Adding Injury to Insult: Bowen and the Duty of Fair Representation

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Vaca v. Sipes\textsuperscript{1} spawned a new breed of duty of fair representation claim. Its scope and dimensions are still being measured. Among the recent attempts by the United States Supreme Court to clarify Vaca was Bowen v. United States Postal Service.	extsuperscript{2} Bowen struggled with the question of whether damages should be apportioned between the employer and the union when the employee prevailed in a hybrid duty of fair representation/Section 301 suit.	extsuperscript{3} The Court found that the union should bear some portion of the damage award.

The duty of fair representation protects the individual rights of the employee in the collective bargaining context. It is usually discussed in legal terms. However, a recent study\textsuperscript{4} of the attitudes among union leaders toward the duty concluded that union representatives considered individual rights important and inseparable from the collective bargaining process. The relationship was summarized in succinct terms: "no union, no individual rights."\textsuperscript{5}

The cases and articles briefly surveyed in this comment reveal that neither the courts nor the academics have exhibited a better understanding of the duty of fair representation than the union representatives themselves. One might expect that courts would hesitate to interfere with relationships as complicated as those in the collective bargaining process. Yet, in response to a perceived threat to individual rights by

\begin{itemize}
  \item 1. 386 U.S. 171 (1967).
  \item 2. 103 S. Ct. 588 (1983).
  \item 5. \textit{Id.} at 418. As one international representative put it:

  If there would be no individual, there would be no union and if there was no union, there would be no individual rights. Of course, there is a certain amount of surrendering of individual rights for the benefit of collective action and the establishment of the structure. But this is finally protective of the individual rights. I can't tell you what came first, the chicken or the egg.
\end{itemize}
the collective bargaining system, the courts have willingly interposed themselves. *Bowen* is an example of the effect of this judicial activism.

This comment will focus on *Bowen* and the apportionment of damages in duty of fair representation suits. The first two sections provide a context for the discussion. The succeeding section examines *Bowen*. The last section analyzes the approach taken by the United States Supreme Court in deciding *Bowen* and suggests some factors to consider for the analysis of future cases.

II. THE NATURE OF THE DUTY

A. Origins and Context

The purpose of this section is not to trace the history of the duty of fair representation; that has been more than adequately accomplished by many others. The purpose is rather to firmly anchor the duty of fair representation in the context of conventional collective bargaining philosophy. In analyzing the duty of fair representation, it is important to bear in mind that the duty functions within the context of a

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collective bargaining agreement. Therefore, it is subject to the same policy determinations and the same stresses and strains as the collective bargaining system in general.

In his classic article which defined employee rights under a labor agreement, Archibald Cox enumerated the employee interests to be protected: (1) the interests of a union as an organization; (2) the unassorted interests of employees as a group; (3) the future interests affected by the law-making aspects of grievance adjustment; (4) the present interests of employees who may be in competition with the grievant; and (5) the interests of the individual who claims he has been damaged. The duty of fair representation as now formulated was developed to protect this last interest, the interest of the individual when the grievance procedure is controlled by the union. But the four other interests presented by Cox, along with the interests of the employer, must not be forgotten. They must be protected as well.

The duty of fair representation is a judicially inferred statutory duty, arising from the Railway Labor Act and the

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7. Part of the difficulty in analyzing duty of fair representation law is that American law has never developed a theory of rights created by a collective bargaining agreement. Feller, A General Theory, supra note 6, at 664. The principal theories that have been suggested include: (1) the custom or usage theory in which the agreement is considered incorporated into the employees' individual employment contracts; (2) the agency theory whereby the union is considered the agent in a contract between employer and employees; and (3) the third party beneficiary theory under which the agreement is considered as one between the union and the employer for the benefit of the employees. In addition, a trust analogy has been suggested whereby the union holds the promises of the employer in trust for the benefit of the employees. Id. at 663 n.1. But see Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?, 126 U. PA. L. REV. 251 (1977). Professor Summers noted that "[t]he problem presented is not one of choosing theories, for we can draw from them only the contents which we have placed in them. The problem is one of policy — what rights should an individual have under a collective bargaining agreement." Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 BUFFALO L. REV. 239, 241 (1958) (emphasis in original). See generally Brousseau, Toward a Theory of Rights for the Employment Relation, 56 WASH. L. REV. 1 (1980).


10. Section 2(4) of the Railway Labor Act provides in relevant part: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes
Taft-Hartley amendments to the National Labor Relations Act. It is a duty correlative to the authority granted to the exclusive representative. The cases from which the duty developed arose out of racial discrimination in contract negotiation, but soon the duty was found to protect employees from other bad faith conduct on the part of unions as well. In *Conley v. Gibson* the Supreme Court held that the duty existed in the application and enforcement of a contract as well as in its negotiation. The National Labor Relations Board (NLRB) found the breach of the duty of fair representation to be an unfair labor practice in *NLRB v. Miranda Fuel Co.*

To this point the law relating to the duty of fair representation developed on its own. However, an entirely separate line of cases was forming which soon converged with fair representation law. *Smith v. Evening News Association* established the individual employee's right to bring an action under Section 301 of the Labor Management Relations Act. In order for an individual employee to bring a Sec-

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14. 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). The development of fair representation law under the National Labor Relations Act will not be considered in this comment.
tion 301 action, however, the employee is required to exhaust the contractual grievance and arbitration procedures. This exhaustion requirement was a reflection of the congressional and judicial determination that the grievance-arbitration process was central to national labor policy. As the Supreme Court said in Republic Steel Corp. v. Maddox, a rule contrary to the exhaustion requirement would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot suit for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizen of the parties. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1976 & Supp. III 1979). The Court had earlier allowed individual claims under the auspices of the Railway Labor Act. See Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711 (1945), aff’d on rehearing, 327 U.S. 661 (1946); Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941).


23. The usual advantages mentioned in conjunction with arbitration include: (1) promptness and efficiency in resolving grievances; (2) informality in that the arbitration procedure can be conducted by nonprofessional employee and employer representatives; (3) adequate consideration of the “common law” of the shop which might not be fully reflected in the written agreement; (4) the final and binding character of arbitration which not only resolves the dispute but also interprets the contract for future guidance. Waldman, supra note 6, at 279.

be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."\textsuperscript{25}

Proper respect for the finality of arbitration decisions when the parties have agreed to arbitration is concomitant to the important position of the grievance-arbitration mechanism in labor relations.\textsuperscript{26} The Maddox Court determined that an employee would not be allowed to judicially relitigate a grievance settled by final and binding arbitration.\textsuperscript{27} However, Maddox left open a possible exception to that rule. In a case in which "the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available,"\textsuperscript{28} This intimation of an exception to the finality rule foreshadowed the problems which would attend the combination of Section 301 actions with duty of fair representation suits.

