University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOLUME 126

DECEMBER 1977

No. 2

THE INDIVIDUAL EMPLOYEE'S RIGHTS UNDER THE COLLECTIVE AGREEMENT: WHAT CONSTITUTES FAIR REPRESENTATION? *

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The Supreme Court's decision in *Vaca v. Sipes*¹ is like a giant squid. It has a number of procedural tentacles, any one of which may be more than we can master, but with all of which we must ultimately contend. There is always the danger that we shall be so preoccupied with avoiding the entwining arms, that we shall never see the head from which the tentacles grow, and that the whole problem will escape in a cloud of ink. I do not propose now to wrestle the squid or cut through the procedural tentacles; I will leave that to others² or to another time. I propose instead to probe

* This Article is a revision of a paper presented at the 1974 annual meeting of the National Academy of Arbitrators. The earlier paper was published in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION—1974 PROCEEDINGS, 27TH ANNUAL MEETING 14 (1975). © Copyright 1975 by Bureau of National Affairs, Inc.

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¹ 386 U.S. 171 (1967).

² E.g., Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U. L. REV. 1096 (1974); Note, *Statute of Limitations Governing Fair Representation Action Against Union When Brought Against Employer*, 44 GEO. WASH. L. REV. 418 (1976); Comment, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179 (1973); Comment, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037 (1973); Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310 (1977); Comment, *Fair Representation and Breach of Contract in Section 301 Employee-Union Suits: Who's Watching the Back Door?*, 122 U. PA. L. REV. 714 (1974). See also Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

only the substantive head and nerve center—the size and shape of the substantive duty of fair representation.

The central substantive proposition of *Vaca v. Sipes* can be simply stated: where the collective agreement gives the union exclusive control over the grievance procedure and arbitration, the individual employee's rights under the collective agreement are limited by the union's duty of fair representation. The employee can sue the employer for breach of his rights under the collective agreement only after first showing that the union has acted unfairly in refusing to process his grievance to arbitration;³ and the employee can sue the union for refusing to process his grievance only upon showing that the union has acted unfairly. The liability of the employer and the liability of the union are both dependent on the union's violation of its duty of fair representation.

Although the substantive proposition can be simply stated, its practical content is not easily defined; the term "fair" provides only the starting point, not the ending point of inquiry. The crucial and difficult question is what standards or guides are to be used in determining whether the union's handling of the grievance has been "fair." It is this question that I want to probe.⁴

I. ROOTS OF THE RIGHT TO FAIR REPRESENTATION

The right to fair representation had its origin in the cases of *Steele v. Louisville & Nashville Railroad*⁵ and *Tunstall v. Brotherhood of Locomotive Firemen*,⁶ decided in 1944. In those cases the Court invalidated seniority clauses, negotiated by the union and

³ *Vaca* addresses the issue of the vindication of an individual employee's contractual rights prior to arbitration. It makes a showing that the union breached its duty of fair representation owed to the employee a prerequisite to the employee's pursuing contractual remedy against the employer on his own. For a discussion of why an employee's challenge of an unfavorable arbitral award should not be similarly conditioned upon a showing of unfair representation on the part of the union, see Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310 (1977).

⁴ For other attempts to give some content to the standard of "fairness," see Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CR. REV. 81; Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391 (1964); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958); Comment, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

⁵ 323 U.S. 192 (1944).

⁶ 323 U.S. 210 (1944). *Steele* and *Tunstall* arose under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1970). The duty of fair representation was later held applicable under the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970). *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

the employer, that had the purpose and effect of putting Negroes at the bottom of the seniority list. In so doing, the Court articulated the basic principle that a union owes a duty to "act fairly" and to "protect equally" all whom it represents. This duty has two separate tap roots.

First, a union vested with statutory authority as the exclusive representative, must have a statutory duty, much like that of a governmental body, to represent fairly those governed by its agreements. In the words of the Court, the statute imposes on the union in negotiating a collective agreement "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."⁷

Second, a union that acts as bargaining representative of employees owes to the employees it represents the duty owed by an agent to its principal, and the duty owed by a fiduciary to its beneficiary. In the words of the Court: "[i]t is a principle of general application that the exercise of granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and their behalf."⁸ The union "chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents."⁹

The size and shape of the duty growing from these roots was not described in these early cases beyond some sketchy outlines colored with value-laden adjectives. In negotiating an agreement, the union need not treat all employees alike, but can make "[v]ariations in the terms of the contract based on differences relevant to the authorized purposes of the contract,"¹⁰ such as seniority, type of work performed, or skill. But, said the Court, the union cannot make "discriminations not based on such relevant differences," and "discriminations based on race alone are obviously irrelevant and invidious."¹¹

Later cases have made explicit what was implicit in the roots of the duty. Variations based on differences other than race may be equally irrelevant and, therefore, prohibited. Discrimination may be found in different treatment on dismissals, granting of vaca-

⁷ *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. at 202.

⁸ *Id.*

⁹ *Id.* (footnotes omitted).

¹⁰ *Id.* 203.

¹¹ *Id.* See also *Marchione, A Case for Individual Rights Under Collective Agreements*, 27 LAB. L.J. 738 (1976).

tions, or rates of pay, as well as manipulation of seniority rights.¹² Nonetheless, the Court has recognized that negotiating agreements requires compromises and adjustments of varied interests and groups. Therefore, "[a] wide range of reasonableness must be allowed . . . subject always to complete good faith and honesty of purpose in the exercise of [the union's] discretion."¹³

II. THE DISTINCTION BETWEEN NEGOTIATION AND ADMINISTRATION OF COLLECTIVE AGREEMENTS

These are the broad standards to be applied in measuring the union's duty in the *negotiation* of an agreement and the employee's rights that arise as a function of the union's negotiating duty. We are concerned here, however, with the standard to be applied in the *administration* of an agreement after it has been negotiated. The standards are not the same, because the statutory policy, the status of the union, and the practical needs of collective bargaining are quite different in contract administration.¹⁴

Section 9(a) of the National Labor Relations Act clearly distinguishes between the roles of a union in negotiating and in ad-

¹² See, e.g., *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954) (Gaynor News); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

¹³ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

¹⁴ The difference between contract negotiation and contract administration, as these terms are used here, is one defined, in the first instance, in terms of time. Negotiation precedes the making of the collective agreement and is directed toward writing and signing the document. Administration follows the making of the collective agreement and is directed toward applying and enforcing its terms. The difference between negotiation and administration is also institutional and procedural. The union committees and officials responsible for negotiating the agreement are specially designated for that purpose and are often different from the shop stewards and grievance committees responsible for administering the agreement. The procedures for determining the demands to be made in negotiations, for weighing what issues are to be given priority, and for deciding whether a proposed contract shall be ratified are normally quite different from the procedures for deciding what grievances are to be filed and how they shall be settled. See generally H. DAVEY, *CONTEMPORARY COLLECTIVE BARGAINING* (3d ed. 1972).

