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IBEW v. Foust: A Hint of Negligence in the Duty of Fair Representation

By Joshua Robert Steinhauer*

The scope of the obligation a union owes to the members of a collective bargaining unit under the judicially created doctrine of the duty of fair representation has yet to be clearly articulated by the United States Supreme Court. This has left the lower courts and the National Labor Relations Board (NLRB or Board) without adequate guidance as to the proper standard of care in applying the doctrine. Confusion has arisen as the Board and the federal courts have sought to apply the doctrine to the realities of labor-management relations.

On May 29, 1979, the United States Supreme Court handed down its decision in IBEW v. Foust. The Court had granted certiorari on the specific question of "what if any circumstances justify

* B.S., 1977, Cornell University, New York State School of Industrial and Labor Relations. Member, Third Year Class.
1. In Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944), a case arising under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), the Supreme Court announced that a union has a statutory duty to represent fairly all members of the employee bargaining unit. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Court applied the doctrine of fair representation to a case under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-169 (1976). The Court implied the duty from the statutory grant to the union in § 9(a) of the NLRA, 29 U.S.C. § 159(a), of exclusive power to represent all employees in the unit.
2. The Board first invoked the unfair labor practice section of the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141-197 (1976), in a duty of fair representation case in Miranda Fuel Co., Inc., 140 N.L.R.B. 181 (1962). See note 106 & accompanying text infra. Section 8(b)(1)(A) of the LMRA, 29 U.S.C. § 158(b)(1)(A) (1970), makes conduct that would "restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157" an unfair labor practice. Section 7 of the LMRA, id. § 157, in general gives employees the right to engage in concerted activity, that is, the right to create and join unions or to refrain from such activity.

The Supreme Court has never specifically passed on the Board's jurisdiction in this area, although in Vaca v. Sipes, 386 U.S. 171, 182-84 (1976), the Court assumed, without deciding, that a breach of the duty of fair representation would constitute an unfair labor practice. The cases that have come before the Court have arisen under either § 301 of the LMRA, 29 U.S.C. § 185 (1976), or the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976).
assessing punitive damages against a union that breaches its duty of fair representation." The import of the decision, however, has not been limited to this question of remedies. Instead, it has enlivened the debate over the scope of the duty of fair representation, for the opinion arguably implies that union negligence alone may be sufficient to constitute a breach of the duty. This Note examines the underlying implications of a negligence standard in Foust to determine (1) whether it is compatible with the doctrine of fair representation as developed in the courts and by the NLRB, and (2) whether negligence is a proper standard for defining a union's duty of fair representation.

The Note concludes that the negligence language in Foust is not necessarily inconsistent with prior interpretations of the standard of care and probably does not reflect the Court's rejection of those interpretations. Rather, Foust may indicate that the Court is leaning towards more definitively prescribing the standard of care under the terminology enunciated in Vaca v. Sipes by applying a negligence standard only in specific instances of procedural misconduct. The Note further suggests that in such specific instances

4. Id. at 46.


7. See Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975). The circuit courts and the NLRB have already been subjecting different situations to varying levels of scrutiny when applying the Vaca standard. See notes 105-48 & accompanying text infra.
The Prevailing Standard: Arbitrary, Discriminatory, or Bad Faith Conduct

The prevailing standard in duty of fair representation cases originally was enunciated by the Supreme Court in the 1967 decision in *Vaca v. Sipes*, which held that a union breaches its duty only if its conduct is "arbitrary, discriminatory, or in bad faith." Thus, where a union arbitrarily ignores a grievance or processes it in a perfunctory fashion, the union will be found to have breached its duty of fair representation.

In formulating this standard, the *Vaca* Court grounded its rea-
soning on the manner in which federal labor law reconciles the interests of the individual with the collective interests of the union: "[T]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." The Court endorsed the position of Professor Archibald Cox who urges that unions be given broad discretion in handling grievances as they are in the best position to develop uniform solutions for existing problems and to anticipate future problems. Although vesting such authority in the union poses great risks for the individual whose access to contractual remedies is often controlled by the union and the employer, Professor Cox contends that the collective benefit that can be gained by allowing the union broad discretion in the performance of its duties as exclusive bargaining agent outweighs the danger of possible abuses of power by the union. In favoring the Cox approach in Vaca, the Supreme Court relied on the duty of fair representation to check such abuses.

Since announcing its decision in Vaca, the Supreme Court has twice had the occasion to reexamine the scope of the duty of fair representation. Although resting its decision on the narrow issue of NLRB preemption, in Motor Coach Employees v. Lockridge the

13. 386 U.S. at 182.
14. Id. at 191.
16. Id.
17. 386 U.S. at 191. See Swedo, Ruzicka v. General Motors Corp.: Negligence, Exhaustion of Remedies, and Relief in Duty of Fair Representation Cases, 33 Am. J. 6, 7 (1978) [hereinafter cited as Swedo]. In deciding Vaca, the Supreme Court rejected the approach of Professor Clyde Summers. 386 U.S. at 191. Professor Summers, the chief proponent of the individual rights theory, premises his views on a policy of protecting the rights of the individual in the grievance process. He argues that employees should be allowed to compel arbitration of their grievances. To filter out frivolous claims, he suggests that the grievant be required to bear the expense of arbitration when his or her case has no precedent value to the group. In circumstances in which the grievant prevails in a claim affecting the group interest, however, Professor Summers reasons that the grievant should be reimbursed by the union for effectively performing its function. Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362 (1962). The Supreme Court also has rejected the compromise position of Professor Blumrosen. He advocates giving an employee the absolute right to press his or her grievance to arbitration only if it involves a "critical job interest" such as a discharge. Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631 (1959). See also Milstead v. Local 957, 580 F.2d 232 (6th Cir. 1978).
Court spoke of the necessity of showing "fraud, deceitful action or dishonest conduct" to establish a breach of the duty. The Court also stated that there must be evidence of "discrimination that is intentional, severe, and unrelated to legitimate union objectives." This narrower standard has since been rejected, and the dictum in *Lockridge* generally is viewed as a description of existing standards, rather than as a narrowing of *Vaca*.

In *Hines v. Anchor Motor Freight, Inc.*, the Court quoted with approval its prior discussion in *Vaca*. *Hines* nonetheless seems to indicate a liberalizing of the *Vaca* standard. Although apparently willing to allow "mere errors of judgment," the Court emphasized that it would not permit a union to leave discharged employees without jobs and without a fair opportunity to secure an adequate remedy.

Although the *Hines* decision generally is viewed as an affirmation of the *Vaca* standard, some commentators have suggested that the decision holds the union to a standard of "carelessness" and

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19. Id. at 299 (citing Humphrey v. Moore, 375 U.S. 335, 348 (1964)).
20. 403 U.S. at 301.
22. Most courts today recognize that bad faith is not required to be proved by a plaintiff alleging breach of a duty of fair representation. See, e.g., Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976); Ruzicka v. General Motors Corp., 523 F.2d 306, 316 (6th Cir. 1975) (McCree, J., concurring). See notes 39-40 & accompanying text infra.
24. See notes 10-12 & accompanying text supra.
25. *Hines* is especially significant because it dealt with the finality of an arbitration award where the union had improperly represented a discharged employee during his arbitration hearing and only minimally investigated the grievance. Information discovered after the hearing revealed that the charges against the grievant had been erroneous. The Court vacated the arbitration award and found that the union had breached its duty. The *Hines* decision, involving a postarbitration suit, seems to put the courts in a position of second guessing the union and breaching the finality of arbitration. See generally United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 365 U.S. 564 (1960). More particularly, *Hines* can be criticized for putting the judiciary in the position of evaluating the manner in which a union conducts its preparation for and presentation of arbitration hearings. See, e.g., Adomeit, supra note 5, at 650-51; Waldman, *The Duty of Fair Representation in Arbitration*, 29th Annual N.Y.U. Conf. on Labor 279, 287-88 (1976).
26. 424 U.S. at 571. The Court stated that "[t]he grievance processes cannot be expected to be error-free." Id.
27. Id. See notes 115-16 & accompanying text infra.
28. Adomeit, supra note 5.
intimates that the Court may eventually settle upon negligence as the appropriate standard of care.\(^9\)

In the final analysis, the vague contours of the Vaca standard have allowed lower courts to approach claims of unfair representation on a case by case basis, balancing the equities presented on the factual record, and then applying the general terminology necessary to reach a legally supportable result.\(^9\) This practice deprives practitioners of needed predictability and thwarts the development of a uniform labor policy in this area of the law.

