CHAPTER 2

THE INDIVIDUAL EMPLOYEE'S RIGHTS UNDER THE COLLECTIVE AGREEMENT: WHAT CONSTITUTES FAIR REPRESENTATION

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Our subject is like an octopus. It has a number of arms, any one of which may be more than we can master, but with all of which we must contend. And there is always the danger that the problem itself will escape in a cloud of ink. I do not propose to wrestle the octopus; indeed, I hope the other panelists will deal with some of the arms. I propose to probe the bulbous head and nerve center—the duty of fair representation.

The rights of an individual employee under the collective agreement can be approached from two perspectives: What rights does the law give the individual to enforce provisions of the contract made for his benefit? What rights can and should the union and the employer give him in the grievance procedure and arbitration when his individual interests are directly at stake?

I want to approach the problem from the legal perspective for three reasons: First, I am a lawyer and a law teacher, not a union officer or personnel manager, and I prefer to keep within my area of primary competence. Second, the legal problems are real, for the reported cases run 50 to 75 a year, and the damages can be substantial. Third, the core of the individual's legal right, both against the union and the employer, is the right to be fairly represented in the grievance procedure and arbitration. By examining the legal right to fair representation, we may find some basic guides for the practical rights that unions and management should recognize, not out of fear of legal liability but out of a desire for fairness.

Therefore, I want to devote my time to the single but central legal question—what is the measure of the right of fair represen-

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tation? What standard is to be applied in determining whether the individual employee has been denied this right in the grievance procedure and arbitration?

The central case defining the individual's legal right under the collective agreement originated in Kansas City 12 years ago.[1] It was a simple case of an employee with heart trouble not being allowed to return to work because he did not pass the employer's physical examination. When the union refused to carry his case to arbitration, he sued the union for violation of its duty of fair representation. Out of these simple facts the Supreme Court fabricated a confusing structure of legal rules which would rival Rube Goldberg, held together by a logic that would match Groucho Marx.

The confusion started with the name, *Vaca* v. *Sipes*; the suit was, in fact, between Owens and Local 12 of the Packinghouse Workers.[2] Owens sued the union for its refusal to carry the case to arbitration, but the court directed most of its attention on Owens' rights against the employer, who had not been sued. Having found that neither the union nor the employer was liable, the court proceeded to discuss how much each should pay if both were liable. Owens' frustration was complete. He won a $9,000 verdict from the jury, had it taken away by the trial judge, reinstated by the Missouri Supreme Court,[3] then taken away by the U.S. Supreme Court. By that time, however, Owens was dead, a victim of the heart trouble that had kept him from returning to work.[4] The only monument he left was the Court's decision, and even it did not bear his name.

Like any Rube Goldberg device, the working principles are quite simple. The Court held that, as against the union, an individual employee has no absolute right to have his grievance taken to arbitration and that the union is liable only if in processing and settling his grievance it violated its duty of fair representation. As against the employer, the Court declared that the individual employee could sue for breach of contract only after attempting to exhaust grievance and arbitration procedures. Where

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[1] *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

[2] Manuel Vaca was president of Local 12, and Niles Sipes was the administrator of the Owens estate.

[3] *Sipes* v. *Vaca*, 397 S.W.2d 658, 61 LRRM 2054 (1965).

[4] See Feller, "A General Theory of the Collective Agreement," 61 *Calif. L. Rev.* 663, 701 (1973).

the collective agreement gave the union exclusive control over those procedures, the individual employee could excuse his failure to exhaust those procedures only by showing that the union had breached its duty of fair representation in its handling of the grievance.

The end result is that the individual's right under the collective agreement is the right of fair representation. The liability of the union and the liability of the employer are both dependent on the union's violation of that right of fair representation.

Procedurally, the logic of the Court leads to a confusion of roles which rivals the Marx brothers in *A Night at the Opera.*

When the union is sued for wrongfully refusing to process the grievance, the measure of its damages would depend upon whether the employer had breached the contract. Thus, the union can reduce its liability for violating its duty of fair representation by showing that the employer had not violated its duty under the contract. The guilty union defends by pleading the virtue of the employer—and this in a suit to which the employer is not even a party.

When the employer is sued for breach of contract, its liability depends on whether the union has violated its duty of fair representation. Thus, the employer which had defaulted in its duty could escape liability by showing that the union had not defaulted in its duty. The guilty employer defends by pleading the virtue of the union—and this in a suit in which the union is not a party.

Although the parties seem to be garbed in wrong costumes playing the wrong roles, the result for the individual remains quite simple. The core of his right under the collective agreement is the right to fair representation. Therefore, the most crucial legal question is the substantive content of that right. It is this question that I want to probe.

Roots of the Right to Fair Representation

The right to fair representation had its origin in the cases of *Steele* v. *Louisville Railroad*[5] and *Tunstall* v. *Brotherhood of Locomotive Firemen,*[6] decided just 30 years ago in 1944. In those

[5] 323 U.S. 192, 15 LRRM 708 (1944).
[6] 323 U.S. 210, 15 LRRM 715 (1944).

cases, the Supreme Court invalidated seniority clauses, negotiated by the union and the employer, which had the purpose and effect of putting Negroes at the bottom of the seniority list. The Court, in those cases, articulated the basic principle that unions owed a duty to "act fairly" and "protect equally" all whom it represented. This duty has two tap roots.

First, the union, vested with statutory authority as the exclusive representative, must have the statutory duty much like that of a governmental body to represent fairly those governed by its agreements. In the words of the Court, the statute imposes on the union "at *least* as exacting a duty to *protect equally* the members of the craft as the Constitution imposes on a legislature to give *equal protection* to the interests of those for whom it legislates." [7]

Second, the union, as bargaining representative of the employees, owes to the employees it represents the duty owed by an agent to its principal, and the duty owed by a fiduciary to its beneficiary. In the words of the Court, "It is a principle of general application that the exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interests and behalf." [8] The statutory representative "is responsible to, and owes complete loyalty to, the interests of all it represents." [9] It "is to act for, and not against, those whom it represents." [10]

The duty of fair representation did not require the union to treat all employees alike. The union could make "[v]ariations in the terms of the contract based on differences *relevant* to the authorized purposes of the contract," such as seniority, type of work performed, or skill. But, said the Court, the union cannot make "discriminations not based on such *relevant* differences." [11]

The Distinction Between Negotiation and Administration of Agreements

These were the broad standards to be applied in measuring the individual's right and the union's duty in *negotiating* an agree-

[7] 323 U.S. at 202.
[8] 323 U.S. at 202.
[9] 323 U.S. at 201.
[10] 323 U.S. at 202.
[11] 323 U.S. at 203.

ment. But we are concerned here with the standard to be applied in the *administration* of the agreement after it has been negotiated. The standards are not necessarily the same, for the status of the union, the statutory policy, and the practical needs of collective bargaining are quite different in contract administration.

Section 9 (a) of the statute clearly distinguishes between the role of the union in negotiating an agreement and administering an agreement.[12] Section 9 (a) vests the majority union with exclusive authority to negotiate an agreement. But the proviso to Section 9 (a) explicitly states that the statute does not give the union exclusive authority in presenting and settling grievances. The statute mandates that the employer *must* deal exclusively with the union in making an agreement,[13] but the statute expressly permits the employer to adjust grievances with individual employees. The only limitation on the employer in adjusting grievances with the individual employee is that the adjustment not be "inconsistent with the terms" of the collective agreement, and that the union be "given opportunity to be present at such adjustment." Thus, in processing and settling of grievances, the statute gives the union the limited legal status of the right to be present when grievances are adjusted and to insist that adjustments not be inconsistent with the agreement.[14]

Under most collective agreements, the union asserts exclusive power to process and settle grievances. This power to control the grievance procedure, however, does not derive from the statute but from the contract. The union's exclusive control is granted by the employer, not by Congress; the employer, by contract, has given the union authority beyond that given by Congress.

Congress drew a clear line between the negotiation and the administration of collective agreements. The explicit judgment of

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[12] Section 9 (a), in its entirety, states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a union appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have them adjusted, without intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

[13] *J. I. Case Co.* v. *NLRB,* 321 U.S. 332, 14 LRRM 501 (1944).

[14] *Hughes Tool Co.* v. *NLRB,* 147 F.2d 69, 15 LRRM 852 (5th Cir. 1945).

Congress, articulated in Section 9 (a), was that the union needed exclusive power to negotiate agreements, but did not need exclusive power to settle grievances arising under the agreements. Indeed, the words of Section 9 (a), on their face, indicate a congressional policy that the union should not have exclusive control over grievances, for the words are "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative."

In practical terms, the union's need for flexibility in negotiating collective agreements is of a different dimension than its need for flexibility in interpreting and applying collective agreements. The collective agreement is a complex package of provisions and benefits. In negotiating an agreement, the union must accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others. Relative advantages and disadvantages of different proposals to the various groups must be weighed both singly and in combination. The package put together represents not only a bilateral compromise between the union and the employer, but also a multilateral compromise among interest groups within the union. To negotiate such a package, the union needs, as the Court said in *Huffman* v. *Ford Motor Co.*, a "wide range of reasonableness." [15]

In contrast, settlement of disputes as to the meaning and application of the collective agreement requires a much narrower range of flexibility. If the meaning of the contract and the facts are clear, then all that is required is to carry out the compromise made when the contract was negotiated. If the contract is ambiguous, then the parties need the flexibility to complete the compromise within the range of reasonable meanings of the agreement. If the facts are unclear, then the parties need no more freedom than to agree on a reasonable determination of the facts.

