THE DUTY OF FAIR REPRESENTATION IN THE ADMINISTRATION OF GRIEVANCE PROCEDURES UNDER COLLECTIVE BARGAINING AGREEMENTS

I. THE DUTY OF FAIR REPRESENTATION

In recent years there has been much written in the area of labor law concerning the union's general duty of fair representation to the members of the bargaining unit.[1] Simply stated, the duty of fair representation is an obligation imposed upon the union as exclusive bargaining agent for a group of employees "to refrain from action which makes its individuals and minorities worse off than they would be in its absence."[2] This requirement, inferred from federal labor statutes, is designed to compensate the individual member of the bargaining unit for relinquishing the right to negotiate his own contract with his employer.[3] While the union's duty of fair representation is primarily concerned with the representation that each individual receives, the union, of course, must also be responsive to the wishes of any majority. This antithetical characterization—a duty running from the union to a group of individuals and to an individual member—has been recognized in both contract negotiation and contract administration. However, it is uncertain whether the individual's right to fair representation is tempered by the union's group-oriented function of bargaining agent for contract negotiation.[4]

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1. For bibliographic references to discussions of this aspect of labor law, *see* Comment, 19 CASE W. RES. L. REV. 146-47 n.2 (1967); Note, *The Duty of Fair Representation and its Applicability When a Union Refuses to Process an Individual's Grievance*, 20 S.C.L. REV. 253, 260 n.42 (1968).

2. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 157 (1957). *But see* Donnelly v. United Fruit Co., 75 N.J. Super. 383, 395, 183 A.2d 415, 421 (Super. Ct. 1962), *aff'd*, 40 N.J. 61, 190 A.2d 825 (1963), where the court said the duty of fair representation "includes an obligation to act for the collective good of its members."

3. "[The duty of fair representation] is inferred by the court as a balance to the exclusiveness of the union's power to represent unit employees and to assure all such employees adequate representation." Fanning, *Individual Rights in the Negotiation and Administration of Collective Bargaining Agreements*, 19 LAB. L.J. 224, 226 (1968). "Thus the duty of fair representation turns out to be the obverse of the coin of exclusive bargaining capacity, imposed in order to remove constitutional doubts concerning Congress' power to grant exclusive bargaining power." Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215, 1233 (1964).

4. *See* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 622, 657 (1956).

The Supreme Court, in *Steele v. Louisville & N.R.R.*,[5] initially recognized the duty of fair representation as an essential part of the exclusive bargaining power conferred upon the union by section 2 of the Railway Labor Act.[6] To make the same duty applicable under the National Labor Relations Act,[7] the Court relied on *Steele* in *Ford Motor Co. v. Huffman*.[8] While both of these cases dealt with contract negotiation, the statutory provision relied upon by the *Huffman* Court also provided for contract administration.[9] Fourteen years later in *Vaca v. Sipes*,[10] the Supreme Court explicitly recognized the duty of fair representation in the contract administration function and established guidelines for proof of the breach of the duty.

Vaca involved a potentially serious breakdown of the union-management relationship because the individual was aggrieved by both his union's and employer's administration of the contract.[11] This type of situation typically occurs when an employee has been "wrongfully" discharged by his employer, and the legality of the discharge can be settled by the union's invocation[12] of the collective bargaining agreement's grievance system.[13] If the union considers the claim unfounded or the outcome too uncertain for a confrontation with management, the union may refuse to process the grievance, and the claim will lapse for lack of another contractual remedy. The *Vaca* Court held that in such a situation the union has breached its duty of fair representation if its action can be characterized as "arbitrary, discriminatory, or in bad faith"[14] or if it processed the grievance in a "perfunctory fashion."[15]

5. 323 U.S. 192 (1944).

6. 45 U.S.C. § 152 (1964).

7. 29 U.S.C. §§ 151-67 (1964).

8. 345 U.S. 330, 337 (1953).

9. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964).

10. 386 U.S. 171, 177 (1967).

11. A brief of amicus curiae, urging reversal of the employee's award against his union, was filed by Swift & Co., the employer. Vaca v. Sipes, 386 U.S. 171, 174 (1967).

12. Usually only the union, acting on behalf of the employee, can invoke the later steps in the grievance system. *See* note 31 *infra*; Brown v. Truck Drivers & Helpers Local No. 355, 264 F. Supp. 776 (D. Md. 1967); *cf.* White v. General Baking Co., 263 F. Supp. 264 (D.N.J. 1964). In Retail Clerks Locals 128 & 633 v. Lion Dry Goods, Inc., 341 F.2d 715 (6th Cir.), *cert. denied*, 382 U.S. 839 (1965), only the employees, and not the union acting in their behalf, could invoke the arbitration procedure in the grievance system.

13. Ninety per cent of the collective bargaining agreements in the United States contain grievance and arbitration provisions. 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 51:6-7 (1965).

14. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

15. *Id.* at 191.

The recognition of the duty in the contract administration function seems only logical and necessary. If the union is to represent the employees it should do so throughout the employment process. Also, since the union is the adversary of management during the negotiation process, it should not later be its ally in contract administration. But, since the goal of federal labor laws is to prevent industrial strife by encouraging harmonious relations between management and labor, many difficulties arise when the union refuses to comply with an individual member's request that it exercise its contract administration powers to satisfy his grievance against management.

II. Breach of the Duty of Fair Representation as an Unfair Labor Practice: Jurisdictional Aspects

A. *Exclusive Jurisdiction of the National Labor Relations Board*

The major ramification of a finding that a union's breach of its duty of fair representation is an unfair labor practice[16] is that the NLRB assumes exclusive jurisdiction of the matter.[17] In *Miranda Fuel Co.*[18] the NLRB held for the first time that a breach of the duty of fair representation was an unfair labor practice under section 8(b) of the National Labor Relations Act.[19] Though the Second Circuit refused enforcement, it did not expressly reject the NLRB's determination that the breach was an unfair labor practice.[20] Three years later in *Local 12, United Rubber Workers v. NLRB*,[21] the Fifth Circuit en-

16. Section 8 of the National Labor Relations Act, 49 Stat. 452 (1935), *as amended*, 29 U.S.C. § 158 (1964), outlines prohibited conduct by employer and union which constitute unfair labor practices. The prohibitions on employer conduct are contained in subsection (a) and prohibitions on union conduct are in subsection (b). Subsections (d) and (e) are applicable to the conduct of both the employer and union.

17. *See* Note, *Federal Pre-emption in Labor Relations*, 63 Nw. U.L. Rev. 128 (1968).

18. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

19. 29 U.S.C. § 158(b) (1964). "This right of employees is a statutory limitation on bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

20. Judge Medina held that the breach of the duty of fair representation was not an unfair labor practice. Judge Lumbard explicitly did not reach the unfair labor practice question but concurred with Judge Medina's alternative ground for decision—insufficient evidence to support a breach of the duty. Judge Friendly dissented, saying that the breach of the duty was an unfair labor practice. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

21. 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), *enforcing*, Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964).

forced an NLRB decision by relying on the *Miranda Fuel* doctrine. If the *Miranda Fuel* doctrine were to prevail, all breaches of the duty of fair representation would be redressed by Board proceedings and would be subject to the discretionary enforcement authority of the General Counsel of the NLRB.[22] Thus, failure by the General Counsel of the NLRB to initiate Board proceedings would, in most cases, effectively prevent a complete determination of the merits of the union member's asserted breach of the fair representation duty.