**Foust and Ruzicka: Inroads Towards a Negligence Standard**

**IBEW v. Foust**

*IBEW v. Foust*\(^{31}\) is the Supreme Court's most recent decision concerning the duty of fair representation.\(^{32}\) Leroy Foust was an employee of the Union Pacific Railway Company and a member of the International Brotherhood of Electrical Workers (IBEW). In March, 1970, he was injured on the job and placed on a medical leave of absence. In February, 1971, he was discharged for not properly requesting an extension of his leave as required under the collective bargaining agreement.\(^{33}\) Under the contract the union

29. *Id.*

30. Dinges, *supra* note 5, at 1782-83. *See also* Fanning, *The Duty of Fair Representation*, 19 B.C.L. Rev. 813, 819 n.54 (1978) [hereinafter cited as Fanning]. In *Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181 (1962), the NLRB concluded that § 8(b)(1)(A) and § 8(b)(2) of the NLRA, 29 U.S.C. § 158 (b)(1)(A)-(B) (1976), prohibited a union from taking action against an employee for reasons that were “irrelevant, invidious, or unfair.” 140 N.L.R.B. at 185. This phrase is vague and imprecise, and like the “arbitrary, discriminatory, or bad faith” standard set forth in *Vaca*, contributed to the general ambiguity of the scope of the doctrine. *See Irving, supra* note 5, at D-1; Address by John Truesdale, Federal Bar Association 1979 Southwest Regional Conference (Mar. 1, 1979) & Labor Law Seminar of Nova University (Mar. 3, 1979), *reprinted in* Daily Lab. Rep. (BNA), No. 50, Mar. 13, 1979, at F-1. The uncertainty over the parameters of the duty is as grave before the Board as it is in the courts. Moreover, this dichotomy does not appear to be diminishing.


32. Although *Foust* arose under the Railway Labor Act rather than the NLRA, cases under the two acts have received similar treatment. See note 1 *supra*. There is every reason to presume, therefore, that the decision in *Foust* will be extended to NLRA cases. This Note treats cases under the two acts without distinction.

33. Under the collective bargaining agreement, employees were required either to request an extension before their leave expired or to return to work as scheduled. Foust sought to renew his leave in late December, 1970, but correspondence between his attorney (whom he had hired to handle the legal aspects of all of his accident related affairs, includ-
had sixty days to file a grievance challenging the dismissal; Foust’s attorney had requested the union to take such action fifty-two days after the discharge. The union, however, failed to meet the deadline because of unnecessary and time-consuming correspondence between union officials and, not surprisingly, Union Pacific and the National Railroad Adjustment Board denied Foust’s grievance as untimely.

In the subsequent suit against the union for breach of its duty of fair representation, the trial court instructed the jury that “the essential legal standard which the evidence had to satisfy was arbitrariness and capriciousness of the Union; [and] that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner.” The district court upheld the jury’s award of $40,000 actual damages and $75,000 punitive damages.

The Tenth Circuit affirmed the district court’s judgment in most respects and found that “[i]n giving its charge the trial court adhered to the decision and language of Vaca.” Furthermore, it found this to be the “correct selection of [the] standards and a proper statement of the applicable law.” The union had pressed the circuit court to apply the narrower bad faith standard involving medical treatment, hospitalization, and surgery) and Union Pacific revealed that the company had not received a doctor’s statement supporting his request. Notwithstanding Union Pacific’s assurance on January 25, 1971, that it would await arrival of the statement before reviewing his request, Foust was discharged on February 3, 1971. Foust’s attorney failed to persuade Union Pacific to reconsider and, thereafter, he requested the IBEW district chairman to initiate grievance proceedings on his client’s behalf.

34. Although he knew that the 60-day deadline was imminent, IBEW District Chairman Jones did not prepare a grievance letter. Instead, he contacted IBEW General Chairman Winiński in Omaha, Nebraska. Winiński insisted Foust himself request the union’s assistance in writing and drafted a letter stating that the union could not “handle” the claim until it received such authorization. Winiński neither phoned Foust nor mailed the letter to him, but mailed it to Jones who signed the letter and forwarded it to Foust, 61 days after the discharge. Jones filed the grievance before receiving the written authorization but two days after the time had expired. The claim form had been prepared by Winiński in Omaha, Nebraska, sent to Jones in Rawlins, Wyoming, and then mailed to the railroad back in Omaha. Id. at 44.

35. Foust v. IBEW, 572 F.2d 710, 714 (1978), aff’d, 442 U.S. 42 (1979). “[The terms] arbitrary and capricious were said to be synonymous and were defined as an act done without adequate principle or an act not done according to reason and judgment. Arbitrary and capricious were defined as requiring judgment on the basis of whether the act complained of is reasonable or unreasonable under the circumstances.” 572 F.2d at 710.

36. 572 F.2d at 719. The circuit court remanded the case for consideration of whether the punitive damages award was excessive.

37. Id. at 715.

38. Id.
appearing in dictum in *Lockridge*, but the court, citing *Hines*, properly rejected the union’s argument.

In upholding the district court in *Foust*, the Tenth Circuit stated that “the perfunctory manner of handling the claim was sufficient justification for the submission of the issue of breach of duty to the jury.” The court found no excuse for the union’s insistence upon a personal authorization from the grievant before it would proceed with the grievance or for the “needless correspondence back and forth.” The court also noted that the union’s conduct in handling a previous grievance for *Foust* could serve to give its subsequent failure to pursue the present claim an arbitrary and unreasonable character.

In its petition for certiorari, the union presented both the standard of care-perfunctory processing issue and the punitive damages issue, but the Supreme Court declined to review the lower court’s formulation of the standard of fair representation. Accordingly, Justice Marshall, writing for a majority of five, directly addressed only the damages question, adopting a per se rule denying punitive damages in unfair representation cases.

Because the question was not before the Court, there was no holding on the fair representation issue. However, in a concurring opinion, Justice Blackmun, joined by the Chief Justice and Justices Rehnquist and Stevens, protested the majority’s adoption of a

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39. Id. See notes 18-22 & accompanying text supra.
40. 572 F.2d at 715. See notes 23-27 & accompanying text supra.
41. 572 F.2d at 716. For legal support, the court of appeals cited Hughes v. International Bhd. of Teamsters, Local 683, 554 F.2d 365 (9th Cir. 1977); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Griffin v. International Union, UAW, 469 F.2d 181 (4th Cir. 1972); and De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970). A review of the decisions reveals that the frequency of plaintiffs’ recoveries is greater in jury trials. Often, the most liberal opinions are those upholding jury verdicts. This may help to explain, in part, the divergence between the courts and the narrower standard promoted by the NLRB.
42. 572 F.2d at 715. See note 33 supra.
43. 572 F.2d at 716. *Foust* had made an earlier effort to file a claim for wages while he was attending physical therapy sessions. The union apparently believed that this claim was cognizable under the Federal Employees’ Liability Act but made little effort to clarify the matter. But see Hughes v. International Bhd. of Teamsters, Local 683, 554 F.2d 365, 367 n.1 (9th Cir. 1977).
45. 442 U.S. at 52. “Because general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance.” Id.
per se rule. Justice Blackmun stated that adopting such a rule was "manifestly unnecessary"\textsuperscript{46} because the record provided a narrower ground for decision in that

[t]he union's conduct here betrayed nothing more than negligence, and thus presented an inappropriate occasion for awarding punitive damages under any formula. In order to dispose of this case, therefore, the Court need hold only that the trial judge erred as a matter of law in submitting the punitive damages issue to the jury . . . .\textsuperscript{47}

This statement raises a major issue as to the scope of the duty of fair representation. For if, as suggested, the punitive damages claim was struck down because the record indicated that the union's conduct was only negligent, Justice Blackmun's statement would nevertheless imply that at least the four concurring Justices might allow the compensatory damages award to stand as a negligent breach of the duty of fair representation.