Because of these differences between contract negotiation and contract administration in the legal status of the union, the statutory policy, and the practical needs of the parties, the standards for measuring the duty of fair representation in grievance han-

[15] 345 U.S. 330 at 338, 31 LRRM 2548 (1952).

dling can be expected to be quite different. It is necessary, therefore, to inquire more specifically what that standard should be.

General Guides from *Vaca* v. *Sipes*

The only guides provided by the Supreme Court for measuring the union's duty in settling grievances are those articulated in *Vaca* v. *Sipes*. In that case, the Court attempted to provide some clues by careful selection of descriptive terms for stating the duty.

In choosing those terms, the Court seemed quite clearly to distinguish between contract negotiation and contract administration. Counsel for the union urged that the union's duty should be limited to "acting in complete honesty and good faith," the words used in *Huffman* v. *Ford Motor Co.* to describe the union's duty in negotiating an agreement. [16] The Court, however, rejected these words, in effect saying that in the settlement of grievances, "complete honesty and good faith" was not enough.

In contrast, the Court defined the duty in broader terms of "wrongfulness." The individual could sue on the basis of "the union's *wrongful* refusal to process his grievance." [17] Wrongfulness was elaborated by three adjectives, used in the alternative—"arbitrary, discriminatory or in bad faith." [18] These three words, and in particular the word "arbitrary," are used repeatedly throughout the opinion to describe the kind of conduct that violates its duty.

Beyond these rather elusive adjectives, the standard of fair representation was further elaborated by narrowing the polar extremes presented to the Court. On the one hand, the Court emphasized that the individual employee had no "absolute right to have his grievance taken to arbitration, regardless of the provisions of the collective agreement." [19] On the other hand, the Court also emphasized that Congress did not intend to confer upon unions "unlimited discretion to deprive injured employees of all remedies for breach of contract." [20] The union did not breach its duty, said the Court, "merely because it settled the

[16] See Feller, "*Vaca* v. *Sipes*, One Year Later," *New York University 21st Annual Conference on Labor* (1969), 141 at 167.
[17] 386 U.S. at 185.
[18] 386 U.S. at 190.
[19] 386 U.S. at 191.
[20] 386 U.S. at 186.

grievance short of arbitration." [21] But, the union does not fulfill its duty, said the Court, merely by refraining from "patently wrongful conduct such as racial discrimination or personal hostility." [22] The union's decision that a particular grievance "lacks sufficient merit to justify arbitration" does not become a breach of duty simply "because a judge or jury later found the grievance meritorious." [23] But, "A union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." [24] The statements of these polar extremes do not define the content of the union's duty of fair representation, but they do provide guides as to the inner and outer limits of that duty.

The substantive standard of the duty of fair representation draws additional content from four interlacing policies which run through the Court's opinion in *Vaca* v. *Sipes*. First, individual employees acquire legally enforceable rights under collective agreements, and union ability to prevent employees from enforcing those rights should be limited. Second, arbitration should not be overburdened with frivolous grievances by allowing an individual employee unilaterally to invoke arbitration or compel the union to take grievances to arbitration regardless of their merit. Third, the union, as "statutory agent and as coauthor of the bargaining agreement" should be able to isolate the "major problem areas in the interpretation of the collective bargaining contract" and to resolve those problems through the grievance procedure and arbitration. Fourth, there should be assurance that in settling disputes under collective agreements, "similar complaints will be treated consistently" and problems of interpretation should be given settled answers.

Application of Guides to Sample Cases

These elusive adjectives, rough-drawn boundary lines, and broad principles are little more than soporific generalities until we attempt to apply them to concrete fact situations. Only then does their meaning begin to emerge. Therefore, I would like to examine the application of these guides to eight hypothetical, though not so hypothetical, cases and to project the results which, it seems to me, the guides require. From these results we may be

[21] 386 U.S. at 192.
[22] 386 U.S. at 190.
[23] 386 U.S. at 193.
[24] 386 U.S. at 191.

able to evolve more specifically the standard for measuring whether the union has fulfilled its fiduciary duty to the individual employee in processing and settling grievances.

1. The Case of Paper Promises

> The truck drivers of a metropolitan cartage company sue for underpayment of hourly rates, overtime, and vacation pay clearly required by a multiple-employer contract. The drivers had repeatedly complained to the union, but the business agent had refused to take any action. His only excuse was that the employer could not afford to pay more.

In this case, the union has had the fullest freedom to negotiate an agreement which it believes is in the best interests of the employees. That agreement has been ratified by established procedures and has become legally binding on the employees, as well as on the union and on the employer. Now a union officer is casting aside that negotiation and ratification process as an empty exercise, and the contract is being treated as consisting of only paper promises.

Such cavalier treatment of the contract is scarcely consistent with the contemplation of the parties when they negotiated the contract and seems contrary to the understanding of the union members when they ratified the contract. Nor does the law contemplate that unions treat contracts they negotiate so lightly. Section 104 of Landrum-Griffin places on unions the duty to provide every employee, who so requests, a copy of any collective agreement that directly affects him.[25] The union can scarcely discharge this duty by delivering a document of paper promises which are not to be enforced. The purpose of the statute was to enable employees to know their rights under the contract; that purpose is frustrated if they are, in fact, denied the rights clearly stated in the contract.

There is no practical need for the union's having this kind of untrammeled discretion. If changed circumstances require changes in the agreement, the union and the employer can nego-

[25] The words of Section 104 are as follows: "It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee whose rights are directly affected by such agreement. . . ."

tiate a modification through the established procedures for contract-making. In addition, there are obvious dangers of misuse if union officers or grievance committees are allowed to set aside or ignore clear provisions of the collective agreement. In the words of the Court in *Vaca* v. *Sipes,* "A union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner."

The union, as representative of the employees, owes to them the duty an agent owes to his principal. How can an agent make a contract on behalf of his principal, and then deprive his principal of its benefits? The obligation of the union as a fiduciary should be to enforce the contracts it has made on behalf of the employees it represents. At the very least, the union ought not to be able to assert its control over grievances to bar employees from enforcing the contract on their own behalf. In the words of the Supreme Court, the duty of the union "is to act for and not against those it represents."

2. The Case of the Painful Principle

> The operation of two plants of a national corporation are consolidated into the newer of the two plants. The national agreement covering both plants explicitly provides that when two plants are consolidated in this fashion, seniority shall be governed by length of service with the company. Application of this rule would result in almost all of the employees from the older, abandoned plant being in the top third of the combined seniority list, and all of the layoffs resulting from the consolidation being suffered by the employees in the newer, continuing plant. To avoid this, the local union and management agree to dovetail seniority according to relative seniority in each plant rather than to slot by straight company seniority. This results in the layoff of some employees from the older, abandoned plant. When they file grievances, the local union refuses to process the grievances, and the international union refuses to intervene.

Again, the union has had the fullest freedom to negotiate an agreement establishing rules to govern seniority in plant rules, and that agreement has been ratified and is legally binding. Now the union seeks to set aside those rules in a particular case in order to reach a different result.

Is not the union's action here "arbitrary" in the most fundamental meaning of that word—not being governed by rule or principle?[26] It is not that the single result, removed from its context, is irrational; rather, it is that the result violates the very rules established to govern it. The union's conduct is arbitrary in the same sense that an employer would be arbitrary in discharging an employee for an offense when the posted rule states a maximum penalty of three months' suspension. It is arbitrary in the same sense that a union would be arbitrary in disqualifying a candidate for union office on grounds not stated in the constitution or generally applied. It is arbitrary in the same sense that an administrative agency would be arbitrary in refusing to apply its published rules in a particular case.

If the collective agreement contains no provision on how seniority lists shall be merged when plants are consolidated, then the union and employer should be able to agree on any reasonable result. But when there are established rules, the refusal to follow those rules can only be described as arbitrary. This meaning of the word "arbitrary," as used in *Vaca* v. *Sipes,* is reinforced by the policy articulated by the Court that similar complaints should be treated consistently.

3. The Case of the Settled Ambiguity

> Two companies governed by the same multiple-employer contract merge. The contract language is ambiguous, but the consistent practice in similar cases has been to dovetail seniority lists. Union officials, responding to the majority views of the employees involved, agree with the employer that the employees of the smaller, absorbed company should go to the foot of the seniority list. Employees who are laid off—all former employees of the smaller, absorbed company—object, and when their grievances are rejected, they sue the employer and the union.

This case is basically no different from the preceding case. Although the words of the contract are ambiguous, its meaning has become settled by past practice. The parties have reached a mutual understanding which is as binding as if it were clearly stated

[26] *Black's Law Dictionary* (4th ed. 1957) defines arbitrary as "fixed or done capriciously or at pleasure; without adequate determining principle; . . . not governed by any fixed rules or standards."

in printed words. There is no longer an ambiguity but an established rule. Refusal to follow the established rule in the particular case is arbitrary in the fundamental meaning of the word.

The fact that the union is responding to majority will makes the union's conduct even more vulnerable, for, as the courts of appeal have emphasized in similar cases, "It is not proper for a bargaining agent in representing all employees to draw distinctions among them based on their political power in the union," or to take action "solely for considerations of political expediency." [27] Again, as in the preceding case, until the ambiguity has been settled, the parties are free to agree upon any reasonable interpretations of the words. But when the ambiguity is resolved and a rule established, the policies of *Vaca* v. *Sipes* come to bear, that similar complaints should be settled consistently and problems of interpretation should be given settled answers. The long-run interest of union and management, as well as those of individual employees, is served by establishing rules that are consistently followed.

4. The Case of the Unloved Grievant

> "Bull Whip Pete" had been promoted to supervisor from the ranks. When he became so abusive and overbearing that he could not work with the men under him, he was demoted back to the bargaining unit. He bid on a job based on seniority accumulated during the years he worked as a supervisor. The company awarded him the job, but when the union protested, the company removed him from the job. The contract language was ambiguous as to accumulation of seniority by supervisors and there were no precedents. The union committee refused to process his grievance with the statement, "He should be ridden out of the plant on a rail."

