APPENDIX I

BREACH OF THE DUTY OF FAIR REPRESENTATION: THE APPROPRIATE REMEDY

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An area of potential conflict between arbitral and judicial decision-making responsibility has become apparent through the increasing tempo and sometimes anomalous dispositions of fair-representation claims in the courts.

The thesis of this comment is that the appropriate judicial disposition of these cases—once the determination of breach of the duty of fair representation has been made by the court[1]—is to refer the dispute back to the contractual arbitration procedure for further processing. If the basis of the finding of unfair representation is that the union failed to process the grievance to arbitration, then the union should be ordered to arbitrate. If the claim is inadequate representation during an arbitration already held—as in *Anchor Motor*[2]—then another arbitration can be ordered, and where appropriate (depending on the nature of the union's breach), the employee to be represented by a lawyer of his own choice, fees to be paid by the union. Since the predicate for the order directing arbitration is that the union has breached its duty, the imposition of the obligation to pay lawyer's fees seems reasonable.

Even if the plaintiff employee has brought action against only one of the parties,[3] or if one of the parties has been dropped

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[1]For the purposes here, the standard for determining whether the duty has been breached is irrelevant; this assumes that whatever the test, a finding of unfair representation has been made.

[2]*Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 91 LRRM 2481 (1975) concerned the union's representation of employees before a joint committee—a body appropriately described by Benjamin Aaron as more akin to an extension of the grievance procedure than to arbitration. The typical collective bargaining agreement using the joint-committee device provides for neutral arbitration in the event of a joint-committee deadlock. A court could require use of the neutral arbitration step where the decision involved in the judicial proceeding was that of a joint committee.

[3]*Kaiser* v. *Teamsters Local 83*, 577 F.2d 642, 99 LRRM 2011 (9th Cir. 1978).

from the action because of a statute of limitations,[4] or if appeal is untimely as against one of the parties,[5] under its equitable powers a court could effectively direct arbitration.

This proposition has been forced upon me by the uncomfortable awareness that treating a fair-representation suit as an action at law for damages has the potential for placing both the question of breach of the duty and propriety of the employer action to a jury.[6]

In a lucid moment, the Supreme Court observed in praise of arbitrators that "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed."[7] If the ablest judge cannot do that, then what can be expected of the jury?

Since the primary source of the fair-representation duty is statutory, there seems to be no conceptual way of keeping the determination as to its breach from the courts. But at least that should be left to the able judges the Supreme Court had in mind, who perhaps might be expected to exercise some restraint as to what the duty entails,[8] and not to a jury.

But the question of the employer's alleged breach—typically a claim of wrongful discharge—need not be and ought not be decided by either court or jury. The breach of the fair-representation duty is independent of the employer's contractual violation. The union may negligently miss time limits, or the union representative may do a woefully inadequate job of representing an employee at a hearing even where the employer action in discharging the employee is completely proper.[9] The propriety of the employer action might affect the employee's remedy

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[4]*Smart* v. *Ellis,* 580 F.2d 215, 99 LRRM 2059 (6th Cir. 1978).

[5]*Miller* v. *Gateway Transportation Co.,* 103 LRRM 2591 (7th Cir. 1980).

[6]*Minnis* v. *UAW,* 531 F.2d 850, 91 LRRM 2081 (8th Cir. 1975); *Smith* v. *Hussmann,* 103 LRRM 2321 (8th Cir. 1980); *Foust* v. *IBEW,* 572 F.2d 710, 97 LRRM 3040 (10th Cir. 1978), *rev'g* as to punitive damages, 99 S.Ct. 2121, 101 LRRM 2365 (1979).

[7]*Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 46 LRRM 2416 (1960).

[8]*See, e.g., Cannon* v. *Consolidated Freightways,* 524 F.2d 290 (7th Cir. 1975), overruling a decision of the trial judge who found a breach because the union failed to raise the defense that the sobriety rule upon which discharge was based was improperly promulgated where the employee admitted he knew of the rule and was given a second opportunity to comply after the consequences of failure to comply were explained to him.

[9]In *Foust* v. *IBEW, supra* note 6, the court recognized the difference between the union's alleged breach of the fair-representation duty and the alleged wrongful discharge. Unfortunately for the point being made here, this was done through the vehicle of approving instructions to a jury in a case involving only the union, which then awarded $40,000 in actual and $75,000 in punitive damages. The Supreme Court later reversed as to the punitive damages, 99 S.Ct. 2121 (1979).

against the union, but should be irrelevant to the issue of union responsibility. For what the employee has lost when his case is not presented or is unfairly presented is the opportunity to have his grievance fairly argued to and decided by an impartial arbitrator, and this he is entitled to even if it is ultimately determined he was discharged for just cause.