Even though the Supreme Court and most lower courts have yet to hold that negligence alone would suffice to establish a breach of the duty,\textsuperscript{48} the significance of Justice Blackmun's language should not be overlooked. The tendency towards an increasingly expansive interpretation of the standard of care in some circuits, and arguably by the Supreme Court itself,\textsuperscript{49} has been the focus of much concern;\textsuperscript{50} it is therefore reasonable to presume that Justice Blackmun was cognizant of the import of the language he used. The underlying implication in his remarks, that negligent conduct may be sufficient to constitute a breach of the duty of fair representation, was not elaborated on in Justice Blackmun's concurring opinion and the majority opinion neither refuted nor directly addressed the issue.\textsuperscript{51}

Whether or not the Court intended to imply the possibility of a negligence standard, this underlying implication has sparked a

\textsuperscript{46} Id. at 60 (Blackmun, J., concurring).

\textsuperscript{47} Id. at 53.

\textsuperscript{48} See note 12 supra.


\textsuperscript{51} Justice Marshall, for the Court, stated in response only that "[w]e are . . . unwilling to substitute our judgment for that of the jury, District Court, and Court of Appeals on this essentially evidentiary question." 442 U.S. at 46 n.7. The jury had been instructed that it could award punitive damages if it found the union had acted "maliciously, or wantonly, or oppressively." Id.
debate on the question, heightening the existing confusion over the scope of the duty of fair representation. After Foust, there is an even greater need for a clarification of the scope of the obligation and, specifically, an examination of whether negligence may be an appropriate standard.

The mere fact that four Justices were willing to characterize the union's conduct in Foust as negligent does not, of course, mean that these Justices would abandon Vaca and its progeny in favor of a broad negligence standard. Furthermore, it is not by any means implicit from pre-Foust fair representation cases that the Court would reexamine the fundamental basis of its view of the relationship of the union and its members by imposing on the union the higher standard of care associated with a fiduciary relationship. However, a negligence standard may be applied in cases such as Foust without disturbing the policy underlying the Court's decisions by applying a negligence standard only in prescribed instances of procedural misconduct.

Ruzicka v. General Motors Corp.

The facts in Ruzicka v. General Motors Corp. closely parallel the facts in Foust, and an examination and comparison of the two cases will illustrate the use of a negligence standard in a narrow set of circumstances. Ruzicka, an active union member and employee of nearly eleven years, was discharged on March 31, 1970, for being intoxicated on the job and using threatening and abusive language towards his supervisors. He filed a grievance claiming that the discharge was an "unduly harsh" penalty. Having lost in the early stages of the grievance procedure, the union filed a "notice of un-

53. See notes 13-16 & accompanying text supra.
54. In the past, the Court has analogized the relationship of the union and its members to that of a legislature representing its constituents, rather than to the higher degree of responsibility owed by an attorney to a client. "For the [bargaining] representative is clothed with power not unlike that of a legislature." Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944). A union, like a legislature, is selected by a majority of its constituents. In addition, it acts as the representative of all, including those who opposed its election or policies. Cf. Schatzki, Majority Rule, Exclusive Representation, and the Interests of the Individual Workers: Should Exclusivity be Abolished?, 123 U. Pa. L. Rev. 897, 901-02 (1975) (author argues the legislative analogy is a limited one). See also Summers, The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation?, 126 U. Pa. L. Rev. 251, 276 (1977) [hereinafter cited as Summers].
55. 523 F.2d 306 (6th Cir. 1975).
adjusted grievance.” To invoke arbitration, however, the collective agreement required the union to file a “statement of unadjusted grievance” with the company simultaneous with the filing of the “notice of unadjusted grievance”. Local union officials discussed the grievance amongst themselves and with management personnel but “inexplicably neglected” to file the required statement despite having twice sought and received extensions of the filing deadline. Once time limits for filing the statement had passed, the company disclaimed any further obligation under the agreement.

The Sixth Circuit, in what has become a widely debated decision, determined that “[s]uch negligent handling of the grievance, unrelated as it was to the merits of [the grievant’s] case, amounts to unfair representation.” In an apparent effort to reach a result consistent with Vaca, the court alternately describes the “negligent failing to take a basic and required step,” when no decision is made on the merit of an individual’s grievance, as “arbitrary and perfunctory,” “arbitrar[y],” or simply “perfunctory” handling. In denying a petition for rehearing en banc, the same judges commented that “[o]ur opinion in this action speaks to a narrow range of cases in which unexplained union inaction, amounting to arbitrary treatment, has barred an employee from access to an established union-management apparatus for resolving grievances.”

Although the Tenth Circuit did not analyze the facts in Foust by applying a simple negligence standard, the record in the case is easily susceptible to such an analysis. Comparing the records in Foust and Ruzicka brings their similarities into sharper focus. In both cases the underlying grievance was a claim of wrongful discharge. Additionally, while the union’s inaction in Ruzicka occurred just prior to arbitration and the wrongful conduct in Foust occurred at the preliminary filing stages of the grievance process, both employees were effectively barred from adjudicating their claims in the employer and union controlled grievance procedure.

56. Id. at 308.
57. Id. at 310.
58. Id.
59. Id.
60. Ruzicka v. General Motors Corp., 528 F.2d 912, 913 (6th Cir. 1975) (denying a petition for rehearing en banc). If a union has an affirmative obligation to investigate the merit of an employee’s grievance as it did in Vaca v. Sipes, 386 U.S. 171, 194 (1967), see notes 136-42 & accompanying text infra, then the union’s inaction in Ruzicka may legitimately be seen as a breach of the duty under Vaca. See 10 SUFFOLK U.L. REV. 642, 653 (1976). See also Swedo, supra note 17, at 10-11.
In neither case was the union's failure to proceed based on any consideration of the merits of the grievance. The union's error in both cases was its inexplicable failure to perform a basic ministerial function—filing a grievance within contractually specified time limits.

Although the *Ruzicka* court described the union's conduct as negligent, it deliberately and repeatedly connected its characterization of negligence with "arbitrary" and "perfunctory" conduct. The court, however, did not make clear the relationship between negligence and arbitrary or perfunctory conduct. It thus is unclear whether *Ruzicka* broadens the *Vaca* standard or merely clarifies it.

The terms "arbitrary" and "perfunctory" have never been defined with such precision that they provide a practical guide to the duty of fair representation. In fact, they often appear to be as amorphous and elastic as the court or jury deems the equities of the case to require. This imprecise standard provides little uniformity and guidance to the union and risks undue court interference in the grievance process.