B. *State Court Jurisdiction*

Early exceptions to the NLRB's exclusive jurisdiction were announced by the Supreme Court in *International Ass'n of Machinists v. Gonzales*,[23] and in *San Diego Bldg. Trades Council v. Garmon*.[24] *Gonzales* held state court jurisdiction proper where "the potential conflict [between the state law and remedies and the NLRB] is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act."[25] In other words, the exclusive jurisdiction of the NLRB does not attach to activity which is merely a peripheral concern of the Labor-Management Relations Act (Taft-Hartley Act).[26] State courts had jurisdiction in "interests . . . deeply rooted in local feeling and responsibility" according to *Garmon*.[27]

The loss of exclusive jurisdiction by the NLRB is undesirable[28] as there will be a multitude of forums available to the complainant, and the opportunities for a consistent application of the fair representation duty will be diminished. However, beneficial results may occur. The courts can potentially provide a forum for speedy redress of grievances, thus preventing the types of industrial strife to which the Board could not quickly respond because of its more cumbersome procedures.[29]

C. *Concurrent Jurisdiction—The NLRB, State and Federal Courts*

The recent case of *Vaca v. Sipes*[30] presented to the Supreme Court the issue of jurisdiction for breaches of the union's duty of fair repre-

22. Notes 71-77 *infra* and accompanying text.
23. 356 U.S. 617 (1958).
24. 359 U.S. 236 (1959).
25. 356 U.S. at 621.
26. 29 U.S.C. §§ 141-88 (1964).
27. 359 U.S. at 244.
28. *See* Note, *Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: A Plea for Pre-emption*, 26 U. PITT. L. REV. 593 (1965).
29. *See* R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW 66-70 (4th ed. 1968). *See also* S. REP. No. 105, 80th Cong., 1st Sess. 15-18 (1947).
30. 386 U.S. 171 (1967).

sentation. An employee sued his union in a Missouri court, alleging that the duty of fair representation had been breached when the union had not processed his allegedly wrongful discharge to arbitration. Arbitration was the fifth and final step in the grievance system.[31] The grievant prevailed at trial and on appeal in the state supreme court. The union, in urging dismissal of the action for want of jurisdiction, argued, *inter alia,* that state court jurisdiction was preempted by the NLRB since a breach of the duty of fair representation was an unfair labor practice.[32] A divided Court held that the NLRB did not have exclusive jurisdiction even though the breach of the duty of fair representation may also be an unfair labor practice.[33]

The Supreme Court's holding that both the NLRB and the courts have concurrent jurisdiction over breaches of the duty of fair representation is limited by the requirement that uniform federal labor standards must be used in all courts.[34] Applying this standard, the Missouri Supreme Court's decision was reversed, because the federal definition of a breach of fair representation was ignored.[35] Specifically, the United States Supreme Court ruled that a grievant, regardless of forum, must show that the union acted in bad faith toward him in order to sustain a breach of fair representation claim.[36] The emphasis on continuity of standards undergirds the application of labor legislation. Earlier the Court said that "[s]tate law which frustrates the effort of Congress to stimulate the smooth functioning of [the collective bargaining] process . . . strikes at the very core of federal labor policy."[37] Forum shopping will be diminished as no advantage will be available to a party because of a particular state's labor policy. The choice of the court, then, will probably depend on economic and procedural matters. The choice between the NLRB and the courts may depend on the type of relief desired and the probability of getting the NLRB's General

31. In steps one and two, either the aggrieved employee or the Union's representative presents the grievance first to [the employer's] department foreman, and then in writing to the division superintendent. In step three, grievance committees of the Union and management meet, and the company must state its position in writing to the Union. Step four is a meeting between [the employer's] general superintendent and representatives of the National Union. If the grievance is not settled in the fourth step, the National Union is given power to refer the grievance to a specified arbitrator.
Vaca v. Sipes, 386 U.S. 171, 175 n.3 (1967).

32. Brief for Petitioners at 39-45, Vaca v. Sipes, 386 U.S. 171 (1967).

33. Vaca v. Sipes, 386 U.S. 171, 186-87 (1967).

34. *Id.* at 189; Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

35. Vaca v. Sipes, 386 U.S. 171, 188-89 (1967).

36. *Id.* at 190.

37. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

Counsel to issue a complaint. Thus with the ruling in *Vaca* the employee now has a choice in the type and situs of the proceeding.

III. Procedural Choices for Asserting a Breach of Fair Representation

A. *Arbitration*

In the *Steelworkers*[38] cases the Supreme Court in 1960 announced its preference for an often used grievance procedure—binding arbitration.[39] The Court stated that no party could be forced to arbitrate unless he had agreed to do so.[40] But if an arbitration clause had been included in the collective bargaining agreement, it could be enforced by court order.[41] Even though arbitration is the stipulated procedure, often the arbitration clause must be interpreted by the courts to determine if the facts of the grievance are those specified by the clause, thus invoking the procedure.[42] Further, the courts can review the arbitrator's decision to determine whether a contract's arbitration clause gave the arbitrator the power to fashion the remedy given.[43]

The argument may be raised that a particular controversy is not within the purview of the arbitration clause.[44] Because of the Supreme Court's preference for arbitration, lower courts repeatedly reject this argument and find that the usual arbitration clause covers nearly all disputes.[45] This emphasis on employing the arbitration process strength-

38. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

39. *See, e.g.*, Guille v. Mushroom Transp. Co., 425 Pa. 607, 229 A.2d 903 (1967).

40. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

41. Lee v. Olin Mathieson Chem. Corp., 271 F. Supp. 635 (W.D. Va. 1967).

42. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

43. Torrington Co. v. Local 1645, UAW, 362 F.2d 677 (2d Cir. 1966).

44. *See* Stillpass Transit Co. v. Teamsters Local 103, 382 F.2d 940 (6th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968); Electric Alarm Trade Ass'n v. Electrical Workers Local 3, 271 F. Supp. 720 (S.D.N.Y. 1967); Local 283, UAW v. Wisconsin Motor Corp., 266 F. Supp. 899 (E.D. Wis. 1967); Richardson v. International Minerals Corp., 64 L.R.R.M. 2241 (M.D. Tenn. 1967); Monroe Sander Corp. v. Livingston, 262 F. Supp. 129 (S.D.N.Y. 1966), *modified on appeal*, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

45. *See* Electric Alarm Trade Ass'n v. Electrical Workers Local 3, 271 F. Supp. 720 (S.D.N.Y. 1967); Local 283, UAW v. Wisconsin Motor Corp., 266 F. Supp. 899 (E.D. Wis. 1967); H.K. Porter Co. v. Local 37, United Steelworkers of America, 264 F. Supp. 203 (S.D.W. Va. 1967); Richardson v. International Mineral Corp., 64 L.R.R.M. 2241 (M.D. Tenn. 1967); Monroe Sander Corp. v. Livingston, 262 F. Supp. 129 (S.D.N.Y. 1966), *modified on appeal*, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). *But see* District 50, UMW v. Chris-Craft Corp., 385 F.2d 946 (6th Cir. 1967).