The Court mentioned the possibility of such a combination in Humphrey v. Moore.\textsuperscript{29} In Vaca v. Sipes\textsuperscript{30} three years after Moore, the Court expressly acknowledged the propriety of a duty of fair representation/Section 301 suit.\textsuperscript{31} In a hybrid suit, proof of a breach of the duty of fair representation will remove the exhaustion requirement and allow the employee to press a Section 301 action for breach of the collective bargaining agreement by the employer. In Hines v. Anchor Motor Freight, Inc.,\textsuperscript{32} the Supreme Court found that

\textsuperscript{25} Id. at 653 (quoting Teamsters Local v. Lucas Flower Co., 369 U.S. 95, 103 (1962)).

\textsuperscript{26} In United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960), the Supreme Court found that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." But see Hoellering, \textit{Finality in Arbitration: How Final?}, 34 N.Y.U. \textit{Conf. on Lab.} 119 (1982); Waldman, supra note 6; Address by Bernard F. Ashe, American Arbitration Ass'n (May 18, 1983), \textit{reprinted in Gov't Emp. Rel. Rep. (BNA)} 1171 (1983).


\textsuperscript{28} Maddox, 379 U.S. at 652.

\textsuperscript{29} 375 U.S. 335 (1964).

\textsuperscript{30} 386 U.S. 171 (1967).

\textsuperscript{31} Id. at 187.

\textsuperscript{32} 424 U.S. 554 (1976).
even an arbitration decision was not final if a union had breached its duty during the arbitration process. One commentator succinctly summarized the effect of the breach of the duty of fair representation in the context of arbitration:

The union will be liable in damages to the aggrieved employee . . . . It will also be subject to a Labor Board unfair labor practice order. The award itself will no longer be regarded as final and conclusive, and the employer can no longer rely upon it as a shield or defense to a breach of contract suit by the employee.

Although claims for the breach of the duty of fair representation are today seldom, if ever, brought separately from a Section 301 claim, the two claims are distinct and the nature of each is quite different.

B. The Standard

The early cases required that a union represent each of the members of the bargaining unit "without hostile discrimination, fairly, impartially and in good faith." The standard was vague and difficult to apply but it insured that the unions would have some flexibility in representation. Although urged to retain a good faith standard, the Court in *Vaca v. Sipes* instead expanded the standard into a three-pronged test, finding a breach of the duty when the union's

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33. The *Hines* Court stated:
In our view, enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings. Wrongfully discharged employees would [otherwise] be left without jobs and without a fair opportunity to secure an adequate remedy. 424 U.S. at 571.
34. Waldman, *supra* note 6, at 284.
37. Isaacson, *From the Editor: The Duty of Fair Representation: Protecting the Protected from Their Protectors*, 6 EMPLOYEE REL. L.J. 1, 1 (1980).
38. Some commentators have distinguished the need for flexibility in contract negotiation as being greater than that necessary for contract administration. The early cases applying the good faith standard were contract negotiation situations. See Summers, *supra* note 7, at 254-63. *But see* Address by William J. Isaacson, American Arbitration Ass'n (May 18, 1983), *reprinted in* 21 GOV'T EMPL. REL. REP. (BNA) 1165 (1983).
conduct was "arbitrary, discriminatory or in bad faith."\textsuperscript{40}

The factual situation in \textit{Vaca} is typical of duty of fair representation cases involving a discharge.\textsuperscript{41} Owens, the employee, was discharged from his job at a packing plant because his blood pressure was too high to permit him to do heavy work. The union processed his grievance through the fourth step of a five-step grievance procedure, but refused to go to arbitration after an independent doctor examined Owens (at union expense) and confirmed that his condition was poor. Owens sued the union\textsuperscript{42} alleging that the union had acted arbitrarily and capriciously in refusing to take his grievance to arbitration.\textsuperscript{43}

The Court, sustaining its new test, found that as a matter of law, the union had not breached its duty.\textsuperscript{44} And even as the Court was establishing a standard which would allow greater judicial interference in the grievance process,\textsuperscript{45} it confirmed the need of the union for flexibility in contract administration. An employee did not have an absolute right to arbitration. The settlement process was necessary to eliminate frivolous grievances, to insure consistency in the inter-

\textsuperscript{40} \textit{Id.} at 190.

\textsuperscript{41} Most apportionment problems arise in relation to the large damage awards sustained in discharge cases. However, duty of fair representation/Section 301 suits are instituted over other issues as well. \textit{See, e.g.}, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980) (seniority rights); Schultz v. Owens-Illinois, Inc., 560 F.2d 849 (7th Cir. 1977) (right to participate in an apprenticeship program); Maurer v. UAW, 487 F. Supp. 731 (M.D. Pa. 1980) (negotiation of a provision which abrogated a prior arbitral award).

\textsuperscript{42} Although \textit{Vaca} opened the door to hybrid duty of fair representation/Section 301 suits, it was not itself such a suit; the employer was not joined.

\textsuperscript{43} At trial the jury awarded Owens $7,000 in compensatory damages and $3,300 in punitive damages. The trial judge set aside the verdict, holding that the NLRB had exclusive jurisdiction. The Kansas City Court of Appeals affirmed but the Supreme Court of Missouri reversed and reinstated the verdict.

Although it is not often noted, the main issue on appeal to the Supreme Court was whether the NLRB had exclusive jurisdiction and "if not, whether the finding of Union liability and the relief afforded Owens are consistent with governing principles of federal law." \textit{Vaca}, 386 U.S. at 174. This second, vague issue opened Pandora's box and let out, in dicta, that which the courts have been struggling with for years. \textit{See id.} at 198-203 (Fortas, J., concurring). In view of the lack of agreement on almost every issue — three justices concurred in the result but disagreed in nearly every other issue; Justice Black, dissenting, disagreed on every issue — it is perhaps surprising that the opinion was accorded such strong precedential value.

\textsuperscript{44} \textit{Vaca}, 386 U.S. at 193.

\textsuperscript{45} \textit{See} Isaacson, \textit{supra} note 38, at 1168-71.
interpretation and treatment of grievances and to support the bargaining authority of the union. Moreover, compelled arbitration would undermine the settlement process and cause more grievances to be arbitrated. This would in turn increase the cost, clog the grievance machinery and ultimately destroy the grievance-arbitration mechanism.

The lower courts, undoubtedly confused by the mixed signals of the Court regarding its new test, reacted inconsistently. Several of the earlier cases appeared to ignore the "arbitrary" prong of the Vaca test. In Motor Coach Employees v. Lockridge the Court went so far as to indicate, in dictum, that there must be "substantial evidence of fraud, deceitful action or dishonest conduct." The wide variety of standards available to the courts has provided material for numerous commentaries. In sum, the trend is for courts to

46. Vaca, 386 U.S. at 191. See also Isaacson, supra note 38, at 1170-71; Waldman, supra note 6, at 291-93.


48. Summers, supra note 7, at 260 n.35.

49. 403 U.S. 274 (1971).

