imposed upon unions in an effort to accommodate these competing interests have been outlined in R. GORMAN, *supra* note 3, at 279-80. First, the majority union is exclusive representative, in the words of § 9(a), only for "the employees in a unit appropriate for such purposes." Second, the duty not to deal with individuals and minority unions applies only to "rates of pay, wages, hours of employment, or other conditions of employment" as stated in § 9(a). Third, § 9(a) provides that the duty not to deal with individuals applies only "for the purposes of collective bargaining." Fourth, the duty to bargain with a certified or recognized union is limited by specific rules promulgated by the

The authority of a union to act as the exclusive representative is subject to a correlative obligation to fairly represent all within the unit. The union's obligation to represent all employees fairly is a judicially fashioned duty implied in section 9(a) of the NLRA.[16]

The doctrine was first discussed in *Steele v. Louisville & Nashville Railroad*,[17] a case arising under the Railway Labor Act.[18] In *Steele*, the railroad company and the union representing its firemen negotiated several collective bargaining provisions which set a ceiling upon the number of black employees to be assigned certain work. The agreement also severely restricted access by black employees to certain jobs. A number of black employees initiated a suit against both the employer and the union on the basis of the racially discriminatory agreement which had resulted in their loss of employment. The Supreme Court of Alabama dismissed the complaint, finding that it failed to state a cause of action because the authority of the statutory bargaining agent to negotiate and modify the rights of employees within the unit was absolute.

The Supreme Court of the United States reversed the Alabama court by holding that the Railway Labor Act implicitly "expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[19] The Court recognized that the statutory representative (the union) was vested with discretion in making employment contracts, even if those contracts resulted in "unfavorable effects on some of the members of the craft represented."[20] The Court held, however, that discriminatory contracts based on irrelevant factors such as race are an impermissible exercise of union discretion and violative of the duty of fair representation. When such a violation occurs, an injured employee may "resort to the usual judicial remedies of injunction and award of damages when appropriate."[21]

Board. Finally, the Landrum-Griffin Amendments of 1959 incorporate a "Bill of Rights" intended to serve as safeguards for individual rights in intra-union affairs. 29 U.S.C. §§ 411-415 (1976).

16. 29 U.S.C. § 159(a) (1976). *See generally* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Comment, *The Duty of Fair Representation*, 20 CATH. L. REV. 271 (1970). *See also* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965).

For a discussion of how the NLRB handles the duty of fair representation, see Fanning, *The Duty of Fair Representation*, 19 B.C.L. REV. 813 (1978); Comment, *Unfair Representation and the National Labor Relations Board: A Functional Analysis*, 37 J. AIR L. & COM. 89 (1971).

17. 323 U.S. 192 (1944).

18. 45 U.S.C. §§ 151-188 (1976).

19. 323 U.S. at 202-03.

20. *Id.* at 203.

21. *Id.* at 207.

In *Wallace Corp. v. NLRB*,[22] a case decided on the same day as *Steele*, the Court indicated in dicta that bargaining agents under the NLRA are "charged with the responsibility of representing . . . [employees'] interests fairly and impartially."[23] Nine years later, the contours of the discretion vested in the union to create reasonable distinctions among groups of employees were explored in *Ford Motor Co. v. Huffman*.[24] In *Huffman*, the Court upheld the validity of an agreement between Ford Motor Company and the UAW which afforded seniority credit for military service to veterans who had not worked for the company prior to their military service in World War II. Balancing the competing interests of veteran and nonveteran employees, the Court explained:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[25]

Although *Huffman* was implicitly based on an extension of the duty of fair representation to cases arising under the NLRA, the Supreme Court first declared the extension in *Syres v. Oil Workers International Union*.[26] Subsequent cases have extended the duty of the union beyond the negotiation stage to encompass the administration of the agreement as well.[27]

In *Smith v. Evening News Association*,[28] the Supreme Court provided the procedural vehicle by which an individual aggrieved employee could sue his *employer* for a breach of the collective bargaining agreement. *Evening News* held that a suit by an individual employee against his employer for breach of a collective bargaining agreement was a suit for the violation of a contract between an employer and a labor organization within the meaning of section 301 of the Labor Management Relations Act.[29] Mr. Justice White, speaking for the Court, explained:

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22. 323 U.S. 248 (1944).

23. *Id.* at 255. The Court explained that "[t]he duties of a bargaining agent . . . extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees . . . ." *Id.*

24. 345 U.S. 330 (1953).

25. *Id.* at 338.

26. 350 U.S. 892 (1955) (per curiam).

27. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564-67 (1976) (discussed in text accompanying notes 76-91 *infra*); Vaca v. Sipes, 386 U.S. 171, 177 (1967) (discussed in text accompanying notes 34-63 *infra*).

28. 371 U.S. 195 (1962). *See generally Labor Law—The Collective Bargaining Agreement and NLRB Pre-emption*, 29 MO. L. REV. 107 (1964).

29. 29 U.S.C. § 185 (1976). Section 301, entitled "Suits By And Against Labor Organizations," provides:

> The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.[30]

In *Republic Steel Corp. v. Maddox*,[31] an employee brought a section

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

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

See generally Comment, *Aspects of Suits to Enforce Collective Bargaining Agreements Under the Taft-Hartley Act*, 13 ARK. L. REV. 58 (1959).

30. 371 U.S. at 200.

31. 379 U.S. 650 (1965). For a discussion of the *Maddox* case, see *Labor Law—Section 301 and Requiring Exhaustion of Grievance Procedures*, 25 LA. L. REV. 949 (1965).

301 suit in a state court against his employer for severance pay allegedly due him under the terms of the collective bargaining agreement between his employer and his union. The collective bargaining agreement contained a three-step grievance procedure, but the employee made no effort to secure a remedy through these procedures. It was held that the employee must at least attempt to exhaust contract grievance procedures through his union before suing the employer. As Mr. Justice Harlan observed for the Court: "[I]t cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."[32] The Court did not address the issue of whether the employee would have any remedy against his employer, or the form that remedy might take, in the event that the union refused to present his claim or presented it in a perfunctory manner. The Supreme Court's decision in *Vaca v. Sipes*,[33] which addressed these issues, constitutes the primary focus of this Article.

III. *VACA V. SIPES*: THE APPORTIONMENT OF LIABILITY PRINCIPLE IN ASSESSING DAMAGES BETWEEN EMPLOYER AND UNION

In 1967 the Supreme Court in *Vaca v. Sipes*[34] addressed a largely unsettled and controversial area of labor law concerning the rights and remedies of individual employees vis-à-vis the union and the employer under a collective bargaining agreement. A detailed explanation of the *Vaca* facts is necessary for a thorough understanding of the Court's legal analysis. Even today, *Vaca v. Sipes* remains the most helpful source of guidance in this sometimes abstruse area of labor law.

In mid-1959 Benjamin Owens, an employee of Swift & Company's (Swift) Kansas City Meat Packing Plant, became ill and entered a hospital on sick leave. Owens, who had a history of high blood pressure, recovered after a long period of convalescence. His family doctor certified him as fit to resume his work in the packing plant.[35] Upon his return to work, Owens was examined by Swift's company doctor who concluded that his blood pressure was too high to permit reinstatement. Owens then secured a second authorization from another doctor not affiliated with Swift and returned to work based on the permission of a company nurse. When Swift's doctor discovered two days later that Owens had returned to work, Owens was permanently discharged because of poor health.

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32. 379 U.S. at 653. The Court noted, "Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees." *Id.*

33. 386 U.S. 171 (1967).

34. *Id.*

35. Owens' employment was characterized as "heavy work." *Id.* at 174.

Owens sought the union's assistance in securing reinstatement, and a grievance on his behalf was filed by the union with Swift. The collective bargaining agreement between Swift and the union created a five-step grievance procedure. Steps one and two provided for either the employee or the union's representative to present the grievance to Swift's department foreman, and then to present it in writing to the division superintendent. Step three required a meeting of the grievance committees of the union and management. The result of that meeting necessitated that the company articulate its position in writing and present it to the union. In the fourth step, a meeting between representatives of the national union and Swift's general superintendent was provided. The fifth and final step empowered the national union to refer the grievance to a specified arbitrator.[36]

By late 1960 the grievance had been processed through the fourth step of the grievance procedure without success. Swift rejected Owens' presentation of his certified bill of health by two noncompany doctors. Numerous medical reports of reduced blood pressure were rejected by Swift because of its belief that they were not based on sufficiently thorough medical tests. Thus, through the fourth step of the grievance process, Swift asserted its original finding that Owens' poor health justified his discharge.

On completion of step four, the union sent Owens to a new doctor in an attempt to secure more thorough evidence for arbitration. The examination did not support Owens' retention. Accordingly, the union's executive board decided not to pursue the final step of the grievance procedure (arbitration) because of insufficient medical evidence. Owens rejected the union's recommendation that he accept Swift's offer of referral to a rehabilitation center. The union refused Owens' demand that the grievance be taken to arbitration. Owens responded by filing a suit against the union alleging that the union had "'arbitrarily, capriciously and without just or reasonable reason or cause'"[37] refused to take his grievance to arbitration under the grievance procedures of the collective bargaining agreement.