Here there was a true ambiguity to be resolved. In a real sense, the contract was not complete, for the parties had never agreed upon a rule to govern this kind of case. The parties must be free to complete their contract by agreeing to whatever reasonable interpretation best serves their mutual interest and establishing a rule to govern this and future cases. This freedom is as wide as the ambiguity of the contract.

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[27] *Truck Drivers & Helpers Local 568* v. *NLRB*, 379 F.2d 137, 65 LRRM 2309 (D.C.Cir. 1967).

But here there is serious doubt that in settling "Bull Whip Pete's" grievance they are agreeing on any rule or principle to govern future cases. The settlement is motivated by personal hostility which generates arbitrariness and discrimination, and bespeaks bad faith. The union is not acting for but against one whom it represents, seeking to destroy rather than protect his potential contract rights. Because it has acted on these motives, the union has violated its duty of fair representation.

I want to leave to the side, for the moment, the difficult but important questions of the employer's liability and the appropriate remedy when the union has violated its duty but the employer may not have violated the contract.

5. The Case of Sudden Statesmanship

> Pulaski was discharged for striking a foreman. Pulaski claimed that the foreman had provoked him with obscene and abusive language containing ethnic slurs. The foreman claimed that Pulaski started the verbal abuse and shoving match. The union refused to carry the case to arbitration because there was little chance of winning Pulaski's reinstatement and it did not want to condone fighting. In the past, however, the union had carried every discharge case to arbitration, no matter how questionable, including fighting cases. Even in some seemingly hopeless cases, the arbitrator had ordered reinstatement without back pay.

The definition of discrimination is to treat unequally; and the union's duty of fair representation, as articulated in *Steele* and subsequent cases, is to "protect equally all those it represents." Here, Pulaski has been discriminated against because he has not been given equal protection by the union. He has been denied a hearing which all others similarly situated have enjoyed. He has thereby been deprived of the chance to win a reduced penalty, a chance of substantial value even if it is only a spin on the roulette wheel of arbitration.

The union, of course, cannot be locked into a duty to arbitrate all discharge cases by its past policy; the union must be free to change that policy. But fairness, it seems to me, requires that it be done by prospective rule rather than by an unannounced application in a particular case which gives no assurance of continued application in future cases. This is certainly the standard of

fairness imposed on employers in discipline cases—past toleration of even a posted rule may bar discipline unless the employer has given notice that in the future such violations will not be tolerated.

6. The Case of the Grievance Grab Bag

> The company and the union have 37 cases awaiting arbitration. The company agrees to grant 13 of the grievances, including ones involving subcontracting, vacation pay, and wash-up time, if the union will withdraw the rest. The union agrees. Among those withdrawn are grievances of individual employees claiming layoff out of line of seniority, wrongful denial of promotion, and improper discipline which have at least some chance of success in arbitration.

This case poses, in its boldest form, the question of how far the union can go in trading off the rights of individuals for the greater good of the group. For me, the language of the Ninth Circuit says all that need be said: "[T]he deliberate sacrifice of a particular employee as a consideration for other objectives must be a concession that a union cannot make." [28]

In analytical terms, such grievance settlements are the rankest form of arbitrary and discriminatory conduct. The settlement is arbitrary in that the established rules are set aside and the individual cases involved are decided on a totally unprincipled basis. These grievances are surrendered because by happenstance they are in the grab bag when the settlement is made. The settlement is discriminatory in that these particular employees are treated differently from other employees; they are not given equal protection, for the protection of their individual contract rights is abandoned in order to benefit others. The right of the individual employee is to be represented fairly and equally by the union in the enforcement of the agreement.

It is true that in negotiating agreements, the union may trade off demands by one group in return for benefits to another group; that is a nearly inescapable part of the contract-making process. But that is quite different from trading off rights of individual employees under the guise of settling grievances concerning the interpretation and application of a collective agreement.

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[28] *Local 13, ILWU* v. *Pacific Maritime Assn.*, 441 F.2d 1061, 77 LRRM 2160 (9th Cir. 1971).

None of the interlacing policies articulated in *Vaca* v. *Sipes* justifies such a grab-bag settlement; all of the principles and policies point the other way.

It is also true that such grab-bag settlements may be useful in unloading grievance procedures which have become overburdened at the arbitration step. But the source of that problem is the persistent failure of one or both of the parties to settle at lower steps. Now they want to shift the burden of their past failures onto individual employees and make randomly designated employees pay by the loss of their job rights. This is an arbitrary and discriminatory imposition of the costs of the parties' past failures on a few employees. The union's fiduciary obligation, at the very least, is to make a good-faith judgment of the merits of the individual's grievance, not to conduct a lottery with his livelihood.

7. The Case of the Careless Committeeman

> Murphy was discharged for theft of company property. He protested his innocence and, following established practice, filled out a grievance form, signed it, and gave it to his shop committeeman. The committeeman lost the form and forgot to do anything about it. Murphy assumed that the grievance was being held pending the criminal proceedings. A year later, after he was acquitted by a jury, Murphy discovered that the union had never filed the grievance. He filed a new grievance, which the union carried to arbitration, but the arbitrator dismissed the grievance as not timely.

In *Vaca* v. *Sipes,* the Court said, " A union cannot arbitrarily ignore a meritorious grievance or process it in a perfunctory manner." How can a union meet the standard of processing a meritorious grievance in more than a perfunctory manner by negligently failing to process it at all? How can a union claim it has fulfilled the duty to represent fairly when, by its negligence, it has failed to represent at all?

The root of the duty of fair representation is that the union is the employee's agent and owes a fiduciary duty to protect the employee's interests. Can it be believed that a fiduciary does not owe a duty of reasonable care—that a fiduciary entrusted with enforcing his principal's legal rights has no liability for his negli-

gence which results in loss of those rights? In any lawyer, this would be malpractice.

This places a substantial burden on the union, but it is the same burden of due care borne by every person who drives a car, every businessman who opens a store, and every employer who hires a worker. And remember—this is a responsibility that the union has voluntarily assumed. The union has voluntarily undertaken, if not aggressively sought, the authority to represent the employees. Having acquired the statutory authority, it has voluntarily expanded that authority by negotiating contractual provisions that give it exclusive control over grievances. How can a union, which voluntarily asserts such control over employees, contend that it owes them no duty of reasonable care in exercising that control? [29]

8. The Case of Inadequate Investigation

> Brown was discharged for leaving his job two hours before the end of his shift, after notifying his group leader that he was too sick to work. Because earlier in the shift he had asked and had been refused permission to leave early, management concluded that his claim of sickness was false. The union committee, after listening only to Brown and to his supervisor, agreed with management and refused to carry the case to arbitration. Three employees, who were working with Brown, saw him vomit twice before he told his group leader he was sick, and are willing to so testify. Also, Brown has obtained a letter from his doctor stating that on the same afternoon Brown came to his office, complained of nausea and dizziness, was given a prescription, and was told to go to bed.

This case is obviously but a variation on the preceding case. The question presented here is whether the union owes a duty to use reasonable effort to investigate a grievance before agreeing to

[29] The NLRB has recently held in a similar case that "negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation." *General Truck Drivers, Chauffeurs, and Helpers Union Local No. 692*, 209 NLRB No. 52, 85 LRRM 1385 (1974). The Board did not explain why the union did not owe the rudimentary fiduciary obligation of reasonable care, or why the individual employee should bear the loss of the union's carelessness in failing to file the grievance. The Board, by its language, would seem to require some hostile intent or unlawful motive on the part of the union to make its failure to process a grievance an unfair labor practice. This is clearly not the standard of *Vaca* v. *Sipes* to be applied when the individual is suing under Section 301 to enforce his rights under the collective agreement.

a settlement. The words of *Vaca* v. *Sipes,* that a union cannot process a grievance in a "perfunctory manner," perhaps should be enough to dispose of the case. However, an additional word may be useful.

Placing such an affirmative obligation to investigate on the union adds a very substantial burden which probably ought not be imposed except where the union has voluntarily assumed it by asserting exclusive control over grievances. However, when the union negotiates for exclusive control of grievances and thereby bars an employee from processing his own grievance or suing the employer to enforce his contractual rights, then the union should have such an affirmative obligation. Having commandeered control of the employees' rights under the contract, it should have full responsibility for enforcing those rights.

In both of these last two cases, I put to the side the question of liability of the employer who may insist that he is in no way responsible for the union's default in its duty. But it must be remembered that it was the employer who granted to the union exclusive control over grievances, depriving employees of any ability to proceed on their own. How can the employer, who has given the union such control, disown any responsibility for the union's misuse of that control? It is the employer, not the employee, who vested the union with exclusive authority to process and settle grievances; and it is the employer, not the employee, who violated the collective agreement. When an employee sues to enforce his rights under the contract, how can the employer set up as a defense to his breach of contract a misuse of authority granted by him to the union to enforce the contract?

Emerging Standards of Fair Representation

These eight sample cases do not purport to cover the full spectrum of fact situations nor the multitude of variations which arise. However, reflection on these cases does lead us to some tentative standards for measuring the individual employee's rights under the collective agreement and the union's duty to represent the employee in enforcing the agreement. Five such standards emerge quite clearly.

1. The individual employee has a right to have clear and unquestioned terms of the collective agreement, made for his benefit, followed and enforced. For the union to refuse to follow

and enforce the rules and standards which it has established and expressly declared on behalf of those it represents is arbitrary and constitutes a violation of its fiduciary obligation.