50. Id. at 299 (citing Humphrey v. Moore, 375 U.S. 335, 348 (1964)). A line of cases has always followed the Lockridge standard. See Comment, supra note 16, at 157 n.14. The Court of Appeals for the Seventh Circuit adopted a bad faith standard in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981). As that court recently explained in Superczynski v. P.T.O. Servs., Inc., 706 F.2d 200 (7th Cir. 1983): "Hoffman holds that a union breaches its duty to fairly represent a worker if it deliberately and unjustifiably refuses to represent that worker in processing a grievance. The union's misconduct must be intentional." Id. at 202. The Superczynski court went on to quote Lockridge extensively.


interpret each prong of the *Vaca* test separately and to interpret the arbitrary prong to include perfunctory and even negligent conduct. The result of penalizing perfunctory and negligent conduct is to make it easier for an employee to allege a claim against his union, to increase the possibility of a challenge to the finality of an arbitration award and to make damage awards more likely.

**C. The Procedural and Remedial Issues**

As noted above, *Vaca v. Sipes* created more issues than it resolved. The Supreme Court has slowly unravelled the knotty procedural problems presented by exhaustion and ulating union behavior rather than for merely compensating the individual. Cheit, *supra*, at 28.

52. *But see supra* text accompanying note 50.


54. The ninth circuit is the only one to have explicitly adopted a negligence standard. See *Dutrisac v. Caterpillar Tractor Co.*, 113 L.R.R.M. (BNA) 3532 (9th Cir. 1983) (court found that union negligence may breach the duty of fair representation where the individual stake is large and the union’s action completely extinguishes the employee’s right to pursue a claim).

The Court of Appeals for the Sixth Circuit seemed to adopt a negligence standard in *Ruzicka v. General Motors Corp.* (*Ruzicka I*), 523 F.2d 306 (6th Cir. 1975). See Morgan, *Fair is Foul, and Foul is Fair — Ruzicka and the Duty of Representation in the Circuit Courts*, 11 U. Tol. L. Rev. 335 (1980). The case was remanded. On appeal for the second time, *Ruzicka v. General Motors Corp.* (*Ruzicka II*), 649 F.2d 1207 (6th Cir. 1981), the court carefully explained that the language to the contrary in *Ruzicka I* had been dicta and that a union’s breach of the duty could not be predicated on simple negligence. *Id.* at 1211-12. On remand, again, the case was dismissed. The dismissal was affirmed in *Ruzicka v. General Motors Corp.*, 707 F.2d 259 (6th Cir. 1983). The *Ruzicka* saga exemplifies the difficulties presented by the arbitrary prong of the *Vaca* test.

55. In discussing *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 42 (1979), one commentator expressed this concern:

There is a vast difference between “perfunctory,” even incompetent, representation and bad faith, discriminatory or arbitrary representation. The Supreme Court’s opinion never makes clear that perfunctory, incompetent representation will not suffice to overcome an arbitration award; indeed, it implies the contrary. It is difficult to avoid the conclusion that the Court is permitting a trier of facts to transform “bad performance” into “bad faith performance.”

Waldman, *supra* note 6, at 287-88.


57. *See supra* note 43.

58. *Clayton v. Automobile Workers*, 451 U.S. 679 (1981), settled one of the big exhaustion issues. The employee had filed a duty of fair representation/Section 301
most recently, the statute of limitations. The remedial questions have been equally complicated and, if possible, more perplexing to the lower courts.

Rejecting the union's contention that an employee should be limited to the remedy of compelled arbitration when successful in a breach of the duty of fair representation suit, the Court in Vaca commented that:

[An] order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved. But we see no reason inflexibly to require arbitration in all cases . . . the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.

In so rejecting compelled arbitration the court discarded the most reasonable method to forestall judicial meddling in the grievance-arbitration process short of NLRB preemption. The courts have taken notice that the normal remedy when wrongful discharge suits are submitted to arbitration is the equitable remedy of reinstatement with back pay; they have decided, however, that prospective damages may sometimes be a less drastic remedy and have specifically reserved the right to award them.

suit before having exhausted the internal union remedies provided by the union constitution. The Court of Appeals for the Ninth Circuit had held that the failure to exhaust barred the suit against the union but not the suit against the employer. The Supreme Court distinguished between contractual and internal remedies and concluded that when the internal remedy could neither reactivate the grievance nor provide as much relief as a Section 301 suit, the failure to exhaust would not bar the suit against the employer or the union when the employee had brought a hybrid suit.

In the combined cases of DelCostello v. Int'l Bhd. of Teamsters and United Steelworkers of Am. v. Flowers, 103 S. Ct. 2281 (1983), the Supreme Court held that in a hybrid suit the six-month statute of limitations governing suits under Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), would apply. The Court declined to apply an analogous state statute of limitations because the choices — contract, action to vacate, malpractice — each suffered legal and practical flaws. DelCostello, 103 S. Ct. at 2287-90.

60. See, e.g., St. Clair v. Local Union No. 515 of Int'l Bhd. of Teamsters, 422 F.2d 128, 132 (6th Cir. 1969).

61. Isaacson, supra note 38, at 1169.


63. See, e.g., Seymour v. Olin Corp., 666 F.2d 202, 211 (5th Cir. 1982); St. Clair v. Local Union No. 515 of Int'l Bhd. of Teamsters, 422 F.2d 128, 132 (6th Cir. 1969).

Damage awards are frequently quite large.\(^6\) An award principally consists of compensatory damages for back pay subject to mitigation.\(^6\) Attorney’s fees and court costs are fairly well established components of the damage award when a union is found to have breached the duty of fair representation in bad faith.\(^6\) Prejudgment interest is not allowed,\(^6\) nor are consequential damages such as humiliation and embarrassment or loss of a home.\(^6\)

*IBEW v. Foust*\(^7\) has apparently removed the possibility of recovering punitive damages in a duty of fair representation/Section 301 suit.\(^7\) The Court in *Foust* found that punitive damages were not in keeping with congressionally expressed labor relations policy which is “essentially remedial” in nature.\(^7\) The fundamental purpose of unfair representation suits is to compensate for injuries, not to punish.\(^7\) The *Foust* Court’s analysis was exemplary. The Court con-

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65. See, e.g., *IBEW v. Foust*, 442 U.S. 42, 45 (1979) ($40,000); *Seymour v. Olin Corp.*, 666 F.2d 202, 204 (5th Cir. 1982) ($139,177.02 plus $39,368.75 in attorney’s fee); *Milstead v. International Bhd. of Teamsters*, 649 F.2d 395, 396 (6th Cir. 1981) ($20,000). See also *Comment*, supra note 16, at 155-56 n.4.