Courts generally have not held that a union's conduct need be intentional to be "arbitrary." Decisions typically define "arbitrary" conduct as lacking in a rational basis, "willful and unreasoning," or "without adequate determining principle." At least

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61. See note 136 infra.
62. In *Ruzicka* the error was termed "unexplained union inaction," 528 F.2d at 913; in *Foust* the error was deemed inexcusable, 572 F.2d at 715.
63. 523 F.2d at 310. See text accompanying note 58 supra.
64. 523 F.2d at 310. See notes 59-60 & accompanying text supra. The court further emphasized this point by stating that the union's conduct "amount[ed] to arbitrary treatment." 528 F.2d at 913.
67. See generally *Clark*, supra note 5, at 1170. "By elaborating on the 'perfunctory' standard in *Vaca*, courts can go as far as necessary to assure that unions represent individuals fairly." Id. See note 30 & accompanying text supra.
68. See *Robesky* v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978); cf. *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 (1st Cir. 1970) (holding the inexplicable failure of a union to investigate a series of grievances was arbitrary). But see *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 315 (6th Cir. 1975) (McCree, J., concurring).
71. Id. Black's Law Dictionary defines "arbitrary" to mean: "[w]ithout adequate de-
two of these definitions of arbitrary conduct could include negligent action or inaction. The same holds true for "perfunctory conduct." The Random House Dictionary, for instance, defines perfunctory as that "performed merely as an uninteresting or routine duty; hasty and superficial; ... negligent." 72

Two examples illustrate the difficulties in applying the terms "arbitrary" and "perfunctory" to union conduct. In Griffin v. International Union, UAW,73 the Fourth Circuit determined that the union had handled the employee's discharge grievance in a perfunctory manner because it filed the employee's claim with the management official with whom the employee had fought when the union could have filed with someone else. Needless to say, the grievance was denied. Although the court noted that negligent conduct was not a breach of the duty,74 the record actually indicates the negligent handling of a procedural matter.

Similarly, in De Arroyo v. Sindicato De Trabajadores Packinghouse,75 a union was held liable for the "perfunctory" processing of a grievance when the facts could have supported a finding based on negligence. In De Arroyo, the union failed to investigate or make any decision on the merits of six discharged employees' grievances because of a good faith but "inexplicable" belief that a pending NLRB proceeding would apply to their situations.76 In these two cases, as in Ruzicka and Foust, the error was procedural—failure to give adequate attention to the grievance—and not based on a faulty decision on the substantive merits.77

terminating principles; ... not done or acting according to reason or judgment; ... not governed by any fixed rules or standard." Black's Law Dictionary 96 (5th ed. 1979). "[A] decision to be nonarbitrary must be (1) based upon relevant, permissible union factors which excludes [sic] the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees." Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976) (footnotes omitted).

72. The Random House Dictionary of the English Language 1070 (unabr. ed. 1973) (emphasis added). In Ethier v. United States Postal Serv., 580 F.2d 733 (8th Cir. 1979), the court defined "perfunctory" as "unconcerned, unsolicitous or indifferent." Id. at 736.
73. 469 F.2d 181 (4th Cir. 1972).
74. Id. at 183.
75. 425 F.2d 281 (1st Cir. 1970).
76. Id. at 284. The NLRB action concerned the company's attempt to subcontract work, while the discharges at issue resulted from automation. The distinction should have been apparent because the union had recently processed another employee's grievance arising from dismissal because of automation. Id. at 285.
77. The Ruzicka court pointed out that De Arroyo presented a "parallel" situation to the case before it, 523 F.2d at 310 n.1, although it did not attempt to analyze the First
Accepting that unfair representation is not limited to intentional conduct, a negligence standard may be useful in providing greater definition to the vagaries of the Vaca standard. However, its application must be specifically and narrowly confined. The Circuit's opinion as a decision based on negligence. Both Griffin and De Arroyo were cited by the circuit courts in Ruzicka and Foust.

78. See Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978); cf. De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970) (unintentional acts may be arbitrary if they reflect reckless disregard for employee rights).

79. The district courts in the Sixth Circuit generally have limited Ruzicka's application to cases of procedural negligence and interpreted the case as a narrow holding providing greater definition to the word "arbitrary" and "perfunctory."

In Perry v. Chrysler Corp., 101 L.R.R.M. 2681 (E.D. Mich. 1978), the court found that the union did not breach its duty when it rejected, without consulting the grievant, management's settlement offer to reinstate an employee. The grievant admittedly was seeking treatment for a drinking problem, and the settlement offer was contingent upon his participation in an alcohol abuse rehabilitation program. The court distinguished Ruzicka, noting that the negligence standard applies only with respect to purely ministerial functions. Id. at 2685. In Perry, however, the court reasoned that the union had made a determination of the merits of the grievance and exercised its discretion in rejecting a settlement offer it considered not to be in the best interests of the membership. Id. at 2684.

In Kleban v. Hygrade Food Corp., 102 L.R.R.M. 2773 (E.D. Mich. 1979), the district court interpreted Ruzicka as fitting into a somewhat broader class of cases. Union negligence was said to amount to arbitrary treatment when it prevents the grievance and collective bargaining systems from working and thereby deprives an employee of his or her right to be represented. See id. at 2778. While the district court's view in Kleban is broader than that suggested in Perry, its interpretation does place Ruzicka within the standard of Vaca and attempts to place some limits on the Sixth Circuit's 1978 decision in Milstead v. International Bhd. of Teamsters, Local 957, 580 F.2d 232 (6th Cir. 1978). In Milstead, the union's ignorance of the applicable contract provisions in preparation for and presentation of a grievance hearing amounted to a total failure of the grievance process for the discharged employee.

In Ruggirello v. Ford Motor Co., 411 F. Supp. 758 (E.D. Mich. 1976), the court focused on both the ministerial duties of the union and the deprivation of employee rights. The employee in Ruggirello relied on the union when it told him that his discharge grievance was meritorious and that it would pursue it. The union, however, failed to file the grievance formally. The court cited Ruzicka and found the union's negligent conduct amounted to arbitrariness: "If a union breaches its duty of fair representation in failing to process a grievance before determining its merit, it is certainly liable for failing to initiate a grievance after acknowledging its merit." Id. at 760 (emphasis added). This possible extension of Ruzicka has not been followed by other courts.

The notion that ordinary negligence could be a breach of the duty of fair representation was specifically rejected in Savel v. Detroit News, 435 F. Supp. 329 (E.D. Mich. 1977). There the court distinguished the case before it from Ruzicka, emphasizing that in Ruzicka the union had made no determination of the merit of the employee's grievance. The district court found Ruzicka to be within the "substance" of the Vaca standard of arbitrariness and perfunctoriness. The union's conduct in Ruzicka was interpreted by the court in Savel as "something more than ordinary negligence and... more akin to gross negligence." Id. at 384. Accord, Barhitte v. Kroger Co., 99 L.R.R.M. 2653 (W.D. Mich. 1978). Gross negligence amounts to arbitrariness when it forecloses the employee's grievance from further considera-
courts should not be in a position of second-guessing union decisionmaking, for this would be contrary to established federal labor policy favoring the collective authority of the union.\textsuperscript{80} The "negligence" referred to in \textit{Ruzicka} and \textit{Foust} thus should be seen as a limited clarification of the \textit{Vaca} standard\textsuperscript{81} and accordingly should be applied in a narrow context.

The Arguments Over a Negligence Standard in Unfair Representation Cases

With the exception of the Sixth Circuit and possibly the Ninth Circuit,\textsuperscript{82} both the courts and the NLRB agree that an across-the-board negligence standard is inappropriate in unfair representation cases.\textsuperscript{83} It generally is recognized that a simple negligence stan-