Contract administration is more than a mechanical process, for it includes substantial elements of bargaining. Negotiations commonly leave the contract incomplete, with gaps to be filled, ambiguities to be resolved, and unforeseen situations to be met. The grievance procedure and arbitration perform the necessary function of contract completion. In this respect contract administration performs the same function as negotiation. There is, however, a difference in the scope of decisions contemplated in the two processes. The very purpose of negotiation is to change the provisions in the agreements, and it is expected that existing provisions may be modified or excised, new provisions may be added, and the whole system of rules may be extensively revised. The purpose of contract administration, in contrast, is to enforce and apply the existing provisions, and grievance settlements are expected to be made within the framework and consistent with the system of governing rules.

ministering an agreement.¹⁵ Section 9(a) vests the majority union with exclusive authority to negotiate an agreement.¹⁶ The proviso to section 9(a), however, explicitly states that the statute does not give the union exclusive authority in presenting and settling grievances. The statute mandates that the employer must deal exclusively with the union in making an agreement, but the statute expressly permits the employer to adjust grievances with individual employees.¹⁷ The only limitations on the employer in adjusting grievances with the individual employee are that the adjustment not be "inconsistent with the terms" of the collective agreement, and that the union be "given opportunity to be present at such adjustment." Thus, under the statute, the union only has limited rights in the processing and settling of grievances: the rights to be present when grievances are adjusted and to insist that adjustments not be inconsistent with the agreement.

Congress drew a definite line between the negotiation and administration of collective agreements. The explicit judgment of Congress, articulated in section 9(a), was that the union needed exclusive power to negotiate agreements, but did not need exclusive power to settle grievances arising under the agreements. Indeed, the words of section 9(a), on their face, indicate a congressional policy that the union should not have exclusive control over grievances, for the words are "any individual employee or a group of employees shall have the *right* at any time to present grievances to

¹⁵ Section 9(a), in its entirety, states:

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 representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment. National Labor Relations Act § 9(a), 29 U.S.C. § 159 (1970).

¹⁶ J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). For an historical study of the majority rule principle in law and practice, see Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 *RUTGERS L. REV.* 237 (1971). See also Weyand, *Majority Rule in Collective Bargaining*, 45 *COLUM. L. REV.* 556 (1945).

¹⁷ *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945). For the legislative development of the proviso, see Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 *COLUM. L. REV.* 731 (1950); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 *N.Y.U. L. REV.* 362 (1962).

their employer and to have such grievances adjusted, without the intervention of the bargaining representative.”¹⁸

Despite the proviso of section 9(a), unions assert under most collective agreements the exclusive power to process and settle grievances and to carry cases to arbitration.¹⁹ This power of the union to control the grievance procedure, however, does not derive from the statute but from the collective agreement. The union's exclusive control over the administration of the agreement is granted by the employer, not by Congress; the employers, by contract, have given unions the status Congress refused to give by statute.

By virtue of this contractually derived status as exclusive enforcer of the collective agreement, the union assumes a heavy responsibility to exercise its control on behalf of, rather than against the individual employee. The collective agreement creates rights in the individual employee which are enforceable under section 301.²⁰ In the absence of a union controlled grievance procedure, the individual can sue and enforce his rights in his own behalf.²¹ The effect of the contractual provision giving the union exclusive control over the grievance procedure is to deprive the individual of his ability to enforce the contract on his own behalf. The union, having deprived the individual of his ability to enforce his rights, has a special obligation to act on his behalf.

¹⁸ This reading of section 9(a) has some support in the legislative history. The Taft-Hartley Act added the words “and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect.” Labor Management Relations (Taft-Hartley) Act § 9(a), 29 U.S.C. § 159(a) (1970). Congress was concerned with the relative rights of the individual and the union and sought to secure the individual employee's rights under the collective agreement. See Dunau, *supra* note 17; Sherman, *The Individual and His Grievance—Whose Grievance Is It?*, 11 PRTR. L. REV. 35 (1949); Summers, *supra* note 17, at 376-85. For a comprehensive and scholarly historical study of the majority rule principle in law and practice, see Schreiber, *supra* note 16.

Professor Cox has effectively argued that, despite the words used, Congress did not intend that the individual should have a “right” to present grievances, but only that the employer should have a “privilege” to listen. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956). He argued that the individual's right was to fair representation in the grievance procedure, the position adopted by the Court in *Vaca v. Sipes*.

¹⁹ See [1976] 2 COLL. BARG. NEGOTIATIONS & CONT. (BNA) 55:1-21. Professor Feller has argued that this exclusive control is essential to the collective agreement. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

²⁰ 29 U.S.C. § 185 (1970).

²¹ *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962). The Court in *Vaca* was explicit: “If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted.” 386 U.S. at 184 n.9 (citations omitted).

In practical terms, the union's need for flexibility in negotiating collective agreements is of a different dimension than its need for flexibility in interpreting and applying collective agreements. The collective agreement is a complex package of provisions and benefits. In negotiating an agreement, the union must accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others. Relative advantages and disadvantages of different proposals to the various groups must be weighed both singly and in combination. The package put together represents not only a bilateral compromise between the union and the employer, but also a multilateral compromise among interest groups within the union. To negotiate such a package, the union needs, as the Court said in *Ford Motor Co. v. Huffman*, a "wide range of reasonableness."²²

In contrast, settlement of disputes as to the meaning and application of the collective agreement requires a much narrower range of flexibility. If the meaning of the contract and the facts are clear, then all that is required is to carry out the compromise made when the contract was negotiated. If the contract is ambiguous, then the parties need the flexibility to complete the compromise within the range of reasonable meanings of the agreement. If the facts are unclear, then the parties need no more freedom than to agree on a reasonable determination of the facts.

These differences between contract negotiation and contract administration as reflected in the statutory policy, the status of the union, and the practical needs of the parties, clearly call for different standards for measuring the duty of fair representation. Returning to the roots of the duty, when a union negotiates a contract it is acting like a legislature establishing rules, and like a legislature it is allowed a wide range of reasonableness; but when a union administers a contract it is acting more as an administrative agency enforcing and applying legislation, and it must act within the boundaries of established rules. If the union is conceived of as an agent or fiduciary, the authority granted to an agent to negotiate a contract is generally broader, with more discretion, than the authority granted to enforce or apply a contract after it has been made. The duty of fair representation in the administration of the agreement requires observance and protection of the rights created by the agreement.

This brings us to the point of inquiring more specifically what is the standard for measuring the union's duty of fair representation

²² 345 U.S. 330, 338 (1953).

in processing grievances. The inquiry is divided into two major parts: first, a close study of Supreme Court opinions for the general guides the Court has provided; and second, an application of those general guides to sample cases with a view toward drawing out more specific standards for judging what is fair and what is unfair in grievance handling. No promise is held out that this will lead us to a comprehensive definition of the duty of fair representation; the most that can be hoped is that we shall move a step or two along the road toward that goal.

III. GENERAL GUIDES FROM THE SUPREME COURT

The only guides provided by the Supreme Court for measuring the union's duty of fair representation in contract administration are those articulated or applied in *Humphrey v. Moore*,²³ *Vaca v. Sipes*,²⁴ and *Hines v. Anchor Motor Freight, Inc.*²⁵ Although amorphous and incomplete, those guides provide a sense of direction and suggest some inchoate standards to be applied in concrete areas.²⁶

In *Humphrey v. Moore*, one trucking company absorbed the operations of a second company. The local union, which represented employees of both companies, recommended that the two seniority lists be dovetailed²⁷ and this recommendation was adopted by the Joint Conference Committee. When employees of the first company who were laid off as a result of this dovetailing charged that they had not been fairly represented, the Court, in rejecting this claim, focused on four points. First, the section of the collective agreement relied upon by the Joint Committee in making its decision "reasonably meant what the Joint Committee said or

²³ 375 U.S. 335 (1964).

