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FINALITY AND FAIR REPRESENTATION: GRIEVANCE ARBITRATION IS NOT FINAL IF THE UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION.

In *Hines v. Anchor Motor Freight,*[1] the Supreme Court held that the Finality Rule,[2] according presumptive validity to an arbitration award, is not applicable if an employee can establish that his union breached its duty of fair representation.[3] The Finality Rule is a manifestation of the public policy favoring internal settlement of labor grievances.[4] By establishing an exception to this rule conditioned upon proving a breach of the duty of fair representation, the Court evinced its recognition of the importance of balancing individual rights against collective interests in labor grievance administration. However, the Court's discussion of the fair representation standard[5] threatens to limit the reach of that exception to the Finality Rule created by *Hines.*[6]

The Finality Rule follows from the fundamental labor law principle that industrial disputes are best resolved through mechanisms of the parties' choosing.[7] This basic policy has been implemented by according presumptive validity to decisions reached through collective bargaining grievance mechanisms.[8] The Supreme Court

[1] 424 U.S. 554 (1976).

[2] The Supreme Court established the Finality Rule with its decisions in the *Steelworkers* Trilogy. *See* text accompanying notes 9-11 *infra.*

[3] The duty of fair representation has received varied treatment from the federal courts. *See* text accompanying notes 26-66 *infra.*

[4] The Finality Rule and the policy underlying it have given rise to a strong policy of deference to arbitration awards in labor grievance cases. *See* note 10 *infra.*

[5] In *Hines v. Anchor Motor Freight,* the Court reviewed a summary judgment for the company. The Sixth Circuit had already found sufficient evidence of bad faith to raise a question of fact as to the union's breach of its duty of fair representation. That question was not before the *Hines* Court. *See* note 86 *infra.* The Supreme Court decided only that summary judgment for the company was improper when the duty of fair representation question remained to be litigated. *See* text accompanying notes 16-21 *infra.*

[6] The *Hines* Court's discussion of the duty of fair representation may have undesirable effects. *See* text accompanying notes 86-93 *infra.*

[7] *E.g.,* Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601, 605 (1956). American labor law is principally devoted to establishing procedures to regulate this system of industrial self-government. *See, e.g.,* Bok, *Reflections on the Distinctive Character of American Labor Laws,* 84 HARV. L. REV. 1394, 1397 (1971).

[8] For a description of a typical, five-step grievance procedure, *see* C. GREGORY, LABOR AND THE LAW 481-85 (1961).

established this Finality Rule with its decisions in the *Steelworkers* Trilogy.[9] Since those cases were decided, both the courts and the NLRB have treated decisions reached through grievance mechanisms with great deference.[10]

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[9] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (arbitration award presumptively final); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (agreement to arbitrate presumed to cover issue in dispute in absence of express exclusion); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (merits of grievance irrelevant in consideration of arbitrability).

[10] The pattern of judicial deference to grievance mechanisms has continued to the present day. *See, e.g.,* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Local 174, International Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). *See also* Note, *The Ascendency of Labor-Arbitration and the Confusion of Labor Arbitrators: A Case of Congressional Neglect,* 62 KY. L. REV. 505 (1974) (hereinafter cited as *Ascendency of Labor Arbitration*).

Recent NLRB decisions also have followed the Finality Rule. *See, e.g.,* Malrite of Wisc., Inc., 198 N.L.R.B. 241, No. 3, 80 L.R.R.M. 1593 (1972); Collyer Insulated Wire, 192 N.L.R.B. 837, No. 150, 77 L.R.R.M. 1931 (1971); *but see* Trinity Trucking & Materials Corp., 221 N.L.R.B. No. 64, 90 L.R.R.M. 1499 (1975).

The policy justifications for the Finality Rule are substantial. The number of labor grievances filed each year would overwhelm the courts. Tobias, *Individual Employee Suits For Breach of the Labor Agreement and the Union's Duty of Fair Representation,* 5 U. TOL. L. REV. 514, 520 (1974) [hereinafter cited as Tobias]. In addition, public policy strongly dictates the rapid resolution of conflicts to avoid the rancor of drawn out and backlogged grievance proceedings. Further, the Trilogy manifested the Court's belief that the parties to an agreement are capable of establishing procedures for the resolution of conflicts which arise under their agreement. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). *See generally* Aaron, *Judicial Intervention in Labor Arbitration,* 20 STAN. L. REV. 41 (1967); Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties,* 52 VA. L. REV. 831 (1966).

Virtually all collective bargaining agreements provide for the arbitration of grievances. Arbitrators are considered to have special knowledge and competence to decide labor grievances. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). *But see Ascendency of Labor Arbitration, supra,* at 523-32.

The Supreme Court recently indicated that arbitration may not be the panacea described in the Trilogy opinions. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Finality Rule weakened in racial discrimination cases). *But cf.* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (mere allegation of racial discrimination does not justify bypassing the contract grievance procedure); Gateway Coal Co. v. UMW, 414 U.S. 368 (1974) (Trilogy held controlling in mine safety grievance case). *See generally* Citron, *Deferral of Employee Rights to Arbitration: An Evolving Dichotomy by the Burger Court?,* 27 HAST. L. REV. 369 (1975).

The Finality Rule generally remains strong. For most grievants, the arbitration process is the court of last resort. Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee,* 8 SUFF. U.L. REV. 1096, 1118-20 (1974) [hereinafter cited as Flynn & Higgins]. Thus, the duty of fair representation is fundamentally important to grievants. *See* text accompanying notes 100-108 *infra.*

The strength of this policy of deferral gives rise to a potential conflict between the Finality Rule and the rights of individual employees. Grievance mechanisms are established and administered by the parties to the collective bargaining agreement,[11] employers and unions. Under the National Labor Relations Act,[12] a union is the exclusive bargaining agent for its bargaining unit,[13] and each employee depends upon the union for adequate representation. Thus, the Finality Rule significantly impedes an employee seeking to overturn an arbitration award on the grounds that his union failed to represent him properly.[14] The Supreme Court, recognizing the danger to individual rights inherent in the union's status as exclusive bargaining agent, has imposed upon unions a duty to represent all employees fairly.[15] These two fundamental policy aims—finality and fair representation—are a source of recurring conflict in the labor law area. While the Finality Rule is necessary to encourage internal settlement of grievances, its effect must be balanced with the duty of fair representation to protect the rights of individual union members.

