APPENDIX II

BREACH OF THE DUTY OF FAIR REPRESENTATION: ONE UNION ATTORNEY'S VIEW

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There is no due process in a nonunion plant; any employee can be discharged, disciplined, downgraded, laid off out of seniority, denied a promotion, for any reason or no reason, with or without a hearing. Only with a majority union does the employee enjoy contract provisions that protect his job, and his seniority, with a grievance procedure that culminates in binding arbitration. The courts have imposed upon the majority representative the duty of fair representation, a duty that responsible unions accept without question. Increasingly, however, the courts are expanding the scope of that duty and are affording types of relief which, if unchecked, may severely hamper unions in the performance of their duties by placing upon them heavy burdens involving their financial resources and their time in expensive litigation over individual members when their money and time should be conserved for the benefit of the entire membership. If our object is to protect industrial due process for individuals, we should keep in mind that effective collective bargaining is the essential source of such due process, and any protective remedies should be so selected and limited as to preserve the resources of labor unions to negotiate and to administer contracts.

Originally, the doctrine of fair representation was devised by the Supreme Court to require labor organizations to negotiate for all employees in the craft or class without discrimination because of their race.[1] From that wholly laudable beginning, the concept has gradually been extended to include "arbitrary, discriminatory, or in bad faith" decisions by a labor organization not to take a grievance to arbitration;[2] negligence in the presen-

[1] *Steele* v. *Louisville and Nashville Railroad*, 323 U.S. 192, 15 LRRM 708 (1944).
[2] *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

tation of a grievance in arbitration;[3] failure to make an adequate investigation in a seniority grievance;[4] failure to give notice of arbitration to a grievant; taking a "doomed to failure" approach in the arbitration; failure to make a transcript of the hearing;[5] failure to file a grievance within the contractual time limits;[6] perfunctory presentation by the union attorney;[7] and failure to permit participation by incumbent employees in a seniority arbitration.[8] Moreover, dissatisfied grievants are permitted to have a jury trial, to sue for damages rather than merely to seek reinstatement and back pay, which would be the available remedy in an arbitration.[9] In these cases, the courts insist that they, rather than arbitrators, can resolve the merits of the grievance while determining whether there was a denial of fair representation.

The guidelines provided by the decided cases create considerable confusion, which is particularly a problem since in the preliminary stages of grievance handling, and often even at the arbitration level, unions as well as employers frequently are represented by laymen. Thus, although it is basic law that the courts are not to review the merits of arbitration decisions,[10] the Supreme Court held in *Hines* that the courts are not bound by the finality of an arbitration award if the union prepares or presents its case poorly, deeming this a denial of fair representation. The Supreme Court has held that in taking a position on seniority issues in negotiations, a union is free to exercise a broad range of discretion even when the union's position may be detrimental to the interests of some of the employees, for example, *Ford* v. *Huffman*[11] and *Humphrey* v. *Moore;*[12] similarly, the Court held in *Emporium Capwell Co.* v. *Waco*[13] that minority employees aggrieved by alleged racial discrimination of the employer were required to deal through their union and resort to

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[3]*Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 LRRM 2481 (1976).

[4]*Figueroa de Arroyo* v. *Sindicato de Trabajudires Packinghouse*, 425 F.2d 281, 75 LRRM 2455 (1st Cir. 1970), *cert. den.*, 400 U.S. 877 (1970).

[5]*Thompson* v. *IAM Lodge 1049*, 258 F.Supp 235 (E.D.Va. 1966).

[6]*Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 90 LRRM 2497 (6th Cir. 1975), *rehearing den.*, 528 F.2d 912 (1975).

[7]*Holodnak* v. *Avco Corp.*, 381 F.Supp 191, 87 LRRM 2337 (D.Conn. 1974), *aff'd in part and rev'd in part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975).

[8]*Smith* v. *Hussmann Refrigerator Co.*, 100 LRRM 2239 (8th Cir. 1979), *on rehearing*, 619 F.2d 1229, 103 LRRM 2328 (1980).