Owens filed his suit against the union in a Missouri state court. In a jury trial, a verdict was returned awarding Owens $7,000.00 compensatory and $3,300.00 punitive damages. The trial judge set aside the jury verdict and entered judgment for the union on the ground that a breach of the duty of fair representation is arguably an unfair labor practice over which the NLRB has exclusive jurisdiction. The Kansas City Court of Appeals affirmed the trial judge's ruling. The Missouri Supreme Court reversed and reinstated the verdict in finding that the Board did not possess exclusive

36. *Id.* at 175 n.3.
37. *Id.* at 173.

jurisdiction in actions alleging a union's breach of the duty of fair representation.[38]

The United States Supreme Court, in an opinion by Mr. Justice White, granted certiorari "to consider whether exclusive jurisdiction lies with the NLRB and, if not, whether the finding of Union liability and the relief afforded Owens are consistent with governing principles of federal labor law."[39] In answering the first question, the Court was unequivocal in ruling that the courts have concurrent jurisdiction with the NLRB to enforce the duty of fair representation. The Court noted that "the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."[40] Recognizing that the duty of fair representation was a judicially fashioned doctrine developed in *Steele*[41] and its progeny, the Court found that the

> primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose . . . [was] not applicable to cases involving alleged breaches of the union's duty of fair representation.[42]

Furthermore, the Court referred to "the unique interests served by the duty of fair representation"[43] and the necessity of judicial supervision to assure that an individual employee's interests are protected. In this regard, it was said:

> This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. . . . Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.[44]

Equally vital to the Court's decision that the Board and the courts have concurrent jurisdiction over fair representation suits was its discussion of the scope of the union's duty of fair representation and the judicial remedies available to the aggrieved individual employee. As to the scope of

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38. 397 S.W.2d 658 (Mo. En Banc 1965), *rev'd*, 386 U.S. 171 (1967).
39. 386 U.S. at 174.
40. *Id.* at 180-81.
41. *See* notes 17-21 and accompanying text *supra*.
42. 386 U.S. at 180-81.
43. *Id.* at 181.
44. *Id.* at 182 (citations omitted).

the duty, the Court explained that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[45] Regarding judicial remedies, the Supreme Court has discussed three alternatives available to ensure the protection of individual rights under the collective bargaining agreement.

One alternative was expressed by Mr. Justice Black in his dissenting opinion in *Vaca*, wherein he took the position that the discharged employee should have an absolute right to bring a breach of contract action against his employer. In response to the argument that compliance with established grievance procedures is vital to the national labor policy goal of encouraging the peaceful resolution of labor disputes in accordance with the method adopted by the parties, Justice Black wrote:

> [T]he Court suggests that its decision "furthers the interest of the union as statutory agent." I think this is the real reason for today's decision which entirely overlooks the interests of the injured employee, the only one who has anything to lose. Of course, anything which gives the union life and death power over those whom it is supposed to represent furthers its "interest." I simply fail to see how the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf.
>
> . . . [R]equiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook.[46]

Thus, Justice Black viewed the union's breach of its duty of fair representation as legally irrelevant to the employee's suit against the employer. Implicit in this absolute right of an employee to pursue his grievance to the arbitration stage or to sue his employer for breach of contract is the elevation of the individual employee's interests to that of highest priority. This follows from Mr. Justice Black's finding that the majority's decision "overlooks the interests of the injured employee, the only one who has anything to lose."[47]

The opposite alternative was articulated by Mr. Justice Goldberg in his concurring opinion in *Humphrey v. Moore*.[48] In *Humphrey*, the Supreme Court rejected a challenge by an individual employee to the modification

45. *Id.* at 190.

46. *Id.* at 209-10 (Black, J., dissenting).

47. *Id.* at 209 (Black, J., dissenting).

48. 375 U.S. 335, 351 (1964) (Goldberg, J., concurring). For a discussion of *Humphrey*, see *Labor Law—NLRA—Union's Duty to Represent Fairly*, 17 VAND. L. REV. 1328 (1964).

of his contractual seniority rights by joint employer-union action. The suit was analyzed as both one for breach of fair representation and breach of the employment contract.[49] Mr. Justice Goldberg's opinion took the position that individual employees should not be permitted to sue an employer under section 301 for violation of an employment contract because there were "too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties."[50] Therefore, an aggrieved discharged employee would be limited to a fair representation suit against the union.

Mr. Justice Goldberg's opinion in *Humphrey* is premised on a finding that the interests of the employer and the union in maintaining a flexible, workable employment contract is more highly valued than the interests of individual employees in having the terms of the collective bargaining agreement enforced as originally written. The approaches of Justices Black and Goldberg find their common ground in each one's refusal to wed the duty of fair representation to a section 301 suit against the employer. The former finds an absolute right to sue the employer under section 301; the latter finds no such right under any circumstances.

The majority of the Supreme Court in *Vaca* took an intermediate approach, thus rejecting the polar positions advanced by Justices Black and Goldberg. Mr. Justice White, speaking for the Court, wed the employee's section 301 suit against the employer for breach of the employment contract to the union's failure to exercise its duty of fair representation. Thus, the analysis of the majority identified the confluence of the union's failure to exercise its duty with the employer's breach of the contract by wrongfully discharging the employee. In an effort to balance the competing interests of the employee, the union, and the employer in formulating national labor policy, the *Vaca* Court reasoned:

> [T]he employer . . . may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. *To leave the employee remediless in such circumstances would, in our opinion, be a great injustice.* We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining

49. 375 U.S. at 343-44.

50. *Id.* at 353-54 (Goldberg, J., concurring). *See generally* Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601 (1956).

> agreements by wrongful union conduct in the enforcement of such agreements.
>
> For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.*[51]

Thus, the Court provided the individual employee with a judicial avenue to seek relief. The right to bring suit, however, is not absolute. Rather, it is conditioned upon the employee's success in establishing that the union has actually breached its statutory duty of fair representation. The majority's reluctance to accept a rule permitting an individual employee to compel arbitration of his grievance regardless of its merit was founded on relevant practical considerations and national labor policy. The Court reasoned that by finding an absolute right "the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiations."[52] Moreover, the resulting greater number of grievances and the attendant increased cost of the grievance machinery "could so overburden the arbitration process as to prevent it from functioning successfully."[53] Finally, in justification of the majority's intermediate position, the Court stated: "Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration."[54]

IV. THE COMPETING INTERESTS UNDERLYING *VACA V. SIPES*

In the context of the national labor scheme, there are competing interests involved. *Vaca v. Sipes* is a landmark decision in this area of labor law because it was the first case (and remains the most illuminating discussion) in which the Supreme Court grappled with the competing interests which adhere in the collective bargaining agreement and the administration of

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51. 386 U.S. at 185-86 (citations and footnote omitted) (emphasis added). For an excellent discussion of the practical problems an employee encounters in the course of his lawsuit, see Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation*, 5 U. TOL. L. REV. 514 (1974).

52. 386 U.S. at 191.

53. *Id.* at 192.

54. *Id.*

that agreement. It is the accommodation of these often conflicting interests which lies at the heart of the Supreme Court's analysis in *Vaca*.

Undoubtedly, such an accommodation requires a balancing of interests. The result in a given case is inexorably a reflection of how this balance is struck. Law is not always logical. Indeed, at times, law must depart from the utilization of the tools of pure logic—even from the analogy of logic. This is because it is not logic alone that shapes the law, but the socio-economic conditions which the law seeks to serve.[55] The words of Mr. Justice Holmes have particular significance in the analysis of judicial opinions which address the remedies available to an aggrieved employee under the collective bargaining agreement. Mr. Justice Holmes explained:

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[56]

The four interests which adhere in this context are those of union, employer, individual employee, and society. Simply stated, the interest of the union is in maintaining the power vital to its role as exclusive bargaining agent. The employer's interest lies in the maintenance of an efficient, responsive work force and adherence to the agreed-upon grievance procedures embodied in the collective bargaining agreement. The individual employee's interest is in the restoration of his employment status and to be "made whole" for the damage attributable to his loss of employment and the union's failure to fairly represent him. Society's interest is the peaceful, orderly, and just resolution of employment disputes between union, employer, and individual employee. The societal interest as expressed through legislation favors the procedures agreed upon by the parties for resolution of disputes.[57] But the judicial function must balance that desire

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55. *See* Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319 (1971); Leflar, *The Great and Common Law*, 30 ARK. L. REV. 395 (1977).

56. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

57. This policy is expressed in the Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1976):

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

See also Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-99 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

with the corollary societal interest in the protection of the individual employee as embodied in sections 7 and 9 of the NLRA.[58]

V. THE PRINCIPLE OF APPORTIONMENT OF LIABILITY

In its discussion of the individual employee's relief for a breach of the union's duty of fair representation, the Court in *Vaca v. Sipes* stated that the "appropriate remedy . . . must vary with the circumstances of the particular breach."[59] After finding that the courts could properly "decide the contractual claim and award the employee appropriate damages or equitable relief,"[60] the Court announced the principle to be applied in apportioning liability:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases in any of those damages caused by the union's refusal to process the grievance should not be charged to the employer.[61]

In *Vaca*, the Court proceeded to find that "even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift."[62] The Court found no liability attributable to the union's failure to process the grievance. The Court explained:

> A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a

58. 29 U.S.C. §§ 157, 159 (1976). *See generally* Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432 (1958); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Comment, *Individual Control Over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559 (1968).

59. 386 U.S. at 195.

60. *Id.* at 196.

61. *Id.* at 197-98. *See also* Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving a Union's Breach of Its Duty of Fair Representation*, 30 MERCER L. REV. 661 (1979).

62. 386 U.S. at 198.

> defendant in the fair representation suit, as in Humphrey v. Moore . . . . It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages.[63]

Thus, the Court in *Vaca* found that all liability should fall upon the employer (assuming the plaintiff could establish the union's failure to exercise its duty of fair representation) because it was the employer's initiation of discharge which effectuated the employee's resulting damage. Although the Court announced the governing principle to be one of apportionment of liability according to damages attributable either to the employer's initiation of the discharge or to the union's violation of its duty, no attempt to distinguish the damages resulting from the action of the employer as contrasted with the action of the union was attempted other than to say that the damages were "solely" attributable to the employer. The Court failed to determine what damages were attributable to the union's violation of its duty. The Court's analytical failure is frequently emulated in the lower court cases discussed below. Why have the courts not taken the next step in the analysis of apportionment of liability?

VI. THE APPLICATION OF THE APPORTIONMENT PRINCIPLE OF *VACA V. SIPES*

The issue of union liability in a fair representation suit was addressed by the Supreme Court in 1970 in *Czosek v. O'Mara*.[64] The Court held that the complaint by former employees brought against the union established that the union had, in fact, violated its duty of fair representation. In addressing the union's fears that it would be held liable for all damages resulting from the employer's discharge of the plaintiffs, the Court indicated that such fears were groundless. The Court was satisfied that the court of appeals had permitted the railroad, the defendant-employer, to be made a party to the suit if it could properly be alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer was in any other way implicated in the union's alleged discriminatory action. Mr. Justice White, speaking for the Court, explained:

> If these allegations are not made and the employer is not a party defendant, judgment against petitioners can in any event be had only for those damages that flowed from their own conduct. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the

63. *Id.* at 196-97 (footnote omitted).
64. 397 U.S. 25 (1970).

> discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.[65]

In *De Arroyo v. Sindicato de Trabajadores Packinghouse*,[66] the United States Court of Appeals for the First Circuit considered an action by discharged employees to recover from an employer for alleged violations of a seniority provision of the collective bargaining agreement and from the union for its alleged breach of the duty of fair representation. The plaintiffs were seven telephone operators formerly employed by the defendant Puerto Rico Telephone Company. They were discharged by the company allegedly in contravention of the seniority provisions of the collective bargaining agreement between the company and the union. The plaintiffs had immediately communicated the fact of their discharge to the union, but the union failed to take their claims through the grievance procedure. Thus, the plaintiffs filed suit against both the union and the company.

At the district court level, a jury returned a verdict in favor of the discharged plaintiffs, finding that the company had violated the seniority provisions of the collective bargaining agreement. A second jury found that the union had breached its duty of fair representation with respect to six of the seven plaintiffs. Accordingly, the jury awarded the plaintiffs the appropriate amounts for their lost earnings, allocating the liability between the company and the union.

On appeal, the First Circuit found that the union had, in fact, failed to exercise its duty of fair representation in handling the submitted grievances. The court based its decision upon the union's arbitrary and perfunctory handling of the grievances, but noted specifically that the union had not acted with bad faith, hostility, discrimination, or dishonesty. Although the court found that the union had breached its duty of fair representation, it also found that the plaintiffs' suit against the union was barred by the one-year Puerto Rico statute of limitations for tort actions. The court specifically rejected the characterization of the plaintiffs' suit against the union as one sounding in contract. The court reasoned:

> We are therefore satisfied that any effort to characterize plaintiffs' suit against the Union as a "contract" action is both unsound and unnecessary in order to effectuate existing federal labor policies. Moreover, the Union's duty seems more akin to, though less rigorous than, the duty of due care normally associated with

65. *Id.* at 29. For an unusual case in which a court did assess all damages against a union without addressing the *Vaca* principle, see Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972).

66. 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

> tort actions. Finally, we detect . . . a distinct preference for the shorter statute of limitations where the question of characterization is a close one and no manifest injustice results from such choice, which preference suggests the tort limitations period in most jurisdictions.[67]

The court then proceeded to determine the amount of lost earnings properly chargeable to the company. The court looked to *Vaca v. Sipes* for guidance on the allocation of lost earnings where the company discharges improperly and the union represents unfairly. The court noted that *Vaca* instructed that the company is only liable for damages attributable solely to its breach of contract. The court found that

> where there had been no suggestion that the Union participated in the Company's improper discharge and where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date, we conclude that the Union's conduct cannot be said to have increased or contributed to the damages attributable to the Company's improper discharge.[68]

Thus, the court found that the entire amount of lost earnings of each plaintiff was properly chargeable to the company.

As compensation for the damages incurred after the date of the district court's judgment, the plaintiffs sought either reinstatement or money damages for future lost earnings, both of which were denied by the district court. The court of appeals found it unrealistic to assume that the injury to an improperly discharged employee continues only until the date of a trial court's judgment. The court noted that in the normal case reinstatement

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67. 425 F.2d at 287. The applicable statute of limitations is a question which has been handled in a variety of ways. In Wallace v. American Tel. & Tel. Co., 460 F. Supp. 755 (E.D.N.Y. 1978), the court applied the same statute of limitations to both the employer for wrongful discharge and the union for breach of the duty of fair representation. The *Wallace* court held that where there had been a previous arbitration award sustaining the employee's discharge, the employee's action against his former employer for wrongful discharge had to be characterized as an action to vacate the previous arbitration award, and thus was subject to a New York statute providing for a 90-day limitations period for actions of that nature.

See generally Note, *Statute of Limitations Governing Fair Representation Against Union Action When Brought With Section 301 Action Against Employer*, 44 GEO. WASH. L. REV. 418 (1976), which contains an excellent discussion regarding the issue of which statute of limitations applies. The Note considers the consequences of applying different statutes of limitations depending on whether the suit includes an action against the employer. A cogent argument is advanced for the uniform application of the contract statute of limitations when an employee brings an action for breach of the duty of fair representation in conjunction with an action for breach of the employment contract under § 301.

68. 425 F.2d at 289-90.

constitutes one form of prospective relief which has some assurance of making employees whole while avoiding the difficult problem of quantifying future lost earnings.[69] The court acknowledged that reinstatement may not be an appropriate remedy in every section 301 suit. The court explained:

> Reinstatement still may not be the appropriate form of prospective relief in this case, however, for it may be that the six year delay since discharge has made reinstatement impractical both for the Company and for the plaintiffs, particularly if the present seniority clause is a weak one which is likely to generate future controversy concerning these employees. If such impracticality exists, we can see no reason why an award for future lost earnings would not be in order, provided they are apportioned between the Union and the employer along the guidelines of *Vaca v. Sipes* . . . , and *Czosek v. O'Mara* . . . . Moreover, we think it makes good sense to give the district court an alternative to reinstatement in those cases where some prospective relief is warranted. The admittedly difficult problems of quantifying future lost earnings should not be allowed to preclude any prospective remedy or to force the parties to accept the more drastic remedy of reinstatement. Of course, the employee will only be entitled to recover from the Company for those damages which are reasonably attributable to the discharge and which could not have been mitigated by engaging in substantially equivalent employment.[70]

Thus, the court remanded this aspect of the damages question to the district court for the purpose of producing further evidence.

The court also discussed plaintiffs' request for an award of reasonable attorney's fees. While noting that such relief is possible in a section 301 suit, the court held that the circumstances in the case precluded such relief. The court noted, however, that "[n]ormally such relief should be charged against the Union, for its failure to utilize the grievance procedure on the employee's behalf is what necessitated his resort to the Courts."[71]

De Arroyo reflects an attempt to articulate and assess liability in the context of unfair representation by the union and a corresponding violation of the collective bargaining agreement by the employer. The court correctly framed the issue in analyzing the proper allocation of retrospective damages, future lost earnings, and the award of attorney's fees. The court's attempt to allocate the damages according to the precipitating cause reflects an understanding of the apportionment principle announced in *Vaca*. The court properly applied that analysis in analyzing and allocating the cost of attorney's fees and future lost earnings. In an attempt to make the employees whole, the court, however, in analyzing the

69. *Id.* at 291.
70. *Id.* at 292.
71. *Id.* at 293.

apportionment of *retrospective* damages, apparently ignored the factor it found convincing with respect to attorney's fees: the union's failure to utilize grievance procedures. Is the analysis applicable to the attorney's fees question equally appropriate with respect to retroactive relief?