2. The individual employee has no right to insist on any particular interpretation of an ambiguous provision in the collective agreement. The union is free to agree upon any reasonable interpretation of the agreement. However, the individual does have a right to have the provision mean the same when applied to him as when applied to other employees. Settlement of similar grievances on different terms is discriminatory and violates the union's duty to represent all employees equally.

3. The individual employee's right to equal treatment includes equal access to the grievance procedure and to arbitration for similar grievances of equal merit.

4. Settlement of grievances for improper motives, such as personal hostility, political opposition, or racial prejudice, constitutes bad faith regardless of the merit of the grievance. The union can violate its duty of fair representation by refusing to process a grievance even though the employer may not have violated the contract.

5. The union owes the employees it represents the fiduciary duty to use reasonable care and diligence in investigating and processing grievances on their behalf.

These tentative standards are obviously not exhaustive, and they lack definitive precision. However, they do carry us a long step beyond the elusive language and general principles of *Vaca* v. *Sipes*, and they give us a more meaningful understanding of the content of the duty of fair representation. These standards, particularly when read in conjunction with the sample cases, provide more workable guides for resolving real cases in a way that will protect the individual's right to representation in grievance handling and provide the union sufficient freedom in administering the agreement.

Comment—

LESTER ASHER*

As an advocate representing labor unions, I think I would emphasize the institutional position of the union far more than does

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Professor Summers. But I find no fault with any of the principles or any of the cases that he presented. It actually happens that he has given fact cases, which he has set out so sharply, and I think the answers which he gives are very clear. I think that any union trying to do a good job for its people would buy those rules and proceed on exactly the same basis. I think the rules are clear, and I would find no fault with the principles he has stated.

However, the problem I have, as a practitioner in the field, is trying to bring these problems into focus and into balance with the day-to-day operations of the union. First of all, each union is different; its traditions are different; its ways of handling grievances are entirely different. Steelworkers and Auto Workers handle their grievances in certain ways, generally with professionals. Building trades, for the most part, have rarely heard of grievances; they are just beginning to handle them. Teamster locals have one tradition; other locals have other traditions. So it's difficult to put all of the backgrounds together and to know how to handle the different problems on a specific day-to-day basis.

Worst of all is the climate today—a climate in which we are being deluged with litigation—in every grievance case, automatically, the person who is dissatisfied with the handling of his grievance runs to the National Labor Relations Board and files a charge that he has not been fairly represented, and somewhere along the line a lawsuit raising exactly the same issue is going to be filed in court. And if the grievant is a member of any minority, or a woman is involved, or there is some way of working in a violation of the Civil Rights Act, the union becomes a defendant in a lawsuit under the Civil Rights Act, the Equal Pay Act, and any other statute you can think of. So all of the cases today are not presented with the simplicity of the clear fact situations and rules that Professor Summers gives us. They come about in a very complicated and very difficult field involving actual working in the plant, with dissident groups and people with opposing viewpoints engaged in lawsuits and legal actions based upon many statutes.

Let me give you, as an example, a recent case cited by the NLRB that I found interesting because it arose in Chicago. This case involves a Teamster local, and the decision was issued on February 28 of this year.[1] The unfair labor practice charges were

[1] *Teamsters Local 705* (Associated Transport Inc.), 209 NLRB No. 46, 86 LRRM 1119 (1974).

filed against Local 705 of the Teamsters; the employer was Foster and Kleiser, a firm that erects large advertising and exhibition signs throughout the Chicago area. This is the part of the NLRB decision that I want to call to your attention. The Board stated:

> "The Administrative Law Judge further found that Respondent [and that is the union in this case] did not breach its duty of fair representation by the manner in which it processed Aaron Kesner's grievance based on the employer Foster and Kleiser's failure to recall him from layoff in accordance with seniority. We disagree with that finding as it relates to the conduct of Respondent's agent at the Joint Grievance Committee meeting of November 8, 1972."

The tradition of the Teamsters is to have these grievances heard by a joint grievance committee composed equally of representatives of the employers and representatives of the unions in the area. The Board's decision then goes on to find that it is clear from the record in this case that the business agent who attended the meeting of the joint grievance committee as a spokesman for the union, and hence as a spokesman for Aaron Kesner, openly stated at that meeting that he believed that Kesner did not have a valid grievance. The Board concluded that by making this statement, the union's business agent had in effect abdicated his duty to present this grievance in the light most favorable to Kesner. The Board stated:

> "In our view, once Respondent [the union] undertook to present Aaron Kesner's grievance to the Joint Grievance Board, it became obligated to represent him fully and fairly. This obligation included the duty to act as advocate for the grievance, which here [the business agent] clearly did not do. To the contrary, by saying that he did not believe Aaron Kesner's claim was valid, [he] undermined Kesner's case before the Joint Grievance Board. In these circumstances, we are constrained to conclude and find, contrary to the Administrative Law Judge, that by this conduct Respondent breached its duty of fair representation and restrained and coerced Kesner in the exercise of his Section 7 rights. . . . Accordingly, we shall order that Respondent cease and desist from such conduct."

The Board thereupon ordered the union to cease and desist and to post a notice in which the union said it would not restrain or coerce employees in the exercise of their rights under Section 7 of the Act by failing or refusing to advocate their position in grievances which are heard by the joint grievance board.

Finally, the Board went on to say:

> "Although we would normally grant an affirmative remedy for the above violation, we do not feel that such is warranted here for

> the following reason. The Administrative Law Judge found, largely on the basis of credibility resolutions, that Kesner's grievance concerning the failure of Foster and Kleiser to recall him from layoff status was without merit. The Administrative Law Judge found as a matter of fact that Kesner was initially hired by Foster and Kleiser as a temporary employee and that, as such, he did not accrue seniority for purposes of recall from layoff. Upon the record as a whole, we find no basis for reversing the Administrative Law Judge's finding in this regard and, therefore, we do not find an affirmative remedy justified."

Thus we now have an NLRB ruling that if a union does go to arbitration, it must do a good job, and the union agent cannot say to the arbitrator that, in his opinion, it's a bad case. As I read *Vaca* v. *Sipes*,[2] the Supreme Court stated that the union cannot handle a meritorious grievance in a perfunctory manner. I suppose we now have to add to that—and I'm willing to buy the NLRB's rule—that even if it's not a meritorious case, if the union does go to arbitration, if the union takes the case to the final step in the grievance machinery, that it has to do a good job; it has to do the best possible job that it can; and it cannot undercut the case by saying to the joint arbitration board, "This is a bad case."

The point I want to make is that this principle is fine for lawyers who are used to being advocates and taking before an arbitrator positions that they may not really believe in; that is our role as lawyers. But to try to sell this sort of concept to a business agent is going to be relatively difficult. It will not be easy to explain to a business agent who came out of the shop that, although the NLRB decided that a grievance was without merit, nevertheless it was an unfair labor practice for him to tell the arbitration board that he did not believe that the claim was valid.

Or let's take a different case. Let's suppose the union agent refrains from saying a word about the fact that this is a bad case, but he just doesn't fight as hard or try to be as convincing as you might think he should be. Or let's suppose the union decides to go to arbitration in a given case, but the union leadership assigns a business agent who has never handled an arbitration case before or who will probably handle it poorly or not get the best results. I believe that in such cases the same argument could be made—that there was a failure properly to represent and that such a set

[2] 386 U.S. 171, 64 LRRM 2369 (1967).

of facts would constitute an unfair labor practice. What the affirmative relief, if any, should be in this kind of case, where the Board couldn't come up with one because it found that the grievance was without merit, is one of the interesting problems we shall have to grapple with in the future.

There is another problem in this same Foster and Kleiser case that the NLRB did not go into. Under this particular Teamster contract, the grievance is carried to a joint committee. The Board did not, in this case, discuss the problem presented by the fact that the union has representatives on this joint arbitration committee. So, in coming to the conclusion that the grievance was without merit, some of the representatives of the same union that the business agent was representing were involved in making that decision. The Board, as I see it, approved the joint arbitration committee procedures, but failed to analyze all of the difficult problems involved.

Or let's take another fact case. Suppose, in this same case where our friend Kesner was arguing that he was entitled to be restored to his job, that he was improperly kept on layoff and not called back, there are other employees who are very sophisticated, and they decide they want to participate in the arbitration machinery and argue their position before the joint committee. As I read the Supreme Court decision in *Humphrey* v. *Moore*,[3] which involved exactly that argument with respect to seniority and dovetailing, the Court said, concerning the antagonistic interests of the two groups of employees, "that both groups were represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." It would seem, therefore, that you might argue that in this very case, where the business agent made a mistake in saying that Kesner's grievance was not a good one, if he had, however, presented at the arbitration proceeding competing employees who were urging their contentions in opposition to the position taken by Kesner, certainly on the basis of *Humphrey* v.

[3] 375 U.S. 335, 55 LRRM 2031 (1964).

Moore, the business agent could have stated his position in support of one side of the argument.

So, with all of these cases descending upon unions, one of the things that is extremely difficult is explaining to business agents or to local union representatives exactly what their duty is, exactly how to handle the fact situations that Professor Summers has discussed. We have found in our office that we have avoided a lot of problems, as a practical matter, by explaining to our local unions (and I think we have been successful) and taking the position that each grievance must be taken very seriously; that no one man, as in the old days the business agent or the leading figure in the union, can determine by himself whether to press the grievance or not. We urge that those days are gone and that the decision to go or not to go to arbitration is no longer a one-man determination. We explain that there must be an appeal procedure within the union so that an individual can move up from a refusal by the steward to press his grievance, that he can take it to another step, and that ultimately he can take it to the executive board of the local or to the membership to determine whether the union will or will not go forward with the grievance.