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\item \textsuperscript{80} See notes 12-25 & accompanying text \textit{supra}.
\item \textsuperscript{81} See \textit{Swedo}, \textit{supra} note 17, at 9-11. Judge McCree's suggestion, contained in his concurrence in \textit{Ruzicka}, of a limited negligence standard independent of the \textit{Vaca} terminology, 523 F.2d at 315-16 (McCree, J., concurring), has found little support as the courts continue to adhere to \textit{Vaca}'s catchwords. For analytical clarity, however, Judge McCree's premise is appealing. He stated that the terms "arbitrary" and "perfunctory" reflect only intentional conduct; therefore, situations of unintentional conduct could be analyzed by using a limited negligence standard. Judge McCree parted company with the majority's attempts to link negligence with \textit{Vaca}'s terminology. He argued that "[a]rbitrary and perfunctory are adjectives characterizing intentional conduct that is capricious or superficial." \textit{Id.} at 315. Judge McCree described negligent conduct as unintentional. He found that negligence could itself be a breach of the duty of fair representation in situations like \textit{Ruzicka}. For example, Judge McCree suggests that a negligent failure to meet procedural filing requirements absent "a good faith judgment for a lawful reason that it should not file" would render a union liable for breach of its duty. 523 F.2d at 316. A union's decision on whether to pursue a particular course of action may be based on any lawful reason including financial considerations, interests of the majority and similar factors. See note 79 & accompanying text \textit{supra}; notes 82-85 & accompanying text \textit{infra}. Despite the analytical appeal of Judge McCree's dichotomy, neither case law nor common definitions require such a firm distinction. This is especially true with respect to the standard of "perfunctoriness." See notes 72-77 & accompanying text \textit{supra}.
\item \textsuperscript{82} In \textit{Robesky v. Qantas Empire Airways Ltd.}, 573 F.2d 1082, 1090 (9th Cir. 1978), the court arguably applied a standard of gross negligence.
\item \textsuperscript{83} See, e.g., \textit{Franklin v. Southern Pac Transp. Co.}, 593 F.2d 899 (9th Cir. 1979) (negligence in failing to present certain medical records to arbitration board not a breach); \textit{Coe v. United Rubber Workers}, 571 F.2d 1349 (5th Cir. 1978) (negligence in misnumbering employee's claim not a breach); \textit{Dente v. International Organization of Masters, Local 90}, 492 F.2d 10 (9th Cir. 1973), \textit{cert. denied}, 417 U.S. 910 (1974) (negligent delay in filing a griev-
standard, although appealing in its deference to the legitimate interests of the wronged individual, would weaken the union’s authority and thereby insert an element of intolerable uncertainty into intra-union and labor-management relations. Nonetheless, the difficulty of meeting the burden of proof imposed by Vaca and the relative paucity of actual recoveries under the Vaca standard have motivated some commentators to argue in favor of adopting negligence as the appropriate standard of care.

Advocates of a negligence standard point out that under the doctrine of the finality of the grievance arbitration procedure, negligent representation or handling may be as detrimental to the employee as intentional or discriminatory conduct. They argue that the union’s voluntarily assuming and often intentionally seeking the authority to act as the employees’ exclusive representative has placed it in the position of a fiduciary representing the employees; the union, therefore, owes an affirmative duty to exercise reasonable care in protecting individual interests.

Although the notion of a fiduciary relationship is not novel, the commentators argue that the Vaca standard has not been applied so as to give actual effect to the concept. They criticize the analogy made between the relationship of the union and its members and that of the legislature and its constituents, and argue that the union should be held responsible for exercising reasonable care—the standard of care that

84. See notes 101-02 & accompanying text infra. In a suit under § 301 of the LMRA, 29 U.S.C. § 185 (1976), an employee must prove a breach of the duty of fair representation by the union before he or she can recover from the employer. Vaca v. Sipes, 386 U.S. 171, 186 (1967).


86. Flynn & Higgins, supra note 85. See also Summers, supra note 54, at 276.

87. Flynn & Higgins, supra note 85, at 1148-52; Summers, supra note 54, at 276-78.

88. The fiduciary relationship concept was discussed in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

89. See, e.g., Flynn & Higgins, supra note 85, at 1148-52.

90. See note 54 supra.
an attorney must exercise towards a client.91 Furthermore, they find it inconsistent with federal labor policy to allow the employer the windfall of being insulated from liability because of the union’s negligence. This not only gives the company an unintended benefit accruing from the union’s exclusive bargaining status, but leaves the employee, wronged by both the employer and the union, without a remedy.92 “Whatever can be said for sacrificing the minority’s interests for the good of all, or at least for the majority, the idea makes no sense when the issue is what should be done regarding a single individual’s grievance with his or her employer."93

These arguments fundamentally reject the policy enunciated by Professor Cox and embraced by the Supreme Court in Vaca.94 In its place these commentators urge that the “courts should be clear in declaring that protection of employees damaged or discharged in violation of the collective bargaining contract is a primary function of the union."95 Although recognizing that a broad reasonable care standard “places a substantial burden on the union,”96 these commentators reason that the burden is justified by recognizing the special character of the relationship between a union and its members and by emphasizing the individual’s contractual rights.

The commentators who advocate a negligence standard further maintain that when a union’s negligence costs an employee the opportunity to seek redress for his or her grievance, the union “does not demonstrate its effectiveness to other workers."97 In such situations, predominantly discharge cases, “[t]he policy of maintaining equality of bargaining power between the union and company, which is a stated objective of the National Labor Relations Act, is undermined when employees lose respect for their union and seek to vindicate their rights on their own."98 Although this

91. See note 54 supra.
92. Dinges, supra note 5, at 1783-84; Summers, supra note 54, at 278. See note 84 supra.
94. See notes 13-17 & accompanying text supra.
96. Summers, supra note 54, at 277.
97. Dinges, supra note 5, at 1783.
98. Id. (footnotes omitted).
argument has both a logical and moral appeal, it assumes that the membership of a union will have a collective reaction to the mishandling of an individual’s grievance. In reality, however, such a response would only be likely to occur in situations of particularly invidious actions—actions which would probably constitute a breach of the duty even under a conservative application of Vaca.

These policy approaches, appealing in the abstract, ignore some of the basic realities of labor relations practice, as well as countervailing administrative, political, and economic considerations. Administration and enforcement of the collective agreement typically are conducted either by the local shop steward or business agent. Quite often the job of shop steward is not full-time and the holder of the position has received little, if any, formal training. To expect the grievance process to be error free or to submit it to the kind of scrutiny to which a trained attorney is subject in his or her preparation for and conduct of a trial is therefore unrealistic and inconsistent with the policies underlying the NLRA. The purpose of the Act is primarily to facilitate collective bargaining and thereby promote industrial peace. The decision to protect the strength of the union in relation to the employer by limiting the scope of the union’s obligation and liability under the doctrine of fair representation is designed to effectuate this policy of the Act.

A union is by nature a political majoritarian organization. Although undoubtedly the interest of an individual or a minority will occasionally be sacrificed to that of the majority, the union official needs to appear to be an effective advocate for all members of the bargaining unit. This political pressure on union leadership should help to ensure that an individual’s minority interest is protected.

99. Irving, supra note 5, at D-4. General Counsel Irving quotes President of the Machinists Union, Bill Winpisinger: “Most of the positions that have to be filled in a union . . . are volunteer in nature. They are done out of a sense of duty. The people who serve in these jobs are not professionals. They are plain everyday working people. For example, the financial secretaries who are elected to handle local union funds are not accountants or bookkeepers. Many do their union work over the kitchen table at night, after pulling a full day's shift on the job. In most cases, locally elected officers do union jobs for little or no reward.” INDUSTRIAL AND LABOR RELATIONS REPORT 9 (Fall 1978).


102. See notes 13-17 & accompanying text supra.
without imposing a broad negligence standard on the union. In practice, members of the bargaining unit must be content with seeking a change in union stewards or officers to express their dissatisfaction in the handling of their grievances or the union's overall performance. Although this may appear to be more a theoretical explanation than an actual solution for the aggrieved individual whose complaint will not likely be directly rectified, dissatisfaction should be neither the test nor the excuse for imposing union liability.

A union's activity, especially at the local level, is also restricted by economic considerations. For instance, the union must always be conscious of maintaining sufficient financial reserves to police the contract through the grievance procedure, to maintain an adequate strike fund, and to prepare for other necessities. Because of these considerations, the interest of the majority must always be paramount in the union decisionmaker's mind. The vulnerability of the union treasury is a significant and legitimate reason to limit the scope of a union's liability for breach of the duty of fair representation.\(^\text{103}\)

In the vast majority of cases, and as a general matter of labor policy, it is undesirable to promote judicial interference with regulation of union affairs. Labor unions have already become burdensomely regulated and scrutinized in every facet of their operations by government agencies and the courts. As a general rule, absent evidence of improper considerations, the substantive decisions of the union representatives should be deferred to in the handling of grievances entrusted to their care without being second guessed by a judge or jury.\(^\text{104}\)

Nevertheless a more stringent standard of care is not inappropriate in all circumstances. Compelling reasons may demand a greater obligation in a very limited area—that of procedural malfeasance.