ens the ties between union and employer by making them confront each other within the framework of their bargained-for grievance procedure.[46]

If an employee is dissatisfied with the arbitration decision there is little he can do. The courts have refused to look at the merits of the grievance.[47] If the matter had been properly submitted to arbitration, they only determine whether or not the arbitrator exceeded his grant of authority from the collective bargaining agreement.[48] The agreements often provide that as the claim is processed through the grievance system towards ultimate arbitration each step is final and binding unless appealed to the next step.[49] The last step, arbitration, usually is final and cannot be challenged in court.[50] Therefore, if the employee

46. Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1964) provides: "Final adjustment by a method agreed upon by the parties [union and employer] is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

47. United Steelworkers of America v. Caster Mold & Machine Co., 345 F.2d 429 (6th Cir. 1965).

48. Thrift v. Bell Lines, Inc., 269 F. Supp. 214 (D.S.C. 1967). Statutes providing for review of arbitration awards usually require fraud or corruption by a party or an arbitrator, or that the conduct of the abitrator was prejudicial before an award can be vacated. *See* 9 U.S.C. § 10 (1964); ALA. CODE tit. 7, § 842 (1960); ARIZ. REV. STAT. ANN. § 12-1512 (Supp. 1967) (decline to confirm an award rather than vacating an award); ARK. STAT. ANN. § 34-509 (1962) (courts shall have power over awards on equitable principles as heretofore); CAL. CIV. PRO. CODE § 1286.2 (Deering 1967); COLO. R. CIV. P. 109(g); CONN. GEN. STAT. REV. § 52-418 (1958); FLA. STAT. ANN. § 57.07 (1943); GA. CODE ANN. §§ 7-111, -219, -220 (1947); HAWAII REV. LAWS § 188-9 (1955); IDAHO CODE ANN. § 7-907 (1948); ILL. REV. STAT., ch. 10, § 11 (1959) (any legal defects); IND. ANN. STAT. § 3-216 (1968); IOWA CODE ANN. § 679.12 (1950) (for any legal and sufficient reasons); KAN. STAT. ANN. § 5-211 (1964); KY. REV. STAT. ANN. § 417.018 (1963) (courts shall have power over awards on equitable principles as heretofore); ME. REV. STAT. ANN. tit. 26, § 958 (1964); MD. ANN. CODE art. 7, § 12 (1968); MASS. ANN. LAWS ch. 150C, § 11 (1965); MICH. STAT. ANN. § 17.454(25) (1968) (petition for writ of certiorari or other such process as may be appropriate); MINN. STAT. ANN. § 572.19 (Supp. 1967); MISS. CODE ANN. § 290 (1956); MO. REV. STAT. § 435.100 (1959); MONT. REV. CODES ANN. § 93-201-7 (1964); NEB. REV. STAT. § 25-2115 (1964) (for any legal and sufficient reasons); NEV. REV. STAT. § 614.040 (1967) (for matter of law apparent on the record); N.H. REV. STAT. ANN. § 542.8 (1955); N.J. STAT. ANN. § 2A:24-8 (1952); N.Y. CIV. PRAC. LAW § 7511 (McKinney 1963); N.C. GEN. STAT. § 1-559 (1953); N.D. CENT. CODE § 32-29-08 (1960); PA. STAT. ANN. tit. 5, § 170 (1963); R.I. GEN. LAWS ANN. § 28-9-18 (1956); S.C. CODE ANN. § 10-1904 (1962); TENN. CODE ANN. § 23-514 (1955) (for any legal and sufficient reasons); TEX. REV. CIV. STAT. art. 248 (1959) (for matter of law apparent on the record); UTAH CODE ANN. § 78-31-16 (1953); VA. CODE ANN. § 8-506 (1957); W. VA. CODE ANN. § 55-10-4 (1966); WIS. STAT. ANN. §§ 111.10, 298.10 (1958); WYO. STAT. ANN. § 1-1048.14 (Supp. 1967); UNIFORM ARBITRATION ACT § 12.

49. *See* Heath v. Central Truck Lines, 195 So. 2d 588 (Fla. Dist. Ct. App. 1967). *See also* Note, *Section 301(a) and the Employee: An Illusory Remedy*, 35 FORDHAM L. REV. 517, 518-28 (1967).

50. *See* Ford v. General Elec. Co., 395 F.2d 157 (7th Cir. 1968); Haynes v. United

pursues this contractual remedy he is excluded from the courts. If the employee does not pursue this "chosen" grievance procedure, the failure to exhaust his contractual remedy will be a defense to court action.[51] In short, the courts prefer that disputes be settled by the use of the arbitration clauses usually included in collective bargaining agreements.[52] The effect of this is to deny the employee a choice of arbitration or court redress. The choice has been made by his union in negotiating a collective bargaining agreement containing an arbitration clause.

Neither the choice of an arbitration clause by the union nor the courts' preference for arbitration is harmful per se. But the inclusion of an arbitration clause in a collective bargaining agreement furthers the union's position as a representative of group rights rather than individual rights in the administration of the contract.[53] This policy of compromising the individual's rights in the grievance system is further emphasized in *Vaca*. The Court said that not all grievances need be processed to arbitration, but that they could be settled in good faith *by the union alone* without consulting the employee.[54] Use of any other system, the Court said, would destroy "the employer's confidence in the union's authority."[55]

However, *Vaca* does liberalize the exhaustion principle. Instead of an absolute requirement that the employee pursue redress within the available grievance system, the employee need only attempt[56] to invoke the grievance machinery by asking the union to process his complaint.[57] If unsuccessful in his attempt to have the union invoke the

States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966); Heath v. Central Truck Lines, 195 So. 2d 588 (Fla. Dist. Ct. App. 1967); Davenport v. Kaiser Alum. & Chem. Corp., 206 So. 2d 526 (La. Ct. App. 1968); Guille v. Mushroom Transp. Co., 425 Pa. 607, 229 A.2d 903 (1967).

51. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965); Bsharah v. Eltra Corp., 394 F.2d 502, 503 (6th Cir. 1968).

52. Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215 (1964); note 46 *supra*.

53. "[R]un-of-the-mill disputes should be settled by the union, on behalf of the employee, because such a procedure substantially assists the union as the employees' representative." Rothlein v. Armour & Co., 391 F.2d 574, 579 (3d Cir. 1968).

54. Vaca v. Sipes, 386 U.S. 171, 192 (1967).

55. *Id.* at 191.

56. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

57. "Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees." *Id.* at 653.

process, he can pursue a judicial remedy for breach of the union's duty of fair representation. This serves to circumvent the exhaustion defense.[58]

Though the *Vaca* decision provided the employee with an exception to the general rule that established contractual procedures must be adhered to,[59] it erected a formidable wall to recovery by an employee who asserts the necessary breach of duty by the union. The criteria for finding a breach of duty by the union, *i.e.*, action which is "arbitrary, discriminatory, or in bad faith,"[60] places a considerable evidentiary burden on the grievant. What ostensibly appears to be a weakening of the union's authority in contract administration is, in fact, a narrow and unclear remedy to redress union action which is grossly unfair to its members.