The Supreme Court recently considered these conflicting policies and doctrines in *Hines v. Anchor Motor Freight.*[16] In *Hines,* two employees sought to overturn an adverse arbitration award on their

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[11] Congressional labor legislation has been advanced by either pro-union or pro-management lobbies. As a result, national labor policy, set forth in the labor statutes, 29 U.S.C. §151 *et seq.* (1970), deals mostly with the rights of unions and employers as parties to collective bargaining agreements, rather than with the rights of individual employees to enforce labor agreements. Tobias, *supra* note 10, at 521.

[12] National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1970).

[13] 29 U.S.C. §159(a) (1970).

[14] Employee actions against employers for breach of the collective bargaining agreement are brought under §301(a) of the Taft-Hartley Act, 29 U.S.C. §185(a) (1970) (district courts have jurisdiction to hear suits for the enforcement of collective bargaining agreements). The section refers only to suits by employers and labor organizations, and contains no mention of suits by individual employees. Nevertheless, the Supreme Court has expressly affirmed the right of an individual employee to sue under §301(a). Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

An employee suing under §301(a) to overturn an arbitration award faces more substantial obstacles than merely the lack of an express statutory authorization. The Finality Rule is one. Others include the superior resources of the union and the company, and the judicial predisposition to favor "establishment" parties in the action. *See generally* Flynn v. Higgins, *supra* note 10 at 1140-55. In addition, exhaustion requirements may force an employee to pursue his grievance through both contract grievance procedures and intra-union grievance proceedings before he is allowed to use his §301(a) remedy. Republic Steel Corp. v. Maddox, 370 U.S. 650 (1965). *See generally* Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee,* 51 TEX. L. REV. 1179 (1973).

[15] *See* text accompanying notes 26-30 *infra.*

[16] 424 U.S. 554 (1976).

wrongful discharge grievance. The employees claimed that the discharge was improper and that the alleged breach of the union's duty of fair representation in preparing and presenting their case to the arbitration committee[17] was sufficient ground for vacating the arbitration award.[18] In reversing summary judgment for the employer, the Supreme Court held that a breach of the duty of fair representation prevents the employer from relying upon the finality of the arbitration award.[19] The Court remanded the case for trial on the fair representation question.[20]

The essence of the Court's opinion in *Hines* was that if a fair representation breach is shown, the employee has demonstrated that the arbitration proceeding was ineffective.[21] The Court rejected the company's argument that it was entitled to rely on the finality of the award because of its good faith reliance upon the contract grievance procedure.[22] The company, the Court noted, had "played its part" in

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[17] Joint area committees often are utilized in grievance resolution mechanisms in the trucking industry. These committees consist of an equal number of management and union representatives. The process by which the committees resolve grievances has been held to constitute arbitration for the purpose of the Finality Rule. *See, e.g.,* Keane v. Eastern Freightways, 92 L.R.R.M. 3082 (D.N.J. May 5, 1976). *See generally* Tobias, *supra* note 10, at 540-43.

[18] 424 U.S. at 554 (1976).

[19] *Id.* at 567. The duty of fair representation had been recognized as an exception to the Finality Rule by several courts of appeals prior to the *Hines* decision. *See* cases cited at Hines v. Anchor Motor Freight, 424 U.S. 554, 571-72 n.11 (1976). In addition to a breach of the duty of fair representation, recognized exceptions to the Finality Rule include fraud, dishonesty or demonstrated bias on the part of the arbitrator and conspiracy between the union and the employer. *See* cases cited at Tobias, *supra* note 10, at 535-37 nn.64-71.

[20] 424 U.S. at 572.

[21] *Id.* at 571.

[22] Justice Rehnquist in dissent emphasized the company's good faith reliance upon the contract grievance procedure and the need to uphold the finality of that procedure where binding arbitration had occurred. *Id.* at 574-75 (Rehnquist, J., dissenting). Justice Rehnquist argued that it was improper to create an exception to the Finality Rule affecting the company because of the union's breach of duty. He analogized the *Hines* rule to one allowing a party to relitigate a claim on the grounds that his counsel had been ineffective. *Id.* at 575.

The "union as counsel" analogy is flawed, however. The individual employee is virtually compelled to allow the union to represent him in a grievance, while compulsion is not present in the normal process of choosing private counsel. Further, the union, standing in this "compulsory counsel" position, bears no risk for its conduct unless the employee can meet the high burden of proof associated with the duty of fair representation. The strictures of conventional malpractice liability which encourage a conventional attorney to perform at a high level are not applicable to a union representing an employee at a grievance proceeding. *See* text accompanying notes 58-70 *infra.*

precipitating the dispute by allegedly discharging the plaintiffs in violation of the collective bargaining agreement.[23] If a fair representation breach could be shown, thereby nullifying the arbitration award, summary judgment for the company would have the effect of denying the plaintiffs a hearing on their grievance.[24] Finding such a result improper, the Court chose to establish an exception to the Finality Rule.[25] Demonstrating a breach of the duty of fair representation is thus a condition precedent to the Finality Rule exception set forth in *Hines.* However, since imposing the duty, the Court has had great difficulty defining a proper standard for fair representation.

The duty of fair representation originated in *Steele v. Louisville & Nashville Railroad.*[26] In *Steele,* the employer and union entered into an agreement to phase out black union members as firemen. Black firemen challenged the arrangement, alleging discrimination.[27] Holding in favor of the employees, the Court imposed a dual obligation upon the union: to represent the best interests of the membership as a whole,[28] and to represent the individual employees in the bargaining unit fairly, impartially, and without hostile discrimination.[29] The Court, however, asserted little more than generalities as

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[23] 424 U.S. at 569.

[24] *Id.* at 571-72. The plaintiff would still have his damage claim against the union for a fair representation breach but would have no claim against the company for wrongful discharge and no claim for reinstatement.

[25] In using the duty of fair representation to establish an exception to a general rule which favors arbitration of grievances, the *Hines* result is analogous to the holding in Vaca v. Sipes, 386 U.S. 171 (1967) (fair representation breach removes exhaustion requirement). The Court has thus consistently conditioned any direct employee action against the company in grievance matters upon a showing of a breach of the union's duty of fair representation.

[26] 323 U.S. 192 (1944).

[27] *Id.* at 195-96.

[28] The duty of fair representation stems from the union's status as exclusive bargaining agent for all employees. *See* text accompanying notes 12-15 *supra.* A union not the exclusive agent operates under no duty of fair representation. *See* Fowks, *The Duty of Fair Representation: Arbitrary or Perfunctory Handling of Employee Grievances,* 15 WASHBURN L.J. 1, 6 (1976). In addition, a union that has a recognized majority in an appropriate bargaining unit and is therefore the exclusive bargaining agent for that unit has a duty to represent fairly non-members as well as members. *See* Richardson v. Communications Workers of America, 443 F.2d 974 (8th Cir. 1971), *cert. denied,* 414 U.S. 818 (1973).