66. See, e.g., *St. Clair v. Local Union No. 515 of International Bhd. of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969); *Comment*, supra note 16, at 162.


69. *Id.* at 293 (mental damages); *St. Clair v. Local Union No. 515 International Bhd. of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969) (humiliation and embarrassment, loss of home). But see *Farmer v. ARA Servs., Inc.*, 460 F.2d 1096 (6th Cir. 1981) in which the court held that damages for emotional and mental distress may be awarded when the union’s breach also results from its wrongful participation in the breach of contract or from the negotiation of discriminatory contract provisions. The union in such a case may be held jointly and severally liable with the employer.

70. 442 U.S. 42 (1979).

71. Punitive damages had been awarded in the past but the courts were divided. See, e.g., *Richardson v. Communication Workers*, 443 F.2d 974 (8th Cir. 1971) (punitive damages recoverable); *Dill v. Greyhound Corp.*, 435 F.2d 231 (6th Cir. 1970) (punitive damages not properly recoverable). The issue may still not be settled. See, for example, *Anderson v. Paperworkers Union*, 484 F. Supp. 76 (D. Minn. 1980), in which punitive damages were awarded. The court distinguished *Foust* as involving arbitrary conduct, while in *Anderson* the union had misrepresented an important fact regarding a contract provision. *Anderson* was, however, reversed on other grounds in *Anderson v. Paperworkers Union*, 641 F.2d 574, 581 n.9 (8th Cir. 1981), so the issue was never reached.

72. *Foust*, 442 U.S. at 52.

73. *Id.* at 49.
considered the financial burden such awards would place on unions and the consequent effect on their exercise of discretion in the handling of grievances. The Court recognized that union discretion was “essential to the proper functioning of the collective-bargaining system.” Most importantly, in *Foust* the Court balanced the interests of the union, the collective employees and the injured individual: “This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds.”

III. Apportionment of Damages

A. *Vaca and Progeny*

There is little discussion in the pre-*Vaca* cases about the apportionment of liability. In these cases the union and employer were generally held jointly liable. The earliest cases were, of course, discrimination cases. Even today a union and employer may be held jointly liable if they have both conducted themselves in a discriminatory manner. One writer has theorized that the lack of analysis may have also been due to the nature of the relief sought; the plaintiffs joined their employers solely for the purpose of blocking the enforcement of discriminatory provisions in the collective bargaining agreement.

The Supreme Court, perhaps responding to the lack of authority on the apportionment problem, took the opportunity provided by *Vaca v. Spies* to lay down a “governing principle”:

The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer’s breach of contract should not

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74. *Id.* at 50-51.
75. *Id.* at 51.
76. *Id.* at 50. Justice Blackmun, however, objected to a per se rule. *Id.* at 52-61 (Blackmun, J., concurring).
77. Seymour v. Olin Corp., 666 F.2d 202, 215 n.14 (5th Cir. 1982); NLRB v. Pacific Coast Util. Serv., 638 F.2d 73 (9th Cir. 1980).
be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.\textsuperscript{80}

The Court offered no other guidance in \textit{Vaca}. Instead, it further confused the issue.

The confusion arose, first of all, from the Court's apparent uncertainty about the legal nature of the collective bargaining agreement. One expert asserts that the \textit{Vaca} Court adopted the Steelworker's Trilogy\textsuperscript{81} view of the collective bargaining agreement as "not simply a contract, but a code to govern the relationship between those functioning in the capacity of employer and employee."\textsuperscript{82} This theory might support its apportionment principle which did not seem to distinguish the contractual relationship between employer and employee from the duty of care owed by the union to the employee. However, the Court did \textit{expressly} acknowledge the distinction between the two duties:

A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages.\textsuperscript{83}

Justice Fortas perceived the fundamental inconsistency in the Court's position, stating:

The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly to represent all employees in the unit.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{80} \textit{Id.} at 197-98.
\item \textsuperscript{81} \textit{See supra} note 22.
\item \textsuperscript{82} Feller, \textit{A General Theory of the Collective Bargaining Agreement}, 61 \textit{CALIF. L. REV.} 663, 696 (1973). Feller was counsel for the union in \textit{Vaca} and the author of the above article which has become a much cited classic on the duty of fair representation.
\item \textsuperscript{83} \textit{Vaca}, 386 U.S. at 197.
\item \textsuperscript{84} \textit{Id.} at 201-02 (Fortas, J., concurring).
\end{itemize}
Secondly, besides blurring the nature of the respective breaches by the employer and the union, the Court strongly implied that the union's damages would be de minimis in a Vaca-type factual situation. In this case, the Court said:

[E]ven if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.85

The Supreme Court left the “dirty work” of actually apportioning liability to the lower courts, giving them no further comment of precedential value.86

Hines v. Anchor Motor Freight, Inc.,87 decided almost ten years after Vaca, presented the Court with an opportunity to assist.88 In Hines the Court held that although a final arbitration decision had been decided in the employer’s favor, the employer had been improperly dismissed from the duty of fair representation/Section 301 suit. The Court concluded that “[p]etitioners, if they prove an erroneous discharge . . . are entitled to an appropriate remedy against the employer as well as the Union.”89 The Court, however, declined to go further. Only Justice Stewart, in a concurring opinion, addressed the apportionment issue: “If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the intervening wage loss must fall not on the employer but on the union.”90

As the result of the dicta in Vaca and Hines, the lower courts generally followed two91 different approaches92 prior

85. 386 U.S. at 198.
86. Linsey, supra note 6, at 670-71.
88. Linsey, supra note 6, at 672; Comment, supra note 16, at 165.
89. Hines, 424 U.S. at 572.
90. Id. at 573 (Stewart, J., concurring).
91. A third line of cases following Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), imposed joint liability; but that is generally considered to be an errant approach, absent intentional conduct on the part of the union. Linsey, supra note 6, at 675. But see Comment, supra note 16, at 170 (describing Ruzicka as a middle ground between the majority and the Stewart approaches).
to Bowen in apportioning liability in a duty of fair representation/Section 301 suit. Courts taking one approach, designated herein as the “majority approach,”93 ignored the theoretical confusion in Vaca and viewed the wrongful conduct of the employer as a breach of contract and the behavior of the union as a breach of statutory duty analogous to a tort.94 Consequently, these courts found that a union cannot be held liable for the contract damages, that is, back pay, resulting from the employer’s breach of contract.95 This approach takes strength from a literal interpretation of the language of Vaca implying de minimis liability on the part of the union.96

Other courts took what has been termed the “Stewart approach”97 and have apportioned some of the liability to the union.98 Both approaches are based upon conflicting causal analyses.99 The majority approach takes the position that “but for” the employer’s breach of the contract the employee would not have been injured and, therefore, the employer has caused the damage and should pay for its cost.100 More-

92. Comment, supra note 16, at 156.
93. One commentator labeled this approach the “Vaca approach”. See id. at 166. This is rather confusing, however, because both approaches claim to have their basis in Vaca.
over, the employer, not the union, is alone able to reinstate the employee. The Stewart approach, on the other hand, implies that "but for" the union's breach of its duty of fair representation the employee would have been made whole at an earlier date.\textsuperscript{101} Therefore, the union ought to be held responsible for any loss, including back pay, which accrues from the estimated date when the grievance would have been settled had the employee been fairly represented, until the date of judgment.