[9]*Minnis* v. *Automobile Workers*, 531 F.2d 850, 91 LRRM 2081 (8th Cir. 1975); *Cox* v. *C.H. Masland & Sons*, 607 F.2d 138, 102 LRRM 2889 (5th Cir. 1979).

[10]*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[11]*Ford* v. *Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953).

[12]375 U.S. 335, 55 LRRM 2031 (1964).

[13]420 U.S. 50, 88 LRRM 2660 (1975).

the procedure, even if they were dissatisfied with their representative and with the grievance procedure. Yet in the *Hussmann Refrigerator* case, the court of appeals found a union guilty of unfair representation because it arbitrated a seniority issue without in effect providing a mechanism for the dissident employees to litigate their own cause. Which will it be—majority representation, or a proportional representation system in which the exclusive bargaining agent shares its authority with minority groups?

In *Vaca* v. *Sipes,* the Supreme Court cautiously expanded the *Steele* definition of unfair representation, but the courts in succeeding cases, such as those discussed above, have significantly expanded the doctrine while invariably citing *Vaca* to make it appear that *Vaca* is still the test. Local union stewards and officials, who usually are laymen working full time on their factory jobs, are expected to find their way through an increasingly harsh and complex body of law as they administer grievances of their members. If the courts continue to expand the limits of fair representation, they should at least return, in terms of remedy, to the concept that arbitration, rather than a court or jury trial, is the preferred means of adjusting grievances. The courts, too, should keep in mind that every union member has access to internal political remedies through the election processes to correct inadequacies of its officers, and that the Landrum-Griffin Act protects the rights of employees to democratic elections of officers. The members of a union can use their elections to remove officers who handle grievances and arbitrations ineffectively, just as the members remove officers who negotiate a poor contract.

In *Vaca,* the Court recognized that "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved."[14] It is submitted that an order to arbitrate or to rearbitrate should be the standard remedy applied by the courts in the absence of a strong showing that it will not be adequate. One of the objections to an order to arbitrate is that an aggrieved employee may also be entitled to damages against the union if the grievance is found meritorious. But this could be provided for; the court, in ordering the case to arbitration, could reserve jurisdiction for the purpose of adjudicating damages under the *Vaca* formula if the arbitrator

[14]*Supra* note 2, at 196.

upholds the grievance. Another objection is that under the time limitations in many labor agreements, the unions may no longer be free to invoke arbitration. This, too, poses no real problem. The courts could hold that such provisions cannot stand in the case of a denial of fair representation, just as the Supreme Court held in *Hines* v. *Anchor* that the contract provision for finality of an arbitration award could not stand because of the denial of fair representation. In this way, the principle that arbitration is the remedy that Congress expressly preferred for resolving industrial disputes is followed;[15] and the concern voiced by the Supreme Court of preserving union assets for collective bargaining[16] will be effectuated.

In this way, too, when an employee in a plant covered by a union contract has been denied fair representation, the end result of litigation will be to afford him fair representation: nothing more and nothing less. The purpose—or effect—should not be to distort the relationship of the parties to the labor agreement, nor should it be to create an undue advantage for that employee over other employees in the plant or the union. Remedies are unrealistic and inconsistent with our scheme of collective bargaining if they substitute damages in place of remedies such as reinstatement with back pay, normally available through arbitration; if they compel the use of outside attorneys in the process; if they create separate representation for minority or dissenting groups of employees; or if they substitute the opinion of a jury or judge for that of an arbitrator. The employee who has been denied the benefit of a hearing before an arbitrator should be awarded a hearing before an arbitrator, not a trial before a court or jury. If the employee has lost a job without just cause, or if the employee's seniority has been abridged improperly, the ultimate relief should be the award of the job with appropriate back pay, or the correct seniority status, and this should be accomplished by returning the case to the arbitration process for resolution.

Thus, I am in substantial agreement with Stu Bernstein that unfair representation cases should end up before an arbitrator rather than a jury.[17]

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[15]LMRA §203(d), 29 U.S.C. §173(d).