[29] 323 U.S. at 204. In addition to its language prohibiting hostile discrimination, the *Steele* court also provided a constitutional basis for its holding. This language would have incorporated traditional equal protection analysis into the duty of fair representation, thus providing a more settled standard for fair representation. The Court reasoned that because the union derives its exclusive bargaining power from the National Labor Relations Act, it is subject to the same constitutional limitations as

the standard for the duty of fair representation.[30] Subsequent decisions have limited the broad outlines of the duty of fair representation.

The first major development in this narrowing process was the establishment of the requirement of no "hostile discrimination"[31] as the basis of the duty of fair representation.[32] The Supreme Court focused upon the search for hostile discrimination in challenged union conduct in its next major consideration of the duty, *Ford Motor Co. v. Huffman.*[33] The Court, while acknowledging *Steele,*[34] based its holding upon the "wide range of reasonableness" allowed to the union as exclusive bargaining representative and the failure of the plaintiff to prove hostile discrimination.[35] Following *Huffman,* the mere fact of discrimination would not constitute a breach. Rather, some antipathy by the union toward the plaintiff would be required.[36] As a result, duty of fair representation cases following *Huffman* consistently permitted the union greater latitude within the confines of the duty.[37]

Congress. 323 U.S. at 198-99. However, the equal protection aspect of *Steele* has played no significant role in the subsequent development of the duty of fair representation. Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1144-47 (1973) [hereinafter cited as Clark].

[30] 323 U.S. at 197.

[31] Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944). Although *Steele* was decided under the Railway Labor Act, the Supreme Court has applied the duty of fair representation to those industries covered by the National Labor Relations Act. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

[32] In duty of fair representation cases subsequent to *Steele,* the Court attempted to ascertain whether hostile discrimination on the part of the union was present. *See, e.g.,* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

[33] 345 U.S. 330, 332 (1953). The plaintiff in *Huffman* claimed that the union had breached its duty of fair representation by entering into a collective bargaining agreement which gave some employees seniority credit for pre-employment military service.

[34] 345 U.S. at 337.

[35] The Court stated that the "mere existence" of a collective bargaining agreement that affects different union members in different ways does not render it invalid unless there is a showing that the agreement was motivated by union hostility toward the adversely affected members. 345 U.S. at 338.

[36] Varied union conduct has been disallowed under the *Steele* rubric of "hostile discrimination." *See* Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963) (duty of fair representation invoked to prohibit union agreement to transfers which entailed loss of seniority solely to discriminate against disfavored group of employees); Cunningham v. Erie R.R., 266 F.2d 411 (2d Cir. 1959) (union action motivated by personal animosity is a fair representation breach).

[37] The Second Circuit has taken the most extreme position by holding that recov-

The Supreme Court continued the development of the standard of hostile discrimination in *Humphrey v. Moore*.[38] The plaintiff in *Humphrey* charged that the union had breached its duty of fair representation by taking sides in the arbitration of a seniority dispute. The Court rejected this claim and held that the duty of fair representation did not compel union neutrality, which would harm the collective bargaining process by unduly limiting the union's discretion.[39] The Court based its holding upon the plaintiff's failure to show any hostile motivation for the union's action.[40]

The refining of the standard for the duty of fair representation from *Steele* through *Huffman* and *Humphrey* reflected the disparate policy aims and interests which are bound up in the duty. Strong unions are viewed as necessary to maintain an effective system of collective bargaining and industrial self-government.[41] This necessity dictates that some limits be placed on the duty of fair representation. Strong individual interests, however, are also present in the relationship between unions and their members. Those interests may be affected by the actions of the union as the exclusive bargaining agent in contract negotiations and grievance procedures. Because the union derives this power from the consent of a majority of the workers in the bargaining unit, the relation between a union and its members has attributes of a fiduciary relation.[42] However, countervailing inter-

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ery for a breach of the duty of fair representation may be granted only if the plaintiff shows that the union's conduct was motivated by "[s]omething akin to factual malice. . . ." Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959).

[38] 375 U.S. 335 (1964). *Humphrey* involved a seniority dispute growing out of the merger of two truck lines. The dispute concerned how the seniority rights of the drivers of the line being taken over would be calculated in the new combined group of drivers. *See generally* Comment, *Post-*Vaca *Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units,* 19 VILL. L. REV. 885 (1974).

[39] 375 U.S. at 349-50. *Humphrey* thus extended the *Huffman* "wide range of reasonableness" language to a grievance situation where the union's action as exclusive bargaining agent adversely affected a specific group of employees identifiable in advance.

[40] 375 U.S. at 351.

[41] The achievement of the goal of industrial self-government requires that unions have the same bargaining power as management. Thus, unions must be vested with some discretion during both contract negotiation and contract administration. Without such discretion and capacity to exercise independent judgment, the union would have little bargaining power. *See* Note, *Individual Control Over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559, 564-72 (1967).

[42] *See, e.g.,* Bazarte v. United Transp. Union, 429 F.2d 868, 871 (3d Cir. 1970); Deboles v. Trans World Airlines, Inc., 350 F. Supp. 1274, 1287 (E.D. Pa. 1972). *See generally* Cox, *Individual Enforcement of Collective Bargaining Agreements,* 8 LAB. L.J. 850, 853-54 (1957); Rosen, *Fair Representation, Contract Breach and Fiduciary*

ests present in the duty of fair representation have prevented the courts from applying traditional fiduciary standards to the employee-union relation.[43]

The next major assessment of the duty of fair representation occured in *Vaca v. Sipes.*[44] In *Vaca,* the Supreme Court analyzed the conflicting interests involved in the relation between the union and its members and established a limited fair representation standard, solicitous of union interests.[45] *Vaca* involved an employee's claim that he had been wrongfully discharged and that the union's failure to process his grievance through arbitration constituted a breach of its duty of fair representation.[46] The union had investigated the claim and processed the grievance through four of the five steps of the grievance procedure before concluding that arbitration would be fruitless.[47] The plaintiff, however, rejected a proffered settlement and sued the union.[48] The *Vaca* Court rejected the plaintiff's claim, finding no breach of the duty of fair representation.[49] The Court held that

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Obligations: Unions, Union Officials and the Worker in Collective Bargaining, 15 HAST. L.J. 391, 396 (1964). For a discussion of the fiduciary standards applicable in the fair representation area, see Flynn & Higgins, *supra* note 10, at 1148-51.

[43] *See* text accompanying notes 54-66 *infra.*

[44] 386 U.S. 171 (1967).