B. *Labor-Management Relations Act of 1947*

A suit in either state or federal courts for the breach of the duty of fair representation can be brought pursuant to the provisions of section 301 of the Labor-Management Relations Act.[61] The Supreme Court originally held in *Association of Westinghouse Salaried Employees v. Westinghouse Elect. Corp.*[62] that an individual could not bring a suit based upon section 301 if he was not directly a party to the collective bargaining contract. But the Court reversed itself in *Smith v. Evening News Ass'n*,[63] saying that individuals could bring such an action when they were employed under a general collective bargaining agreement. Since diversity of citizenship and dollar amount in controversy are not jurisdictional prerequisites to a section 301 suit, this section provides many individuals an opportunty for redress in the federal courts.[64] But

58. Vaca v. Sipes, 386 U.S. 171, 185-88 (1967).

59. Williams v. Pacific Maritime Ass'n, 384 F.2d 935 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968).

60. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

61. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties.
Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1964).

62. 348 U.S. 437 (1955).

63. 371 U.S. 195, 200 (1962).

64. Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1964). This section also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . ." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957). *See also* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

the grievance systems in most collective bargaining agreements provide for a final settlement—usually by arbitration—which will still serve as a defense to court action.

The constitutional basis for section 301 is the Interstate Commerce Clause. Commerce is defined in broad terms by the Act,[65] and courts have interpreted the definition to cover all employers large enough to have contact with organized labor.[66] In construing the same definition of commerce in the National Labor Relations Act,[67] the Supreme Court in *NLRB v. Fainblatt*[68] said, "We can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than to which courts would apply the maxim de minimis."[69]

C. *National Labor Relations Board Proceedings*

A majority of the Supreme Court in *Vaca* modified, *sub silentio,* the *Miranda Fuel* doctrine by finding that concurrent jurisdiction reposed in both the courts and the NLRB.[70] A cogent reason given by the majority of the Court for not finding exclusive jurisdiction in the NLRB was the extent of discretion possessed by the NLRB's General Counsel in the issuance of complaints.[71] Three Justices, concurring in result, disagreed on this issue and explicitly stated that the breach

65. Labor-Management Relations Act (Taft-Hartley Act) § 501(3), 29 U.S.C. § 142(3) (1964) adopts the definition of "commerce" in the National Labor Relations Act § 2(6), 29 U.S.C. § 152(6) (1964). "The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce . . . or the free flow of commerce." Labor-Management Relations Act (Taft-Hartley Act) § 501(1), 29 U.S.C. § 142(1) (1964). "It is a sufficient basis for jurisdiction [under section 301] if the union *only* is involved in an industry affecting commerce." Block Pontiac, Inc. v. Condando, 274 F. Supp. 1014, 1018 (E.D. Pa. 1967).

66. *Compare* Schlecht v. Hiatt, 271 F. Supp. 644 (D. Ore. 1967), *with* Local Joint Exec. Bd., Bartenders Int'l Union v. Joden, Inc., 262 F. Supp. 390 (D. Mass. 1966).

67. § 2(6), 29 U.S.C. § 152(6) (1964).

68. 306 U.S. 601 (1939).

69. *Id.* at 607.

70. We . . . assume for present purposes that . . . a breach of duty by the union is an unfair labor practice . . . . The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. . . . [I]f, to facilitate his case, the employee joins the union as a defendant, the situation is *not substantially changed.*

Vaca v. Sipes, 386 U.S. 171, 186-87 (1967) (emphasis added). "[T]he courts may also fashion remedies for . . . a breach of duty." *Id.* at 188.

71. *Id.* at 182.

of the duty of fair representation was an unfair labor practice within the exclusive jurisdiction of the NLRB.[72]

The General Counsel derives his discretionary authority from the National Labor Relations Act[73] which requires him to issue a complaint in order to initiate Board proceedings.[74] The General Counsel has delegated[75] the complaint issuing authority to Regional Counsel with a right of appeal from their decisions to the General Counsel.[76] Once the General Counsel has refused to issue a complaint, his decision is not reviewable in the courts.[77]

This lack of an appeal from the General Counsel's exercise of discretion clearly works to the disadvantage of the employee in securing a complaint. It is indicative of the NLRB's greater concern with the employer-union relationship than with the resolution of day-to-day contract grievances between the employee and his union or employer.[78] In other words, an unfair labor practice proceeding is directed more

72. Chief Justice Warren, Mr. Justice Fortas, and Mr. Justice Harlan concurred in the result saying "a complaint by an employee that the union has breached its duty of fair representation is subject to the exclusive jurisdiction of the NLRB. It is a charge of unfair labor practice." Vaca v. Sipes, 386 U.S. 171, 198 (1967). If conduct is characterized as an unfair labor practice, the National Labor Relations Act has pre-empted most state redress. *See* National Labor Relations Act § 10, 29 U.S.C. § 160 (1964); note 17 *supra*.

73. 29 U.S.C. §§ 151-67 (1964).

74. National Labor Relations Act § 3(d), 29 U.S.C. § 153(d) (1964) provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . ."

75. "After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board . . . ." 29 C.F.R. § 102.15 (1968).

76. "If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel . . . ." 29 C.F.R. § 102.19 (1968).

77. *See* Mayer v. Ordman, 391 F.2d 889 (6th Cir. 1968); United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); Dunn v. Retail Clerks Int'l Ass'n, 307 F.2d 285 (6th Cir. 1962). For arguments that the General Counsel's decisions should be subject to some type of review, see Booker & Coe, *The Labor Board and its Reformers*, 18 LAB. L.J. 67, 72 (1967).

78. "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor remedies." Vaca v. Sipes, 386 U.S. 171, 182 n.8 (1967). "Through the years the Board and the courts have stressed repeatedly that the function of the Board is the vindication of public as distinguished from private rights." Fanning, *Individual Rights in the Negotiation and Administration of Collective Bargaining Agreements*, 19 LAB. L.J. 224, 225 (1968).

at the contract negotiation process than at contract administration. Once again the group rights of the exclusive bargaining agent prevail, and minor confrontations with management are avoided, although considerable hardship may be imposed on the employee.

IV. Procedural Problems in a Section 301 Suit

If the employee did not have his claim fully processed in the grievance system, or if the employee's claim was unsuccessfully processed through the final step, usually his only remaining remedy is to state a "new" claim against his union under section 301 for breach of the duty of fair representation.[79] If the employee was wrongfully discharged, he can always sue the employer for breach of contract.

In a section 301 fair representation suit, the employee will often sue both the employer and the union by alleging a conspiracy in which the employer illegally discharged the employee and the union refused to invoke the grievance procedures.[80] This has been the most successful way to state a breach of the duty and refers to the situation in which the duty was clearly meant to apply. Here no group rights of the employees could be advanced by refusing the employee his action. The suit would clearly involve the infringement of the representation right between the employee and his union. Since this relationship is basic to the concept of a union, there can be no countervailing group rights present.

In a suit alleging a breach of the duty of fair representation against only the union, one court passed on the non-joinder of the employer and held that the employer was an indispensable party.[81] In *Vaca* the

79. *See, e.g.*, Meola v. Bethlehem Steel Co., 246 Md. 226, 228 A.2d 254 (1967).