In *Holodnak v. Avco Corp.*,[72] a discharged employee brought an action against the employer and the union challenging his dismissal for publishing an article critical of company and union practices. In an opinion by Judge Lumbard, sitting by designation at the district court level, the decision of the arbitrator which upheld the plaintiff's dismissal was reversed on the ground of the arbitrator's bias. The court found that the union had breached its duty of fair representation because of the perfunctory manner in which it handled the representation of the discharged employee at the arbitration hearing. Specifically, the court held that the union's representation of Holodnak "was sadly lacking and was arbitrary."[73] In assessing Holodnak's claim under section 301, the court held that his discharge was not for just cause because it was due to his exercise of rights protected by the first amendment. Recognizing that the first amendment protections do not infringe upon the rights of a private employer, the court nonetheless found sufficient "state action" in the company's status as a major defense contractor.

Holodnak sought reinstatement, back wages, punitive damages for willful discharge, and attorney's fees. Finding Holodnak was under a duty to mitigate damages, the court awarded him $9,113.24 in back pay. In assessing the apportionment of damages between the employer and the union, the court found damages were attributable solely to the employer "[s]ince essentially all the loss suffered here was due to Avco's improper discharge of the plaintiff."[74] As to punitive damages, the plaintiff was awarded $10,000.00 because Avco had acted willfully in its discharge of Holodnak contrary to his constitutional rights. The court rejected Holodnak's request for reinstatement, finding that his apparent failure to seek work for several years and poor physical condition provided no basis for ordering reinstatement.

As for Holodnak's request for attorney's fees, the court held that such an award was proper, but questioned how such fees were to be allocated. In this vein, the court reasoned:

> While violation of Holodnak's rights was caused primarily by Avco's actions, it cannot be said that the union's breach of its duty of fair representation did not contribute to Holodnak's need for counsel to assert his rights. On all the circumstances of the case, a

72. 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part and rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

73. *Id.* at 201.

74. *Id.* at 205.

fair apportionment of the liability for counsel fees and expenses is that Avco pay two-thirds and the union one-third.[75]

The court in *Holodnak*, as had the First Circuit in *De Arroyo*, cited *Vaca* and its guidance as to the appropriate apportionment of liability in this context, but failed to apply the analysis with respect to the proper allocation of retrospective monetary relief (*i.e.*, back wages). In *De Arroyo*, unlike *Holodnak*, the court appeared ready and willing to apply the *Vaca* analysis to back pay, but did not do so because of the application of the statute of limitations for tort actions. The *Holodnak* decision never even intimated that the analysis required a more rigorous examination of the appropriate causation resulting in relief for back pay. The *Holodnak* court was satisfied that the resulting damages from the discharge were *essentially* attributable to Avco's actions. The failure to apply the analysis pursued with respect to the attorney's fees to the award of back wages reflects an unexpressed judicial preference in *Holodnak* to protect the union from such liability. How else can the apparent inconsistent application of the analysis be explained when one compares the back pay award with the award of attorney's fees? If the *Holodnak* finding of the union's failure in its duty of fair representation (in that it did not rigorously represent its members' interests at arbitration) is to be given weight, the union should be held equally liable for the resulting back pay damages caused by the discharge.

VII. *HINES V. ANCHOR MOTOR FREIGHT, INC.*: AN EXTENSION OF THE EMPLOYER'S POTENTIAL LIABILITY

In 1976 the United States Supreme Court, in the case of *Hines v. Anchor Motor Freight, Inc.*,[76] addressed the question of whether a union's

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75. *Id.* at 206. On review, the district court's decision was affirmed by the United States Court of Appeals for the Second Circuit in all respects except for the award of punitive damages against the employer. 514 F.2d at 293. The appellate court did not discuss the apportionment of damages in its decision.

76. 424 U.S. 554 (1976). For a brief commentary discussing both the *Vaca* and *Hines* decisions, see Comment, *Duty of Fair Representation—Consequences for Breach*, 17 B.C. INDUS. & COM. L. REV. 1042 (1976). The Comment reviews the *Hines* decision favorably:

> It is submitted that the majority reached the correct result in extending a judicial remedy to employees who have been unfairly represented in the arbitration process. In *Hines*, The Court was faced with three distinct interests: the employees' interest in obtaining a fair forum to present breach of contract claims against the employer; the employer's interest in freedom from multiple exposure to litigation; and the public interest in maintaining the legitimacy and usefulness of the collective bargaining process. When all of these interests were examined in light of

breach of its duty of fair representation would afford the employee a judicial remedy against his employer, not, as in *Vaca*, where the union had failed to process the grievance, but where the union had already exhausted an arbitration process defined by the contract to be final and binding on all parties. Petitioner-employees (truck drivers for Anchor Motor Freight) were discharged by the company for alleged dishonesty in seeking reimbursement for money spent in overnight lodging. The practice at Anchor Motor Freight was to reimburse drivers for money spent for lodging while the drivers were on the road overnight. The company charged the petitioners with having sought reimbursement for motel expenses in excess of the actual charges sustained by them.

At a meeting between the company and the union, the company presented the evidence upon which it relied for its allegation of dishonesty.

> Anchor presented motel receipts previously submitted by petitioners which were in excess of the charges shown on the motel's registration cards; a notorized statement of the motel clerk asserting the accuracy of the registration cards; and an affidavit of the motel owner affirming that the registration cards were accurate and that inflated receipts had been furnished petitioners.[77]

The union opposed the discharges claiming that the petitioners were innocent. Pursuant to the collective bargaining agreement, the matter was submitted to a joint arbitration committee.

At the hearing before the joint arbitration committee, Anchor Motor Freight presented evidence supporting its allegation of employee dishonesty. The petitioners denied their dishonesty, but neither they nor the union presented any documentary evidence contradicting that relied upon by the company. The committee sustained the discharges. Petitioners sought a rehearing hoping to establish that the motel clerk was, in fact, responsible for the discrepancy between the motel receipts presented to Anchor Motor Freight by the employees and the charges shown on the motel's registration cards. The committee denied the rehearing.

Petitioners then brought a wrongful discharge suit against the employer and union under section 301,[78] alleging that the falsity of the charges could have been discovered with a minimum of investigation, but that the union had made no effort to ascertain the truth and thereby had violated its duty of fair representation by arbitrarily and in bad faith depriving petitioners of their employment. The district court found no evidence supporting a showing of bad faith, arbitrariness, or perfunctoriness

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> the policy encouraging final resolution of labor disputes through contractual grievance procedures, the majority properly found the interests of the employer to be the least compelling.

Id. at 1047-48.

77. 424 U.S. at 556.

78. 29 U.S.C. § 185 (1976).

on the union's part, and granted summary judgment for both the union and the company on the ground that the arbitration committee's decision was final and binding. [79] The court of appeals reversed the district court's summary judgment as to the local union because it found that there were sufficient facts from which to infer a possible violation of the union's duty of fair representation.[80] However, the court affirmed the judgment in the employer's favor finding that the finality provisions of the collective bargaining agreement were controlling unless evidence demonstrated misconduct by the employer or a conspiracy between it and the union.[81] The Supreme Court reversed the court of appeals' decision concerning the employer, holding that if the petitioners could prove an erroneous discharge and that the union's breach of duty of fair representation tainted the arbitration committee's decision, then the petitioners were entitled to an appropriate remedy against the employer as well as the union.

In its analysis of the issue presented, the Court was confronted with the conflicting interests of the individual employee in seeking fair representation and of the employer in preserving the finality of decisions pursuant to the procedures embodied in the collective bargaining agreement. The company argued that the petitioner-employees were foreclosed from judicial relief, unless some blameworthy conduct on its part disentitled it to rely on the finality provisions embodied in the contract and on the general deference to the mechanism of dispute resolution chosen by the parties. In its rejection of the company's argument, the Court was particularly influenced by the fact that "it was Anchor that originated the charges for dishonesty. If those charges were in error, Anchor has surely played its part in precipitating this dispute."[82] Recognizing the vital function of the finality provision commonly found in collective bargaining agreements, the Court noted that deference to such provisions requires "that the contractual machinery . . . operate within some minimum levels of integrity."[83] The

79. Hines v. Local 377, International Bhd. of Teamsters, 72 Lab. Cas. 28, 129 (N.D. Ohio 1973), *aff'd in part and rev'd in part*, 506 F.2d 1153 (6th Cir. 1974), *rev'd in part sub nom.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

80. Hines v. Local 377, International Bhd. of Teamsters, 506 F.2d 1153 (6th Cir. 1974), *rev'd in part sub nom.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

81. *Id.* at 1157. The court of appeals concluded that the finality provision of collective-bargaining contracts must be observed because there was "[n]o evidence of any misconduct on the part of the employer," and wholly insufficient evidence of any conspiracy between the union and Anchor Motor Freight. *Id.*

The court of appeals relied primarily upon its prior opinion in Balowski v. International Union, 372 F.2d 829 (6th Cir. 1967). The *Balowski* case held that an employee could litigate his discharge in court if he proved bad faith or gross mistake on the part of either the union or the employer.