[45] *See* text accompanying notes 67-70 *infra.*

[46] 386 U.S. at 173. The plaintiff in *Vaca* was discharged for health reasons. The union agreed to abide by the decision of a company-approved doctor who pronounced the plaintiff unfit for work. The plaintiff later produced medical testimony that he was fit for work.

[47] 386 U.S. at 175-76.

[48] *Id.* at 173. The plaintiff in *Vaca* brought suit under §301(a) of the Taft-Hartley Act, 29 U.S.C. §185(a) (1970).

[49] 386 U.S. at 194-95. Additionally, the Court rejected defendant's contention that the doctrine of labor law preemption operated to place the case within the exclusive jurisdiction of the NLRB. *Id.* at 188.

The doctrine of labor law preemption generally applies when the challenged activity is arguably governed by the NLRA's unfair labor practice provisions. Such activities are subject to federal regulation and are within the exclusive jurisdiction of the NLRB. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The NLRB has held that a breach of the duty of fair representation is an unfair labor practice. Miranda Fuel Co., 140 N.L.R.B. 181, No. 7, 51 L.R.R.M. 1584 (1962). Nevertheless, in *Vaca* and Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274, 299 (1971), the Court held that the duty of fair representation represented a limited exception to the preemption doctrine and therefore concurrent jurisdiction existed in the state and federal courts and the NLRB to hear fair representation suits. Most fair representation suits are brought in the courts rather than to the NLRB because damages are available from the courts. The only remedies the Board may grant are reinstatement and back pay. *See generally* Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights,* 51 TEX. L. REV. 1037 (1973).

a breach of the duty occurs only when the union's conduct is "arbitrary, discriminatory, or in bad faith."[50] In addition, the Court accepted the proposition that a "union may not arbitrarily ignore a grievance or process it in a perfunctory manner."[51]

The standard developed in *Vaca* for the union's duty of fair representation has been difficult to apply.[52] The Court's opinion established only that the conduct of the union in *Vaca* was not arbitrary, discriminatory, or in bad faith, but provided no guidance for determining the content of these labels. Furthermore, the opinion failed to clarify whether "perfunctory" union conduct would constitute a breach of the duty of fair representation after *Vaca.*[53]

Later decisions have applied three different standards for the duty of fair representation while citing *Vaca* as controlling.[54] These standards can be briefly described as bad faith,[55] arbitrary and perfunctory representation,[56] and negligence.[57] Courts adhering to a bad faith standard have denied recovery for various forms of union malfeasance

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[50] 386 U.S. at 190. The analysis of the duty of fair representation in *Vaca* reflects the Court's acceptance of the "union control" theory of collective bargaining. 386 U.S. at 191-92. This theory postulates that effective collective bargaining and contract administration require strong unions totally in control of their half of the collective bargaining relationship. *See generally* Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601 (1956); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes,* 1967 SUP. CT. REV. 81 (1967). *But see* Blumrosen, *Legal Protection For Critical Job Interests; Union-Management Authority Versus Employee Autonomy,* 13 RUTGERS L. REV. 631 (1959); Summers, *Individual Rights in Collective Agreements and Arbitration* 37 N.Y.U.L. REV. 362 (1962).

[51] 386 U.S. at 191.

[52] *Compare* Jackson v. Trans World Airlines, Inc., 457 F.2d 202 (2d Cir. 1972) *with* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975). Both cases purportedly followed *Vaca. See* text accompanying notes 54-66 *infra.*

[53] *See* note 55 *infra* (cases applying a bad faith standard); note 56 *infra* (cases applying a perfunctory representation standard). *See generally* Clark, *supra* note 29, at 1122-25.

[54] *Compare* Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970) (bad faith standard) *with* Retana v. Hotel Operators Local 14, 453 F.2d 1018 (9th Cir. 1972) (arbitrary or perfunctory standard) *and* Zalejko v. RCA, 98 N.J. Super. 76, 236 A.2d 160 (1967) (negligence standard).

[55] *See, e.g.,* Jackson v. Trans World Airlines, Inc., 457 F.2d 202 (2d Cir. 1972); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970); Marietta v. Cities Serv. Oil Co., 92 L.R.R.M. 2867 (D.N.J. May 20, 1976).

[56] *See, e.g.,* Beriault v. ILWU, 501 F.2d 258 (9th Cir. 1974); Retana v. Hotel Operators Local 14, 453 F.2d 1018 (9th Cir. 1972); DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.) *cert. denied,* 400 U.S. 877 (1970).

[57] *See, e.g.,* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); Ruggirello v. Ford Motor Co., 411 F. Supp. 758 (E.D. Mich. 1976).

absent an additional specific finding of bad faith or hostility toward the plaintiff.[58] The view that a breach of the duty will be found only upon a showing of "something akin to factual malice"[59] has been followed in cases subsequent to *Vaca.*[60] Recent decisions, however, indicate a trend away from rigid adherence to a bad faith standard.[61] These cases characteristically have involved summary dismissal of member claims by union leadership.[62] Adopting the "arbitrary and perfunctory" language from *Vaca* as their standard for fair representation, these decisions permitted recovery without requiring the plaintiff to prove bad faith on the part of the union.[63] A third standard, adopted in very few cases, permits recovery for negligence.[64] While the standard in these cases has generally been stated as an

[58] Balowski v. UAW, 372 F.2d 829 (6th Cir. 1967). *Cf.* Sims v. Rex Paper Co., 26 Mich. App. 129, 182 N.W. 2d 90 (1970) (union negligently allowed the time limit for filing a grievance to pass); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970) (union's decision not to press plaintiff's grievance found to constitute reckless disregard of employee's rights, but recovery denied because the plaintiff failed to show bad faith).

Under a bad faith standard, courts have focused upon the union leadership's state of mind and not the merits of the plaintiff's grievance. Some cases have held that considering the merits of the grievance in evaluating the union's motive under a bad faith standard is reversible error. *See, e.g.,* Simburland v. Long Island Ry. Co., 421 F.2d 1219 (2d Cir. 1970).

[59] Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959).

[60] Jackson v. Trans World Airlines, Inc., 457 F.2d 202 (2d Cir. 1972); Hiatt v. New York Cent. R.R., 444 F.2d 1397 (7th Cir. 1971). Both *Jackson* and *Hiatt* involved union action during contract negotiations and thus may be distinguished from cases involving grievance procedure administration. The courts, however, have not recognized this distinction. *See* text accompanying notes 101-104 *infra.*

[61] *See, e.g.,* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); Retana v. Hotel Operators Local 14, 453 F.2d 1018 (9th Cir. 1972).