This is not to suggest that a union has, or ought to have, the duty to arbitrate every grievance. But the benefit of the doubt should be given the employee, and the close ones ought to be arbitrated. This is certainly preferable to subsequent litigation.[10]

When the employer agreed to limit his common-law right to terminate the employment relationship at will and agreed to terminate or discipline only for just cause, he did not agree that just cause would be determined by a judge or jury. His bargain created no right in the employee to be vindicated in the court.[11] "Just cause," in this context, is a concept developed out of the common law of arbitration and is peculiarly dependent on the arbitration process for its nurturing and growth. It does not belong in court and certainly not before a jury. Contemplate framing standardized jury instructions on the infinite variety of factual situations lying behind a discharge or suspension for "just cause." It is here more than in any other area of grievance resolution that the experience and competence of the arbitrator is needed. But it is the discharge cases—the just-cause cases—that generate the vast majority of court suits on the fair-representation issue.

What stands in the way of the proposition asserted here—that when there is a judicial determination of the breach of the duty of fair representation the dispute be directed to arbitration or a second arbitration with independent counsel—is the *Vaca* v. *Sipes* dictum. The Court had found no breach of duty in that case in the union's refusal to process a grievance to arbitration. That

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[10]Employers occasionally find themselves in the awkward position of hoping the union will arbitrate rather than drop a grievance when the lawyer for the affected employee phones the employer and suggests that if the union doesn't arbitrate, the employee will litigate.

[11]The employer in *Anchor Motor* argued to the Supreme Court that if arbitration awards were not accepted as final, "employers . . . would be far less willing to give up their untrammeled right to discharge without cause and to agree to private settlement procedures." *Supra* note 2, at 570. What is suggested here is that where there is a finding that the union breached its duty of fair representation in presenting the grievance to the arbitrator, there is no "final award," but the remedy should be to arbitrate again, not let the court or jury decide the issue put to the arbitrator in the first instance.

should have been sufficient to end the matter. But the Court could not resist telling us what would have happened if a breach had been found. The Court observed that if in fact Owens, the employee, had been improperly discharged and an action had been brought against the employer rather than the union, the employer's only defense would have been the union's failure to resort to arbitration; but if that failure was itself a violation of the union's statutory duty to the employee, there would be no reason to exempt the employer from "contractual damages" he would otherwise have had to pay. "The difficulty lies in fashioning an appropriate scheme of remedies."[12]

This is what the Court said in exploring that "difficulty":

> "Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and union to arbitrate the underlying grievance. It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. For this reason, 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. In some cases, for example, at least part of the employee's damage may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issue may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief."[13]

These broad comments cast apart from a factual setting really beg the question. The employer has not granted broad contractual rights to the employee entitling him to "contractual damages" in the sense used by the Court. With respect to the issue of the power of the arbitrator to grant "damages" (back pay?) attributable to the union's breach, why not? As long as the Court was indulging in dicta, it might have held that this was within the authority of the arbitrator in a circumstance where the court directs arbitration because it has found a breach of the union's duty. There is no apparent reason why a court, after a finding of breach of the union's duty, could not empower the arbitrator to allocate the back-pay award, if one is found to be appropriate,

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[12]*Vaca* v. *Sipes*, 386 U.S. 171, 196, 64 LRRM 2369 (1967).
[13]*Id.*, at 196.

between the employer and union in accordance with the formula set out in *Vaca:* "The governing principle, then, is to apportion liability between the employer and union according to the damage caused by the fault of each."[14]

In the last point raised in *Vaca*—that the arbitrable issues may have been substantially resolved in the course of trying the fair-representation issue—the Court denies its own recognition of the relative inexpertise of judges to make such determinations, overlooks the possibility that juries may be called upon to make the decision, and tends to confuse the separate questions of fair representation and employer breach.