We have also urged that there must be more careful preparation, and in many cases where the union is uncertain whether to go to arbitration or not, we insist that we get the file, that we complete the investigation, and that we review all of the problems involved; then we write a formal opinion as to whether we think the union should go to arbitration or not. We are trying, on behalf of each union, to make a better record with respect to all of these grievance cases. As to some of the problems that have arisen in arbitration cases, long before *Vaca* v. *Sipes,* we decided that if any employee wanted to bring in his own attorney, that was perfectly agreeable with us. If that attorney wanted to put on witnesses, we had no objections; if he wanted to examine, cross-examine, or participate in the arbitration procedure, we have never raised any question, and we have had no problems with respect to such issues.

What has happened as a result of *Vaca* v. *Sipes,* I think, is that we entered an era that was in many ways extremely costly for labor unions. Labor organizations have been taking more and more cases to arbitration. Not only has that been extremely expensive, but it has caused the organizations to become en-

shrouded in an aura of legalisms and to use lawyers far more than they have wanted to. Basically, every labor union would like to handle each grievance not as a legal procedure but on the basis of democracy in the work place, with the proceeding being conducted by its own agents and on as informal a basis as possible. I think we have now reached a period where, as I see the picture, labor organizations overdo going to arbitration. While I hate to hurt the work of any of the people here, I think labor unions feel that in many cases they have to tighten up and realistically assess the value of the grievance and then decide that they are not going to go to arbitration and that they will take the consequences if the case winds up in a lawsuit or goes to the NLRB or whatever happens, because the cases, even following arbitration, are all winding up in the Board and in litigation in any event.

Another point that has added to the difficulties is the fact that there is an interlacing of all of the laws in the labor field which has complicated the whole situation. I have insisted that one of the grave problems with respect to the responsibility of unions—and it has an effect upon grievance handling and the frequency of arbitrations—is that the Landrum-Griffin Act has made the terms of office for local union officers three years. I think this term is far too short; it should be increased to four or five years, and such an increase in the term of office would result in a substantially stabilizing effect upon the negotiating of contracts, the handling of grievances, and everything that goes into the collective bargaining process in all of its phases.

The U.S. Court of Appeals for the Seventh Circuit finally handed down an important decision at the end of December 1973 in an airline stewardesses' dispute.[4] The decision involved the American Airlines and Trans World Airlines and arose under the Civil Rights Act. The union had started a civil rights class-action suit and then attempted to settle its civil rights case on the basis of securing the right to reinstatement for stewardesses who were laid off because they became pregnant. The rule of the airlines had been that as soon as any one of the stewardesses became pregnant, she was off the payroll. The attempted settlement called for obtaining reinstatement for those women laid off on account of pregnancy, as jobs opened up, only on the basis of a preferential

[4] *Stewards* v. *American Airlines, Inc.*, 490 F.2d 636, 6 FEP Cases 1197 (7th Cir. 1973).

list and with seniority up to the date of termination. The Seventh Circuit ruled that this class action could not be settled on such a basis because there was a conflict between the stewardesses who were employed and the stewardesses who were out of work. Thus, the problems of class actions and all of the discrimination and civil rights statutes have made it more difficult for a union to settle many of these problems and have made it more complicated for the union to handle and dispose of its grievance disputes.

It seems to me that despite the general rules that Professor Summers is trying to develop for us, we are actually going to have to litigate these cases one by one, and undoubtedly we will wind up with the elucidating process of litigation.

Comment—

BERNARD DUNAU*

One of the ironies of *Vaca* v. *Sipes* is that it's supposed to be serving the employer-union institutional interest. By closing access to any forum to the individual employee, except upon a showing of unfair representation, we are supposed to have developed the greatest of all possible worlds whereby the institution will control itself, and only unfairness will justify outside intervention. It takes no imaginative lawyer, however, to dream up a lawsuit based on unfair representation, and instead of having the institutional interest served by barring access to the employee, what we have, I think, is the institutional interest disserved by having the same issues litigated, but challenged through a side door of unfair representation suits.

Now, I do not expect that this Supreme Court can be persuaded to reverse *Vaca* v. *Sipes,* to take the proviso to Section 9 (a) at face value, and to say that an individual employee has an individual right to prosecute his own grievance because we deal in this area not simply with a two-party interest but, it seems to me, with a tripartite interest—namely, the union, the employer, and the individual employee who claims a right under the agreement.

Well, if we cannot expect salvation from the Supreme Court, perhaps we can save ourselves. We pride ourselves that we have

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built an arbitral institution as a private method of dispute settlement that is superior to anything that could have evolved had the controversies remained in the legal system or been resolved on the picket line. Perhaps there is another step that now should be taken in the interest of serving both the institutional and the individual interests. That step is for the union and the employer, in negotiating their collective bargaining agreement, to provide that when the union decides that a grievance should no longer be prosecuted, because it has made a good-faith and reasonable judgment that it lacks merit, then from that point on the contractual adjustment procedure should be open to the individual employee to prosecute his grievance through the remaining steps of the grievance procedure and, if he thinks that his grievance is good enough, to invoke arbitration of that grievance.

If the grievance and arbitration procedure were open to the individual employee, one of the virtues would be that the union could be more candid in the positions it takes. It would no longer run a serious risk of being accused of unfair representation in saying that the individual has a lousy case, and, therefore, it would be less prone to pursue a poor grievance for fear that it would be charged with unfair representation if it did not. It could say, "We think you have a lousy case, but if you think you have a better one than we think, take it through the rest of the grievance procedure yourself. We will present our position, you will present your position, and the employer will present its position."

Now, if we are disposed to try this great revolution of opening up the grievance and arbitration procedure to the individual employee, we will have to make a number of subsidiary decisions. We will have to say, in order for this to be a fair procedure, that the individual employee may participate in the selection of the arbitrator. It must be his choice as well as the union's and the employer's. In addition, in order for this procedure not to be overly clogged with frivolous grievances, presumably we've got to have some way of having the individual employee pay his own way. Now that presents a problem. I don't think you can make the price so high that you're subject to the claim that you have frozen the employee out of the procedure because it's too expensive. I don't think you can make it free because it would encourage anybody just to push whatever gripe he had because it's not

expensive to him to push it. Maybe he's got to gamble a week's wages—something high enough by way of financial disincentive to make him aware that he runs a risk. Moreover, in establishing this procedure, perhaps we have to say that the employee is confined to his individual interests. The clearest ones would be discharge or the underpayment of a wage. Maybe the employee has no interest that he should be allowed to litigate where his interest in the particular dispute may be either nonexistent or relatively minuscule.

There would be a vast number of other subsidiary matters that would have to be resolved by the negotiators. But I wonder whether, in choosing to open the grievance and arbitration procedure to the individual employee, we would not to a substantial degree do away with the nonsense of having to decide that the union has defaulted in its duty of fair representation as a precondition for the employee to say, "Look, I work for three bucks an hour. You didn't pay me three bucks an hour. I want my $3.00 an hour." Why shouldn't he be able to present that claim without also having to say the union was crooked or in some other way unfair by not pushing his interests?

Of the cases that Professor Summers has discussed, four of the five need never confront the question of the duty of fair representation if you would open up the grievance and arbitration procedure to the individual employee. If he claims an underpayment of wages as in one case, or layoff as in another, or discharge as in two others, then he presents that claim. There is no reason for the sideshow of demonstrating that the employer ought to respond to him in the vindication of the employer's promise to pay him, or not to discharge him without just cause, because he has been doubly wronged—namely, that the union has also participated in his victimization.

Now, if we are disposed to be bold enough to create such a procedure, then I suggest it presents a rather formidable challenge to the arbitrators themselves. It's going to be far too tempting, if the individual employee before him is confronted by adverse positions of both the union and the employer, to tend to slough the individual's interest in deference to the institutional interest. If that should happen, the scheme I suggest is not worth the time I am spending talking about it.

The essence of this procedure, therefore, if it is to be successful, is that the arbitrator must give the same careful attention to the individual grievant who comes before him with his claim as he gives to the claim of a union and the defense of an employer. And if we are able, with some degree of that overworked word statesmanship, to do for ourselves what the law has not required us to do, perhaps we can eliminate, not altogether but to a very significant degree, the necessity for deciding how perfunctory the union has been, how unfair it has been, how reasonable or unreasonable it has been. The employee takes his position, the union takes its, and the employer takes its. And the arbitrator, if he is truly a judge, will make his decision based on the intrinsic merits of the case, and not on the alignment of institutional interests.

Comment—

ROBERT H. KLEEB*

The problem is basically a union problem, although management must be concerned with it. I do not think that the proviso of Section 9 of the National Labor Relations Act has anything to do with the subject. Having been a regional attorney for the Board back in 1935 under the Wagner Act, it is my recollection that the proviso in Section 9 was to permit the employer to talk directly and alone with an employee about grievances even though the employee had an exclusive union agent, without the employer being guilty of an unfair labor practice of failure to bargain with the agent.

I think *Vaca* is wrong in so far as it exposes the employer to a Section 301 damage suit by an employee without the union's having to be a party and places the burden on the employer to defend himself by proving that (a) the union fairly represented the employee, and (b) there was no breach of the labor agreement.

I challenge Professor Summers's statement that the employer gives the union exclusive control over the employees. The employees give the union agent exclusive control over themselves by virtue of the statutory majority-rule process and the legal obligation of the employer to deal with that agent as the employees' exclusive agent.

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I was delighted to hear my good friend Les Asher say that the unions he represents are seriously addressing themselves to the proposition that they should settle grievances under the grievance procedure and not take everything to arbitration. I have discussed this subject with many union officials and union lawyers, and they tell me, "We're going to take it to arbitration because we are afraid if we don't, we'll have a lawsuit on our hands in the federal or state court, and we'll have to defend that; and it's more costly to the union to defend a fair-representation suit under *Vaca* than it would be to submit the grievance issue to arbitration." So, the grievance goes to arbitration, regardless of the question of fair representation, when the union has the responsibility, in my judgment, of doing what Les Asher says his unions are instructed to do, *viz.*, get the facts and, if management is right, agree with it and refuse to go to arbitration.