[62] In DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970), the union failed even to consider the seniority claims of the employees plaintiffs. In Retana v. Hotel Operators Local 14, 453 F.2d 1018 (9th Cir. 1972), Spanish-speaking union members recovered after showing that the union had totally ignored their needs by failing to provide any liaison or even to explain the grievance procedure to them.

[63] Cases imposing an arbitrary and perfunctory standard for fair representation have drawn a distinction between perfunctory representation and *mere negligence* on the part of the union. The latter conduct is not, according to these cases, proscribed by the duty of fair representation. *See, e.g.,* Whitten v. Anchor Motor Freight, 90 L.R.R.M. 2161 (6th Cir. 1975); Nagel v. International Bhd. of Teamsters, 396 F. Supp. 391, 394 (E.D.N.Y. 1975) ("mere negligence does not establish a breach of the duty of fair representation"). *See generally* Tobias, *supra* note 10, at 524-28.

[64] *See* cases cited at note 57 *supra.*

arbitrariness test,[65] the facts and language in the opinions support the view that a negligence standard for fair representation was imposed upon the union.[66]

When *Hines v. Anchor Motor Freight*[67] came before the Supreme Court, these three standards for the duty of fair representation had been spawned by *Vaca.* No court had adequately articulated a standard balancing the conflicting interests bound up in the duty of fair representation.[68] The existence of these conflicting standards[69] and the confusion in the lower courts indicated that *Vaca*'s generalities did not provide an adequate basis for deciding cases which involved the duty of fair representation. Although the procedural context of *Hines* prevented the Court from establishing a binding standard for

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[65] Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); Griffin v. UAW, 469 F.2d 181, 184 (4th Cir. 1972). Zalejko v. RCA, 98 N.J. Super. 76, 236 A.2d 160 (1967), is an exception. Faced with facts almost identical to those in *Vaca,* the New Jersey court upheld a verdict for the plaintiff, stating that "fair" representation meant "adequate" representation. The court cited *Vaca* but made no effort to categorize the union's conduct as "arbitrary" or "perfunctory." 98 N.J. Super. at 84, 236 A.2d at 164. The union was liable because its investigation of the plaintiff's fitness to return to work had led to the wrong conclusion.

[66] *See* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). The plaintiff in *Griffin,* who was discharged for fighting with a supervisor, recovered for a breach of the duty of fair representation occurring when the union took his grievance to that same supervisor. The *Griffin* court found that the union's handling of the plaintiff's grievance was "arbitrary" because it was unreasonable under the circumstances. 469 F.2d at 183-84. Thus, while characterizing its holding as the imposition of an arbitrariness test, the court utilized the standard for common law negligence. However, the union's breach of duty in *Griffin* was aggravated, and therefore the case will not support a contention that negligent union conduct will hereafter give rise to a fair representation cause of action.

The *Ruzicka* case provides a clearer example of employee recovery for a fair representation breach where the union's conduct was negligent. By failing to file a timely notice of intent to proceed with a grievance, the union lost the plaintiff's grievance. The court held that the plaintiff was not required to show bad faith and that the union's negligent failure to file was a breach of the duty of fair representation. The court went to great pains to reconcile *Ruzicka* with its earlier bad faith standard cases, *see, e.g.,* Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), which had involved a reasoned evaluation of the situation by the union and a conscious decision as to how to proceed. In contrast, the union's procedural negligence in its treatment of Ruzicka's grievance was termed "inexplicable" and therefore arbitrary and perfunctory within the meaning of *Vaca.* 523 F.2d at 310. *See also* Recent Development, *Union's Duty of Fair Representation Held to be Breached by Negligent Failure to Act on Behalf of Member,* 44 FORD. L. REV. 1061, 1067 (1976).

[67] 424 U.S. 554 (1976).

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

[69] *See* text accompanying notes 52-66 *supra.*

the duty of fair representation,[70] the facts of the case did present an opportunity to analyze and perhaps alleviate the problems, inconsistencies, and general lack of clarity which had prevailed in the fair representation area since *Vaca.*

The plaintiffs in *Hines* were discharged for allegedly falsifying motel receipts, and thus receiving excessive expense reimbursements. The employees protested their innocence to the union, telling union officials that the motel clerk was the guilty party. Union officials told the employees that they had "nothing to worry about,"[71] but conducted no investigation of the motel clerk, even when the motel manager stated that those claims might well be true. The grievance was processed through preliminary steps to arbitration. At the arbitration hearing, the joint arbitration committee for the area[72] upheld the discharges because the union presented no evidence to counter that put forward by the company.[73] Evidence subsequently surfaced supporting the employees' claims regarding the motel clerk. The employees filed suit against the company, the local, and the international,[74] claiming that the new evidence of the merit of their grievance plus evidence of the hostility of local union officials toward them[75] justified a finding of a breach of the duty of fair representation and required vacating the arbitration award.[76] The district court granted summary judgment for all defendants, holding that insufficient evidence of bad faith was present to justify overturning an arbitration award in the face of the Finality Rule.[77] Citing the evidence of hostility as a valid basis for an inference of bad faith,[78] the Sixth Circuit vacated the

[70] *See* note 86 *infra.*

[71] 424 U.S. at 557.

[72] *See* note 17 *supra.*

[73] 424 U.S. at 557-58.

[74] *Id.* at 558.

[75] Evidence of hostility between the plaintiffs and the local union leadership included a dispute over the appointment of a steward which resulted in one of the plaintiffs being denounced as a "hillbilly" by the president of the local, and lingering hostility from a wildcat strike in which the plaintiffs had participated. *Id.* at 559-60 n.4.

[76] *Id.* at 558.

[77] Hines v. Local 377, Int'l Bhd. of Teamsters, 84 L.R.R.M. 2649 (N.D. Ohio 1974). In granting summary judgment for all defendants, the district court held that the Finality Rule was applicable unless the plaintiff alleged facts sufficient to raise an inference of bad faith. *Id.* at 2650.