80. *See, e.g.*, Chasis v. Progress Mfg. Co., 382 F.2d 773 (3d Cir. 1967).

81. Kress v. Teamsters Local 776, 42 F.R.D. 643 (M.D. Pa. 1967). The district court felt bound by its circuit court's holding in Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 365 F.2d 802 (3d Cir. 1966). The Third Circuit held that "[t]he indispensable party doctrine is not procedural. It declares *substantive* law and accords a *substantive right* to a person to be joined as a party to an action when his interests or rights may be affected by its outcome. The indispensable party doctrine is beyond the reach of, and not affected by, Rule 19 of the Federal Rules of Civil Procedure . . . ." *Id.* at 805 (emphasis in original).

The Supreme Court unanimously reversed the circuit court in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). Even though the procedural rule applicable during the district court proceeding was rewritten and a new version adopted on July 1, 1966, while the appeal was pending before the Third Circuit, the Supreme Court said, "[t]he majority in the Court of Appeals did not purport to rely on the older

Court said that "the employer may (and probably should be) joined as a defendant in the fair representation suit."[82] This joinder may be desirable to avoid unnecessary litigation and because the duty of fair representation is tempered by the union-employer relationship in the federal labor policy. Another reason is that an effective remedy will probably involve the employer.[83]

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version, but on its conclusion that the Rule, in either form, had no application to this case." *Id.* at 116-17 n.12.

The *Kress* Court also ignored Rule 19. It noted that *"it cannot be said that in the absence of the employer, a judgment would have no injurious effect on its interests.* Clearly, the employer's actions started this whole controversy. The absence of the employer would make the fashioning of relief almost impossible, since the possible relief may be arbitration, damages or other equitable relief. The interests of the employer are inextricably tied in to [*sic*] this action and thus the employer is an indispensable party." Kress v. Teamsters Local No. 776, *supra* at 647 (emphasis added).

However, the *Provident Tradesmens* Court, besides holding that Rule 19 was applicable, said that the *possibility* that a non-joined party's interest "may be affected" is not a proper standard. Such a party's interests "must, unavoidably, be affected by a decree" in order to call the party "indispensable." Provident Tradesmens Bank & Trust Co. v. Patterson, *supra* at 125. Thus, the *Kress* court, in adhering to the Third Circuit's decision in *Provident Tradesmen*, stated invalid law.

Kress also relied on language from *Vaca* that ostensibly supports a finding that the employer is an indispensable party in a typical fair representation suit. Kress v. Teamsters Local 776, *supra* at 646-47. The *Vaca* Court said that "the employer may be (and probably should be) joined as a defendant in the fair representation suit . . . ." Vaca v. Sipes, 386 U.S. 171, 197 (1967). But the Court in *Vaca* was less concerned with the employer's interests than with the union's interests. The Court goes on to say that even if the union could be indemnified by the employer, it would still be a hardship on the union to pay damages attributable to a breach of contract by the employer. Indeed, the Court emphasized its concern for the union's interests by encouraging joinder. "With the employee assured of direct recovery [for breach of the contract] from the employer, we see no merit in requiring the union to pay the employer's share of the damages." *Id.* The fact that the Court in *Vaca* encouraged joinder of the employer goes only to the sufficiency of the relief for the aggrieved employee. The Court in *Provident Tradesmen,* unconcerned with any substantive rights of a non-joined party, again adverted to the matter as one concerning the adequacy of the plaintiff's remedy because the absent party could not be bound. "[F]or clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable." Provident Tradesmens Bank & Trust Co. v. Patterson, *supra* at 111.

Since the issues of adequacy of relief and substantive rights of non-joined parties have been settled by *Provident Tradesmen,* it is clear that *Kress* has no vitality as an interpretation of indispensable parties. *Kress* is also doubtful authority as an interpretation of *Vaca* because it *requires* joinder of the employer in the typical fair representation suit. It is interesting to note that in *Vaca,* even though the employer was not a party, the Supreme Court did not hold the non-joinder a reason for its reversal. *But cf.* Bennie v. Pastor, 393 F.2d 1 (10th Cir. 1968).

82. Vaca v. Sipes, 386 U.S. 171, 197 (1967).

83. *Id.* Where the employer and union had acted together in the unfair labor practice, the liability was held to be joint and several. NLRB v. Campbell Soup Co., 378 F.2d 259

The *Vaca* Court noticed that a separate suit was instituted in the state courts against the employer for the discharge of the employee. That action was still pending in a pretrial stage when the Supreme Court decided the fair representation issue.[84] If the fair representation case does not involve the merits of the underlying grievance then the two cases should not be combined because any fault would clearly involve only the union. Also, to prevent confusion in standards and elements of proof in the two actions separate trials would be required. But if the breach of the duty of fair representation is the result of concerted action between the union and the employer, it would be desirable that the actions be consolidated and the parties joined for trial. It would be destructive of the union's position, though, to join as defendants the union and employer unless they were acting cooperatively. To force the union and employer to oppose the employee would tend to weaken the traditional union-employer relationship and subvert the adversary or bargaining nature of their roles in contract negotiation.

Since the duty of fair representation runs from the union to the employee, any breach of that duty should logically be redressed between the two parties. A problem arises, though, when the employee has been discharged as a result of the union's breach of its duty by not processing a meritorious grievance. As part of his remedy, the employee usually wishes to be reinstated but this is within the control of the employer. In these cases the courts will eventually have to face the situation in which reinstatement is the only effective remedy, but no fault on the part of the employer in the handling of the grievance can be shown. The Supreme Court in *Vaca* said that in such a situation reinstatement could not be the remedy as each party must be responsible only for its own faults.[85] The net effect, then, is that the employee cannot get his job back unless the abuse is the result of concerted action between the union and the employer.

Although both union and employer should be joined as defendants in order to obtain meaningful relief, in practice it will be difficult to show fault on the part of the employer except by a conspiracy. If the employee has been discharged and this action affirmed by the arbitrator

(9th Cir.), *cert. denied*, 389 U.S. 900 (1967); *see* Vaca v. Sipes, 386 U.S. 171, 197 n.18 (1967). *But see* NLRB v. Lexington Elec. Products Co., 283 F.2d 54 (3d Cir. 1960), *cert. denied*, 365 U.S. 845 (1961).

84. Vaca v. Sipes, 386 U.S. 171, 176 n.4 (1967).

85. *Id.* at 197.

in the grievance system, the employer has probably abided by the terms of the collective bargaining agreement. The employer may have wrongfully discharged the employee and be in breach of contract, and the union may have breached its duty of fair representation by processing the claim in a perfunctory manner, but there would be no connection between the actions of these parties. Notwithstanding the lack of concerted action, a final and binding arbitration decision affirming the employer's action is conclusive as to the issue of the employer's fault.[86] There would be no grounds to require the employer to grant reinstatement.[87] In such a case the employee, deprived of his job by two parties acting independently, has no way to regain it through the courts. So, if the employee sues his union alone under section 301 alleging breach of the duty of fair representation, he must abandon any hope of binding the employer or securing reinstatement by court order.