²⁴ 386 U.S. 171 (1967).

²⁵ 424 U.S. 554 (1976).

²⁶ For other efforts to develop standards of the duty of fair representation in grievance administration, see Feller, *supra* note 19; Levy, *The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances*, 118 U. PA. L. REV. 1036 (1970); Lewis, *supra* note 4; Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55 (1972); Comment, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Comment, *Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885 (1974).

²⁷ The dovetailing of the seniority lists of the absorbing and absorbed companies was to result in a master seniority schedule wherein the seniority of any given employee was to be measured from his date of employment with either company. 375 U.S. at 339. Because the absorbed company was older than the absorbing company and consequently had employed its employees generally for longer periods, the sandwiching of the seniority lists meant that the employees of the absorbing company had to be laid off first. *Id.*

assumed it meant.”²⁸ Second, the decision to dovetail “was neither unique nor arbitrary,” but was a “familiar and frequently equitable solution” in such cases.²⁹ Third, the local union was free to take a “good faith position . . . supporting the position of one group of employees against that of another,” for it should not “be neutralized when the issue is chiefly between two sets of employees.”³⁰ Finally, the disfavored employees were not deprived of a fair hearing, for they had notice of the hearing, and three stewards representing them were present at the hearing and were given every opportunity to state their position. With these four elements present, the union fulfilled its duty of fair representation. Whether something less would have met the minimum standard, we cannot know, but these four elements are considered by the Court as relevant in determining the standard.

In *Vaca v. Sipes*,³¹ an employee, Owens, who had been on sick leave, was denied reinstatement because of his heart condition. The Court emphasized that the union had pressed the grievance through the grievance procedure, attempted to obtain evidence to support Owen’s case, attempted to secure less strenuous work for him, and tried to help him be rehabilitated. Only after all these efforts did the union conclude that arbitration would be fruitless and dismissed the grievance. Beyond holding that this diligence in processing Owen’s grievance met the standard of fair representation, the Court, by its choice of language and its analysis, provided additional guides as to the measure of that duty.

The Court in *Vaca* carefully and deliberately selected the terms for describing the duty, and in doing so distinguished between the standards to be used in contract negotiation and contract administration. Counsel for the union urged that the union’s duty should be limited to acting in “complete good faith and honesty,” the words used in *Ford Motor Co. v. Huffman* to describe the union’s duty in negotiating an agreement.³² The Court, however, rejected these words as an inadequate description of the duty, in effect saying that in the settlement of grievances, “complete good faith and honesty” was not enough.

²⁸ *Id.* 345.

²⁹ *Id.* 347.

³⁰ *Id.* 349.

³¹ 386 U.S. 171 (1967).

³² Feller, *Vaca v. Sipes: One Year Later*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL CONFERENCE ON LABOR 141, 167 (T. Christensen ed. 1968).

In contrast, the Court defined the duty in broader terms of "wrongfulness;" the individual could sue on the basis of the union's "wrongful refusal to process the grievance."³³ Wrongfulness was elaborated by three principle adjectives, used in the alternative—"arbitrary, discriminatory, or in bad faith."³⁴ Repeated emphasis was given to the word "arbitrary," which union counsel had urged the Court not to add to the standard stated in *Ford Motor Co. v. Huffman*.³⁵ Wrongfulness was further elaborated by the Court to include ignoring a meritorious grievance or processing it in a perfunctory manner. Thus, the Court declared: "[A] union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. . . . [T]he Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner."³⁶

These carefully selected terms for describing the duty were more than elusive adjectives to create a mood; they were used to narrow the polar positions presented by arguments to the Court and to bring the standard of fair representation into clearer focus. Rejecting the polar extremes, the Court emphasized on the one hand that the individual employee has no "absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement,"³⁷ for if he could, "the settlement machinery provided by the contract would be substantially undermined."³⁸ On the other hand, the Court emphasized that the union's exclusive control over grievance procedures did not

³³ 386 U.S. at 185 (emphasis in original).

³⁴ *Id.* 190.

³⁵ Feller, *supra* note 32. The courts were slow in recognizing that *Vaca* announced a different standard in processing grievances. See *Jackson v. TWA, Inc.*, 457 F.2d 202 (2d Cir. 1972); *De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970); *Dill v. Greyhound Corp.*, 435 F.2d 231 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971). In 1972, the Court of Appeals for the Fourth Circuit, having read Professor Feller's article, *supra* note 32, pointed out that "repeated references in *Vaca* to 'arbitrary' union conduct reflected a calculated broadening of the fair representation standard." *Griffin v. U.A.W.*, 469 F.2d 181, 183 (4th Cir. 1972). Other courts of appeals have now explicitly recognized that the union's duty "to avoid arbitrary conduct" is a distinct obligation from its duty to treat all factions "without hostility or discrimination," and its duty to exercise its discretion in "complete good faith." See *Kesner v. NLRB*, 532 F.2d 1169 (7th Cir.), *cert. denied*, 429 U.S. 983 (1976); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975); *Berault v. Local 40, ILWU*, 501 F.2d 258 (9th Cir. 1974); *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973).

³⁶ 386 U.S. at 194 (footnote omitted).

³⁷ *Id.* 191.

³⁸ *Id.*

carry with it "unlimited discretion to deprive injured employees of all remedies for breach of contract."³⁹

In narrowing the polar positions of the parties, the Court stated that the union did not breach its duty "merely because it settled the grievance short of arbitration."⁴⁰ The Court approved the union's desire to assure that "frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures."⁴¹ The union does not fulfill its duty, however, merely by refraining from "patently wrongful conduct such as racial discrimination or personal hostility."⁴² "[A] union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances."⁴³

Proof of violation of the duty of fair representation requires more than a showing that the evidence supports the individual's claim that he has been wrongfully discharged;⁴⁴ the union's decision that a particular grievance "lacks sufficient merit to justify arbitration" does not become a breach of duty simply "because a judge or jury later found the grievance meritorious."⁴⁵ But, said the Court, "a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion."⁴⁶

In *Hines v. Anchor Motor Freight, Inc.*⁴⁷ a truckdriver was discharged for allegedly falsifying a motel receipt, and this discharge was upheld by a Joint Conference Committee. He claimed that had the union adequately investigated it would have discovered that the falsification was made by the motel clerk, and with this evidence obtained his reinstatement. Although the only issue before the Court was whether the employer could be sued for wrongful discharge when the union had failed to produce evidence at the Joint Conference Committee hearing, the Court restated and extended the standards articulated in *Vaca*. The "duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.'" ⁴⁸ Although the duty does

³⁹ *Id.* 186.

⁴⁰ *Id.* 192.

⁴¹ *Id.* 191.

⁴² *Id.* 190.

⁴³ *Id.* 194.

⁴⁴ *Id.* 192-93.

⁴⁵ *Id.*

⁴⁶ *Id.* 191.

⁴⁷ 424 U.S. 554 (1976).