[78] Hines v. Local 377, Int'l Bhd. of Teamsters, 506 F.2d 1153, 1157 (6th Cir. 1974). Reversing the district court's summary judgment for the local union, the court held that the plaintiffs' allegations of bad faith handling of their grievance went beyond conclusory statements and alleged specific facts that, if true, could constitute bad faith. *Id.* at 1157.

summary judgment for the local union and remanded that claim for trial.[79] The court of appeals held that the Finality Rule barred reconsideration of the employees' grievance against the company, given the total lack of evidence of misconduct by the company or conspiracy between the company and the union.[80] The Supreme Court granted certiorari to consider only the holding as to the company.[81]

The question before the Supreme Court in *Hines* was the validity of the company's claim that the Finality Rule barred relitigation of the employees' grievance after an adverse arbitration award.[82] In reversing the Sixth Circuit's decision, the Court held that if an employee proves a breach of the duty of fair representation which seriously undermines the integrity of the arbitral process, the company may not rely upon the Finality Rule.[83] This result seems unassailable based upon the facts of this case.[84] The *Hines* decision gives force to the fair representation breach exception to the Finality Rule. Thus, *Hines* is apparently a decision which increases the protection given to the rights of individual union members. However, the Court's discussion of the duty of fair representation reduces the likelihood that the rights of individual employees will be aided by this exception to the Finality Rule.[85]

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[79] *Id.* The court upheld the summary judgment for the international union, citing insufficient evidence from which bad faith could be inferred. *Id.*

[80] *Id.* at 1157, 1158.

[81] 424 U.S. at 561.

[82] *Id.* at 560-61.

[83] *Id.* at 567.

[84] The union, after telling the plaintiffs they had "nothing to worry about," did nothing to further the plaintiffs' case. It then sat mute at the arbitration hearing after the company presented the evidence that resulted in the discharges being upheld. *Id.* at 557-58.

The result in *Hines* was foreshadowed by decisions of several courts of appeals. *See, e.g.*, Margetta v. Pam Pam Corp., 501 F.2d 179 (9th Cir. 1974) (plaintiff entitled to attempt to prove fair representation breach where facts permitted inference that union's conduct has deprived plaintiff of right to a "fair hearing" on grievance); Local 13, Longshoremen v. Pacific Maritime Assoc., 441 F.2d 1061 (9th Cir. 1971) (evidence permitted inference that hostility motivated union's decision to "swap" on plaintiffs' grievance, summary judgment for union vacated). *See also* cases cited at 424 U.S. 554, 571-72 n.11. *See generally* Clark, *supra* note 29, at 1168-69; Flynn & Higgins, *supra* note 10, at 1018-21; Tobias, *supra* note 10, at 537-39.

[85] *See* text accompanying notes 88-92 *infra.* The discussion of the fair representation standard was not necessary to reach the result in *Hines.* The Court could have rejected the company's arguments and set up the breach of the duty of fair representation as an express exception to the Finality Rule without any discussion of what constitutes a breach of the duty. Alternatively, the Court might have analyzed the duty of fair representation and clarified the *Vaca* standard.

The *Hines* opinion provided a brief discussion of the duty of fair representation which failed to clarify the *Vaca* standards.[86] Asserting that a breach of the duty of fair representation "involves more than . . . errors in judgment by the union",[87] the Court went on to state that erroneous arbitration decisions cannot be allowed to stand when the union's representation of the employee has been "dishonest, in bad faith, or discriminatory."[88] This series of adjectives simply reiterated the *Vaca* fair representation standard with one notable exception—*Hines* substituted "dishonest" for "arbitrary."[89] If this change is taken as a change in the fair representation standard, the range of union conduct which breaches the duty will be narrowed greatly.[90]

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[86] No fair representation claim was actually before the Court. The plaintiffs' claim against the local union had been remanded to the lower courts. The only question facing the Supreme Court was what impact a judgment for the plaintiff against the union would have on the company's attempt to rely upon the finality of the arbitration award. The Court could have answered this question without any mention of the standard of fair representation to be applied by the lower court.

The Court's discussion of the duty of fair representation in *Hines* was reminiscent of its discussion of the duty in dicta in Amalgamated Assoc. of St. Employees v. Lockridge, 403 U.S. 274 (1971). The principal issue in *Lockridge* was whether fair representation claims were within the NLRB's exclusive jurisdiction over unfair labor practice claims. *See* note 49 *supra.* The Supreme Court held that fair representation claims were not preempted by the NLRB and that the federal courts thus had jurisdiction to hear these claims. The Court, in attempting to allay fears that the duty of fair representation exception to the doctrine of labor law preemption would "swallow up" the NLRB's jurisdiction over union unfair labor practices, stated that duty of fair representation cases would not conflict with unfair labor practice cases because the former require a showing of "intentional, severe union discrimination." 403 U.S. at 301. The Court then stated that if the preemption doctrine was "not to be swallowed up, the . . . distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs to be strictly maintained." 403 U.S. at 301. If these adjectives were to be adopted as the standard for fair representation, recovery for a breach of the duty would be unlikely.

Some courts have viewed the *Lockridge* dicta as narrowing *Vaca. See, e.g.,* Buzzard v. Machinists Local 1040, 480 F.2d 35 (9th Cir. 1973); Papillon v. Hughes Printing Co., 413 F.Supp. 1313 (M.D. Pa. 1976). Generally, however, courts have continued to adhere to *Vaca* as the fair representation standard and have viewed the *Lockridge* dicta as a restatement of pre-existing fair representation law, and not as a limitation of *Vaca. See* Clark, *supra* note 29, at 1126.

[87] 424 U.S. at 570-71.

[88] *Id.* at 571.

[89] *Compare* Vaca v. Sipes, 386 U.S. 171, 190 (1967) *with* Hines v. Anchor Motor Freight, 424 U.S. 554, 571 (1976).

[90] The Court's substitution of "dishonest" for "arbitrary" in the fair representation standard implies that the plaintiff must demonstrate an element of intent if he is to recover. Intent is always difficult to prove, a fact illustrated by the rarity of actions founded upon intentional torts as compared with those founded upon negligence. Fur-

Such a narrowed fair representation standard necessarily reduces the protection afforded individual rights by the duty.[91] Therefore, the Supreme Court's discussion of the duty of fair representation in *Hines* leaves that area of the law unclear while opening the way for a standard less protective of individual rights. Those aspects of *Vaca* which have proved troublesome and have led to the development of conflicting standards[92] were not clarified and may well be further confused by the Court's opinion in *Hines.*[93]

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thermore, by impliedly requiring the plaintiff to prove the subjective intent of the union to harm him, the Court lent support to the view that bad faith was an essential element of unfair representation. *See* text accompanying notes 53-60 *supra.*

[91] The *Vaca* standard was a holding by the Court, while the discussion of the duty of fair representation in *Hines* is only dictum. Thus, the substitution of dishonest for arbitrary need not have the effect of lowering the fair representation standard. The Court, however, has not made an authoritative statement on the duty since *Vaca* and both references to the duty in dicta in subsequent cases have stated lower standards for union conduct than did *Vaca. See* note 86 *supra.* Thus, while the lower courts have been moving toward a more protective view of the duty of fair representation, *see* text accompanying notes 61-63 *supra,* the Supreme Court's comments support the view that the union's bad faith or hostility is a prerequisite for recovery.