82. 424 U.S. at 569.

83. *Id.* at 571.

Court found it quite another matter to suggest that erroneous arbitration decisions must stand where "the process has fundamentally malfunctioned by reason of the bad-faith performance of the union."[84]

The Court was emphatic in its determination that the "enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings."[85] Particularly germane to the *Hines* decision was the realization that "[w]rongfully discharged employees would be left without jobs and without a fair opportunity to secure an adequate remedy"[86] if the finality provision were applied so as to preclude an aggrieved employee's suit against his employer where the union has failed in its duty of fair representation. Therefore, the Court held that the petitioners were entitled to an appropriate remedy against the employer, as well as the union, if they could prove an erroneous discharge and the union's breach of duty tainted the decision of the joint committee.

Mr. Justice Stewart, in his concurring opinion, agreed with the Court that proof of breach of the union's duty of fair representation would remove the bar of finality from the joint committee's decision that Anchor Motor did not wrongfully discharge the petitioners. However, according to Mr. Justice Stewart's analysis, "this is not to say that proof of breach of the Union's representation duty would render Anchor potentially liable for backpay accruing between the time of the 'tainted' decision by the arbitration committee and a subsequent 'untainted' determination that the discharges were, after all, wrongful."[87] Then, in what is the most helpful clarification of the apportionment principle of liability announced in *Vaca*, Mr. Justice Stewart explained why the employer should not be held liable for back pay for that period in which he relied, in good faith, on the determination of the arbitrator that the discharge was proper. He explained:

> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the intervening wage loss must fall not on the employer but on the union. Such an apportionment of damages is mandated by *Vaca*'s holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any of those damages caused the union's refusal to process the grievance should not be charged to the employer." . . . To hold an employer liable for back wages for the period during

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 572-73 (Stewart, J., concurring).

> which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.[88]

The dissent, authored by Mr. Justice Rehnquist, with whom Chief Justice Burger joined, argued that the union's breach of its duty of fair representation was an insufficient reason to void an otherwise valid arbitration decision in favor of the employer. Justice Rehnquist urged that *Vaca* allowed an employee to turn to the courts only when the union had prevented him from taking his grievance to arbitration. According to the dissent, "the existence of a final arbitration decision is the crucial difference between this case and *Vaca*."[89] The dissent considered the fact that the employee has an independent remedy against the union for the breach of its duty of fair representation, and therefore concluded that to provide for a judicial remedy against the employer in these circumstances was "anomalous and contrary to the longstanding policy of this Court favoring the finality of arbitration awards."[90] The dissent concluded:

> Now the employer, which concededly acted in good faith throughout these proceedings, is to be subjected to a damages suit because of the Union's alleged misconduct. In view of the fact that petitioners have an action for damages against the Union, . . . this additional remedy against the employer seems both undesirable and unnecessary.[91]

VIII. LOWER COURTS IMPOSING JOINT AND SEVERAL LIABILITY ON THE EMPLOYER AND UNION

It is not uncommon in this context for the courts to impose joint and several liability upon the employer and the union. Often, this is accomplished with little or no discussion of the standard announced in *Vaca*.[92] In *Ruzicka v. General Motors Corp.*,[93] however, the proper allocation of liability was thoroughly discussed.

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88. *Id.* at 573 (Stewart, J., concurring) (citation omitted).

89. *Id.* at 575 (Rehnquist, J., dissenting).

90. *Id.* at 574 (Rehnquist, J., dissenting). *See generally* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

91. 424 U.S. at 576 (Rehnquist, J., dissenting) (citation omitted). *See* Coulson, Vaca v. Sipes *Illegitimate Child: The Impact of* Anchor Motor Freight *on the Finality Doctrine in Grievances Arbitration*, 10 GA. L. REV. 693 (1976). The Article criticizes *Hines* as a dilution of the traditional adversary nature of grievance arbitration, and suggests that employers bargain for a specific provision protecting them from liability in these suits. Would the courts honor the provision?

92. *See, e.g.*, Peterson v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972).

93. 96 L.R.R.M. 2822 (E.D. Mich. 1977).

The plaintiff in *Ruzicka* was discharged for intoxication on the job and for using threatening and abusive language toward his superior. He filed a grievance with the union seeking reinstatement. The union processed the grievance through step two of the process, but negligently failed to file a timely statement of the grievance pursuant to step three. The company relied on the finality provisions in the contract and refused to process the grievance further.

In a section 301 suit, the plaintiff sued the employer for wrongful discharge and the union for breach of its duty of fair representation. The district court dismissed the complaint finding there was no breach of duty by the union.[94] The United States Court of Appeals for the Sixth Circuit held that the local union's failure to take the required steps toward arbitration of a grievance constituted a breach of its duty of fair representation notwithstanding the fact that it was not motivated by bad faith.[95] The appellate court remanded the case to the district level, ordering that the case be referred to arbitration and that the district court should retain jurisdiction to award relief against the union on the unfair representation claim.

In the appellate court's opinion, authored by Judge Celebrezze, the issue of the allocation of liability was discussed as follows:

> Appellant's complaint asserts that GM and the Unions are jointly and severally liable for his injury. This is not true. When a union breaches its duty of fair representation, the employer remains liable for any damages "attributable solely to the employer's breach of contract," i.e., the wrongful discharge. *Vaca* [*v. Sipes*] . . . .
>
> When a breach of the duty of fair representation is shown, however, the Union is liable for that portion of Appellant's injury representing "increases if any in those damages [chargeable to the employer] caused by the union's refusal to process the grievance." *Vaca* [*v. Sipes*] . . . . Thus, upon a finding of unfair representation, "the court must fashion an appropriate remedy," . . . compensating Appellant from the Union's pocket for those expenses he incurred because of the Union's failure to process his grievance properly.[96]

On remand the district court ordered arbitration, and the arbitrator subsequently found the discharge of the plaintiff wrongful and violative of the collective bargaining agreement.[97] The district court accepted the arbitration findings and also found that the union had failed to exercise its duty of fair representation.[98] The court then considered the appropriate

94. Ruzicka v. General Motors Corp., 86 L.R.R.M. 2030, 2031 (E.D. Mich. 1973), *rev'd*, 523 F.2d 306 (6th Cir. 1975).

95. 523 F.2d 306, 310 (6th Cir. 1975).

96. *Id.* at 312.

97. 96 L.R.R.M. 2822, 2828 (E.D. Mich. 1977).

98. *Id.* at 2828, 2830.

apportionment of liability. The union argued that the company should be liable for all damages flowing from Ruzicka's discharge. The union maintained that the company was wholly at fault because it had wrongfully discharged Ruzicka and had refused to process the grievance for reinstatement.

The company responded that the union was liable for all damages from the time that it breached its duty of fair representation. It reasoned that had it not been for the union's breach of its duty, the wrongful discharge would have been rectified by a favorable award (*i.e.*, reinstatement) at arbitration. The company relied on the reasoning expressed in Justice Stewart's concurring opinion in *Hines v. Anchor Motor Freight, Inc.*[99]

After due consideration of the arguments offered by the union and company in assessing the proper apportionment of liability, the trial court announced a finding of joint liability based on an analysis which attempted to balance the respective positions of the parties. The court found the formulae offered by the parties to be based almost wholly on the sequence or timing of their respective acts toward the discharged employee. The court recognized the offered formulae to be plausible and apparently supported in the cases, but found each analysis to be myopic. In assessing joint liability, the court reasoned:

> It was the combined effect of General Motors' wrongful discharge and the Union's breach of duty of fair representation which has operated all of these years to deprive plaintiff of his job with the Company and his rights under the contract, and the Court is not about to apportion damages by trying to determine which tooth of this buzz saw was responsible, at any given moment, for the damages plaintiff was incurring at the time. The Court believes that a proper apportionment of damages must consider not only the chronology of the defendants' wrongful acts but also the gravity and nature of their wrongdoing. Each defendant contributed in its own way to the injuries suffered by plaintiff, and each must answer for damages accordingly.[100]

Another case illustrative of the inclination of some courts to award joint and several liability of both the employer and the union is *Freeman v. O'Neal Steel, Inc.*[101] In *Freeman*, the plaintiff was discharged because of his involvement in an altercation that took place during working hours.

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99. 424 U.S. at 572-73 (Stewart, J., concurring).

100. 96 L.R.R.M. at 2837.

101. 436 F. Supp. 607 (N.D. Ala. 1977), *rev'd on other grounds*, 609 F.2d 1123 (5th Cir. 1980). *See also* Farmer v. Hotel Workers Local 1064, 99 L.R.R.M. 2166 (E.D. Mich. 1978) (holding that the union may be held jointly and severally liable with the employer, or that damages may be apportioned to the extent that the union shares responsibility for the damages).