⁴⁸ *Id.* 564.

not require "pressing the employee's case to the last step of the grievance process," it does require that a union not "'arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.'" ⁴⁹ Congress, in putting its blessing on private dispute settlement anticipated that "the contractual machinery would operate within some minimum levels of integrity." ⁵⁰ If the union fails in its duty in presenting the case at arbitration, the individual employee is not bound by the award. Otherwise, "[w]rongfully discharged employees would be left without jobs and without a fair opportunity to secure an adequate remedy." ⁵¹

Although the Court's opinions in these three cases do not define the standard of the union's duty of fair representation, they do reject the polar extremes and mark some outer boundaries, thereby providing some guides as to the inner and outer limits of the duty. Those limits are further narrowed, and the standard is given substantive content by four interlacing policies or values which run through all of the Court's opinions from *Humphrey* to *Hines*.

First, the legally enforceable contractual rights that individual employees acquire under collective agreements are valuable personal rights and the union's ability to prevent employees from enforcing those rights should be limited. In the words of the Court in *Vaca*, "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." ⁵²

Second, arbitration should not be overburdened with frivolous grievances by allowing an individual employee unilaterally to invoke arbitration or to compel the union to take grievances to arbitration regardless of their merit. The union must be free to sift out wholly frivolous grievances that would only clog the grievance process and must have the power to settle the majority of grievances short of the costlier and more time consuming steps of arbitration.

⁴⁹ *Id.* 569.

⁵⁰ *Id.* 571.

⁵¹ *Id.* The Court treated the decision of the Joint Conference Committee as an arbitration award. Because of the bilateral character of the Committee and the nature of its operation, its determination should be viewed as a grievance settlement agreed upon by the parties. The characterization of the Committee, however, makes no difference in this case, for the union owes at least as much duty to investigate before settling as before arbitrating.

⁵² 386 U.S. at 186.

Third, the union, as "statutory agent and as coauthor of the bargaining agreement" should be able to isolate the "major problem areas in the interpretation of the collective bargaining contract"⁵³ and resolve those problems. Where bargaining has left ambiguities or gaps in the agreement, the union must be able to resolve those ambiguities or fill those gaps by settlement of grievances with the employer.

Fourth, there should be assurance that in settling disputes under collective agreements, "similar complaints will be treated consistently."⁵⁴ A problem of interpretation, once settled by the parties in one case should settle the problem in all other cases. Individual grievants should not be subject to "the vagaries of independent and unsystematic negotiation."⁵⁵

IV. APPLICATION OF SUPREME COURT GUIDES: SEVEN SAMPLE CASES⁵⁶

The general guides drawn from the Supreme Court opinions are rich in adjectives and illuminated by metaphors that articulate values and give a sense of direction. The central core of policies is made explicit, and some of the outer boundaries are marked. The general guides acquire useful content, however, only when we try to apply them to concrete fact situations. Only as we confront specific cases and ask ourselves whether the union has fairly represented the grievants can we make the guides more explicit.

Therefore, I would like to examine the application of these guides to seven hypothetical, though not so hypothetical, cases and project the results that the guides require. The hope is that from these results we may evolve and articulate more specific standards for measuring whether the union has fulfilled its fiduciary duty to the individual employee in processing and settling his grievance.

A. *The Case of the Paper Promise*

The truck drivers of a metropolitan cartage company sue for underpayment of hourly rates, overtime, and vacation pay

⁵³ *Id.* 191.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ This article does not attempt to survey the view of the law as it exists in the various circuit courts of appeal. For compilations of how the courts have handled claims of breach of the duty of fair representation, see R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 695-728 (1976); Koretz & Rabin, *Arbitration and Individual Rights*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 113 (J. Corrège, V. Hughes & M. Stone eds. 1976); Tobias, *supra* note 26; Comment, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

clearly required by a multiple-employer contract. The drivers repeatedly complained to the union, but the business agent refused to take any action. His only excuse was that the employer claimed that he could not afford to pay more.

The union here, by refusing to process grievances, has effectively set aside a provision of the collective agreement. When the agreement was made, the union had the fullest freedom to negotiate terms it believed were in the best interests of the employees. That agreement has been ratified by established procedures, and it has created legal rights and duties in the employees, as well as in the union and in the employers. Now a union officer has cast aside that negotiation and ratification process as an empty exercise and seeks to treat the contract as consisting of paper promises.

Such a cavalier treatment of the contract is scarcely consistent with the contemplation of the parties and seems contrary to the union members' understanding and expectations when they ratified the contract.⁵⁷ The expectation of the employees was that they would be paid the rates promised in the contract, not something less later deemed adequate by the business agent. Those expectations are rooted in legal rights. As the Court held in *Smith v. Evening News Association*,⁵⁸ the collective agreement created legal rights in the employees that they be paid in accord with its terms. The only thing standing in the way of their legally enforcing those rights is the union's assertion of exclusive control over the enforcement procedure and its refusal to use that procedure on the employees' behalf. As the Court said in *Vaca*, Congress did not intend "to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract."⁵⁹

Congress has further affirmed that unions should not treat contracts they negotiate so lightly, and that employees should be able

⁵⁷ In most unions, the process for union ratification of agreements differs markedly from the process for the settlement of grievances. Ratification is normally by a special process maximizing membership participation, either through referendum vote or approval by a specially selected bargaining committee or representative body. Ratification votes often generate heated debates and large membership turnout, with the recommended agreement being rejected in about 10% of the cases and union negotiators being required to bargain further to obtain different terms. Simkin, *Refusals to Ratify Contracts*, in *TRADE UNION GOVERNMENT AND COLLECTIVE BARGAINING: SOME CRITICAL ISSUES* 107 (J. Seidman ed. 1970); Summers, *Ratification of Agreements*, in *FRONTIERS OF COLLECTIVE BARGAINING* 75 (J. Dunlop & N. Chamberlain eds. 1967). This political process of contract ratification contrasts sharply with the essentially administrative process with which grievances are normally handled.

⁵⁸ 371 U.S. 195 (1962).

⁵⁹ 386 U.S. at 186.

to rely upon the contract as written. Section 104 of the Landrum-Griffin Act places on unions the duty to provide every employee, who so requests, a copy of any collective agreement that affects him.⁶⁰ The union can scarcely discharge this duty by delivering a document of paper promises not to be enforced. The relevance of this section was underlined by the Third Circuit in *Price v. International Brotherhood of Teamsters*: "Implicit in this provision was the assumption that absent appropriate amendment of the labor contract, there could be no changes in the agreement that would abrogate rights contained in it."⁶¹ The purpose of the statute was to enable employees to know their rights under the contract; that purpose is frustrated if they are in fact denied the rights clearly stated in the contract.

None of the policies or values that have been articulated by the Court weigh against the individual drivers in this case enforcing their rights under the contract. There is no gap in the contract for the union and the employer to fill or ambiguity for them to resolve by negotiation and settlement through the grievance procedure; the rates of pay are clearly prescribed. The union is not sifting out frivolous grievances, but is ignoring a meritorious grievance. In this case, to impose on the union the duty to enforce the drivers' rights would not "so overburden the arbitration process as to prevent it from functioning successfully,"⁶² but would instead require that arbitration successfully perform its function. Indeed, if the union could block enforcement of employee rights in these circumstances, "the contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract."⁶³

There is no practical need for the union's having the power to nullify provisions of the contract by refusing to process grievances. If changed circumstances require changes in the agreement, the union and the employer can, as suggested in *Price*,⁶⁴ negotiate an amendment to the contract. Amendment, however, should be

⁶⁰ The words of Section 104 are as follows:

It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement. . . .

29 U.S.C. § 414 (1970).

⁶¹ 457 F.2d 605, 610 (3d Cir. 1972).