The Court's statement that the Finality Rule does not apply when the employee can prove a breach of the duty of fair representation that "seriously undermines the integrity of the arbitral process . . .," 424 U.S. at 567 raises additional questions. The Court stated that in cases where an employee seeks to overturn an arbitration award, the focus must be upon whether a substantial reason exists to believe that the union's conduct "contributed to an erroneous outcome of the arbitration proceedings." *Id.* at 568. It is unclear whether this language places an additional requirement upon the plaintiff analogous to showing proximate cause. Arguably, any breach of the duty of fair representation necessarily undermines the arbitral process and contributes to an erroneous result, thus entitling the employee under *Hines* to relitigate his grievance against the company. Only two courts have considered this aspect of *Hines.* Hardee v. North Carolina Allstate Serv., Inc., 537 F.2d 1255 (4th Cir. 1976); Lewis v. Greyhound Lines-East, 411 F. Supp. 368 (D.D.C. 1976). Both of these cases state the *Hines* standard as two separate requirements: first, the plaintiff must prove a breach of the duty; second, he must prove that breach undermined the arbitral process. However, the courts in both cases held that the plaintiff had failed to show a breach of the duty of fair representation. The opinions did not reach the question of whether some breaches of the duty of fair representation might fail to undermine the arbitral process, thereby preventing the employee from relying upon the *Hines* exception to the Finality Rule. Whether the employee must establish a link analogous to proximate cause between the union's breach of duty and the erroneous arbitration award in order to rely on the *Hines* exception remains uncertain.

The discussion of fair representation in *Hines* is made more threatening to the interests of individual union members by the presence of similar language in *Lockridge,* the court's only other post-*Vaca* discussion of the duty. *See* note 86 *supra.*

[92] *See* text accompanying notes 54-66 *supra.*

[93] No cases reported subsequent to *Hines* have relied upon the Court's opinion as authority for a standard of fair representation. However, one court did rely heavily on

The future impact of *Hines* depends upon the continued evolution of the standard for the union's duty of fair representation.[94] The duty as it is discussed in *Hines* reflects conditions which no longer exist in the labor relations area. Standards that are solicitous of union interests and evince a concern that the ability of unions to bargain from a position of strength be carefully safeguarded misconceive the nature of the modern union-management relationship.[95] Such standards reflect concerns applicable to the labor movement in its infancy but no longer accurate.

The labor movement today is mature, and unions typically deal with management from a position of great strength.[96] In addition, the complete identity of interest which characterized the relationship between the union and its members during the formative years of the labor movement no longer exists.[97] Thus, the individual interests present in the relation between unions and their members should now be given greater protection.[98] The imposition of a fair representation standard giving greater protection to those individual interests would not significantly threaten the collective bargaining process.[99]

Grievance cases particularly require increased protection of individual rights. The balance of individual and collective interests in-

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the very similar *Lockridge* dicta, *see* note 86 *supra,* in a fair representation case after the *Hines* decision. Papillon v. Hughes Printing Co., 413 F. Supp. 1313 (M.D. Pa. 1976).

[94] Proof of a breach of the duty of fair representation is a condition precedent to making use of the *Hines* exception to the Finality Rule. 424 U.S. at 570-71.

[95] H. WELLINGTON, LABOR AND THE LEGAL PROCESS 186-90 (1968); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 902-08 (1975) [hereinafter cited as Schatzki]; Tobias, *supra* note 10, at 520-23. The principal standards of fair representation are bad faith and perfunctory representation. See text accompanying notes 54-63 *supra.* Both of these standards are founded upon the "union control" theory of collective bargaining recognized by the Court in *Vaca. See* note 50 *supra.* These standards require more severe union misfeasance than simple negligence to support union member recovery for a breach of the duty of fair representation. *See* text accompanying notes 54-66 *supra.*

[96] *See* C. GREGORY, LABOR AND THE LAW 504-30 (1961); Blumrosen, *Group Interests in Labor Law,* 13 RUTGERS L. REV. 432, 480-84 (1959) [hereinafter cited as Blumrosen].

[97] *See* Blumrosen, *supra* note 96, at 452-60; Schatzki, *supra* note 95, at 901-10; Note, *Fair Representation Suits and Breach of Contract in Section 301 Employee-Union Suits: Who's Watching the Back Door?*, 122 U. PA. L. REV. 714, 723-25 (1974).

[98] *See, e.g.,* Blumrosen, *supra* note 96 at 481-83; Clark, *supra* note 29, at 1177-78; Summers, *Individual Rights in Collective Bargaining Agreements and Arbitration, 37 N.Y.U.L.* REV. 362, 410 (1962); Tobias, *supra* note 10, at 559-61.

[99] *See, e.g.,* Flynn & Higgins, *supra* note 10, at 1115-52; Schatzki, *supra* note 95, at 903-04; Tobias, *supra* note 10, at 559-61.

volved in the duty of fair representation is different in grievance administration than in contract negotiations. In contract negotiations, the union represents the bargaining unit as a whole,[100] and the collective interest in allowing the union to maintain its discretion to serve the best interests of the bargaining unit is strong.[101] In contrast, grievance cases involve the individual interests of an identifiable employee.[102] Whether a union should be permitted to exercise the same discretion under those circumstances as it does in contract negotiations is questionable.[103] Failure to recognize this distinction[104] has resulted in an unduly rigid fair representation standard. This standard fails to provide adequate protection for individual rights in the situation where those rights are most in jeopardy. The Court's discussion of the duty of fair representation in *Hines* gave no indication that the Court recognized the necessity for distinguishing between fair representation in contract negotiations and fair representation in grievance administration.[105]

Likewise, within the broad classification of grievance proceedings, claims of wrongful discharge require special consideration.[106] Discharge is the "capital punishment of the industrial world."[107] In addition, the temptation for the union to expend less than the maximum

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[100] Negotiated contract provisions may affect different members different ways, but they affect a class of similarly situated workers, not a particular individual. *See* Comment, *Individual Control Over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559, 562-63 (1968).

[101] Recognition of the need for broad union discretion during contract negotiations was the essence of the Supreme Court's holding in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); *see* text accompanying notes 33-35 *supra*. *Huffman* established that a union must be allowed a "wide range of reasonableness" in which to negotiate agreements with employers. However, the *Huffman* standard has been applied to grievance cases as well. *See, e.g.*, Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976) (union accorded broad discretion in contract negotiations; Marietta v. Cities Serv. Co., 92 L.R.R.M. 2867 (D.N.J. May 20, 1976) (*Huffman* "wide range of reasonableness" language relied upon in grievance cases); *see generally* Schatzki, *supra* note 95, at 898-904.