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103. The need to protect the financial viability of unions was emphasized in IBEW v. Foust, 442 U.S. 42, 48-52 (1979). See Irving, supra note 5, at D-1 n.4. But see Dinges, supra note 5, at 1784-85 (author argues that it is an improper exercise of union discretion to refuse to prosecute a discharge grievance because of lack of funds).

104. Although it still may be argued that union strength would be better promoted by spontaneous rank-and-file support, rather than by judicial insulation from liability, the argument is unpersuasive in light of the practical pressures a union faces. See note 99 supra.
Distinctions Based Upon Context and Conduct

Although the courts have purported to use the same "arbitrary, discriminatory, or bad faith" standard in each type of fair representation case that has arisen, analysis reveals that they actually subject different situations to different levels of scrutiny. Most particularly, in the discharge context, when procedural errors in conduct are alleged, the courts have held the union to a greater standard of care. While this same pattern is somewhat discernible from the NLRB's treatment of the cases, the Board generally

105. In an effort to "clarify the scope of the obligation" before the Board, then General Counsel John S. Irving, whose remarks are particularly significant because the Board cannot act on a case until the General Counsel has issued a complaint, circulated a memorandum dividing fair representation cases into four categories. Irving, supra note 5, at D-1. The four categories are: (1) Instances of intentional misconduct attributable to improper motives or fraud. See id at D-2; (2) Circumstances where the union's conduct is wholly arbitrary, that is, where there is no rational basis upon which the union's conduct can be explained. Id; (3) Certain instances of such gross negligence as to constitute reckless disregard of the interests of the employee. Id. at D-2 to -3; (4) Instances where the union, after deciding to grieve on behalf of the employee, undercuts the employee's grievance without some reasonable or judgmental explanation. Id. at D-3 (citing cases). Most of the cases in this category would fall within the presentation and preparation categories. See notes 126-35 & accompanying text infra.

The guidance afforded by the former General Counsel's memorandum is particularly ambiguous in the third delineated category. Here, despite stating that he would not "add further confusion by adding new word-tests," Irving, supra note 5, at D-1, General Counsel Irving proposed that a line be drawn between instances of simple negligence and gross negligence. However, he failed to provide any guidance as to how to draw this "admittedly difficult" line. In fact, he suggested that Regional Directors submit such difficult cases to the General Counsel for advice. Id. at D-3. In contrast, the notion in tort law of distinguishing between degrees of negligence generally has been rejected as vague and impracticable. See W. Prosser, HANDBOOK OF THE LAW OF TORTS § 34, at 182 (4th ed. 1971).

The former General Counsel does cite the Sixth and Ninth Circuits for their discussions of gross negligence in Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), and Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978), although noting he is not bound by these decisions. These decisions, however, do not really clarify the distinction between gross and simple negligence. For example, the Robesky court miscites Ruzicka in that the latter decision made no reference to "gross negligence." 573 F.2d at 1090.

Court decisions suggest that the negligent handling of a grievance may, at least in some circumstances, constitute a breach of the duty of fair representation. See notes 82, 136-48 & accompanying text supra. Therefore a negligence or liberal standard should not be rejected as being extreme. The NLRB's special expertise in this area is doubtful; the Board should pay closer attention to court decisions. See Peck, The Administrative Procedure Act and the NLRB General Counsel's Memorandum on Fair Representation Cases: Invalid Rulemaking?, 31 LAB. L.J. 76, 81-82 (1980). Furthermore, it is difficult to determine how General Counsel Irving intended to develop a gross negligence standard. If the test is to apply only to the "really egregious case," Irving Address, supra note 5, at D-5, then it is not clear how the analysis will differ from the instances of arbitrary or improperly motivated conduct as previously defined. In addition, merely suggesting a negligence or recklessness
has applied a lesser standard of care, requiring some evidence of bad faith, hostility, or willfulness in order to find a breach of the duty of fair representation.\textsuperscript{106}

Unfair representation suits arise in primarily three contexts: contract negotiations, seniority disputes, and wrongful discharges. This division proves useful in analyzing which standard is to be

standard where the parameters of such standards are undefined may result in an unwarranted expansion of the duty that is inconsistent with the Board's generally narrow view. This can only add to the confusion over the proper standard to be applied in cases alleging a breach of the duty of fair representation.

If, however, the application of a negligence standard is strictly limited, then it may constitute the kind of clarification of the doctrine that is needed and provide a mechanism by which the Board can uniformly and justifiably respond to the complaints of unfairly represented workers. At present, however, Irving's proposed negligence category does not fit well with the Board's narrow approach towards fair representation cases, particularly with the expressed views of Chairman Fanning and Member Truesdale. See note 106 infra.

The Board's general predilection for requiring some evidence of bad faith or willfulness has somewhat obscured the "wholly arbitrary" and "gross negligence" categories. See, e.g., United Steelworkers, Local No. 7748, 246 N.L.R.B. No. 6 (1979); United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 60, 242 N.L.R.B. No. 173 (1979); Glass Bottle Blowers Ass'n, Local No. 106, 240 N.L.R.B. No. 29 (1979); ITT Arctic Servs., Inc., 238 N.L.R.B. No. 14 (1978); Irving Address, supra note 5, at D-4. However, Board decisions may nonetheless be examined within the delineated contextual categories. See notes 107-48 & accompanying text infra.

General Counsel Irving made it clear that the purpose of his July 9, 1979, memorandum was to define the scope of the duty of fair representation more narrowly. He was concerned that "[t]he absence of clear standards and the extremely broad approach taken by some courts have operated to adversely affect national labor policy." Irving Address, supra note 5, at D-1. A similar concern over the ambiguity and breadth of the doctrine had provoked the following statements from two members of the NLRB, in which they also noted their support for a narrower standard. At present, however, Irving's proposed negligence category does not fit well with the Board's narrow approach towards fair representation cases, particularly with the expressed views of Chairman Fanning and Member Truesdale. See note 106 infra.


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applied.

The union is afforded wider latitude in negotiating the collective bargaining agreement than in its subsequent enforcement or administration of the agreement. In the area of contract negotiations, the policies of the NLRA to promote collective bargaining and to achieve industrial peace and stability justify the greatest subordination of individual interests to the achievement of the collective interest. It is uniformly agreed that a negligence standard would be inappropriate in this area because the collective interests of the bargaining unit are most clearly superior to those of the individual.

Seniority disputes may arise in the context of contract negotiation or administration. These cases are often particularly difficult for the union because it is often caught between the competing interests of employees within the bargaining unit. Notwithstanding the fact that the employee may have strong accrued interests, the nature of the grievance in this situation contrasts with that in the discharge situation because a union that mishandles a seniority dispute may have a later chance to remedy the aggrieved employee’s claim. In addition, because the employee generally is still a member of the bargaining unit, he or she would have at least the indirect recourse of seeking a change in the union’s locally elected representatives. Although some commentators advocate making the union answerable to a greater standard of care because of its special fiduciary relationship, the courts have not subjected union discretion in seniority disputes to the greater degree


109. Because of the agreement that a negligence standard would be inappropriate in this area, the following discussion will focus on issues arising in the course of contract administration.

110. See Humphrey v. Moore, 375 U.S. 335 (1964); Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976). See also Milstead v. International Bhd. of Teamsters, Local 967, 580 F.2d 232 (6th Cir. 1978); Augspurger v. Brotherhood of Locomotive Eng’rs, 510 F.2d 883 (8th Cir. 1975); Denver Stereotypers v. NLRB, 104 L.R.R.M. 2656 (10th Cir. 1980).