⁶² 386 U.S. at 192.

⁶³ 424 U.S. at 571.

⁶⁴ 457 F.2d at 611.

through affirmative exercise of established procedures for making new contractual rules, not through refusal to use the procedures for enforcing existing rules. Even beyond the frustration of the legitimate expectation of union members that the union's legislative processes be followed, there are obvious dangers if union officers or grievance committees are allowed to set aside or ignore clear provisions of the collective agreements.

The union's refusal to enforce a clear provision in the collective agreement cuts at the very root of its duty of fair representation. The union as representative of the employees owes to them the duty an agent owes to his principal. How can an agent authorized to make a contract on behalf of his principal, make the contract and then deprive his principal of its benefits? The obligation of a union as fiduciary should be to enforce the contract it has made on behalf of the employees it represents. At the very least, the union ought not play "dog in the manger" and assert its control over the grievances so as to bar employees from enforcing the contract in their own behalf. As the Supreme Court said in *Steele*, the duty of the union "is to act for and not against those whom it represents."⁶⁵

B. *The Case of the Painful Principle*

The operation of two plants of a national corporation are consolidated into the newer of the two plants. The national agreement covering both plants explicitly provides that when two plants are consolidated in this fashion, seniority shall be governed by length of service with the company. Application of this rule would result in almost all of the employees from the older, abandoned plant being in the top third of the combined seniority list, and all of the layoffs resulting from the consolidation being suffered by the employees in the newer, continuing plant. To avoid this, the local union and management agree to slot the employees according to relative seniority in each plant rather than by straight company seniority. This results in the layoff of some of the employees from the older, abandoned plant. When they file grievances, the local union refuses to process the grievances and the international union refuses to intervene.

When the union negotiated the national agreement, it had the fullest freedom to negotiate rules governing merger of seniority lists

⁶⁵ 323 U.S. at 202.

when plants consolidated. The union chose and established by agreement the rule of dovetailing according to company seniority and that agreement has been ratified and is legally binding. The union now seeks to set aside that rule in a particular case and work a result contrary to the contract.

As in the preceding case, the union's refusal to enforce clear provisions in the contract violates its obligation to represent employees who have legal rights under the contract. In more basic terms, the union's action here is "arbitrary" in the most fundamental meaning of that word—not being governed by rule or principle.⁶⁶ The arbitrariness is not in the particular result, removed from its context, for relative seniority would be a rational rule for merging seniority lists. The arbitrariness of the result lies in its violation of the very rule established to govern the case. As the Eighth Circuit said in *Butler v. Local 823, International Brotherhood of Teamsters*, a similar case: "[T]he Local . . . breached its duty to insist that the Employer adhere to the contract, and . . . acquiesced in an irrational interpretation of the contract, thereby discriminating against Butler [the employee]." ⁶⁷

The union's refusal to follow the contractual rule is arbitrary in the same sense that an employer would be arbitrary in discharging an employee for an offense when the posted rule stated a maximum penalty of three months suspension. It is arbitrary in the same sense that a union would be arbitrary in disqualifying a candidate for union office on grounds not stated in the constitution or generally applied. It is arbitrary in the same sense that an administrative agency would be arbitrary in refusing to apply its published rules in a particular case.

If the collective agreement contains no provision on how seniority lists shall be merged when plants are consolidated, the union and employer can fill the gap by agreeing on any result within "the wide range of reasonableness" applicable to negotiating new terms. On the other hand, when the contract establishes rules, the refusal to follow those rules can only be described as arbitrary. For the union to reject a grievance that correctly protests a violation of the contract is for it to "arbitrarily ignore a meritorious grievance."

Again, the union can negotiate an amendment to the contract and establish a different rule if experience shows that the existing

⁶⁶ BLACK'S LAW DICTIONARY 134 (4th ed. 1968) defines arbitrary as "fixed or done capriciously or at pleasure; without adequate determining principle; . . . not governed by any fixed rules or standard."

⁶⁷ 514 F.2d 442, 454 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975).

rule works undesired results; but it should do so through procedures appropriate for making contract rules, not by refusing to enforce existing rules in the particular case. The new contract rule should be applicable only prospectively to future consolidations, for to make it effective retroactively to grievances already filed would not only defeat the matured expectations of the employees but would give it an element of arbitrariness.

C. *The Case of the Settled Ambiguity*

Two companies governed by the same multiple-employer contract merge. The contract language is ambiguous, but the consistent practice in similar cases has been to dovetail seniority lists. Union officials, responding to the majority views of the employees involved, agree with the employer that the employees of the smaller, absorbed company should go to the foot of the seniority list. Employees who are laid off—all former employees of the smaller, absorbed company—object, but their grievances are rejected by the union-employer joint committee.

This case is basically no different from the two preceding cases. Although the words of the contract are ambiguous, its meaning has become settled by past practice.⁶⁸ The parties, in disposition of prior cases, have reached a mutual understanding as binding as if it were clearly stated in the printed words. There is no longer an ambiguity, but an established rule. Refusal to follow the established rule in the particular case is arbitrary in the fundamental meaning of the word.

Until the ambiguity is resolved, the parties are free to agree to any interpretation that is within the range of the ambiguity. For instance, had there been no prior cases of consolidation and no relevant past practice, the decision to entail the seniority lists would not violate the union's duty of fair representation. The court will not substitute its interpretation for that of the parties so long as their interpretation meets the *Humphrey* standard that the contract provision "reasonably meant what the Joint Committee said or

⁶⁸ Recognized rules of contract construction direct that ambiguities in the parties' agreement be read in light of performance as well as in light of custom. A. CORBIN, CORBIN ON CONTRACTS §§ 101, 556 (1963) (effect of subsequent action by the parties; proof of usage and custom to add provisions to a contract). Indeed, in the area of commercial contracts these rules have been given the force of statute. U.C.C. §§ 1-205, 2-208 (course of dealing and usage of trade; course of performance or practical construction). For a general discussion of the applicability of contract principles to collective bargaining agreements, see Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969).

assumed it meant.”⁶⁹ In resolving ambiguities or filling gaps, the parties are completing their contract, not changing it. This can be done through the grievance procedure, for settlement of issues left unresolved or partially resolved during negotiations is one of the major functions of the grievance procedure. Unresolved ambiguities do not create defined contract rights and employee expectations are not defeated by the resolution of ambiguities within the range of reasonable interpretations.

In contrast, when the parties have resolved the ambiguity, and by their grievance settlements have established a rule, the policies of *Vaca* come to bear. Among those policies is that “similar complaints will be treated consistently” and that individual grievants [will] not be subject to “the vagaries of independent and unsystematic negotiation.”⁷⁰ These policies can be fulfilled only if the union follows its own precedents and settles grievances in accordance with established rules.

That the union responded in the present case to majority pressure in entailing employees from the smaller company does not justify the union’s action, but makes it more vulnerable. As the Court said in *Steele*, the union “is to represent all its members, the majority as well as the minority.”⁷¹ The duty to represent equally the interests of the minority limits the legitimizing force of majority rule, for as emphasized by courts of appeal “[I]t is not proper for a bargaining agent in representing all of the employees to draw distinctions among them which are based upon their political power within the union.”⁷² When there is a direct clash of interests between two groups of employees, as in the present case, submission of the issue to majority vote may lead to the conclusion that the

⁶⁹ *Humphrey v. Moore*, 375 U.S. 335, 345 (1964). The majority of the Court implicitly rejected Mr. Justice Goldberg’s argument that the parties were free to amend the contract by settlement of a grievance, and that an individual employee could not complain because a grievance settlement was not within the confines of the contract. As was said in *Price v. Teamsters*, “The majority adopted a more traditional approach and required the parties to operate within the confines of the collective bargaining agreement.” The union’s action was upheld “only after making a determination that the interpretation involved was reasonable in the light of the contractual language.” 457 F.2d at 610.