[102] *See* Clark, *supra* note 29, at 1156-77.

[103] *Id.*

[104] *See* note 101 *supra* (cases applying *Huffman* "wide range of reasonableness" test to union conduct in grievance proceedings).

[105] The *Hines* court began its discussion of the duty of fair representation by quoting the *Huffman* "wide range of reasonableness" test. 424 U.S. at 563-64.

[106] Lowe v. Hotel & Restaurant Employees Local 705, 389 Mich. 123, 205 N.W.2d 167, 170 (1973). *See* Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 57 (1972).

[107] Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 57-58 (1972).

effort possible on the grievance of a member unpopular with local leadership is particularly strong in discharge cases.[108] Therefore, a fair representation standard must reflect the gravity of a wrongful discharge grievance.

A sound standard of fair representation would reflect the complexities involved in evaluating the union's duty in various circumstances. Such a standard would impose fiduciary obligations consistent with the nature of the relationship between modern unions and their members.[109] Furthermore, the primacy of individual interests in grievance cases would be recognized. A requirement of "pure reasonableness"[110] for union conduct thus is more consistent with the fiduciary nature of the union—member relation and the magnitude of individual interests involved in grievance cases than the standards now normally imposed.[111] In particular, discharge cases merit special consideration and a more exacting standard of fair representation.[112]

The test for common law negligence, reasonable care under the

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[108] A discharge case offers local union leadership the opportunity to get rid of a dissident member by expending less than a maximum effort on his grievance, thereby increasing the likelihood that his discharge will be upheld. Furthermore, *any* discharge case presents little risk of future dissatisfaction with local union leadership stemming from poor representation. If a discharge is upheld, the losing grievant is no longer a voting union member with a practical avenue to express his dissatisfaction. In contrast, members dissatisfied with the union's handling of a seniority grievance retain their positions and thus a means of exerting leverage against the local leadership.

The facts of *Hines* provides a possible illustration. *Hines* involved union members out of favor with local leadership. The union's handling of the plaintiffs' grievance could support an inference that the local leadership was seeking to rid themselves of the plaintiffs. *See* note 84 *supra*.

[109] Deboles v. Trans World Airlines, Inc., 350 F. Supp. 1274 (E.D. Pa. 1972), where the court stated, "[t]he union's conduct must conform to the high standard demanded of any fiduciary relationship." *Id.* at 1287. Nevertheless, the court applied the *Vaca* standard which recognizes union liability only for arbitrary, discriminatory or bad faith conduct—hardly the standard demanded of a typical fiduciary. *See* note 42 *supra*. *See generally* Cox, *Individual Enforcement of the Collective Bargaining Agreement*, 8 LAB. L.J. 850, 853-54 (1957).

[110] The court in Lowe v. Hotel & Restaurant Employees, Local 705, 389 Mich. 123, 205 N.W.2d 167 (1973), upheld an instruction which stated the fair representation standard as one of "pure reasonableness." 389 Mich. at 147, 205 N.W.2d at 178. The question in *Lowe* was whether the union acted in a manner that was reasonable and prudent under the circumstances in refusing to take the plaintiff's grievance to arbitration. 389 Mich. at 149, 205 N.W.2d at 178. *See also* Recent Decisions, *Fair Representation—Discharge Cases Demand a High Degree of Care*, 51 J. URB. LAW 575 (1974).

[111] Under present standards, the vast majority of fair representation claims are dismissed for failure to state a claim upon which relief can be granted. Flynn & Higgins, *supra* note 10, at 1150-51 n.286.

[112] *See* text accompanying notes 106-109 *supra*.

circumstances,[113] would provide the needed combination of flexibility and increased protection. Courts properly applying a negligence standard would consider the varying balance of interests involved in fair representation in different contexts and evaluate union responsibility accordingly.[114] Phrasing the union's duty as one of reasonable care under the circumstances would emphasize the fiduciary aspects of the union's role better than the statements of the duty now employed.[115]

Hines v. Anchor Motor Freight offered the Supreme Court an opportunity to undertake a reasoned analysis of the duty of fair representation and advance an improved standard. However, the Court's discussion of fair representation was unilluminating and perhaps even potentially harmful to the interests of individual employees.[116] *Hines* was a discharge case involving unpopular union members.[117] The union did very little to increase the likelihood of a favorable arbitration award.[118] The Court should have recognized the special nature of discharge cases[119] and the different balance of interests involved in grievance proceedings compared with contract negotiations.[120] Instead, the Court opened its discussion of fair representation with a citation to the "wide range of reasonableness" language from *Huffman*[121] and gave no indication that it recognized the dubious applicability of this standard to a grievance proceeding.[122] The Court's discussion of the proper standard for fair representation is narrower and equally as vague as the unsatisfactory *Vaca* adjectives.[123]

After *Hines,* an employee who can show a breach of the duty of fair representation will be entitled to litigate the merits of his grievance in court despite an adverse arbitration award. Therefore, *Hines* seems to have the effect of increasing the protection given to the individual rights of union members. However, the *Hines* Court provided an inadequate discussion of the duty of fair representation which may reduce the protection given to the rights of individual

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[113] W. PROSSER, THE LAW OF TORTS ch. 5 (4th Ed. 1971).

[114] *See* text accompanying notes 64-66 *supra.*

[115] *See* text accompanying notes 58-63 *supra.*

[116] *See* text accompanying notes 86-93 *supra.*

[117] 424 U.S. at 559-60 n.4.

[118] *See* text accompanying notes 71-76 *supra.*

[119] *See* text accompanying notes 106-108 *supra.*

[120] *See* text accompanying notes 100-105 *supra.*

[121] 424 U.S. at 563-64. *See* note 101 *supra.*

[122] *See* text accompanying notes 100-105 *supra.*

[123] *See* text accompanying notes 86-93 *supra.*

employees. Modern unions are sufficiently well established to allow the imposition of a negligence standard for fair representation consistent with the fiduciary obligations present in the relation between a union and its members.[124] Such a standard is particularly necessary in grievance proceedings because of the primacy of individual interests, as opposed to collective interests, in grievance administration. Courts should impose the highest standard of fair representation in discharge grievance proceedings. *Hines v. Anchor Motor Freight* provided the Supreme Court with an opportunity to examine and discuss this issue; however, the Court failed to take full advantage of this opportunity.

E. TOWNES DUNCAN

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[124] *See* text accompanying notes 96-99 *supra*.