Ten years before *Vaca,* the rule was and remains that the bargaining process is a continuing thing—that it involves day-to-day adjustments in the contract and other working rules, the resolution of problems not covered by the labor agreement, and the protection of employee rights already secured by the contract, including representation at the arbitration hearing. Also, that the union can no more unfairly discriminate in carrying out these functions than it can in negotiating the collective agreement. The burden placed on the union by *Vaca* to prove that it fairly represented the employee is not a heavy burden. As I read the cases, poor judgment and negligence is not unfair representation, and I feel that the unions could very easily defend themselves in *Vaca* lawsuits—in those cases where they settled grievances short of arbitration.

In *Vaca,* there were two theories submitted to the Supreme Court. One was that the employee should have the right to have his grievance taken to arbitration. The other was that the union should have sole discretion in the matter subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility. The Supreme Court came out in between those two theories with the *Vaca* rule enunciated by Professor Summers.

Does the *Vaca* rule apply to the representation of the employee at the arbitration hearing? If so, what is the company's burden at

the hearing? I know of no cases where the question of fair representation at the arbitration hearing has been an issue. How is the arbitration award to be attacked? Does the employee who thinks he has not been fairly represented at the hearing go into court to set aside the award? May the employer be sued under Section 301 for breach of contract under the *Vaca* principle because the union did not fairly represent the employee at the hearing? If in a Section 301 proceeding to set aside the arbitration hearing the union isn't made a party, does the employee have the burden of proving the union did fairly represent the employee at the arbitration hearing? Should the arbitrator be called as a witness to testify that the employee was, in his opinion, fairly or unfairly represented? What if there is no transcript of the arbitration hearing? How is the burden of proving unfair representation sustained?

Professor Summers seems to presuppose that an individual employee has a prevailing interest in having his private matters resolved as he sees fit. If you accept the proposition that the individual is paramount, it follows that a system that does not protect him from the negligence and poor judgment of his elected representative is not adequate. The underlying rationale of Professor Summers's position seems to run counter to what I consider the established precepts of collective bargaining. Summers characterizes the rationale that those who seek the benefit of the collective agreement must accept its burdens as sort of circular sophistry. He would appear to limit the majority representative to the negotiation of the collective agreements and would make that same representative a secondary party in the enforcement of the very agreement that the exclusive agent negotiated. There is a distinct advantage to employees in preserving effective grievance and arbitration machinery. If management is faced with the obligation of taking every individual grievance to arbitration at the whim of the employee, grievance and arbitration provisions would soon disappear from collective bargaining agreements.

I was intrigued with Bernie Dunau's thought about negotiating into the agreement a different type of procedure from that which we all know and use today. The employee's only recourse would be a one-on-one confrontation with his employer wherein he

stands a poor second, or the employee must resort to court action which is complicated, time consuming, and prohibitively expensive.

Even if management permitted employees to resort to the arbitration process apart from the majority representative, it is questionable that the employees are competent to do so. Because of his personal involvement in the grievance, the employee lacks objectivity. In most cases, he is ignorant of labor relations and the administration of collective bargaining agreements, is liable to be unaware of past practices, and is not privy to mutual understandings and negotiation history between his exlusive agent and the employer. Furthermore, isn't he liable to be unconcerned about the effect his particular case may have on the overall work force or the common law of the institution or the industry? In order to present his case, the employee would probably have to employ counsel, and not all employees are financially capable of doing that. If we go that course, might not the next step be to require the employer to maintain a legal office that could be used by all employees to obviate any financial discrimination so that they can take all of their cases to arbitration?

Comment—

LEO KOTIN*

It occurred to me as I listened to the first two speakers that I would have to make a gigantic leap from the etherial atmosphere of the discussion of arbitration and rights to the arbitration table. I'm very happy that half that distance, I think, was covered by the previous speaker.

What I would like to talk about is the arbitrator at the arbitration table and some of the problems he faces. Presumably, when he comes to the arbitration table, he is under the impression in most instances that there has been complete agreement that the issue should be arbitrated and that all of the appurtenances to the arbitration proceeding have been taken care of, such as the appointment of counsel, the retention of a court reporter, if one is necessary, and sometimes, if he is fortunate, even an agreement on the statement of the issue.

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Let us spend a few minutes discussing some of the problems that are left when the arbitrator appears at the hearing. First and foremost is the grievant who comes with his own lawyer. He may or may not have informed the union official that he is going to have his own counsel, but he is there at the arbitration table and the first thing you do is have a motion that he be recognized as counsel for the grievant. If the union official is smart, he will not oppose it; he will say, "Thank God I'm rid of this." If the case is so involved that the grievant is seeking personal counsel, generally speaking, the onus of any possible adverse decision is one that the union official will seek to avoid. Very often, however, for reasons many of which are legitimate—basically the protection of the labor agreement as the union seeks to apply it—the union-appointed representative will oppose the intervention of other counsel, and the arbitrator is there faced with his first big decision. What does he do?

Well, the first thing he will try to do is to see if he can work it out amicably, and the best basis for working it out amicably that I have found is to give both of them some share in the conduct of the proceedings. Even this poses a problem. For example, the private counsel of the grievant will insist on the right to cross-examine; counsel for the union will insist that cross-examination should be through him. Somehow or other, I have not found it too difficult to give both parties ample opportunity to provide what advocacy they feel their client should have. The real problem, however, arises when sometimes this advocacy appears to be based on the application of two seemingly different labor agreements. The arbitrator is there called upon to resolve not only a dispute between the union and the employer, but conflicting interpretations of the same language between counsel representing, one, the union, and two, the grievant. And the counsel representing the union is, *per se,* also representing the grievant. In such instances—and I've had several of them—I've had the audacity to tell the parties that they're arguing at cross-purposes and the least they could do would be to get together to decide on a common interpretation, however wrong it might ultimately appear in my view, before they come and argue their conflicting interpretations before me.

There is yet another problem, That problem, probably the most difficult one an arbitrator has to face, is to make a determi-

nation as to whether the grievant is being properly represented. This involves many considerations, one of which is an assessment of the capacity of his advocate to represent. The reality is that in a good many unions that cannot afford high-priced attorneys, where the business agent is the one who presents the cases, and the business agent before you has just been elected to his first term about two weeks ago, you find that his approach to the arbitration process is fairly infantile. The question posed to the arbitrator is to what extent should he help him. Here, I don't believe that there can be any one specific rigid view. The reality is that the arbitrator is well aware in such a situation that the grievant is not getting the sort of representation he is entitled to. On the other hand, he is also aware that the grievant is being represented by that responsible individual whose duty it is to represent. So, the arbitrator may or may not try to help the grievant. If he tries too hard and he has sophisticated counsel on the other side, the first thing you know he's going to be told he's exceeding his authority, he's pleading instead of judging, and he'd better cut it out. The veiled threat of trying to set aside an adverse award is raised. On the other hand, the arbitrator has the right, it seems to me, to inquire, to elucidate, to dig further into areas that have been opened up by the parties, in an effort to see that he at least gets all of the facts that he thinks are pertinent.

Then there is the problem, of course, of an arbitrator's opening up an area of discussion or inquiry that both parties have meticulously ignored. In an arbitrator's mind, it may not only be significant, but controlling. And here, too, the arbitrator is faced with some exercise of judgment. First, if he has sophisticated counsel on either side or both sides, he must assume that they know just as much about the value of the particular evidence as he does. That means they have purposely and intentionally avoided any reference to it. It would seem to me that where there is good-faith arbitration and good-faith negotiations and dealings between the parties and they have agreed to do that, they have a legitimate basis for avoiding this relevant area on the premise that some greater considerations are involved. So, the question is posed to the arbitrator as to whether he invades this area that the parties have meticulously avoided, or he continues to avoid it.

The decision is not quite as simple as I make it out to be because, obviously, the avoidance of this particular area of inquiry

may mean the difference between a favorable or unfavorable award for the grievant. Essentially, the whole procedure is there as one manifestation of the rights of the grievant. The arbitrator has to weigh these two basic considerations, and he comes to some sort of conclusion. I doubt whether anybody can fashion a rule that would apply in all instances.

The actual conduct of the case is the next problem the arbitrator faces. All of us arbitrators, I think, have squirmed at the head of the table where we have seen the case actually butchered. One that should have been won was being lost because of improper presentation. Query: Does the arbitrator's sense of equity in that sort of situation oblige him or permit him perhaps to assume the role of advocate, in a sense, in terms of examination of witnesses in order to elicit from them that which is consistent with justice? In some instances, if he tries it, again he is going to be slapped down by counsel for the other side. In other instances, he will find that union counsel is very grateful because his own inadequacy is responsible for the failure to elicit these particular problems.

Another situation that arises frequently is, to put it bluntly, the intentional throwing of the case, where the arbitrator may come to the conclusion that the union is not exerting its best efforts in order to protect the rights of the individual and to secure redress for the grievance that is being arbitrated. What does the arbitrator do in a situation like that? One thing he can do is to tell counsel that, in his opinion, he is throwing the case. I doubt whether most arbitrators would resort to those measures. On the other hand, he could replace counsel and, after examination by counsel has been completed, he could take over the examination and elicit the testimony that is most favorable to the grievant.