⁷⁰ 386 U.S. at 191.

⁷¹ 323 U.S. at 202.

⁷² *Ferro v. Railway Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961) (allegation that union favored politically strong local over politically weak local). See also *O’Mara v. Erie Lackawanna R.R. Co.*, 407 F.2d 674 (2d Cir. 1969), *aff’d on other grounds*, *Czosek v. O’Mara*, 397 U.S. 25 (1970); *Mount v. Grand Int’l Bhd. Loc. Eng’rs.*, 226 F.2d 604 (6th Cir. 1955).

decision is not based on legitimate considerations, but on political power, and is therefore arbitrary and discriminatory.⁷³

D. *The Case of Grievance Horsetrading*

Two discharge cases were pending arbitration. Olsen, who was 55 years old, a warehouse worker, and a former union officer, was discharged for intoxication on the job. The evidence against him seemed overwhelming and this was his third offense, but the union committee demanded arbitration because, in their terms, "this is the last thing we can do for Ollie." Schmidt, a truck driver, was discharged for refusing to take out a truck on an assigned load, claiming that the truck was in bad repair and was overloaded. Union investigation had found that the brakes were defective and the load was 10,000 pounds above the legal limits. A week before the scheduled arbitration the company offered to reinstate Olsen if the union would withdraw the Schmidt grievance. The union committee agreed.

This case is but one variation of grievance horsetrading, a practice based on the assumption that the union owns the grievance and is free to trade one grievance for another to gain what it considers is a net advantage. The union, however, does not own the grievance, for the individual employee acquires legal rights under the collective agreement, and the union is the employee's agent to enforce those rights. In the present case, both Olsen and Schmidt had legal rights not to be discharged without just cause, and the union had a duty to each of them. That duty, under *Vaca*, was to, "in a non-arbitrary manner, make decisions as to the merits of particular grievances"⁷⁴ and not to ignore meritorious grievances. The union here surrendered Schmidt's right to a job, not because it judged his grievance to be without merit, but because it sought a benefit for Olsen. The union has not represented Schmidt's interests, but has abandoned them; it has not acted for him, but against him.⁷⁵ It is difficult to understand how the union in this case could straightfacedly assert that it has represented Schmidt fairly and equally. To sustain such grievance trading would lead to the result decried in

⁷³ *NLRB v. General Truck Drivers Local 315*, 545 F.2d 1173 (9th Cir. 1976); *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

⁷⁴ 386 U.S. at 194.

⁷⁵ In *Harrison v. United Transp. Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), such trading of discharge grievances was characterized as "arbitrary," and a violation of the duty of fair representation.

Hines: "Wrongfully discharged employees would be left without jobs and without a fair opportunity to secure an adequate remedy." ⁷⁶

A closely related variation of horsetrading was involved in *Local 13, ILWU v. Pacific Maritime Association*,⁷⁷ where the union accepted the employer's deregistration of a longshoreman in return for the employer's granting a grievance concerning the packing of sacks. The rationale of the union was that the trade resulted in the greater good for the greater number because the deregistration involved only one man and sack-packing involved a large number. The response of the court of appeals was blunt: "[T]he deliberate sacrifice of a particular employee as a consideration for other objectives must be a concession the union cannot make." ⁷⁸

The union's violation of its duty in these cases is that its decision to surrender the individual's grievance was not based on a judgment of the merits of the grievance. If a union, after full investigation and fair consideration, decides that a grievance is not worth carrying to arbitration, then in such a case there would be no unfairness to the individual employee in its trading surrender of his grievance for whatever favorable settlements of other grievances it might persuade the employer to give.

Grievance trading is sometimes done in the bulk where a large number of grievances are awaiting arbitration. The employer may agree to grant a number of grievances in return for the union's agreement to withdraw the rest. Among those withdrawn may be grievances of individuals claiming misclassification, lay off out of line seniority, wrongful denial of promotion, or improper discipline. If the union has evaluated each of the withdrawn grievances and duly judged that they lack sufficient merit to go to arbitration, then no serious problem of fairness is posed, for the union's action serves the legitimate purpose recognized in *Humphrey* to "sift out wholly frivolous grievances which would only clog the grievance process." ⁷⁹ The individuals whose grievances are surrendered have no cause for complaint if the union succeeds in trading off grievances it would never have processed further in the first instance. However, this is often not the case. The union may not be sifting out wholly frivolous grievances, but rather withdrawing grievances that it believes have merit or that it has not sufficiently investigated to make a judgment.

⁷⁶ 424 U.S. at 571.

⁷⁷ 441 F.2d 1061 (9th Cir.), *cert. denied*, 404 U.S. 1016 (1971).

⁷⁸ *Id.* 1068.

⁷⁹ 375 U.S. at 349.

In analytical terms, such grievance settlements in bulk are the rankest form of arbitrary and discriminatory conduct. The settlement is arbitrary in that the established rules are set aside, and the grievances are not decided on their merits but on a wholly unprincipled basis. The grievances are settled because, by happenstance, they are in the backlog when the settlement is made. The settlement is discriminatory in that these particular employees are treated differently from other employees; they are not given equal protection, for the protection of their individual contract rights is abandoned in order to benefit others. The union's fiduciary obligation, at the very least, is to make a good faith judgment of the merits of the individual's grievance, not to conduct a lottery with his livelihood.

Such bulk settlements may be useful in relieving grievance procedures which have become overburdened at the final steps, but this does not justify wholesale abandonment of employees' rights. Such backlogs do not grow overnight, but are the result of one or both parties' refusing to settle at lower steps of the grievance procedure or to press forward at upper steps. The parties can not fairly assert exclusive control over procedures to enforce the contract and then shift the burden of their failure properly to use that procedure onto randomly designated employees and make them pay with loss of their job rights. This is an arbitrary and discriminatory imposition on a few employees of the costs of the parties' past failures. The union should not so readily escape its responsibility to aggrieved employees to weigh the merits of the grievances and to seek settlement of those grievances on their merits, nor should the employer so readily escape its liability for breaches of the collective agreement.

E. The Case of Sudden Statesmanship

Pulaski was discharged for striking a foreman. Pulaski claimed that the foreman had provoked him with obscene and abusive language containing ethnic slurs. The foreman claimed that Pulaski started the verbal abuse and shoving match. The union refused to carry the case to arbitration because it believed that there was little chance of winning Pulaski's reinstatement and it did not want to condone fighting. In the past, however, the union had carried every discharge case to arbitration, no matter how questionable, including fighting cases. Even in some seemingly hopeless cases, the arbitrator had ordered reinstatement without back pay.

The definition of "discriminate" is to treat unequally; and the union's duty of fair representation, as articulated in *Steele* and subsequent cases, is to "protect equally" all those it represents. Here, Pulaski has been discriminated against because he has not been given equal protection by the union; he has been denied access to the arbitration process previously enjoyed by others similarly situated. He has thereby been denied a chance given to other discharged employees to win a reduced penalty, a chance of substantial value even if it is only a spin on the roulette wheel of arbitration.