\textbf{B. Seymour v. Olin Corp.}

\textit{Seymour v. Olin Corp.}\textsuperscript{102} best exemplifies the majority approach. Seymour, an electrician employed by Olin Corp., was discharged for allegedly selling wire stolen from the company. Seymour notified his union of the termination and a union representative commenced investigation. Shortly after that, Seymour hired his own attorney. The union representative met with Seymour and informed him that the union was willing to press his grievance. However, upon learning that Seymour had hired his own attorney, the union representatives explained that it was their policy not to allow outside attorneys to participate in union business. Seymour refused to give up private counsel, the union refused to file the grievance and the time limits passed without a grievance being filed. The Court of Appeals for the Fifth Circuit held that the union's conduct had "exceeded the limits of its right of exclusive representation and ignored a substantial interest of Seymour . . . in obtaining informed legal advice from competent counsel of one's own choosing"\textsuperscript{103} and was therefore arbitrary.

The court turned to the issue of damages by first approving the award of prospective damages, finding substantial evidence that reinstatement was not feasible.\textsuperscript{104} The court


\textsuperscript{102} 666 F.2d 202 (5th Cir. 1982).

\textsuperscript{103} Id. at 208.

\textsuperscript{104} Id. at 211. Seymour and his family had moved from Tallahassee, the location of the corporation, to Atlanta.
then considered Olin's argument that it was responsible only for those damages that accrued prior to the time that an arbitrator would have issued an award had the grievance process been followed and that any subsequent damages should have been charged against the union.\(^\text{105}\) In firmly rejecting Olin's contention, the court of appeals first quoted the "governing principle" language from *Vaca*. The court noted that, under Olin's theory, if the union in *Vaca* had breached its duty of fair representation, the union could have been liable for three years' worth of back pay. On the contrary, the *Vaca* Court clearly "held" that the union's share would have been de minimis.\(^\text{106}\) The Court cited with approval other majority approach cases.\(^\text{107}\) Indications of a contrary approach in *Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse*\(^\text{108}\) and *Soto Segarra v. Sea-Land Service, Inc.*\(^\text{109}\) were dismissed as dicta.\(^\text{110}\) The court portrayed Justice Stewart's dissent in *Hines v. Anchor Motor Freight, Inc.*\(^\text{111}\) as a "suggestion." *Hines* was distinguished on the ground that in *Seymour* there was no final arbitration decision on which the company could have justifiably relied.\(^\text{112}\) The court also characterized the joint liability in *Ruzicka v. General Motors Corp.*\(^\text{113}\) as an oddity.\(^\text{114}\) And finally the court distinguished *Harrison v. United Transportation Union*\(^\text{115}\) as a case involving deliberate union misconduct rather than merely arbitrary behavior.\(^\text{116}\)

The key to the court's decision in *Seymour* lies in its ac-
ceptance of the majority approach as "sound policy." The employer's position was paraphrased by the court: "Olin, the wrongdoer, protests to the Union: you should be liable for all damages flowing from my wrong from and after a certain time, because you should have caught and rectified my wrong by that time." This position was not, the court said, consistent with the policy of attempting "to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds." The real reason for assessing damages against the union was to "ensure that unions will diligently pursue their duty of fair representation." This goal could be adequately accomplished by the award of attorney's fees and costs, an amount which might be substantial.

Seymour has been presented as epitomizing the majority approach. The latest word on the Stewart approach, and, indeed, on apportionment of damages in duty of fair representation/Section 301 suits, is the case discussed below.

IV. Bowen v. United States Postal Service

A. The Facts

In Bowen v. United States Postal Service the United States Supreme Court finally faced squarely the apportionment issue. The facts of the case fell into a familiar pattern. Bowen, a postal worker and member of the American Postal Workers Union, was discharged on March 30, 1976 following an altercation with another employee. He filed a grievance with the union. His local union took the grievance through the first three steps of the grievance procedure. However, decisions to arbitrate were made at the national level and the national office decided not to pursue the grievance. Bowen brought suit against the union, arguing that it had breached its duty of fair representation, and against the

117. Id. at 214.
118. Id. at 215.
119. Id. (emphasis added).
120. Id.
121. Id.
Postal Service for violation of the collective bargaining agreement in discharging him without just cause.\textsuperscript{123}

The jury returned a special verdict in favor of Bowen and the district court entered judgment. The court found that if Bowen's "apparently meritorious grievance" had been arbitrated he would have been reinstated by August, 1977.\textsuperscript{124} Instead, the court found, the union had handled the grievance in an "arbitrary and perfunctory manner," and both the union and the Service had acted "in reckless and callous disregard of [Bowen's] rights."\textsuperscript{125} The $52,954 award for lost benefits and wages was apportioned by the jury — $30,000 to be paid by the union, $22,954 to be paid by the Postal Service.\textsuperscript{126} The jury also found the Postal Service and the union liable for punitive damages of $30,000 and $10,000 respectively. However, the district court set this award aside, determining that punitive damages could not be assessed against the Postal Service because of sovereign immunity and deciding that it would not be equitable for the union to pay them when the Service was immune.\textsuperscript{127}

The trial judge also considered the question of reinstatement versus prospective damages. In view of the plaintiff's "dismal outlook" for reemployment, the court ordered reinstatement, or in the alternative, $125,000 for future loss of earnings.\textsuperscript{128} In addition, attorney's fees were awarded and apportioned, oddly enough, with $20,000 to be paid by the union, $15,000 to be paid by the Postal Service.\textsuperscript{129}

The Court of Appeals for the Fourth Circuit accepted the trial court's findings of fact and affirmed the apportionment of liability.\textsuperscript{130} However, the court found that "[a]s Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the

\begin{itemize}
\item \textsuperscript{123} Id. at 590-91.
\item \textsuperscript{124} Id. at 592 n.6.
\item \textsuperscript{125} Id. at 591.
\item \textsuperscript{126} Bowen v. United States Postal Serv., 470 F. Supp. 1127, 1131 (W.D. Va. 1979).
\item \textsuperscript{127} Id. at 1131.
\item \textsuperscript{128} Id. at 1129-31.
\item \textsuperscript{129} Id. at 1129-32.
\item \textsuperscript{130} Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981).
\end{itemize}
deprivations — $47,000.00 plus $5,954.12 — was chargeable to the Union.”¹³¹ The appeals court also refused to increase the award against the Postal Service and as a result Bowen was left with a judgment of $22,954.12¹³² plus reinstatement or prospective damages¹³³ and attorney’s fees.