The collective bargaining agreement contained a grievance procedure consisting of three steps, and a right of appeal to arbitration. When the plaintiff filed his grievance with the union, the union pursued the grievance up to arbitration, but decided not to take the grievance through the arbitration process.

Plaintiff filed a section 301 suit alleging a violation of the collective bargaining agreement in the employer's wrongful discharge, and a violation of the union's duty of fair representation by failing to take his grievance to arbitration. The court found that it was arbitrary for the union not to proceed to arbitration and that the union's representative had exhibited personal hostility based on race against the plaintiff. Thus, the union had breached its duty of fair representation. As for the wrongful discharge allegation, the court found the discharge to be improper, noting that the plaintiff had a right to be involved in the altercation.

In assessing the appropriate remedy and the apportionment of liability, the court cited *Vaca* and found that under these circumstances it was proper to hold both parties jointly and severally liable. The court analyzed the issue of apportionment of liability in the following manner:

> The appropriate remedy for an employer's breach of the employment contract and for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. The difficulty here, as in the *Vaca* case, lies in fashioning an appropriate scheme of remedies. It is the court's opinion that both the union and O'Neal are equally culpable in their wrongful actions toward the plaintiff. Accordingly, the court holds the union and O'Neal jointly and severally liable for any amount of damages awarded to the plaintiff. In this regard the court is of the opinion that the plaintiff is entitled to reinstatement to his employment with O'Neal Steel, payment of all back damages (less wages earned from other employment) from the time of his discharge to present, payment of back contributions to O'Neal's pension fund and credit of all time from plaintiff's wrongful discharge to the present toward obtaining a vested interest in that pension fund and, finally seniority as if the plaintiff had suffered no termination of employment from O'Neal Steel.[102]

102. 436 F. Supp. at 613. The district court's decision was reversed by the Fifth Circuit. 609 F.2d 1123 (5th Cir. 1980). The appellate court, on reviewing all the evidence, found that there was not substantial evidence to support the district court finding that the union had failed in its duty of fair representation. Accordingly, the appellate court never reached the question of wrongful discharge by the employer and the apportionment of liability. *Id.* at 1128. Nevertheless, the district court's opinion remains helpful as a model for the study of the issue of apportionment of liability.

IX. JUDICIAL CONFUSION IN APPLYING THE *VACA-HINES* PRINCIPLE OF APPORTIONMENT OF LIABILITY

The apportionment of liability between the union and the employer as announced in *Vaca v. Sipes* and elucidated upon in *Hines v. Anchor Motor Freight, Inc.* continues to trouble the courts. Two recent federal court decisions reveal the continuing confusion—the United States Court of Appeals for the District of Columbia decision in *Chambers v. Local 639, International Brotherhood of Teamsters*,[103] and the Seventh Circuit decision in *Battle v. Clark Equipment Co.*[104]

In *Chambers*,[105] the court considered the plaintiff-employees' section 301 suit against their employer (Kane) and the union charging that the defendants were jointly liable to them for damages; the employees alleged that the employer had breached the collective bargaining agreement by denying them work to which they were entitled by their seniority status under the collective bargaining agreement, and that the union had failed to properly represent them. At the heart of the case was the accommodation of seniority rosters from two separate plants. In March of 1973, the plaintiff-employees were laid off by Kane from their jobs at Tuxedo, Maryland. Kane had a contract account with another company, Grand Union. The plaintiff-employees discharged from the Tuxedo plant sought to bump into the seniority roster at the Grand Union plant and thus displace drivers there who had less seniority. When the Tuxedo employees were denied the opportunity to bump into the Grand Union plant, they sought relief through the grievance procedure. In a grievance hearing held in April of 1973, it was decided that the plaintiff-employees were entitled to employment at Grand Union. By September of 1973, plaintiff-employees realized from their workweek assignments that they had not obtained the priority and seniority originally requested. Through the union, they brought a second grievance attempting to establish their priority status with respect to work assignments. That second grievance was resolved contrary to the plaintiff-employees' request. The United States Court of Appeals for the District of Columbia found evidence that the union may well have breached its duty of fair representation in seeking a second grievance decision contrary to the finding of the first grievance hearing. The court noted: "This adverse decision to appellants' claims represented the culmination of all the defects in [the] representation of which appellants complain[ed]."[106]

In its analysis of the employer's liability, the court acknowledged that

103. 578 F.2d 375 (D.C. Cir. 1978).
104. 579 F.2d 1338 (7th Cir. 1978).
105. 578 F.2d 375 (D.C. Cir. 1978).
106. *Id.* at 387.

its decision did not rest upon an imputation of bad faith to the company. The court observed:

> From the very start, Kane expressed no serious interest in the seniority merger one way or the other, so long as the matter was resolved amicably with the employees. But labor-management contracts create rights in individual employees, not just labor unions and employers; and those rights can be enforced in courts of law.[107]

The court proceeded to hold that "[w]hen the employer relies on the advice and interpretation of a labor union to the detriment of an employee, it does so at its own risk, subject to an apportionment of any liability between itself and the Union."[108] The court found that the employer, Kane, was liable to plaintiff-employees for not granting them the dovetail seniority at the Grand Union plant.[109] The court expressly left open the possibility of joint liability of the employer and the union, noting that its analysis as to whether the doctrine of exhaustion of internal remedies applied would not necessarily result in the union's liability for damages based on a violation of the collective bargaining agreement.[110]

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107. *Id.* at 380.

108. *Id.* In note 3 on the same page of the opinion, the court reasoned that good faith reliance of an employer upon a union's representations does not protect the employer from liability: "If this were not so, no union-shop employee could seek reinstatement after being discharged in good faith by an employer who relied on a union's erroneous allegation that the employee had failed to pay dues, since only the company can provide reinstatement." *Id.* at 380 n.3.

109. *Id.* at 383. The court reasoned:

> Though without malice throughout the proceeding, it was Kane that, in the end, denied the plaintiff employees the benefit of their favorable decision on the 1973 grievance. Kane had agreed to this decision, and it was Kane who was bound by the collective bargaining contract to honor the 1973 decision as final. . . . We accordingly conclude (1) that the judgment of the district court was clearly erroneous in ordering summary judgment for Kane, (2) that Kane is liable to appellants for not granting them the dovetailed seniority at Grand Union that is clearly called for by the collective bargaining contract, (3) that the judgment should be vacated, and (4) the case remanded to the district court to determine the amount of damages as further outlined in the following discussion of the case against the union.

Id.

110. *Id.* at 388. The court discussed in some detail the possibility of joint liability:

> We do not, however, suggest that summary reversal in the appellants' favor should be granted, but merely that the judgment in the union's favor should be vacated and the case remanded to the district court for trial on the merits of appellants' claim that the union violated its obligations to appellants as alleged in the complaint. We recognize that the

In *Battle v. Clark Equipment Co.*,[111] the United States Court of Appeals for the Seventh Circuit considered whether an employer could be held liable for retroactive monetary relief when it relied in good faith on the union's representations of its actions in the process of amending the collective bargaining agreement. The dispute arose from actions taken by the company and the union upon the closing of the company's trailer division in Michigan City, Indiana. The collective bargaining agreement contained a supplemental unemployment plan (SUB plan) that provided for regular weekly benefits payable to any qualified employee laid off during the course of employment. The union had requested an amendment to the SUB plan so that the distribution of the funds could be based on a pro rata basis according to accrued seniority status.

The plaintiff-employees sued the union for failure to carry out its duty of fair representation, alleging that their signatures in support of the amendment were obtained by fraudulent misrepresentations. In addition, the plaintiff-employees sued the company under section 301, arguing that the SUB plan amendment was improperly executed and ratified by the union, and that the company's failure to pay them the benefits due under the original plan constituted a breach of contract.

In its analysis of the employees' suit against the employer, the court found the distinguishing characteristic to be that these claims did "not rest on any allegations of misconduct by the company other than the . . . [company's] acquiescence in the union's demands for a modification of the SUB plan."[112] Although the court found that the plaintiff-employees' claim

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union is in a very difficult position, but the case against it involves a number of genuine issues of fact that, as yet, have not been proved. The alleged participation of the union in violating appellants' rights is a more complex question than the violation by the company. The case against the company is essentially completed by our interpretation of the seniority clause of the agreement and by the admission that Kane denied appellants the dovetailed company seniority at Grand Union that they were entitled to. The case against the union, however, depends upon proof of a number of additional acts by those acting for the union and in some instances the intent with which those acts were committed. *It will also be necessary, if the court finds that the union is jointly liable, to take evidence in order properly to apportion the damages with Kane.* In deciding that the appellants need not exhaust their internal union remedies, we do not determine that the union has in fact breached its duty of fair representation to them or illegally interfered with their contractual rights. We hold only that this action should not be barred by appellants' failure to exhaust the union grievance mechanisms, and remand the case so that they may have the full hearing on their claim to which they are entitled.

Id. (emphasis added) (footnote omitted).

111. 579 F.2d 1338 (7th Cir. 1978).

112. *Id.* at 1345. The court stated:

against the union raised the question of fraud and bad faith on the part of union leaders, it determined that the plaintiff-employees could not rely upon the union misconduct to obtain relief against the company.