Since the duty of fair representation in contract administration arises from the notion of a collective bargaining agreement,[88] the employee is required to use the administrative grievance procedures provided by that agreement. If the employee has not or cannot invoke the grievance system, he must at least have attempted to do so by requesting the union to process his grievance.[89] If the employee has done neither, he is subject to a defense based on his failure to exhaust his remedies created by the collective bargaining contract.[90] Assuming exhaustion of grievance procedures or an attempt by the individual to have the union invoke the administrative procedures, the employee must show that the union's conduct was "arbitrary, discriminatory, or in bad faith" in order to state a cause of action.[91] Unions have successfully defended these charges in many cases, because the courts have refused to equate

86. Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966).

87. The *Vaca* Court does not face the reinstatement problem realistically. It said, "there is no reason to exempt the employer from contractual *damages* which he would otherwise have had to pay. . . . The difficulty lies in fashioning an appropriate scheme of remedies." 386 U.S. at 196 (emphasis added). "The employee should have no difficulty recovering these *damages* from the employer who cannot, as we have explained, hide behind the union's wrongful failure to act." *Id.* at 197 (emphasis added).

88. Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215, 1233 (1964).

89. *See, e.g.*, Brown v. Truck Drivers & Helpers Local No. 355, 264 F. Supp. 776 (D. Md. 1967).

90. Steen v. Local 163, UAW, 373 F.2d 519 (6th Cir. 1967); Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958) and cases cited therein. *But see* Williams v. Pacific Maritime Ass'n, 384 F.2d 935 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968).

91. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

bad faith with the refusal to process a meritorious grievance or claim.[92] In *Vaca* the Court said no "individual employee has an absolute right to have his grievance taken to arbitration."[93] This approach recognizes the group interests and "furthers the interest of the union as *statutory bargaining agent and as co-author* of the bargaining agreement."[94] If the union can be second-guessed by the courts on all its grievance decisions, it will have no bargaining position and will lack the respect necessary to perform its function of contract negotiation.[95]

If an employee can meet the test of a breach of the duty of fair representation, he should be entitled to punitive as well as compensatory damages. Since one purpose of punitive damages is the deterrence of malicious action,[96] whether contractual[97] or tortious, the proof of the breach—union conduct which is "arbitrary, discriminatory, or in bad faith"—should automatically show that the employee has been the subject of malicious action.[98] If one can analogize from employer-union section 301 suits for breach of contract, punitive damages were a possible remedy where the parties' relationship was expected to continue, thus giving effect to deterrence in their future dealings.[99] In *Sidney Wanzer & Sons, Inc. v. Milk Drivers Local 753*,[100] the awarding of punitive damages in a section 301 suit was not sanctioned as a form of punishment.[101] Should the court in *Sidney Wanzer* apply such a "relationship" analysis in a section 301 suit involving an employer-union situation, it would also be conscious in a fair representation suit of the role that group rights play in a federal labor policy.

The rationale of exemplary or punitive damages in *Sidney Wanzer*

92. *See, e.g.*, Palmieri v. United Steelworkers of America, 270 F. Supp. 5 (W.D. Pa. 1967).

93. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

94. *Id.* (emphasis added).

95. Foltz v. Harding Glass Co., 263 F. Supp. 959 (W.D. Ark. 1967).

96. C. McCORMICK, DAMAGES § 77, at 276 (1935); Comment, *Punitive Damages in State Courts for Acts Constituting Unfair Labor Practices Under the Taft-Hartley Act*, 6 U.C.L.A.L. REV. 421, 427-33 (1959). Revenge and compensation comprise the other two theories of punitive damages. *Id.* at 428-30.

97. *See* Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959).

98. This is especially true in a situation that cannot be easily classified as either "contract" or "tort." See 5 A. CORBIN, CONTRACTS § 1077, at 440 (1964). *See also* Note, *Labor Law—The Duty of Fair Representation*, 7 WASHBURN L.J. 78, 86 (1967).

99. Sidney Wanzer & Sons, Inc. v. Milk Drivers Local 753, 249 F. Supp. 664, 671 & n.5 (N.D. Ill. 1966).

100. 249 F. Supp. 664 (N.D. Ill. 1966).

101. Sidney Wanzer & Sons v. Milk Drivers Local 753, 249 F. Supp. 664 (N.D. Ill. 1966). *But see* Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962); *cf.* Hall v. Pacific Maritime Ass'n, 281 F. Supp. 54 (N.D. Calif. 1968).

may be generally applicable to fair representation suits. Such a rationale of punitive damages is consistent with the fair representation test of extreme abuse of, or discrimination against, the individual employee. The only remaining question in regard to the award of punitive damages is whether or not punitive damages are relief fashioned "from the policy of our national labor laws."[102] If a court feels that punitive damages will cripple a union financially or destroy its prestige, it will probably deny the damages even though there is no severance of the union-employee relationship. This could be rationalized as necessary in order to protect and foster the concept of the exclusive bargaining agent. Such a case would provide a clear-cut example in which the duty of fair representation is tempered by the union's group-oriented function of contract negotiation.

Presently, it is doubtful that courts will award punitive damages to an aggrieved employee in the typical fair representation suit. If, however, a well-established union with independent financial resources breaches its duty of fair representation, group rights may actually be benefitted by the award of punitive damages to an aggrieved employee. This situation could occur when the union is acting only to benefit business interests that arise from the institution itself and not from the role of representing its members. In such a case, courts should not hesitate to award punitive damages.

Punitive damages seem even more equitable when the merits of the underlying grievance or claim are not in issue, and the union has invoked the defense of mere negligence in the processing of the grievance. Proof of negligent processing neither meets the test of breach of the duty of fair representation[103] nor does it show malicious wrongdoing.[104] Also, the possibility of large punitive damages might reduce the number

102. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957); *see* Vaca v. Sipes, 386 U.S. 171, 187-88 (1967).

103. It was once thought that negligence would support a cause of action for breach of the duty of fair representation. Zdero v. Briggs Mfg. Co., 338 Mich. 549, 554, 61 N.W.2d 615, 618 (1953); Marchitto v. Central R.R., 9 N.J. 456, 466, 88 A.2d 851, 856 (1952), *overruled on other grounds*, Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Donnelly v. United Fruit Co., 75 N.J. Super. 383, 393-94, 183 A.2d 415, 420-21 (Super. Ct. 1962), *aff'd on other grounds*, 40 N.J. 61, 190 A.2d 825 (1963); Falsetti v. Local No. 2026, UMW, 400 Pa. 145, 171, 161 A.2d 882, 895 (1960) (dictum) (by implication). A union has not breached its duty of fair representation by "a mistake in interpreting the bargaining contract." Pekar v. Local No. 181, United Brewery Workers, 311 F.2d 628, 637 (6th Cir. 1962), *cert. denied*, 373 U.S. 912 (1963). *See* Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORN. L.Q. 25 (1959).

104. C. MCCORMICK, DAMAGES § 79 (1935).

of meritorious claims negligently processed thus avoiding any future animosity between the union and its members.