This leads to a consideration of one of the most serious problems that I face in arbitration. Very often—and we may as well speak candidly about it—an arbitrator is told that the parties would like an informed arbitration, where they have agreed to the ultimate result. They want the procedure to go along as if it were genuine, although everyone knows beforehand what the results will be. In that sort of situation, the parties are blatantly open about it, and the arbitrator must make a decision, based on his own sense of ethics. If the informed arbitration is proposed with an insidious objective—and an arbitrator who has had expe-

rience can determine this with some degree of certainty—if it is done insidiously by the failure of the union to afford proper representation for the grievant, then the arbitrator is faced with the basic problem of taking over the case himself or else ruling against the grievant on the basis of poor presentation. The whole question of the quality of presentation, it seems to me, is a very serious one, particularly in view of the fact that any number of advocates are absolutely unqualified for their advocacy. Again, I refer to the new, inexperienced business agent; I refer sometimes to counsel who has been corporation counsel for a corporation and is called in for his first arbitration, where you are addressed as, "Your Honor, may it please the court." That always gives me the shivers a little bit because I do not want to be held to the same tests applied to His Honor and the court. But in those situations, again the arbitrator is faced with the choice of the degree of participation that he should engage in.

I mention the word "participation." To me, it seems that arbitrators differ in this area more than in any other approach to the arbitral process. Some arbitrators are quite active. They will participate to the point where just about every witness, after he's been examined and cross-examined, will be subject to examination by the arbitrator. The arbitrator may take the liberty of interrupting examination to clarify certain points. Others are what I call the passive arbitrators who take the position, and a tenable one, that essentially it is the duty of the parties to present the cases, and it is not the duty of the arbitrator to help them by his interpretation.

This raises the question of what is the basic nature of the arbitral process. On its face, it's an adversary procedure, and certainly there are some aspects of an adversary situation in it. We have counsel opposing each other. We have counsel trying to persuade the arbitrator to accept one of extremely conflicting points of view, and the arbitrator, in a sense, has to determine one or two things: Who is the better counsel, and who has made the more persuasive case? Wherein does the truth lie? The two are not necessarily synonymous. I don't know what the answer is. I think each arbitrator must find the answer for himself. But, essentially, one of the questions that must be answered by all of those who engage in arbitration is whether it's basically an adversary situation that, in one way, reflects itself as being a contest between counsel;

or whether it is, in a sense, a truth- or fact-finding procedure in which the arbitrator may permit himself great license to find wherein the truth lies.

Just to end on a personal note, I will say that I adhere to the latter view—that it is a fact-finding, truth-seeking procedure, rather than a contest between opposing counsel.

Discussion—

CHAIRMAN PETER SEITZ: I'm sure the panelists have many things to say to each other, and we may have time to do this subsequently. I think it best at this time to throw the matter open for discussion by the group.

MR. BENJAMIN AARON: I have a question for both Professor Summers and Mr. Dunau. It has to do with the appropriate forum in which an individual employee adversely affected by his union's failure to represent him fairly can seek redress.

If, in the interests of simplicity and brevity, we exclude cases of alleged discrimination based on race, sex, religion, or national origin, there are typically three possible forums: arbitration under the collective agreement, the NLRB, and the courts. If the employee elects to file an unfair labor practice charge with the NLRB, and manages to avoid having his case sent back to arbitration under the *Collyer* rule, his remedy, if granted, will be limited to a remedial order against the union. Even in the most egregious case of unfair treatment, he will not be able to recover punitive damages.

Now, suppose the case goes to the arbitrator. Should the grievant have the right, as Mr. Dunau suggested, to insist upon a trilateral arbitration proceeding, in which he will have the status of a party in interest? If so, the problems suggested by Mr. Kleeb are not the only ones likely to arise. For example, to mention only one, in such a proceeding the employee would, presumably, be allowed to select his own representative. Suppose that representative happens to be the attorney for a rival union: At what point can it be said that the employee is not merely processing his own grievance, but is also actively seeking an opening wedge for the rival union in the bargaining unit?

Finally, suppose the employee takes his case directly to court. Forgetting the various procedural barriers established by *Repub-*

lic Steel Corp. v. *Maddox* and *Vaca* v. *Sipes,* and assuming that the court reaches the merits of the dispute, there is a real danger that the court may adopt a construction of the collective agreement urged by the plaintiff that seriously undermines settled understandings between the employer and the union. That this is not idle speculation is demonstrated by the Italian experience; cases of the type described in my hypothetical are regularly tried on the merits by the regular Italian courts, with exactly the same consequence as I have suggested.

I realize that Professor Summers was attempting to deal with other tentacles of the octopus, but I should like to hear his opinion on how best to vindicate the individual's rights in these circumstances, and I should like to hear Mr. Dunau's comments as well.

MR. SUMMERS: Your question seems to pose both some procedural problems and some substantive problems. In procedural terms, it seems to me that if the individual is attempting to assert a right under the collective agreement (the Supreme Court did not deal with this problem), an appropriate solution ought to require that there would be joined in the same proceeding both the employer and the union. I think it's inappropriate to have a proceeding in which the individual's rights under a collective agreement are being adjudicated without having both of the other parties there. Now, I see no reason why the National Labor Relations Board might not be able to accomplish that by various procedural devices. It can be accomplished by the court by the court's requesting that the other party be joined. However it is done, I think both ought to be there; that seems to me to be clear. And I don't think that it is any more difficult for the NLRB to do than for the court to accomplish. All you need to do is to have a modification of what the Supreme Court gummed up in *Vaca* v. *Sipes.*

The second part of the question, procedurally, is: Who is to represent the individual? Are you going to end up with representation by some attorney who is, in fact, the spokesman for another union? It seems to me that that is a risk which is going to be present no matter what you do, no matter where the problem arises, or where the individual litigates his right—whether it's before the Board, before the arbitrator, before the court, or whether it's on a contract claim or fair-representation claim. It is

an inevitable problem, and I think we just learn to live with it. There are some discomforts that we learn to bear, and I think that's it.

When it comes to the substantive questions, one of the problems must ultimately be the interpretation of the collective agreement. The parties have, of course, agreed that the contract should be interpreted by an arbitrator. In the theoretical context, that would mean the proper place to have this case would be before an arbitrator, and in that respect I think that I share Bernie's desire. In my paper, I did not attempt to reach that far. I was reaching for something much more modest, and that is a remedy for the individual when the union does not give him the benefit of the same interpretation it gives to others or settles on the basis of an interpretation that is beyond the bounds of reasonableness. However, in principle, I think that arbitration is the proper place for questions of contract interpretation. But let me say that if these kinds of cases are going to arbitration, to be decided by arbitrators, then it is absolutely fundamental that arbitrators conceive of themselves as something totally different than they now do. Arbitrators cannot conceive of themselves as being fundamentally servants of union and management, that union and management are their customers and their clientele, and that they are to serve the interests of those institutions. If these cases are to go to arbitration, arbitrators must take upon themselves a quite different role and responsibility. They must assume a responsibility beyond the union and the management. In interpreting the contract, they must accept responsibility to interpret in an objective and consistent way even though both the union and the employer would prefer a different interpretation in the particular case. My only qualm is that accepting such a responsibility may be the road to extinction for an arbitrator. It is at that point that I have doubts whether such cases can, in the long run, be handled by arbitrators because arbitrators probably cannot survive, in the long run, if they so conceive their function—at least as long as the parties conceive that arbitrators are their servants, as they now do. Although I would like to see such cases handled by arbitrators, and I think they theoretically can be handled more appropriately by arbitrators, until the arbitrators think of themselves as something different and the parties think of them as something different, I think we may have to settle for a second-best forum in terms of competency, and that's the courts.

MR. DUNAU: The forum question is what provoked me to the contract solution because the forum at the present time is very clear. If there is a common pleas court in Oshkosh, Wis., that is your forum if that is where the plaintiff chooses to take you. And before this judge in Oshkosh, Wis., you will litigate the question of the violation of duty of fair representation; and to my utter surprise, when I looked into it, you will find that if the plaintiff —the employee—does not choose to join the union, it will be the employer who will be defending the union's discharge of its duty of fair representation. And in the same suit, somehow or other, if you first persuade the Oshkosh common pleas judge that the union has defaulted in its duty, he will then decide whether the employer has violated the collective bargaining agreement. If you like this way of handling it, then you live with what we now have. If you don't like it, either you persuade the Supreme Court to do something, which I think is unlikely, or you do it for yourself.

Now, before I get to the problem that you put in doing it for yourself, I will suggest that the NLRB has no business in this field at all. I do not think the violation of the duty of fair representation is or should be an unfair labor practice. I do not think the Board has the remedial capacity to do the job. I do not know how it orders an employer to arbitrate when the employer is not before it. I do not know what happens if it orders the union to request arbitration, the union does, but the employer refuses. Then what do you do? I do not think it has any authority to assess damages in the way the Supreme Court said was an appropriate remedial measure for the violation of the duty of fair representation. So, I think the Board is in a field that is utterly none of its business by statute and good sense. What is left is my paltry solution.

You raised what I think is at the edge of the problem—the possibility of exploiting the grievance procedure for rival union ends. You can have the same thing if the suit is started in a common pleas court in Oshkosh and the employee is represented by the attorney for the rival union. I do not think you could begin to persuade that judge that that employee was not properly represented by that attorney because that attorney and that employee have ulterior motives. If that is true, I think we at least suffer no more by having the same problem in arbitration, and I think

we'd get a more informed forum. But if that does indeed become a problem, then I think there is a long and tangled but perhaps a solution available at law. If the union thinks the grievance is being submitted for rival union ends, it can refuse to arbitrate, a motion can be made to compel arbitration, and in that forum I think the question can be decided whether there is a genuine grievance that is being submitted or the exploitation of the grievance for a rival union's end. You either compel or do not compel arbitration based on what the judicial determination of that question is. But I think of all three methods—NLRB, court, or contract adjustment—there is no solution that will be perfectly satisfactory. Of all three, I would opt for putting it into the grievance and arbitration procedure rather than having to risk what a judge or the Board will do.