111. See Dinges, supra note 5, at 1783.

112. Irving Address, supra note 5, at D-2.

113. See Flynn & Higgins, supra note 85, at 1143-52; Summers, supra note 54, at 276.
The underlying grievance in the vast majority of duty of fair representation cases is for wrongful discharge. The severe impact of a discharge on an employee is so significant that it is commonly referred to as the "industrial equivalent of capital punishment." Many courts and commentators have therefore distinguished the discharge grievance as being inherently more serious than others. A union's failure to undertake basic and necessary steps to represent the employee effectively "locks the jailhouse door" for the dischargee. Consequently, a greater degree of scrutiny of union conduct and an emphasis on individual rights is often exercised in these situations. Although many of the commentators urging the adoption of a negligence standard would have it applied far beyond the narrow confines suggested in this Note, they correctly emphasize the importance of the discharge grievance in formulating their proposals.

Even in discharge cases, however, the courts generally have not held the union to a greater standard of care where a question of contract interpretation was involved, where a decision had been made on the merits of the grievance, or in cases challenging the adequacy of representation at hearings. But a greater standard of care has been applied in wrongful discharge cases in which

114. See, e.g., Ryan v. New York Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451 (2d Cir. 1979); NLRB v. General Truck Drivers, Local 315, 545 F.2d 1173 (9th Cir. 1976); Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975).
115. See, e.g., Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972); Curth v. Faraday, Inc., 401 F. Supp. 678, 681 (E.D. Mich. 1975); Dinges, supra note 5, at 1783-86; Flynn & Higgins, supra note 85, at 1146-47. The impact of a discharge arises in part from the inevitable disruption of the worker's personal life, the unforeseen and immediate loss of income, and the investment lost in seniority and pension rights.
116. Dinges, supra note 5, at 1783.
117. Professor Dinges, for instance, would "require that unions establish a compelling union reason before they may refuse to take a discharge grievance to arbitration." Dinges, supra note 5, at 1786. Professors Flynn and Higgins state that "[t]he remediless employee, wrongfully discharged because of union negligence in the handling of his discharge grievance, even when the grievance can be proved meritorious, presents courts with a clear example of institutional failure ripe for correction." Flynn & Higgins, supra note 85, at 1146-47 (footnote omitted). See also Summers, supra note 54, at 278.
118. See, e.g., Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir. 1979). See note 125 & accompanying text infra.
the union allegedly failed to perform a basic procedural requirement.  

The union action or inaction challenged in cases alleging breach of the duty of fair representation in handling discharge grievances can be separated into three general categories of conduct: substantive errors, errors in the preparation or presentation of grievances, and procedural errors. Only in cases involving procedural errors have the unions been held to a negligence standard of care.

Allegations that the union has committed substantive errors in the evaluation of the grievant's case arise relatively infrequently, and recovery is rare absent evidence of improper motivation; the courts are reluctant to second guess the union on questions of contract interpretation. A union's conduct will be subject to examination only upon a showing that the union's position is not supported by any rational interpretation of the contract or that it was motivated by discrimination or bad faith. The standard of care is narrowly applied because holding the union to a greater standard would encourage direct judicial interference with union decisionmaking.

The second category of cases involves alleged error in the preparation or presentation of the grievance at a hearing. In these cases, negligence or poor judgment generally will not suffice to establish a breach of the duty of fair representation. It is recog-


122. See note 125 & accompanying text infra.

123. See notes 126-35 & accompanying text infra.

124. See notes 136-48 & accompanying text infra.

125. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967); Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir. 1979); Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977); Bazarte v. United Transp. Union, 429 F.2d 888 (3d Cir. 1970); Savel v. Detroit News, 435 F. Supp. 329 (E.D. Mich. 1977); Perry v. Chrysler Corp., 101 L.R.R.M. 2681 (E.D. Mich. 1978). This Note does not cover these cases further because a negligence standard would be inappropriate, and such a standard has not been suggested by the courts. See notes 99-104 & accompanying text supra.

126. See, e.g., Franklin v. Southern Pac. Transp. Co., 593 F.2d 899 (9th Cir. 1979); Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975); Bruno v. United
nized that arbitration hearings are not judicial proceedings and need not be conducted as such; the union is not required to handle the matter with the expertise of a trial lawyer.127 Because neither lawyers nor strict adherence to rules of evidence are required in these hearings, errors in tactics and procedure are usually excused.128 Nevertheless, both the courts and the Board recognize that once a union decides to pursue a grievance to arbitration, it has an affirmative obligation to advocate the employee’s position “fully and fairly and to function as her advocate.”129 This obligation forms a firmer basis for liability in this area. However, the Board tends to emphasize any evidence of hostility or other improper motives in finding that the union’s conduct in preparing or presenting a grievance has been “arbitrary” or “perfunctory.”130

In general, the courts also are reluctant to suggest in hindsight what the union representative “should have argued” or “should have emphasized.”131 Although some decisions have required a


131. But see Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), aff'd on other grounds, 514 F.2d 285 (2d Cir.), cert. denied, 423 U.S. 892 (1975). The district court in Holodnak overturned the decision of the arbitrator and alternately termed the union attorney's preparation for and handling of the grievance hearing "perfunctory" and "arbitrary." The employee had been discharged for printing an article critical of company and union practices. Although the court went to great lengths in reviewing the union's presentation at the hearing, indicating what it reasoned the union attorney "should have argued" and "should have emphasized," id. at 200, the decision is distinguishable by the influence of the first amendment issue and the inquisitorial intrusion into the grievant's political beliefs at the arbitration hearing. The outrageous behavior of the parties was unusual, and it seems unlikely other courts will be similarly inclined to second guess the union's presentation in most cases.
finding of bad faith, ill will, or spite,\textsuperscript{132} most decisions apply \textit{Vaca}'s amorphous catchwords “arbitrary” or “perfunctory” in finding that the union’s negligence or laxity has not risen to the level required for a breach.\textsuperscript{133}

In presentation cases, for example, where the plaintiff alleges that the union failed to object to the introduction of certain evidence at the hearing, the courts generally have employed a deferential approach. Courts have demonstrated a similar reluctance to find the union liable in cases where the union failed to present pertinent evidence or arguments.\textsuperscript{134} At least one court, however, has shown a greater willingness to find a breach where the union is “ignorant of those contract provisions having a direct bearing on the case.”\textsuperscript{135}

The third category, procedural errors, constitutes the most frequently alleged breach. Typically these involve failure to investigate adequately the merit of the grievance, failure to inform the employee of pertinent matters with respect to the handling or progress of his or her grievance, or failure to file the grievance in a timely manner. Although the scrutiny employed may vary greatly among each of these subcategories, all fall within the vague contours of \textit{Vaca}.

The union’s obligation to make some investigation of the merits of an individual’s grievance arises from \textit{Vaca v. Sipes}.\textsuperscript{138} Simple

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\item See Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975) (no breach when union failed to raise defense that sobriety rule was improperly promulgated); Bruno v. United Steelworkers, Local 3871, 456 F. Supp. 425 (D. Conn. 1978) (no breach when union neglected to present evidence of more lenient treatment of other employees who had breached company’s rules more severely). See also Mangiaguerra v. D & L Transp., Inc., 410 F. Supp. 1022 (N.D. Ill. 1976).
\item See, e.g., Buchanan v. NLRB, 597 F.2d 388 (4th Cir. 1979) (no breach in union’s failure to invoke reinstatement provision of collective bargaining agreement pending arbitration); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899 (9th Cir. 1979) (no breach in union’s failure to present certain medical evidence to Arbitration Board). See also Connally v. Transcon Lines, 583 F.2d 199 (5th Cir. 1978) (no breach in union’s failure to apprise Multi-State Committee of procedural rules where union’s presentation was not so poor as to deprive grievant of a fair hearing). Some courts, however, have found a violation in situations similar to that in \textit{Connally}. See, e.g., Marietta v. Cities Serv. Oil Co., 414 F. Supp. 1029 (D. N.J. 1976); Arnold v. A & P Tea Co., 102 L.R.R.M. 2409 (E.D. Pa. 1979).
\item 386 U.S. 171 (1967). \textit{In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary man-}
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\end{footnotesize}
negligence in investigating a grievance has not been held to breach the duty of fair representation, but at least one court has suggested the applicability of a gross negligence standard. The Ninth Circuit has held that the thoroughness of an investigation is immaterial. This seems to be a better position because it would obviate unwelcome judicial determinations of what constitutes a reasonable investigation.