The union, of course, cannot be permanently locked into a duty to arbitrate all discharge cases of this type because of its past policy; the union must be free to change that policy. Fairness, it seems to me, requires, however, that a change of policy should be made by prospective rule rather than by application in a particular case that arises before the decision to change is made. Refusing to proceed in the particular case, rather than adopting a prospective rule, not only defeats the expectations of the employee, but also presents the risk that the change will not be made in future cases and that the purported rule is no rule at all.⁸⁰ The standard of fairness suggested here is similar to the standard of fairness imposed on employers in discipline cases—past toleration of violations of even a posted rule may bar discipline until after the employer has given notice that in the future such violations will not be tolerated.⁸¹

A reverse problem is presented when the union refuses to process a meritorious grievance because the union lacks the resources or decides that the grievance is not worth the cost. Certainly, the union cannot be expected to carry every meritorious grievance to arbitration, for a grievance may be frivolous because of triviality as well as lack of merit.⁸² Furthermore, union mem-

⁸⁰ The usual policies weighing against allowing individuals to insist on arbitration do not apply here. No problem of interpretation to be resolved by the parties is involved. The grievance procedure will not be substantially burdened, for there need be only one more case, and of the kind the parties have regularly arbitrated in the past. The union is free to adopt for the future a policy of not arbitrating grievances which have little chance of success.

⁸¹ The requirement that the union's policy of not carrying all discharge cases to arbitration be prospective only is not to provide notice to the employees, for an employee can scarcely claim he engaged in misconduct justifying discharge in reliance on the union's taking his case to arbitration. Requiring the policy to be prospective is to insure that the change is genuinely one of policy and not one motivated by and limited to the immediate case.

⁸² The union's decision should appropriately take into account both the value of the grievance to the employee if the arbitration is successful, and the likelihood that the arbitration will be successful. See *Vaca v. Sipes*, 386 U.S. 171, 192-93 (1967); *Encina v. Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971); *Curth v. Faraday, Inc.*, 401 F. Supp. 678 (E.D. Mich. 1975).

bers may refuse to assess themselves dues sufficient to arbitrate even substantial grievances. However, it is one thing for a union to declare an inability or unwillingness to process a meritorious grievance, and quite another thing for a union to bar the individual from processing it on his own behalf. The union's exclusive control over grievances is not one imposed on the union by the statute, but is one voluntarily assumed by the union under the contract.

The union's duty of fair representation would seem to preclude it from preempting enforcement of individuals' rights under the collective agreement when it lacks the ability to perform that function. At least where substantial grievances are involved, fair representation should require the union either to enforce the contract or to allow the individual to enforce the contract on his own behalf.⁸³

F. The Case of the Unloved Grievant

"Bull Whip Pete" had been promoted to supervisor from the ranks, but after several years he became so abusive and overbearing that he could not work with the men under him. When he was demoted back to the bargaining unit, he bid on a job based on seniority accumulated during the years he worked as a supervisor. The company awarded him the job but when the union protested, the company removed him from the job. The contract language was ambiguous as to accumulation of seniority by supervisors and there were no precedents. The union committee refused to process his grievance, stating, "He should be ridden out of the plant on a rail."

Two compelling considerations meet here head-on. On the one hand, the contract is ambiguous and the parties should be allowed to resolve that ambiguity. At the bargaining table the contract was left incomplete, failing to specify the rule to govern this case; the grievance procedure has provided the parties no prior opportunity to complete their contract. They should now be free to complete their contract by agreeing to whatever reasonable interpretation best serves their mutual interests and establishing a rule

⁸³ When the individual has a valuable interest at stake, such as in a discharge case, the union could offer to take the case to arbitration on the condition that the employee pay the costs. See *Encina v. Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971). The union's failure to do this would seem to raise questions of good faith as to its claim that its refusal to proceed was because the case was not worth the cost.

If the employee pays for the arbitration and it is successful, he should be entitled to reimbursement by the union, for he has vindicated his claim that the case was worth the cost.

to govern this and future cases. This freedom should be as wide as the ambiguity in the contract, and might well encompass the result reached in this case.

On the other hand, the union, in settling Pete's grievance was motivated by personal hostility which generates arbitrariness and bespeaks bad faith. The union did not act for but against one whom it was obligated to represent, seeking to destroy rather than to protect his contractual rights. In this respect, the case is a paradigm of the failure to represent fairly.⁸⁴

The grievance settlement here cannot claim validity as an act of contract completion, for the parties did not weigh the considerations as to whether a general rule allowing accumulation of seniority during service as a supervisor would serve their mutual interests. Indeed, it is doubtful if they intended to establish a general rule to govern future cases. Nonetheless, if no personal hostility had been involved, and they had made a good faith judgment on the merits, they might well have arrived at the same result. Pete has not necessarily been deprived of any substantive contract right to accumulated seniority; he has clearly been deprived of a procedural right to a fair determination.

Given the patent bad faith of the union in this case, there can be no dispute that Pete has been deprived of his right to fair representation and is entitled to legal relief. The problem is to design a remedy that will not unduly impair the parties' freedom to complete the contract by agreeing to a general rule to govern future cases, but that will give Pete a fair determination of his grievance in the particular case. Wrestling with the slippery and entangling problems of remedies is beyond the scope of this paper. It is sufficient to say that there are a range of alternatives, one of which is for the court to make the determination, as it can under *Vaca*, with the explicit statement that the court's decision in the particular case shall not be a binding precedent preventing the parties from adopting a different rule in future cases.⁸⁵

G. The Case of the Careless Committeeman

Murphy was discharged for theft of company property. He protested his innocence and, following established practice, filled out a grievance form, signed it, and gave it to his shop

⁸⁴ See, e.g., *NLRB v. Local 485, IUE*, 454 F.2d 17 (2d Cir. 1972); *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

⁸⁵ Ordering the parties to reprocess the grievance would only cast the grievant back into the lion's den, and ordering arbitration would give the grievant less than full assurance of fairness if the arbitrator is selected by the parties.

committeeman. The committeeman lost the form and forgot to do anything about it. Murphy assumed that the grievance was being held pending the criminal proceedings. A year later, after he was acquitted by a jury, Murphy discovered that the union had never filed the grievance. He filed a new grievance, which the union carried to arbitration, but the arbitrator dismissed the grievance as not timely.

The duty of fair representation, as stated in *Steele*, is rooted in the basic proposition that the union, in exercising its power to act on behalf of the employee, owes a fiduciary duty to protect the employee's interests. The union, as fiduciary, is entrusted with enforcing the employee's rights under the contract; certainly, it must owe the duty of reasonable care not to default those rights by failing to file the grievance. The union's position in this respect is analogous to that of a lawyer who is retained to enforce a claim, and like a lawyer the union should be liable for negligence that results in loss of that claim. The union can scarcely assert that it has fulfilled the duty to represent fairly when, by its negligence, it has failed to represent at all.

The Court, in *Vaca*, elaborated on the union's duty in grievance handling, saying: "[A] union can not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."⁸⁶ How can the union meet the standard of processing the grievance in more than a perfunctory manner when it has negligently failed to process it at all? As the Sixth Circuit said in *Ruzicka v. General Motors Corp.*:

[W]hen a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step toward resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation.⁸⁷

The union's negligence may take the form of inadequate investigation or presentation of the grievance, leading the union to withdraw a meritorious grievance or lose it in arbitration. For example, in *Minnis v. U.A.W.*,⁸⁸ an employee was discharged for falsifying a medical form. An alteration was apparent on the face

⁸⁶ 386 U.S. at 191.