The issue as framed by the United States Supreme Court was “whether a union may be held primarily liable for that part of a wrongfully discharged employee’s damages caused by his union’s breach of its duty of fair representation.”¹³⁴ The Court held that the damages sustained by Bowen were initially caused by the Postal Service but were increased by the union’s breach of its duty of fair representation. “Accordingly, apportionment of the damages was required . . . .”¹³⁵ The Supreme Court reversed the judgment of the court of appeals and remanded the case for allocation of damages consistent with the principles expressed in the opinion. Five justices joined in the opinion; three justices concurred as to the remand but dissented as to the Court’s rationale. One justice dissented.¹³⁶

B. The Court’s Rationale

In Bowen v. United States Postal Service,¹³⁷ the issues were well joined. The dissent fully articulated the Seymour v. Olin Corp.¹³⁸ approach, while the majority opinion embodied the Stewart approach. Each side asserted that its position was firmly grounded in Vaca v. Sipes¹³⁹ and its progeny. And each side displayed a different conception of the nature and importance of the duty of fair representation.

Both the majority and the dissent acknowledged the centrality of the grievance procedure in federal labor law, as well as the necessity of preserving it in order to preserve sta-
ability within the collective bargaining system. The two groups of Justices disagreed about the effect of a breach of the duty of fair representation on a Section 301 suit. The dissent insisted that, as under previous holdings, a breach merely removes the procedural exhaustion-of-remedies bar and allows the employee to bring suit, but does not affect the employer’s back pay liability. On the other hand, the majority applied a “but for” analysis and concluded that but for the union’s failure to represent the employee fairly, the employer’s breach would have been remedied through the grievance process. Therefore, “[t]he fault that justifies dropping the bar to the employee’s suit for damages also requires the union to bear some responsibility for increases in the employee’s damages resulting from its breach.”

The dissent, distinguishing the contract duty of the employer from the statutory duty of the union, applied its own “but for” analysis: “But for the employer’s breach of contract, there would be no occasion for anyone to reimburse the plaintiff . . . .” The employer, after all, had exclusive control over reinstatement. The dissent’s approach depended upon the application of common-law contract principles, a concept which the majority firmly rejected. In the words of the Court, the dissent’s interpretation “fails to recognize that a collective-bargaining agreement is much more than traditional common-law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy.”

Having discarded the theoretical underpinnings of the *Seymour* approach, the Court next turned to policy considerations. The majority determined that the right of the employee was of “paramount importance.” But, although the employer should never be shielded from its share of lia-

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140. *See, e.g., Bowen*, 103 S. Ct. at 596, 605 n.11 (White, J., concurring in part and dissenting in part).
141. *Id.* at 601.
142. 103 S. Ct. at 595.
143. *Id.* at 603-04 (White, J., concurring in part and dissenting in part) (emphasis in original).
144. *Id.*
145. 103 S. Ct. at 594.
146. *Id.* at 595.
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bility because of wrongful conduct by a union, it would be unjust, in a degree equal to the injustice of preventing recovery by an employee, to require the employer to bear the increase in damages.\textsuperscript{147} The grievance procedure "contemplates that both the employer and union will perform their respective obligations."\textsuperscript{148} The Court felt that an employer had a right to rely on the union fulfilling its obligation to the employee. "By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibility faithfully — a duty which it owes to the employees whom it represents and on which the employer with whom it bargains may rely."\textsuperscript{149}

Apparently as a result of this "duty" owed by the union to the employer, the majority found that the union was primarily responsible for damages resulting from its breach while the Postal Service remained secondarily liable.\textsuperscript{150} The Supreme Court expressed concern that imposing total liability on the employer would affect the willingness of employers to agree to arbitration clauses.\textsuperscript{151} On the other hand, the Court shrugged off the effect that damages liability would have on union financial resources. In a footnote the Court opined that compensatory damage awards "normally will be limited and finite."\textsuperscript{152} Liability would merely impose a burden consistent with national labor policy in that it would "provide an additional incentive for the union to process its members' claims where warranted."\textsuperscript{153}

The dissent, on the other hand, found no support for the proposition that the union had a duty to protect the employer. On the contrary, such a duty seemed to imply an unbargained-for indemnification clause in the collective bargaining agreement. The minority found it clearly violative of national labor policy for a court to so modify the substan-

\begin{itemize}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.} at 597.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.} at 595 n.12.
\item \textsuperscript{151} \textit{Id.} at 597.
\item \textsuperscript{152} \textit{Id.} at 597-98 n.16.
\item \textsuperscript{153} \textit{Id.} at 597-98.
\end{itemize}
tive terms of a collective bargaining agreement.\textsuperscript{154} The Court’s decision would interfere with the grievance procedure by forcing unions to take unmeritorious grievances to arbitration merely to avoid liability.\textsuperscript{155} A more disturbing effect would be the threat to a union’s financial stability. Under the \textit{Bowen} rule unions would have no way to limit constantly increasing liability.\textsuperscript{156} In the past, attorney’s fees and court costs had provided adequate deterrence.\textsuperscript{157} In short, \textit{Bowen} did not adequately balance the collective interests of the employees as against the interests of the employer and the individual employee. In the absence of the union’s inducement of an employer to breach the contract, a union should not be liable. Even where the union had affirmatively engaged in misconduct, it should only be secondarily liable.\textsuperscript{158}

In its opinion the majority accepted the approach urged by the federal respondent.\textsuperscript{159} The union would be liable for any compensatory damages accruing after the hypothetical date that reinstatement would have occurred had the union not breached its duty of fair representation.\textsuperscript{160}

\begin{align*}
\text{Grievance Producing Event i.e. Discharge} & \quad \text{Hypothetical Point of Settlement Absent Union Breach of DFR} \\
\text{Employer Liability} & \quad \text{Union Liability} \quad \text{Decision On the Merits}
\end{align*}

\textit{Id.} at 171.