The NLRB General Counsel, in a recent memorandum, stated that the Board will not judge the adequacy of a union's efforts unless no inquiry has been made or the inquiry conducted is so perfunctory that it is tantamount to no inquiry at all. The union is required to make only "some inquiry into the facts" or have "some basis in reason" for its contract interpretation. In practice, however, it is evident that in investigation cases, as in most other contexts, the Board will often look to find some evidence of bad faith or hostility to establish a breach.

In cases where the alleged breach is based in whole or in part on the union's failure to inform the employee of some crucial matter, such as the time of a hearing or the union's decision not to pursue the grievance, most courts look to see whether the employee's position has been prejudiced by the union's silence.


140. Irving Address, supra note 5. See notes 136-37 & accompanying text supra.


143. Decisions finding a breach where the employee's position was prejudiced by the union's nondisclosure include Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978), and Pratt v. United Air Lines, Inc., 468 F. Supp. 508 (N.D. Cal. 1978). For decisions where no prejudice was found, see Bazarte v. United Transp. Union, 429 F.2d 868 (3d
Where the employee's interests have been adequately represented, courts have held that the failure to notify does not constitute a breach of the duty. The prejudice test provides a better standard for evaluating errors in this procedural context than would a negligence standard alone. If the grievant's position has not been irrevocably harmed by the union's failure, either because he or she was nonetheless adequately represented at the hearing or because the grievance can still be filed, the union should not be held liable for its failure to keep the employee informed. However, the prejudice test may not always provide the best means for judging union conduct. For instance, in a discharge case the union should be responsible for informing the employee of a settlement offer made by the employer before it is rejected.

The final category of procedural errors in conduct involves cases arising from the union's failure to file before the deadline or otherwise to take the necessary basic steps in the contractual

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144. See Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980); Schum v. South Buffalo Ry. Co., 496 F.2d 328 (2d Cir. 1974). The union in Schum processed a discharged employee's grievance through the first stage of the grievance process but failed to file an appeal within the required time. The court found that if the grievant reasonably relied on the union's processing of the grievance until the filing time had passed, the union had breached its duty. The court, however, also referred to the union's duty of due care and diligence in procedural processing matters. See also Ruggirello v. Ford Motor Co., 411 F. Supp. 758 (E.D. Mich. 1976).

145. The Board has noted that a union may not "purposely" keep an employee uninformed or misinformed. Local 417, Int'l Union, UAW, 245 N.L.R.B. No. 75 (1979); Groves-Granite, 229 N.L.R.B. 56 (1977). For the duty to inform during contract negotiations, see Warehouse Union, Local 860, 236 N.L.R.B. 844, 850-51 (1978). This element of willfulness has not been required in the federal courts. See notes 143-44 & accompanying text supra; notes 146-50 & accompanying text infra.

146. In Perry v. Chrysler Corp., 101 L.R.R.M. 2681 (E.D. Mich. 1978), the local union rejected management's settlement offer to reinstate a discharged employee contingent upon the employee's participation in an alcohol abuse rehabilitation program. The court rejected the allegation that the union's failure to report the offer to the grievant was a breach of its duty of fair representation. The court noted that the union must have the discretion to refuse to "settle cheap" to avoid a harmful precedent for future grievances. Id. at 2685 n.4. See note 79 supra. Although this argument may be persuasive in some grievance situations, in discharge cases the consequences to the employee are sufficiently grave to require that he or she be informed of any settlement offer made before it is rejected. In this context it is not appropriate to subordinate the interests of a dischargee, who may be without recourse, in order to promote the position of the union as the collective bargaining agent. See note 86 & accompanying text supra. See also Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978).
grievance procedure. Such errors, occurring in the routine steps of grievance processing, may not warrant an investigation of union intent. Consequently, simple negligence may appropriately be applied to these mechanical functions to find a breach of the duty of fair representation. However, only where an error is "inexplicable," where the union fails to consider the merit of the grievance, or where the failure to file is not based in whole or in part on any legitimate considerations would the application of such a standard be warranted.

Conclusion

An analysis of the cases involving the doctrine of fair representation reveals that a disparity exists between the Board's generally narrow interpretation of what constitutes a breach of the duty of fair representation and the manner in which the doctrine has been expanded in many courts. This split between the Board and the courts is detrimental to the formation of a uniform labor policy. Furthermore, it promotes forum shopping by prospective plaintiffs and leads labor practitioners and their counsel to be unsure of the standard to which they could be held in fair representation cases. The analytical framework employed in this Note demonstrates that different levels of scrutiny are employed when applying the Vaca standard to each of several categories of fair representation cases. The nature of the union conduct called into question and the importance of the plaintiff's underlying grievance

147. In this area as well, the Board has continued to apply a narrower standard. Although negligence or ineptitude is not a breach, see, e.g., PPG Indus. Inc., 245 N.L.R.B. No. 166 (1979); General Truck Drivers Union Local No. 692, 209 N.L.R.B. 446 (1974), a willful failure to process the grievance is a breach of the duty of fair representation. See Local 417 Int'l Union, UAW, 245 N.L.R.B. No. 75 (1979). In a concurring opinion, Chairman Fanning agreed only with the finding that the union's conduct was improperly motivated by animosity. He did not reach the issue of willfulness. Id. at 2 n.2 (Fanning, Ch., concurring).

148. See Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir. 1979). Contra Ruggirello v. Ford Motor Co., 411 F. Supp. 758 (E.D. Mich. 1976). See also Griffin v. International Union, UAW, 469 F.2d 181 (4th Cir. 1972). See notes 62-63, 79 & accompanying text supra. The union in Griffin filed the grievance with a person who was authorized to receive it, but one with whom the employee, who was discharged for fighting, had fought. The union's conduct was held to be arbitrary, even though it had decided to pursue the grievance, when there were others with whom the grievance could have been filed.

149. The sympathies of the jury in the lower courts have undoubtedly had significant impact in the pattern that has emerged. In fact, a review of the cases discloses that the overwhelming majority of recoveries are in decisions that uphold jury verdicts.

150. See Irving Address, supra note 5, at D-1 to -2.
significantly influence the application of the standard. Unfortunately, the distinctions between the categories are not always clear, and this adds uncertainty to the outcome of fair representation suits. However, when the employee has been wrongfully discharged and the alleged breach is of a certain procedural character, the courts are consistently sympathetic to the plaintiff and hold the union to a greater standard of care.

In *Foust*, the Supreme Court had the opportunity to clarify the parameters of the duty in a manner which would provide practical guidance to practitioners, but declined to make this clarification. Instead, *Foust* has added to the existing uncertainty over the standard by impliedly suggesting the adoption of a negligence standard. The analysis undertaken in this Note demonstrates that a standard of reasonable care can only be consistent with national labor policy, *Vaca*, and judicial developments, if it is strictly limited to high impact grievance situations, such as a discharge, where the union's negligence on essential procedural steps has precluded consideration of the employee's grievance. It does not overstep legitimate expectations to require reasonable compliance with these fundamental elements of modern union representation.

Judicial review of a union's representation of individuals in a bargaining unit should not include second-guessing the union's legitimate contemplation of a grievance's priority or its judgment on substantive matters. The union was formed by workers and remains the best mechanism to assert and protect both their collective and individual interests. Only where the individual's interests are at their strongest and the error in representation is procedural rather than judgmental should the judiciary's interference be encouraged.