⁸⁷ 523 F.2d 306, 310 (6th Cir. 1975). For similar cases, see *Day v. UAW Local 36*, 466 F.2d 83 (6th Cir. 1972); *Boone v. Armstrong Cork Co.*, 384 F.2d 285 (5th Cir. 1967).

⁸⁸ 531 F.2d 850 (8th Cir. 1975).

of the form and the union dropped the grievance without investigating the employee's claim that the alteration was made by the doctor's nurse. The union's failure to make this investigation, said the court, was a violation of its duty to represent the employee. Similarly, in *Hines v. Anchor Motor Freight*,⁸⁹ the local union lost a discharge grievance before the joint area committee because it had failed to investigate the employees' claim that they had not falsified their receipts, but that the motel clerk had falsified the motel records.

The union, acting as a fiduciary representing the employees in enforcing their rights under the contract, owes a duty to use reasonable care to investigate the grievance. To settle the grievance, or to present it to arbitration without making reasonable efforts to investigate it is, in the words of *Vaca*, to "process it in perfunctory fashion."⁹⁰

Requiring a union to use reasonable care in filing, investigating, and processing grievances places a substantial burden on the union. However, the burden of reasonable care is borne by every union member who drives a car, every union that owns a union hall, every agent who undertakes a task, and every lawyer who accepts a client. At a minimum a union owes the same duty of reasonable care to those it represents as persons generally owe to strangers, and its special status vis-à-vis employees further imposes upon it the duty of reasonable care a fiduciary owes to the persons on whose behalf he acts.⁹¹

⁸⁹ 424 U.S. 554 (1976).

⁹⁰ 386 U.S. at 191. In *De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970), the union failed to press the grievances of six discharged employees because of a good faith but mistaken belief that they would be reinstated by the NLRB. The court held that this amounted to arbitrary and perfunctory processing of the grievances. In *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972), the union filed its grievance through the management official with whom the grievant had engaged in a fight that led to his discharge. The union's using this channel when another was available was termed "the equivalent of arbitrarily ignoring the grievance or handling it in a perfunctory manner." *Id.* 184.

⁹¹ What constitutes "reasonable care" varies according to the relationship, if any, existing between the parties. The traditional tort duty of reasonable care is essentially negative in character in that it is breached only through affirmative misconduct—"misfeasance"—and not through failure to act—"nonfeasance." W. PROSSER, *THE LAW OF TORTS* § 56 (4th ed. 1971). Affirmative duties arise between parties as a function of special relationships, however, and in their presence, nonfeasance is a basis for liability. *Id.*; see, e.g., *RESTATEMENT (SECOND) OF AGENCY* § 379 (1957) (duty of care and skill); A. SCOTT, *THE LAW OF TRUSTS* §§ 174-85 (3d ed. 1967) (duty to exercise reasonable care and skill and other affirmative duties of trustees). The fiduciary nature of the union-employee relationship imposes on the union an affirmative duty of reasonable care in the investigation and processing of an employee's grievance, and nonfeasance, such as a failure to adequately investigate a grievance, may constitute a breach of this duty.

A union's failure to exercise reasonable care in grievance handling should be considered a violation of its duty of fair representation for two reasons. First, the union has voluntarily assumed, if not aggressively sought, the authority to represent the employees. Having acquired the statutory authority, it has voluntarily expanded that authority by negotiating contractual provisions giving it exclusive control over grievances. It has, thereby, barred the employee from processing his own grievance or suing the employer to enforce his contractual rights. Having commandeered control over the employee's rights under the contract, the union should owe at least the duty to use reasonable care in enforcing those rights. Second, the employer, by giving the union exclusive control over grievances, has insulated himself from the employee's suit unless the union has violated its duty of fair representation. An employer who has wrongfully discharged an employee should not escape liability because of the union's negligence. This would leave the employee who was a victim of two wrongs, one by the union and one by the employer, wholly remediless.

The standard of reasonable care is, of course, a flexible one; here, as elsewhere, it must be shaped to conform to the special needs and character of the situation and the nature of the relationship between the parties. This means it should take into account, among other things, the special nature of union organization, the customary practices in grievance handling, the kinds of cases being handled, the expectations of the employees, and the fiduciary status of the union. The union, in administering the agreement, must do more than avoid dishonesty, arbitrariness, discrimination, and bad faith. It has voluntarily assumed the exclusive responsibility and authority to enforce the employees' rights under the contract; its duty of care in representing the employees should be commensurate with that fiduciary responsibility and authority.

V. EMERGING PRINCIPLES OF FAIR REPRESENTATION

These seven sample cases do not purport to cover the full spectrum of problem situations nor suggest the multitude of fact variations which arise. They are intended only to provide points of focus for applying the general guides and principles articulated by the Supreme Court to concrete fact situations. Reflection on these cases, however, does lead us to some more explicit standards for measuring the individual employee's rights under the collective agreement and the union's duty to represent the employee in enforcing the agreement. Six standards emerge quite clearly.

1. The individual employee has a right to have clear and unquestioned terms of the collective agreement that have been made for his benefit, followed and enforced until the agreement is properly amended. For the union to refuse to follow and enforce the rules and standards it has established on behalf of those it represents is arbitrary and constitutes a violation of its fiduciary obligation.

2. The individual employee has no right to insist on any particular interpretation of an ambiguous provision in a collective agreement, for the union must be free to settle a grievance in accordance with any reasonable interpretation of the ambiguous provision. However, the individual has a right that ambiguous provisions be applied consistently and that the provision mean the same when applied to him as when applied to other employees. Settlement of similar grievances on different terms is discriminatory and violates the union's duty to represent all employees equally.

3. The union has no duty to carry every grievance to arbitration; the union can sift out grievances that are trivial or lacking in merit. However, the individual's right to equal treatment includes equal access to the grievance procedure and arbitration for similar grievances of equal merit.

4. The individual employee has a right to have his grievance decided on its own merits. The union violates its duty to represent fairly when it trades an individual's meritorious grievance for the benefit of another individual or of the group. Majority vote does not necessarily validate grievance settlements, but may instead, make the settlement suspect as based on political power and not the merits of the grievance.

5. Settlement of grievances for improper motives such as personal hostility, political opposition, or racial prejudice constitutes bad faith regardless of the merit of the grievance. The union thereby violates its duty to represent fairly by refusing to process the grievance even though the employer may not have violated the agreement.

6. The union can make good faith judgments in determining the merits of a grievance, but it owes the employees it represents the duty to use reasonable care and diligence both in investigating grievances in order to make that judgment, and in processing and presenting grievances on their behalf.

These standards are obviously not exhaustive, and they lack definitive precision. They do, however, carry us a substantial step beyond the general guides and principles as stated in *Humphrey v. Moore*, *Vaca v. Sipes* and *Hines v. Anchor Motor Freight*. They give us a more meaningful understanding of the nature and content of the duty of fair representation and provide more workable guides for deciding concrete cases. Together, they protect the individual's right to representation in grievance handling, and, at the same time, allow the union sufficient freedom to fulfill its function in administering the agreement.