MR. JERRY J. WILLIAMS: One of the complicating factors that I think we have with regard to the duty of fair representation is the question of the status of the parties, and in that regard I have a question for Professor Summers. There really are two sides to the same coin, relating first to the committeeman representative of the union who is described by Professor Summers as negligently failing to pursue the grievance. Professor Summers has found that this is violation of the fiduciary obligation. Now, the status of that committeeman, or job steward as the case may be, may itself be in question where the union contract oftentimes says, for example, that the steward or the committeeman is not a representative of the union, but is a representative of the employees. Does that make a difference? And then there is the other side of the coin, where the individual who is a grievant performs a supervisory function, so that it is doubtful whether, under the Labor Act, he would fall under the term "employee," but nevertheless he has been represented by the union within the bargaining unit. Would that make a difference on the question of the duty of fair representation?

MR. SUMMERS: Well, I'm not quite clear what impact would follow from putting in the collective agreement that when an individual employee files a grievance with the steward, the steward is the representative of the individual employee. I guess my reaction is that some things you say in a collective agreement can be treated as not seriously meant. That is frequently the case. If the steward is the representative of the employees and the union

really means it, then, it seems to me that if the grievance is turned down by the employer, the steward ought then, as representative of the employee, to be able to take it to the next step; indeed, the individual ought to be able to insist that he do so. If that's what the parties mean—that the stewards can proceed in the grievance procedure contrary to the will of the shop committee or the other officers of the union—I think you have a different case, but that strikes me as being not the kind of situation that raises a serious problem.

I don't think the law will allow the union to subdelegate its statutory power in such a way. And I don't think a union can disown the steward as being the union's representative and agent.

As far as the question of a grievance filed by a supervisor, if it's a grievance that relates to his rights to return to the bargaining unit, so that the interest involved is governed by the collective agreement and relates to rights he will have in the unit represented by the union—if that is the issue involved—then we are in the ordinary situation. However, if he is claiming a right that does not arise under the collective agreement, then he has no contractual grievance and the union is not his statutory representative. In such a case, the union has no duty to represent him, and at most has a duty under the *Howard* case not to use its bargaining power in an oppressive or discriminatory fashion.

MR. MAURICE BENEWITZ: I know of a contract covering 16,000 people that allows the individual to pursue his own grievance all the way to arbitration in precisely the way Mr. Dunau proposed. However, even when the union in this case considers that the grievance has very little merit, it pursues the grievance at least a step further, and often to arbitration, because it fears it will be charged with failure to represent on the grounds that if the individual is required to carry it, he has fewer resources, less knowledge, less information about the history of the agreement, and so on. I wonder whether, under your procedure, the union can really escape the duty, if Professor Summers is right that there is such a duty to pursue every individual grievance up the ladder if it wishes to avoid a charge of failure of fair representation. Are unions in the situation I suggested being overly apprehensive?

MR. DUNAU: I do not think unions are being overly apprehensive. I think there are very substantial problems which are practi-

cally faced with respect to claimed violations of the duty of fair representation, and I think—I breach no confidences when I say —that many a union attorney, including myself, has advised taking a questionable case to arbitration in preference to risking a suit for violation of the duty of fair representation. I do not think we avoid all the problems in the area of fair representation, but I think we avoid the problem at least until the employee has exhausted his avenues of recourse under the agreement, namely, taking it through the grievance procedure and invoking arbitration. And if at the end of that route, and if he takes that route, he still has anything to complain about, I think there will be no alternative to then facing a suit for the violation of the duty of fair representation. But if the procedure is open to him and if it is fairly open to him, and he exhausts it and he loses, what does he claim when he claims a violation of the duty of fair representation? Ultimately, what he's got to get or want is vindication of a contract right. Yet the procedure which he has exhausted and which was available to him has told him he has no contract right. So I think, while suits for violation of the duty of fair representation may still persist, what you're after is gone as a practical matter. I think there would be a very substantial reduction in the incidence of such suits if there were a procedure that was open and fairly available to the employee. It would be a lot easier to accept an argument by a union that it has reasonably and in good faith decided not to prosecute the grievance if, at the same time, it had negotiated a procedure by which the employee can go the route himself. You mentioned that there was such an agreement in New York; I had forgotten that I had seen such agreements in school contracts in Virginia and in Pennsylvania. I do not know that anything disastrous has happened as a result of that kind of procedure in a contract.

MR. JOHN E. DUNSFORD: I am going to repeat the last question because I don't think Bernie Dunau has answered it. Would there be a violation of the duty of fair representation if the kind of procedure you are proposing were set up and the union told the employee, "We don't think this grievance has any merit, but you may continue to press it yourself," but he then turned around and claimed there was a breach of duty by the union's taking that position? Perhaps you are telling us that you think a court would require the exhausting of contract remedies by the

agreement, but what we are asking is: Wouldn't the court say that the requirement that the contract remedies be exhausted in this way—namely, that the grievant himself now take the claim to arbitration—be a violation of the duty?

MR. DUNAU: I can't imagine any court saying that the setting up of a grievance and arbitration procedure open to the employee would itself constitute the union's failure to discharge its duty of fair representation. This is absolutely inconceivable to me. If there is anything settled in this area, it is that before you can institute a suit either for the violation of the duty of fair representation, or independently of that on the contract itself, you must at least attempt to exhaust the contract procedure. If the employer and the union have set up a fair procedure to be exhausted and you seek to bring a suit for violation of the duty of fair representation prior to your exhaustion—prior to your attempt to exhaust what is seemingly a fair procedure—I think that a court should say to you, "You are premature. Exhaust your remedies, and let's see where we are at the end of the road." And I would suggest that, as a practical matter, at the end of the road there will be a very substantial decrease in the number of suits for the violation of the duty of fair representation.

MR. DUNSFORD: Do you say that, even though your proposal lacks the specifics with respect to how the employee is to have adequate representation at the hearing or what amount of money the employee must risk in order to enjoy this option?

MR. DUNAU: I suggested when I spoke of this procedure that there are subsidiary questions to be resolved, to and including how much financial disincentive it is fair to impose on the employee in exchange for the right of not having frivolous grievances put into the hopper. There's another problem to be resolved, namely, the claim that this procedure cannot work at all, because where is the employee going to get a lawyer? But if that is a serious objection, it's just as much an objection to the solution in *Vaca* v. *Sipes*. Where does he get a lawyer to start a suit for the violation of the duty of fair representation? If he can find a lawyer for that, I expect he can find a lawyer to prosecute a claim through the grievance and arbitration procedure. I expect that employees are not really quite so helpless in the shop, that they're really not quite so unaware of how to process a grievance and how to take it to arbitration. I haven't found, at least with

the employees I have come in contact with, that they are helpless sheep. I rather expect, at least from the reactions I get from some of the business agents with whom I deal, that they look more like wolves than sheep sometimes.

MR. HARRY J. DWORKIN: I should like to address this question to Mr. Kleeb. After some 27 years of arbitration, I'm somewhat intrigued and perplexed by the suggestions from so many eminent individuals that arbitrators should do more than merely resolve the grievance, and should ascend to the level of judges and even statesmen, and also make inquiries, as Mr. Kotin suggests, as to whether the employee has had fair representation on the part of the union. Now, for the past 27 years, I've been reminded continually that my functions are confined, restricted, and limited by the parties to the process of collective bargaining, to the terms and conditions as set forth in their agreements, and to the evidence as presented by the parties at the hearing. We have been reminded also that the award and its decision should draw their essence from the collective bargaining agreement and be limited and restricted to the facts. Now, if these are not correct guidelines, and we owe a further and greater duty as statesmen to consider whether the employees have had fair representation and to incorporate, perhaps, those determinations in the decision and award, would we not then be violating our responsibility to the parties in the manner in which they have fashioned them, and will it not also provide a ready and prestigious handle to a dissatisfied union or employee or company to request that the award be vacated or to resist its enforcement because the arbitrator exceeded his authority?

MR. KLEEB: I hope I didn't indicate in any way that I thought an arbitrator should participate actively in the hearing. On the contrary, it is my position that he should not. I do not know what the rules of fair representation will be in connection with the union's representation of the employee at the arbitration hearing. I have supported the principles you've stated in all the years I've engaged in arbitration for management. It is up to the parties to present the facts. The arbitrator's role is to listen and make his award and decision, and, as you say, they should draw their essence from the terms of the labor agreement.

MR. NEIL N. BERNSTEIN: My question is to Mr. Asher. I'm surprised that I heard no reference to what seems to me to be a

growing tendency toward the creation of dissident organizations within a union to represent a group that considers itself permanently in the minority. I'm wondering whether you would accord the same kind of recognition to that kind of group where there is a lawyer who represents a group of workers who feel that they are permanently slighted by the union and who always wish to appear and press their claims throughout the grievance procedure. According them legitimacy, it seems to me, could raise a question that could destroy or impede the normal function of the union. I'm wondering if that creates any distinctions in your mind.

MR. ASHER: My own answer would be a simple one: I have just not run into that situation. The situations which we have had have involved isolated grievances—one employee who, for some reason, wants to bring in his own lawyer, sometimes a friend of his or something of that kind. We have never raised any objections to it, and we have found that that's the easiest way to handle the situation. Your question of dissident groups doesn't square with my experience. There have been some dissident groups in unions we are representing where they have had slates run for office, but they still haven't developed the expertise of starting to take on grievances and things of that kind in an organized opposition fashion. I haven't had that experience and have not been required to sit down and think it out.