The court could always award compensatory damages as in *Thompson v. Machinists Lodge 1049*.[105] The court there limited the damages imposed on the employer in accordance with *Vaca*[106] to those caused by the employer. Since the employee would have been laid off in the future, and he had mitigated[107] his damages by obtaining another job, the damages were the ordinary employment contract damages.[108]

V. Inconsistencies in the Application of Section 301

The Supreme Court has held that federal and state courts have concurrent jurisdiction in fair representation suits under section 301.[109] However, state courts are required to apply federal standards even though deciding cases which may be essentially contractual and presumably controlled by state law.[110] By adopting a single set of standards, the Supreme Court hoped that uniformity would prevail in a situation that is national in scope and respects no state boundaries. In section 301 suits—both ordinary contract suits and fair representation suits—courts have not always appeared to be promoting uniformity in their interpretations of section 301. While most of the cases have not involved the duty of fair representation, they are never-

105. 258 F. Supp. 235 (E.D. Va. 1966).

106. Vaca v. Sipes, 386 U.S. 171, 197 (1967).

107. In seeking new employment the employee is held "only to reasonable exertions in this regard, not the highest standard of diligence." NLRB v. Arduini Mfg. Corp., 394 F.2d 420, 423 (1st Cir. 1968). *See also* Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962) (interest on back pay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); F.W. Woolworth Co., 90 N.L.R.B. 289 (1950) (back pay and reinstatement).

108. It has been said of the National Labor Relations Act that:

> loss of pay [is to] be computed on the basis of each separate calendar quarter or portion thereof . . . . Loss of pay shall be determined by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, [his] net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

F.W. Woolworth Co., 90 N.L.R.B. 289, 292-93 (1950). "[I]n an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach, furnishes the ordinary measure of damages." 5 S. Williston, Contracts § 1358, at 3811 (rev. ed. 1937). *Accord*, Restatement of Contracts § 336 (1932).

109. Vaca v. Sipes, 386 U.S. 171 (1967); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

110. Vaca v. Sipes, 386 U.S. 171 (1967).

theless important because section 301 is the ordinary vehicle in fair representation cases which confers the jurisdiction to fashion relief.

A. *Statute of Limitations*

Section 301 contains no statute of limitations. While this may have been a legislative oversight, one is wary to seize on this as a reason for such an omission in federal legislation. In the past, such an omission has been found to indicate a congressional "intent" that the state law should be adopted to complete the statute.[111] In *International Union, UAW v. Hoosier Cardinal Corp.*,[112] the Supreme Court came to this conclusion and adopted a state statute of limitations in a section 301 suit. The Court said, however, that it adopted this method of limiting the time period in which to bring suit because it did not wish to legislate in this area.[113] The Court recognized that its holding would produce the vice of non-uniformity which Congress had intended to prevent by enacting federal labor laws.[114] However, the Court felt that

111. *E.g.*, Cope v. Anderson, 331 U.S. 461 (1947) (National Bank Act).

112. 383 U.S. 696 (1966). In *Hoosier*, the union and the company executed a collective bargaining contract that contained a section governing vacations. One clause, dealing with accumulated vacation pay, provided that "[e]mployees who qualified for a vacation in the previous year and whose employment is terminated for any reason before the vacation is taken will be paid that vacation at time of termination." *Id.* at 698. Prior to the expiration of the collective bargaining contract the company terminated the employment of 100 employees covered by its provision but did not pay them accumulated vacation pay. Two suits were brought in Indiana courts to recover the vacation pay. Both actions were held defective under Indiana law. The union then filed an action in the United States District Court after nearly seven years had elapsed since the employees left the company. The District Court regarded the action as "based partly upon the written collective bargaining agreement and partly upon the oral employment contract each employee had made" with the company. *Id.* at 699. As a result of such characterization, the court applied the six-year Indiana statute of limitations governing contracts not in writing. IND. ANN. STAT. § 2-601 (1967). The Seventh Circuit affirmed the district court. The union contended, *inter alia*, that if Indiana law was to be applied, the twenty-year limitation (IND. ANN. STAT. § 2-602 (1967)) was appropriate since a section 301 suit is bottomed on a written collective bargaining agreement. The Supreme Court affirmed saying that the collective bargaining agreement did characterize the action as a section 301 suit under Smith v. Evening News Assn., 371 U.S. 195 (1962), but that the nature of the action somehow changes after jurisdiction attaches. The Court said that "[p]roof of the breach and the measure of damages . . . both depend upon proof of the existence and duration of separate employment contracts between the employer and each of the aggrieved employees." International Union, UAW v. Hoosier Cardinal Corp., *supra* at 706. Three justices dissented saying that "courts *are* expected to develop the law of labor contracts . . . ." *Id.* at 710 (emphasis in original).

113. *Id.* at 702-703.

114. *Id.* at 701. *See also* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). *But cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957) where the Court said "[t]he legislative history of § 301 is somewhat cloudy and confusing."

this expression of intent by Congress was not sufficient to enable the Court to enter this particular area.

As a further justification for not fashioning a statute of limitations "from the policy of our national labor laws,"[115] the Court stated that the problem of limitations was not significant:

> The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when those processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any single goal of labor policy.[116]

However, if federal labor standards are to be applied by all courts to gain uniformity, why did the Court not "incorporate" the six month statute of limitations applicable to unfair labor practices?[117] This would be the ideal solution in a fair representation case when the "new"[118] *Miranda Fuel* doctrine applied.[119] It must be remembered, though, that *Hoosier* was not a fair representation case. The Court could yet find that the six month limitation applicable to unfair labor practices also applies to section 301 suits if the breach of the duty of fair representation involved an unfair labor practice.

The application of state statutes of limitations would not be a step towards uniformity.[120] If an employee chose the unfair labor practice proceeding rather than a section 301 suit, there would be a senseless inconsistency if both actions required proof of an unfair labor practice but allowed different time periods in which to do so. Also, the short statute of limitations for unfair labor practices—six months—will force most of the "new" *Miranda Fuel* doctrine cases away from the Board

115. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

116. International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966).

117. [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1964).

118. The original *Miranda Fuel* doctrine called for the redress of a breach of the duty of fair representation as an unfair labor practice. The "new" *Miranda Fuel* doctrine, as announced in Vaca v. Sipes, 386 U.S. 171 (1967), permits judicial redress even if the breach of the duty of fair representation includes an unfair labor practice.

119. *See* notes 18-21 *supra* and accompanying text.

120. *See* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

and into the courts. *Miranda Fuel* will not need to be overruled; it will be the victim of atrophy.

B. *Norris-LaGuardia Act*

It seems strange that any court could decide that section 4 of the Norris-LaGuardia Act[121] is not a part of the federal labor policy. But this is, in effect, what is being done in some section 301 suits brought in state courts.[122] If, for example, an employer seeks an injunction to enforce a "no-strike" clause of a collective bargaining agreement in the state courts, some courts have held that the Norris-LaGuardia Act's section 4 prohibition of injunctions is not binding upon state courts.[123] This issue is usually decided in the context of a motion to remove[124] to the federal district court.