[16]*See Electrical Workers* v. *Foust*, 442 U.S. 42, 50–51, 101 LRRM 2365, 2368 (1979); *Vaca* v. *Sipes*, *supra* note 2, at 197.

[17]I disagree with Stu Bernstein's suggestion, unless it is limited to extreme situations, that in unfair-representation cases the union should be required at its expense to provide an attorney chosen by the employee. Many unions rarely use attorneys in

As noted by Stu Bernstein's perceptive paper on this general topic, *Smith* v. *Hussman Refrigerator Co.*,[18] recently decided by the Eighth Circuit, raises especially troublesome questions. The court was presented with a claim by certain employees that their union had failed to represent them properly when it processed and won a grievance that caused their displacement by other employees. Four unsuccessful job bidders had grieved, claiming that they had equal skill and ability and more seniority than the employees that the company had selected, and thus were entitled to certain jobs under the contract. The arbitrator awarded the jobs to two of the grievants. Because of ambiguities in the award, the company and the union met and agreed to a clarification which was approved by the arbitrator. The two displaced employees attempted to file grievances, but the union refused to process them. The Eighth Circuit reinstated a jury verdict for plaintiffs, citing among possible grounds on which the jury might have held for the plaintiffs that the union's strict adherence to the principle of seniority could be considered arbitrary, as it disregarded the merit factor also included in the contract; and that the union had failed to invite the plaintiffs to the arbitration hearing to defend their interests. This decision has serious implications that threaten the concept of majority representation.

Several Supreme Court decisions have recognized that a union must have flexibility when faced with competing interests of employees. In *Ford Motor Co.* v. *Huffman, supra,* the Court found that a union must have broad authority in negotiating agreements, noting that "[T]he complete satisfaction of all who are represented is hardly to be expected." In *Humphrey* v. *Moore, supra,* the Court applied this principle to administration of the

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arbitration, either because of the expense involved or because of a belief that union officials who understand the shop situation and the collective bargaining agreement can better represent the interests of the aggrieved employee and the union. Unions that do not ordinarily use attorneys in their arbitrations should not be required to finance attorneys for employees as a result of suits for unfair representation. Instead, the complaining employee should be represented in the arbitration by a union member or official selected by that employee. Such a representative may be more likely to understand the institutional concerns that are necessarily a part of the grievance and arbitration procedure, as well as the particular concerns of the employee. Providing the aggrieved employee with an attorney may give that employee an advantage unavailable to other employees in the arbitration process, particularly where the interests of the grievant are in conflict with those of other employees. Where the union ordinarily uses an attorney, that attorney should represent the grievant unless there is a showing of conflict.

[18]100 LRRM 2239 (8th Cir. 1979), *on rehearing,* 619 F.2d 1229, 103 LRRM 2328 (1980).

contract as well, so long as the union acts in good faith. The *Hussman* case, although citing *Humphrey* v. *Moore,* seems contrary to the spirit of that decision. The Court's implication that the employees, whose jobs the grievants were seeking, be allowed to participate in the process, is contrary to the principle of majority representation that forms the basis of national labor policy. The court would inject an additional party into the voluntary dispute-settlement mechanism, necessarily interfering with its effectiveness. The court would, in effect, rewrite the arbitration agreement of the parties by substituting an unworkable proportional representation system in place of majority representation. Such interference in the collective bargaining process undermines the goals of national labor policy. The Supreme Court's decision in *Emporium Capwell Co.* v. *Waco, supra,* which upheld the discharges of a group of minority employees who sought to bypass the grievance procedure, supports the policy of limiting the role of dissenting employees in the collective bargaining process. Dissenting groups have an avenue for input through the political processes of the union, and the Landrum-Griffin Act protects their rights in that regard. The Supreme Court said in *NLRB* v. *Allis-Chalmers Mfg. Co.:*[19] "National labor policy has been built on the premise that, by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislature both to create and restrict the rights of those whom it represents.' " (Quoted in *Emporium Capwell, supra,* at 63.)

If this basic policy is to continue to define the role of a majority representative, *Hussman* is an unfortunate deviation that must not be followed.

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[19]388 U.S. 175, 180, 65 2449 (1967).