\textsuperscript{154} \textit{Id.} at 604-05 (White, J., concurring in part and dissenting in part).
\textsuperscript{155} \textit{Id.} at 605.
\textsuperscript{156} \textit{Id.} at 602-03.
\textsuperscript{157} \textit{Id.} at 602 n.6.
\textsuperscript{158} \textit{Id.} at 605-06.
\textsuperscript{160} The Federal Respondent had in turn adopted an approach to apportionment suggested by the student writer in Comment, \textit{supra} note 16. In adopting the Stewart approach, he illustrated the apportionment of liability as follows:
C. After Bowen

The Court’s decision in *Bowen v. United States Postal Service* raised a series of new problems for unions which had previously relied on the apportionment of liability exemplified in *Seymour v. Olin Corp.* The union’s counsel in *Bowen* objected to the special verdict form on the general grounds that “[t]raditionally the union does not pay wages. And these damages are wholly assessable to the [Service], if at all.”

The problem remaining after *Bowen* is the mechanics of apportioning damages. No answer can be found in the decision. The Supreme Court apparently approved the method employed by the district court. The trial court, first of all, instructed the jury that apportionment was within its discretion. The trial court then suggested that the employer could be liable for damages before the date of a hypothetical arbitration decision and the union could be liable for damages after that date. The court found that if Bowen’s grievance had been arbitrated he would have been reinstated by August, 1977. The jury adopted the court’s suggestion and apportioned back pay damages to the union after that date.

While the *Bowen* Court did not object to the trial court’s apportionment method, it did not sanction that method. The case was remanded and the holding merely stated that “apportionment of damages was required by *Vaca*.” *Bowen* does not answer the question of how to apportion damages. Opportunities for creativity abound.

First, if the “real issue” in *Bowen* is not merely apportionment of damages but the fundamental apportionment of responsibility between the parties . . .,” then it is still possible to argue that the union found to have breached its duty should be liable only for attorney’s fees or court costs and not for back pay. The *de minimis* language in *Vaca v.*

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162. 666 F.2d 202 (5th Cir. 1982).
163. *Bowen*, 103 S. Ct. at 591 n.3.
164. *Id.* at 591. See also diagram accompanying supra note 160.
165. *Bowen*, 103 S. Ct. at 592 n.6.
166. *Id.* at 599.
Sipes\textsuperscript{168} has not been overruled. Second, the Court explicitly discarded contract liability as the measure of the employer's damages\textsuperscript{169} and implicitly dismissed the trust analogy urged by the dissent.\textsuperscript{170} Tort law presents the next most obvious model.

The duty of fair representation has frequently been considered as analogous to a tort duty.\textsuperscript{171} If the employer's liability were to be similarly characterized then fault could be apportioned or compared according to the principles of tort law. The trial court in \textit{Bowen} seemed to have a tort approach in mind when it left the apportionment of damages to the discretion of the jury.\textsuperscript{172} As to the mechanics of apportionment, the \textit{Bowen} Court has opened a new area for confusion and disagreement among the circuits.

After \textit{Bowen} the concerns of union attorneys are more practical than theoretical. The focus is on strategies for minimizing union liability. In an address before the American Bar Association, Section of Labor and Employment Law, Attorney Anton G. Hajjar put forth these suggestions for undermining the effect of \textit{Bowen}:

1. Employ jury instructions allowing the jury to assess less than post-arbitration backpay against the union.
2. Shift it to the employer by undermining its reliance on the union's conduct.
3. Demand arbitration or seek an order compelling it to remove the case from the jury.
4. Bargain for an appeal procedure which can result in a reinstated grievance, or for indemnification by the employer, or make the grievance procedure non-exclusive for high-liability grievances.
5. Oppose jury trials.
6. Oppose awards of attorneys fees.\textsuperscript{173}

\textsuperscript {168} 386 U.S. 171, 199 (1967).
\textsuperscript {169} \textit{Bowen}, 103 S. Ct. at 594.
\textsuperscript {170} \textit{Id.} at 606 (citing Cox, supra note 8, at 652). \textit{Id.} at 606 n.14.
\textsuperscript {171} \textit{See}, e.g., Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir. 1970).
\textsuperscript {172} \textit{Bowen}, 103 S. Ct. at 591.
\textsuperscript {173} Address by Anton G. Hajjar, American Bar Association, Section of Labor and Employment Law, Annual Meeting (August 2, 1983) (unpublished manuscript).
V. CRITICISM

The foregoing survey of duty of fair representation law which focused on Bowen v. United States Postal Service\textsuperscript{174} and the issue of the apportionment of liability, reveals a complex, confused and confusing body of law. The theme has been simple: the more the courts have intervened, the more complicated matters have become. Several analytical factors have emerged, however, which, if applied to each duty of fair representation decision, will contribute to a consistent development of the law.

Analysis must begin by expressly acknowledging that the duty of fair representation functions within the system of labor relations and requires an acceptance of the idiosyncrasies of labor law. Chief among these is the centrality of the grievance-arbitration mechanism.\textsuperscript{175} Such a system is delicately balanced and requires that labor and management feel confident that they will be free to settle grievances together in the manner they have selected under the collective bargaining agreement.\textsuperscript{176} A sophisticated grievance system also requires that a union be willing to decide against an employee if a grievance lacks merit.\textsuperscript{177} The perpetual threat of court review means that a union can no longer absolutely guarantee that a grievance once settled will stay settled.\textsuperscript{178}

The results of this threat are frequently recited: “less settlement at the early stages of grievance adjustments, more arbitrations, lengthier, more contentious hearings, more formality\textsuperscript{179} and evidentiary objections, and a tendency to advance any conceivable argument, however flimsy it may appear.”\textsuperscript{180} It is too late to request that the “law stay out”\textsuperscript{181} of the arbitral system, but each court should be aware of the

\textsuperscript{174} 103 S. Ct. 588 (1983).
\textsuperscript{176} Isaacson, \textit{supra} note 38, at 1168.
\textsuperscript{177} Waldman, \textit{supra} note 6, at 289.
\textsuperscript{178} Isaacson, \textit{supra} note 38, at 1171.
\textsuperscript{179} One commentator has questioned whether unions will now be required to provide lawyers to represent employees at arbitration hearings. Waldman, \textit{supra} note 6, at 290-91. Of course, even an attorney may not be able to assure freedom from liability. \textit{See} Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974) (an attorney represented the plaintiff but the union was still found to have breached its duty of fair representation).
\textsuperscript{180} Waldman, \textit{supra} note 6, at 289-90 (footnote added).
effects of judicial interference upon that system and attempt to minimize them.

Next, courts must balance all of the interests affected under a collective bargaining agreement when it decides a duty of fair representation issue. These include not only the interests of the individual employee, the employer and the union, but also those other interests as defined by Cox — the unassorted interests of the employees as a group, the future interests of the employees and the present interests of employees who may be in competition with the grievant. If the courts are going to review grievances, then they must protect the same interests that arbitrators attempt to consider.