The danger inherent in broad dicta apart from a specific factual setting is illustrated by the results of a recent Ninth Circuit decision, *Clayton* v. *ITT Gilfillan.*[15] The court reached a decision which it acknowledged "produces an anomaly," but the court believed it had no choice after *Vaca* and *Hines.* The action was the usual one against the union and company for unfair representation and wrongful discharge. The union had processed the claim through the grievance procedure, made demand for arbitration, and then withdrew the request. The trial court found the employee had failed to exhaust the internal union review procedures through which he could challenge the decision not to arbitrate, and dismissed the action against the union. The court also held that this barred the employee's action against the employer. The court recognized the awkward result: "In an action from which the union has been dismissed, ITT [the employer], to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's [the employee's] grievance." The court of appeals concluded that despite the anomaly, this is how it had to come out because of *Vaca* and *Hines.*[16]

The trial court's decision was sensible, realistic, and should

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[14] *Id.*, at 197.

[15] 104 LRRM 2118 (9th Cir. 1980).

[16] A similar result was reached in a recent decision of the Seventh Circuit in *Miller* v. *Gateway Transportation Co.*, 103 LRRM 2591 (1980). The trial court had granted summary judgment in favor of the union and employer. The plaintiff, the discharged employee, appealed the dismissal of his suit, but his appeal against the union was dismissed by the court of appeals as untimely filed, leaving only the appeal against the employer before it. The court found there were genuine fact issues as to both the claim of unfair representation by the union and improper discharge by the employer, and that summary judgment was therefore improper. The case was remanded for trial. Thus, in the trial court, the employer will be required to defend not only the propriety of the discharge, but the fairness of the union's representation, while the union is out of the case completely.

have been affirmed. The employer should not be responsible for defense of a claim of the union's breach. The union ought to be an indispensable party on the fair-representation issue, and until that issue is disposed of, the propriety of the discharge should not be a triable issue before any forum. If the employee has failed to perfect his right to bring suit against the union, he ought not to be able to go after the employer.

The confusion resulting from the overinvolvement of courts and juries in the process is sharply illustrated by *Smith* v. *Hussmann Refrigerator.* [17]

The fact situation is somewhat complex, but these are the essentials. The company promoted four employees out of seniority order, claiming they had greater skill and ability; the contract permitted such promotions. Senior employees grieved, and the union processed their grievances to arbitration. At the hearing the grievants testified; the successful bidders were not invited to attend. The only evidence in support of the successful bidders was testimony by the employer's foreman as to his evaluation of the relative merits of those awarded the promotion and the grievants. The arbitrator granted the claims of some of the grievants, but the award granted more promotions than there were openings. The union and employer held a clarification meeting with the arbitrator at which no employees were present. The final award was still somewhat confusing, but in any event, the original successful bidders attempted to file grievances challenging the clarified award, which the union refused to process.

The original successful bidders filed suit against both the union and the company. Both the claims of breach of contract by the employer and breach of duty of fair representation by the union were tried before a jury which found against both defendants and awarded damages to two of the plaintiffs. The trial court then entered judgment in favor of the defendants notwithstanding the verdict.

In its first decision on review, the court of appeals upheld the judgment in favor of the employer, but reversed as to the union on the ground that the jury could reasonably have found a breach of the duty of fair representation. After en banc hearing, the court issued a second decision one year later, and this time

[17] 100 LRRM 2239 (8th Cir. 1979), on rehearing, 103 LRRM 2321 (1980).

reversed the trial court as to the employer and union and reinstated the jury verdict against both. The ground for the change in the decision respecting the employer was that the jury could have found a contract breach in the clarification meeting, where apparently the employer and union had arrived at a resolution of the problems presented by the confused first award, which resolution was adopted by the arbitrator.

Here is a case whose precise facts are so complex that I must confess to still being confused about them even after four readings of the decision; yet it was presented to a jury. The trial judge disagreed with the jury; the court of appeals disagreed with the trial judge and then with itself. The employer, who, as far as can be determined from the reported case, made the right decision in the first instance about the relative abilities of the bidders, is required to pay money damages to those it selected for promotions because the union did not allow them to participate in the first hearing or tell them about the second. The jury was given both issues at the same time, and one certainly had to influence the other.[18]

Why did not the court simply direct a new arbitration of the whole business where the competing employee interests would be given an opportunity to participate. In light of the one-year delay between the first and second decisions of the court of appeals, the argument that the second arbitration would unduly delay the ultimate disposition is not compelling.

It may be that the *Vaca* v. *Sipes* dictum invited this strange result, but it also allows trial courts to direct arbitration. There is constant complaint about the overburdened judiciary. This is one way to ease the workload.

[18]The employer is in an untenable position before the jury. If he says nothing in support of the union's conduct, he may be giving up a good defense or may appear to agree that the union acted improperly. If he argues that the union acted fairly, he runs the risk that the jury will interpret this as collusion.