In *Avco Corp. v. Aero Lodge No. 735*[125] an employer secured a temporary injunction from a Tennessee court enjoining the union and its members from violating a "no-strike" clause in the collective bargaining agreement. The union petitioned the federal district court under section 1441(b) for removal.[126] The employer's motion to remand to the state court was denied, and the district court granted the

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121. Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1964) provides that:

> 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of a labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> . . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

A violation of the terms of a collective bargaining agreement is not enjoinable in a federal suit because it is a "labor dispute" within the broad definition of that term in the Act. Norris-LaGuardia Act § 13(c), 29 U.S.C. § 113(c) (1964).

122. *Compare* McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958), *with* Independent Oil Workers v. Socony Mobil Oil Co., 85 N.J. Super. 453, 205 A.2d 78 (Super. Ct. 1964).

123. *See, e.g.*, American Dredging Co. v. Local 25, Marine Div., IUOE, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965).

124. The federal removal statute provides for the removal to the United States District Courts of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the . . . laws of the United States . . . ." 28 U.S.C. § 1441(b) (1964).

125. 390 U.S. 557 (1968).

126. 28 U.S.C. § 1441(b) (1964).

union's motion to dissolve the state court's injunction.[127] The employer then appealed.[128] The Sixth Circuit declined to follow the Third Circuit's holding in *American Dredging Co. v. Local 25, Marine Div., IUOE*[129] that the Norris-LaGuardia Act was not applicable to the state courts.[130] Instead, the Sixth Circuit affirmed the district court and in dictum said "the remedies available in State Courts are limited to the remedies available under Federal law."[131] Because of this conflict among the circuit courts the Supreme Court granted certiorari in *Avco.*

In deciding *Avco,* however, the Supreme Court refused to consider the issue of injunctive relief. The Court's choice of words stresses its mechanical approach in order to avoid dealing with the knotty problem of available remedies consistent with a federal labor policy:

> It is . . . *clear* that the claim under this collective agreement is one arising under the "laws of the United States" within the meaning of the removal statute. . . . It *likewise seems clear* that this suit is within the "original jurisdiction" of the District Court. . . .[132]

Once the federal district court had jurisdiction, it followed that the court had the power to dissolve a state court's injunction under its federal equity powers.[133]

Despite avoiding the main issue of whether injunctive relief could be granted in the state courts, three members of the Court stated that the remedies issue would be decided "upon an appropriate future occasion."[134] The majority opinion suggests, in a footnote, that the "occasion" must be a state court decision granting an injunction in a situation that the Norris-LaGuardia Act prohibits a federal court from doing so.[135] The Court did recognize, however, that removal would

127. Avco Corp. v. Aero Lodge No. 735, 263 F. Supp. 177 (M.D. Tenn. 1966).

128. The order dissolving the state court's injunction was appealable only under 28 U.S.C. § 1292(a)(1) (1964) because it was not a "final decision" within 28 U.S.C. § 1291 (1964). An order denying remand to the state court is not appealable, American Dredging Co. v. Local 25, Marine Div., IUOE, 338 F.2d 837, 838 n.2 (3d Cir. 1964), *cert. denied,* 380 U.S. 935 (1965), and "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" except for civil-rights cases removed under section 1443. 28 U.S.C. § 1447(d) (1964).

129. 338 F.2d 837 (3d Cir. 1964), *cert. denied,* 380 U.S. 935 (1965).

130. Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337, 339 (6th Cir. 1967), *aff'd on other grounds,* 390 U.S. 557 (1968).

131. *Id.* at 343.

132. Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968) (emphasis added).

133. 28 U.S.C. § 1450 (1964).

134. Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 562 (1968) (concurring opinion).

135. *Id.* at 560 n.2.

also be available in such a case.[136] Hence, in all probability, such an "occasion" to directly announce the addition of the Norris-LaGuardia Act to the federal labor policy will not arise[137] because the case will be removed to the federal district court.

While the cases previously discussed do not specifically involve section 301 suits for fair representation, the removal issue points out the problems of uniformity that are yet unresolved at a time when the fair representation cases are being taken away from the NLRB, a forum designed to foster uniformity.

C. *Forum Shopping*

Vaca could easily promote needless forum shopping because it permits suits in both state and federal courts as well as unfair labor practice proceedings before the NLRB. The federal removal statute[138] and the short statute of limitations for unfair labor practices, however, will probably force most of the litigation into the federal courts and hence eliminate what appears to be a multitude of forums.[139] Even though state courts have jurisdiction, they must apply the standards of a federal labor policy. But if a goal of the federal labor policy is an expansion of the availability of forums for the abused employee,[140] then it would seem that uniformity and the federal goals are by their very nature inconsistent.

CONCLUSION

If an employee is not grossly abused by his employer, the usual contractual remedies provided by the collective bargaining agreement's grievance system are probably adequate to satisfy his claim. But if the employee does not feel he has been fairly represented in this process by his union, the procedures to then gain redress are few and uncertain. The employee's section 301 suit for breach of the duty of fair representation is limited by the high standards for proof of such a breach delineated by the Supreme Court in *Vaca v. Sipes.* The un-

136. *Id.*

137. "[T]he Norris-LaGuardia Act has been considered a cornerstone of our national labor policy." Stern, *The Norris-LaGuardia Act and State Court Injunctions Against Strikes in Breach of a Collective Bargaining Agreement Under Section 301: Accommodation vs. Incompatibility,* 39 TEMP. L.Q. 65, 75 (1965).

138. 28 U.S.C. § 1441(b) (1964).

139. Notes 125-37 *supra* and accompanying text.

140. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

reviewable discretion of the NLRB's General Counsel in the issuance of complaints makes the initiation of unfair labor practice proceedings doubtful at best.

The duty of fair representation as announced by *Vaca* promulgates a remedy that is bounded by the superior federal labor policy of protecting group rights. The individual will not be allowed to seek redress for a private injury when the result will tend to destroy the union's function of advancing group rights in contract negotiation. Even the NLRB seems to regard the duty of fair representation in the context of day-to-day contract administration and hence too trivial to warrant extensive concern that would perhaps impinge upon its supposedly more fundamental role in union-management relations.

The availability of section 301 of the Taft-Hartley Act increases the grievant's chances for redress by providing a ready vehicle for access to the federal courts.[141] However, even though jurisdiction for relief of a breach of the duty of fair representation is no obstacle to recovery by the employee, the procedural requirements and burden of proof standards enunciated by *Vaca* are formidable barriers to any meaningful relief.

While it appears that the duty of fair representation is well established in principle, "new" matters have emerged since *Vaca* that still prevent an employee's recovering from his union. Any of these "roadblocks" can be used by the courts to deny relief to the employee if there is danger that a recovery will affect the union's function of representing group rights. Thus, beneath the protective veil of the duty of fair representation there still lies the majority-rule concept[142] that compels the election of an exclusive bargaining agent for contract negotiation. This concept is "unquestionably at the center of our federal labor policy,"[143] and it surely tempers the duty of fair representation.

141. "[E]xperience has shown that [the duty of fair representation] gives almost no protection to the individual . . . . [I]t is almost without exception a form of words which holds the promise to the ear and breaks it to the heart." Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 410 n.188 (1962).

142. The question of what constitutes a "majority" is beyond the scope of this note. See Hope, *"Majority Choice"—What Does it Mean?*, 18 LAB. L.J. 515 (1967).

143. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333 (1958).