The difficulty is that these interests frequently overlap and sometimes cannot be severed as neatly as a court might like. For example, the duty of fair representation, in some ways, identifies the interests of the employer with those of the union:

One of the ironies of the doctrine of fair representation in arbitration matters is the inhibitions it necessarily places upon the employer in what is essentially an adversary process. In order for the employer to achieve what he expects and hopes to obtain out of the arbitration, the union must be performing fairly and adequately; otherwise the employer's own efforts will be useless and he will have to retry in the courts the same dispute he thought had been resolved in arbitration.

Certainly the individual has an important interest to protect, but the courts must neither lose sight of the other interests involved, nor emphasize the rights of the individual employee to the point where the grievance arbitration mechanism and the stability of the system is undermined.

Finally, the courts must consider duty of fair representation law as one body and view each part in relation to the

181. Dean Shulman made this remark in a famous speech in which he argued against the law providing remedies for breach of collective bargaining agreements and argued in favor of maintaining judicial noninterference with arbitration. Feller, A General Theory, supra note 6, at 689 (citing Shulman, Reason, Contract and Law in Labor Relations, 68 HARV. L. REV. 999, 1001 (1955)).
182. See Cox, supra note 8.
183. Waldman, supra note 6, at 294.
184. Id. at 280; Isaacson, supra note 38, at 1169.
other. Procedural issues must not be considered in a vacuum, but must always be viewed in relation to the substantive law, with an eye toward maintaining the balance in the labor relations system. For example, if, as it appears, the standard for the breach of duty of fair representation is tending toward negligence, then it will become easier for employees to prevail in a duty of fair representation suit. But clearly unions do not possess unlimited resources. It is reasonable in this context to adjust the remedial or procedural arms of the law.

Testing Bowen v. United States Postal Service against these analytical factors yields mixed results. First of all, the Bowen Court demonstrated a real acceptance and understanding of the practical functioning of the duty of fair representation within the collective bargaining system and the grievance procedure. It accepted the Steelworkers Trilogy characterization of the collective bargaining agreement as a code rather than a simple contract. Further, the Court recognized the stabilizing effect of its decision. As a practical matter Bowen has put a cap on the back pay liability of the employer. In the Court's view, that should strengthen the employer's reliance on the union's decision. The employer will not, thereby, be placed in a position more detrimental than if the employee had acted on his own behalf. This increased reliance by the employer will make him more willing to participate in the grievance-arbitration system and consequently the system will be strengthened.

This overriding concern with employer reliance was the hallmark of the Court's attempt to balance the interests involved in the apportionment of liability. The interest of the individual was identified as of "paramount importance."

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185. Isaacson, supra note 37, at 1.
187. Id. at 593-97.
188. Id. at 596. See supra note 21.
189. Isaacson, supra note 38, at 1166.
190. Bowen, 103 S. Ct. at 597.
191. Id. at 595. This language may prove to be as significant as the holding in Bowen and has already been cited to support an employee's right to have his union dispute resolved in federal court rather than before the National Railroad Adjustment Board where he had reasonably relied upon his union to process his grievance. See Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 909 (6th Cir. 1983).
As indicated above, the employer’s interests were sympathetically considered. However, the Court completely disregarded any effects of the *Bowen* rule on the ability of the union to function. The Court ignored evidence of an already overworked arbitration system, both within the Postal Workers Union\textsuperscript{192} and nationwide among all unions.\textsuperscript{193} The threat of an undue financial burden\textsuperscript{194} on unions was also glibly dismissed, even though it was clear that a union may now have the bulk of the financial responsibility when unsuccessful in a duty of fair representation/Section 301 suit.\textsuperscript{195}

This callous disregard of the union’s interests was in harmony with the Court’s emphasis on the “power” and “authority” of the union.\textsuperscript{196} Nowhere did the Court acknowledge the collective interests of the employees as a group or recognize that a union’s ability to function was as necessary to the stability of the system as was the confidence of the employer.

Nor did the Court consider the standard applied in duty of fair representation cases as having any impact on the proper apportionment of liability.\textsuperscript{197} Indeed, the opinion reflected a lack of concern. In a footnote the Court dismissed the possibility that the *Bowen* rule would cause an undue financial burden on unions. “An award of compensatory damages, however, normally will be limited and finite. Moreover, the union’s exercise of discretion is shielded by the

\textsuperscript{192} See Brief for Respondent at Appendix, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

\textsuperscript{193} Bowen, 103 S. Ct. at 601 n.4 (White, J., concurring in part and dissenting in part).

\textsuperscript{194} Nor will requiring the union to pay damages impose a burden on the union inconsistent with a national labor policy. It will provide an additional incentive for the union to process its members’ claims where warranted. This is wholly consistent with a union’s interest. It is a duty owed to its members as well as consistent with the union’s commitment to the employer under the arbitration clause.

\textsuperscript{195} Isaacson, \textit{supra} note 38, at 1167.

\textsuperscript{196} Bowen, 103 S. Ct. at 597.

\textsuperscript{197} See Wollett, \textit{Supreme Court Report: Five Cases Focus on Grievance Arbitration}, 69 A.B.A. J. 1892 (1983). The author suggests “that union attitudes on whether a case should go to arbitration should depend on standards that the courts apply in determining whether the duty of fair representation requires arbitration,” rather than whether a union will be held liable for damages under *Bowen*. \textit{Id.} at 1894.
standard necessary to prove a breach of the duty of fair representation.”

But surely this is the crux of the problem. At what point does the shield begin to deteriorate and the delicately balanced grievance-arbitration system begin to break down under the financial and administrative strain? Bowen does not consider this problem because the decision was limited to resolving the issue of the apportionment of liability. It is this tunnel vision approach to fair representation law which has given us confusion and disagreement rather than an integrated body of law.

VI. CONCLUSION

The apportionment of damages in a duty of fair representation/Section 301 suit posed a difficult problem for the Supreme Court. Neither of the two lines of cases on the issue presented a completely satisfactory theory. Consequently, the Court based its decision on policy considerations. In so doing, however, the Supreme Court limited its considerations to the apportionment question instead of also considering the standard which provides the basis for the suit. The remedial question was severed from the substantive law.

Bowen is true to breed. Rather than producing a more reliable body of law, the Court’s tinkering in Bowen has produced more uncertainty, more questions and more opportunity for inconsistency among the circuits.

Elizabeth Stephens

198. Bowen, 103 S. Ct. at 598 n.16 (emphasis added).
199. For some thoughts on the matter, see Isaacson, supra note 38, at 1170; Kopp, supra note 6, at 12-13; Waldman, supra note 6, at 294-95.