The court reasoned that the status of the union as exclusive bargaining agent of all employees within the unit necessitated that the employer bargain in good faith with the union. As a corollary, the court found that "the employer cannot be held liable for retroactive monetary relief when it relies in good faith on union actions or representations that are not obviously outside the scope of its authority."[113] As to the employer's liability, the court reasoned in relevant part:

> In the instant case there is no showing of independent wrongdoing by the employer, who was essentially a neutral stakeholder with regard to the SUB plan fund. We do not believe that in enacting Section 301(a) Congress intended to permit the awarding of retroactive monetary relief against an employer whose only fault has been to rely in good faith on the representations of the union leaders that the union membership had properly ratified the amendments. In *Hines v. Anchor Motor Freight* . . . (Stewart, J., concurring), it was suggested that even if there were an eventual determination of wrongful discharge of the plaintiff, the employer should not be held liable for back pay for that period in which he was relying in good faith on the determination of the arbitrator that the discharge was proper.[114]

The analysis and conclusion employed by the District of Columbia Circuit in *Chambers v. Local 639, International Brotherhood of Teamsters*,[115] and the Seventh Circuit in *Battle v. Clark Equipment Co.*[116] illustrate that the judicial decisions which result in this context depend in large

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> Appellants' claims against the company are primarily based on the contention that the amendment to the SUB plan was improperly executed and ratified and that therefore the company must accord them their rights under the premodification agreement. The first allegation of impropriety is that by asking the company to agree to an amendment to the SUB plan the union violated the "zipper clause" contained in Article XXV of the collective bargaining agreement which prohibits either party from requesting any change in the SUB plan during the life of the collective bargaining agreement. Secondly, there is a contention that the nature of the changes in the SUB plan sought by the union and agreed to by the company manifest such a disregard of the interests of the appellants as to constitute a breach by the union of its duty of fair representation. Lastly, appellants allege that the local union leaders engaged in fraud and improper conduct in the way in which they ran the January 5 meeting and gathered the ratification signatures.

Id. (footnote omitted).

113. *Id.* at 1349.

114. *Id.* at 1349-50.

115. 578 F.2d 375 (D.C. Cir. 1978).

116. 579 F.2d 1338 (7th Cir. 1978).

part on a given court's unarticulated balancing of the interests of employee, union, employer, and society. In both cases, the employer was characterized as a neutral or innocent party who simply acquiesced in a union's desire to modify an existing term of the collective bargaining agreement. The *Chambers* court chose to impose financial responsibility on the employer for the consequences of his acquiescence; the *Battle* court chose to relieve the employer of such responsibility.

The *Chambers* court found the attendant financial responsibility of the employer by emphasizing the rights of individual employees in the collective bargaining agreement negotiated by the union and agreed to by the employer. As such, *Chambers* reflects a judicial preference in the emphasis of an individual's rights which adhere in the collective bargaining agreement. Unlike the court in *Battle*, the *Chambers* court was not particularly concerned with the employer's reliance on the union's representation in its role as the exclusive bargaining agent of its members. The fact that the employer was a party to the modified seniority status plan constituted a sufficient basis upon which the court predicated employee relief. The analysis of *Chambers* is susceptible to criticism because the court focused upon the employment relationship to the exclusion of any consideration of the integral part played by the union's failure to exercise its duty of fair representation. By assessing liability without proper consideration of the union's failure, the *Chambers* court protected the union from liability for its failure to represent adequately.

X. THE JUDICIAL PREDILECTION IDENTIFIED, ANALYZED, AND EVALUATED

In the seminal case of *Vaca v. Sipes*,[117] the Supreme Court confronted the issue of what avenues an aggrieved employee could seek to attempt to gain reinstatement and back pay for his discharge. The majority opinion, the concurring opinion, and the dissenting opinion each viewed the individual's rights differently. Mr. Justice Black's dissenting opinion articulated the position that the employee had the absolute right to pursue his discharge action for breach of contract against the employer in court.[118]

Mr. Justice Fortas, in his concurring opinion,[119] found such a right to be nonexistent because the matter was preempted by national labor policy and the jurisdiction for such a case was vested solely in the NLRB. Mr. Justice White, speaking for the majority of the Court in *Vaca*, espoused

117. 386 U.S. 171 (1967).

118. *Id.* at 203 (Black, J., dissenting). *See* notes 46 & 47 and accompanying text *supra*.

119. *Id.* at 198-203 (Fortas, J., concurring).

and established an intermediate position whereby the employee must attempt to exhaust the internal remedies provided for by the union unless such an attempt would be futile.[120] Once that has been established, the employee, unsuccessful through the grievance and arbitration procedure, may pursue his remedy in court. The employee may join the employer and the union as codefendants, seeking relief against the employer for wrongful discharge and against the union for its failure to carry out the duty of fair representation. In establishing such a case, however, the employee must first establish a breach in the union's duty of fair representation. Only then is the employee free to establish the wrongful discharge suit against the employer.

The virtue of the intermediate approach is that it provides the employer with a needed buffer tool, the union's duty of fair representation. This is a very practical and valid buffer because it is with the union that the employer bargains and it is upon the union that the employer relies. Such reliance is essential to the collective bargaining agreement. Without it, the employer bargains for nothing. Without it, the mechanism to effect the peaceful resolution of labor disputes is destroyed.

The employer's reliance upon the union's buffer cannot be employed to frustrate the employee's request for relief. The Supreme Court emphatically held this to be so in *Hines v. Anchor Motor Freight, Inc.*[121] Thus, the Court struck a balance in favor of the individual employee who may be considered to have been the innocent party. How can the employer be excluded from the remedial order of the court when it is the employment relationship which is at the heart of the employee's request for relief? It is this writer's belief that few would contest that the employee's interest in reinstatement is more highly valued than the employer's interest in the finality of the grievance procedure embodied in the collective bargaining agreement. Although reinstatement is a proper remedy if the discharge is later determined to have been wrongful, the reasoning with respect to that issue is not equally applicable to an analysis of the attendant liability for back pay as apportioned between the union and employer.

The problem lies in the courts' failure to adequately identify and articulate the identifiable interests which adhere in this context of competing interests. This inarticulate approach is a reflection of the judicial

120. *Id.* at 184. The Court instructed:

> Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement . . . .

Id. (citation omitted).

121. 424 U.S. 554 (1976).

reluctance to express underlying policy considerations. Only if the courts are willing to articulate the priority of the individual employee's interests vis-à-vis the union and the employer, and the union's interests vis-à-vis the employer, will the student of this area come to understand the underlying considerations that persuade the courts. Perhaps the reluctance of the courts to expressly identify and attach values to the competing interests is simply a reflection of the inherent difficulty of such an assessment when the values to be assigned differ as societal priorities change. Obviously, different facts (for example, the actions and assets of the union, the actions and assets of the company, and the attractiveness of the employee's request for relief) necessarily justify dissimilar results.

With few exceptions, however, the cases reflect a judicial predilection to assign the attendant liability resulting from an employee's discharge to the employer. Perhaps the best analog in the law for purposes of this analysis is that of strict liability in tort law.[122] In tort law, the doctrine of strict liability evolved and developed to its present status because of the judicial desire to provide the injured party with relief. Similarly, in the area of labor law, when the union and the employer are joined as codefendants the courts desire to provide relief to the injured plaintiff. In assessing the alternatives, the courts have restricted their analysis to whether the union

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122. Strict liability may be defined as liability without fault. *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). *See generally* Judge Cardozo's opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Comment, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233 (1968).

The RESTATEMENT (SECOND) OF TORTS § 402A (1965) has proven to be significant in the development of the law in many jurisdictions which have adopted the concept of strict liability. Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

It should be noted that the concept of "fault," in the term "liability without fault," carries with it no meaning of moral fault. Rather, in balancing social equities, the loss has been shifted by law from the plaintiff to the defendant. This is because the courts have found that the defendant can better bear the cost. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 492-542 (4th ed. 1971).

or the employer should bear the burden of liability.[123] Without great discussion, the courts appear to inexorably assign the resulting liability to the employer's discharge. The courts reason that it is the discharge which causes the resulting liability—that is, the employee's loss of employment and loss of wages. Why are the courts so reluctant to assign to the union its apportioned share of liability?

The reluctance stems from an unspoken belief that the cost can be better handled by the employer than by the union. Just as in the strict liability analysis of tort law, there is the recognition that the employer can pass on the cost of the product to the consumer, and thus to society at large. When confronted with the dilemma of providing the employee with a "make whole" remedy, the courts often find the employer the most appropriate choice. Perhaps this lies in the assumption that should the union pass on its costs of operating as a union, this would merely penalize the members of the union, the class which the NLRA seeks to protect, as found in sections 7 and 9 of the NLRA.[124] At least by assessing the cost to the employer, there is the recognition that the employer will simply pass on the cost to his consumers in the market price of products and services. Thus, the aggrieved employee is provided with a remedy.

The limitation of this analysis by the courts is that it fails to appreciate the positive effect such damage suits would have on union activity. It can be persuasively argued that it is only by recognizing union liability through damage awards that unions will truly act without arbitrariness, bad faith, and perfunctoriness when confronted with an individual employee's grievance. Such damage suits would add vitality to the union's duty of fair representation. This vitality is necessary in light of the union's unique status as the exclusive bargaining agent.

The judicial predilection to protect unions against large damage suits is exemplified by the Supreme Court's 1979 decision in *IBEW v. Foust*.[125] In *Foust*, it was held that the Railway Labor Act[126] does not permit an

123. One approach ignored by the judicial opinions on the subject is to provide the employee with reinstatement, but if there is an internal union appellate procedure which was available but not utilized by the employee, to let the loss of retroactivity for which the defendant (union or employer) would otherwise be liable fall upon the employee. This approach was suggested in Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 822 (1973). This approach rejects the finding that failure to exhaust union appellate procedures bars suit entirely. *See generally* Fox & Sonenthal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989 (1980); Comment, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI.-KENT L. REV. 259 (1979).

124. 29 U.S.C. §§ 157, 159 (1976).

125. 442 U.S. 42 (1979).

126. 45 U.S.C. § 8 (1976).

employee to recover punitive damages against a union that breaches its duty of fair representation by failing properly to pursue a grievance. Thus, the Court reversed the Tenth Circuit ruling[127] that punitive damages were appropriate if the union had acted wantonly or in reckless disregard of an employee's rights.

Mr. Justice Marshall, writing for the majority, cited several reasons for the Court's finding that punitive damages in unfair representation suits are per se inconsistent with federal labor policy. The Court examined the issue of punitive damages in light of its function "to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace."[128] The argument that a strong legal remedy against the union was necessary to encourage unfair representation suits and thereby inhibit union misconduct was rejected. The Court found that "offsetting these potential benefits is the possibility that punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area."[129]

Mr. Justice Marshall explained the judicial solicitude for the financial stability of unions as follows:

> This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit punitive damages . . . could undermine this careful accommodation. . . . Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have.[130]

The concern for the possible impairment of the financial stability of unions and the careful balance of competing interests referred to by Mr. Justice Marshall in *Foust* is indicative of the underlying policy considerations that influence the courts in fashioning an appropriate remedy for the aggrieved individual employee. The judicial tendency to assess all, or a substantial amount, of the financial damage incurred by the employee against the employer, however, fails to recognize other valid, overriding interests. To simply saddle an employer with the financial liability resulting from a union's failure of duty runs contrary to sound legal analysis and public policy.

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127. Foust v. IBEW, 572 F.2d 710 (10th Cir. 1978), *rev'd*, 442 U.S. 42 (1979).

128. 442 U.S. at 47.

129. *Id.* at 48.

130. *Id.* at 50-51 (citations omitted).

The present state of the law in assessing employee liability essentially has the effect of imposing on the employer, as well as the union, the duty of fair representation. The thrust of this analysis of an employer's liability is to replace the classic arms' length posture of the parties at the bargaining table with a fiduciary standard.[131] The case law assessing employers' liability for union unfair representation discards bargaining reality for fiduciary duty.

Such a policy deprives the employer of the *quid pro quo* of his bargain. In an attempt to assure the aggrieved worker of a "make whole" remedy, the national labor policy of encouraging the parties (employer and union) to settle their differences according to the terms of the collective bargaining agreement is violated.[132] The remedy authorized by *Vaca* "imposes a greater alteration on the contractual arrangement by construing the substantive provisions of the collective agreement as an individual contract divorced from the procedures and remedies contained in the grievance and arbitration provisions."[133] It fails to appreciate the integral nature of the two.[134] This basic failure to conceptualize properly the nature of the collective bargaining agreement and the administration of the agreement underlies the judicial confusion in apportioning damages.

Basic legal principles for the breach of contract and the resulting damages attributable to the breach require the injured party to mitigate his damages by taking appropriate corrective action as soon as possible.[135] An analysis of liability for negligence under tort law recognizes causation as the determinative factor in assessing liability.[136] Within that model, an intervening cause that supplements the original cause necessitates an apportionment of the resulting liability. If in the difficult factual determina-

131. *See* Edwards, *Employer's Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 LAB. L.J. 686 (1976). Professor Archibald Cox has suggested that the collective bargaining agreement be compared to a trust under which the union holds the employer's promises as a fiduciary for the individual employees. That theory, as well as others, is rejected by Professor Cox as a basis for decision in certain types of cases. *See* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 21 (1958).

132. The Supreme Court has long recognized the desirability of encouraging parties to settle their differences according to the terms of the collective bargaining agreement. *See also* authorities cited notes 7 & 55 *supra*.

133. Feller, *supra* note 123, at 819.

134. *Id.*

135. The duty to mitigate damages has generally been applied to § 301 actions involving a union's failure in its duty of fair representation. *See, e.g.*, De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 292 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

136. *See, e.g.*, Judge Cardozo's opinion and Judge Andrews' dissent in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). *See generally* James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951).

tion of causation there can be no clear differentiation of causation, then joint and several liability is applied under a joint tortfeasor analysis.

The judicial concern for the depletion of union treasuries assumes the effect of depletion would be to impair the effectiveness of unions as collective bargaining agents.[137] This finding reasons that the welfare of individual employees depends upon the strength of their union. The flaw in the analysis is its undue deference to the status quo position of the union. It does not contemplate the positive benefits that individual employees (and ultimately society) would derive from a more fluid vision of the union as the exclusive collective bargaining agent.

By viewing the union's status as a potentially transient one—that is, as limited by its ability to represent all members fairly—the positive attributes of the deterrent effect of a damage suit become more apparent. In the event that a union is consistently subject to damage suits for its unfair representation, and the dues paying members are personally affected in an adverse pecuniary way (*i.e.*, the monthly dues are increased), the necessity of evaluating whether the union is actually serving the needs of its members becomes that much more vital. The ultimate effect would be to compel individual members to take an active interest in a re-evaluation of the union's performance as their representative.

This proposed analysis relies on a vision of unions which recognizes their fluid nature as the exclusive representative. It attributes to individual union members a dynamic participation in assessing the union's effectiveness. Such an analysis contemplates employees' rights under sections 7 and 9 of the NLRA[138] as ever subject to an evaluation of its representative's ability to serve their needs. It assures the employee member that the union will be responsive to all individuals within the unit—at least to the extent that it would deter unions from acting arbitrarily, perfunctorily, or in bad faith.

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137. *See* IBEW v. Foust, 442 U.S. 42 (1979), wherein Mr. Justice Marshall wrote with respect to punitive damages awarded against a union: "Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have." *Id.* at 50-51 (citation omitted).

138. 29 U.S.C. §§ 157, 159 (1976). Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The present judicial predilection to protect union treasuries from the depletion that damage suits for unfair representation would effectuate values the stability of the incumbent union too highly. To say that limitation on union liability is indispensable to the collective interests of union members in protecting limited funds is to ignore the viability of damage suits in deterring future union derelictions. By holding unions accountable for the financial liability flowing from unfair representation, union members would more likely become vigilant policymakers in the manner envisioned by participatory democracy.

The present state of the law does not engender this vigorous participation. It evades the issue by passing the cost of the union's unfair representation on to the employer. The employer then passes that financial burden on to the public in the form of higher prices for services and products. Therefore, society at large bears the burden of the union's failure.

To saddle society with the financial burden of a union's failure to fulfill its duty is to abandon the common law principle of liability based on fault. The present judicial predilection to protect the depletion of union treasuries encourages union dereliction and creates a fiduciary duty on the part of society to act as a guarantor for the resulting liability. Such a result cannot be fairly judged as socially desirable.

XI. CONCLUSION: CAUSATION ANALYSIS AND THE NEED TO ARTICULATE UNDERLYING REASONS IN SELECTING AN ANALYTICAL MODEL

The proper analysis of the apportionment of liability for damages in section 301 actions against an employer and union involving a union's failure in its duty of fair representation is one of causation. As Justice Stewart suggested in his concurring opinion in *Hines v. Anchor Motor Freight, Inc.*,[139] causation analysis requires that damages that would not have been sustained but for union unfair representation are attributable to the union —not the employer. Recognizing that the utilization of a causation analysis necessarily implies a judicial evaluation of the gravity of each party's act, the courts must consciously seek to articulate the reasons found to be determinative in assessing the liability of the respective parties. That this process may be difficult is not sufficient justification for the failure to articulate the factors found convincing.

Whether a given court finds the analytical model of the timing of the act or the quality of the act to be dispositive is not so vital to the development of the law as is the effort to express the reasons for selecting a certain analytical model. When the reasons that underlie the choice of one model of causation over another are fully identified and articulated, then the

139. 424 U.S. 554, 572-73 (1976) (Stewart, J., concurring).

decision may be evaluated as a proper balancing of competing interests. In this way, the common law tradition of evaluating competing legislative grounds will continue to assure the law's viability in fashioning an appropriate remedy.