Protection of Individual Rights in Collective Bargaining: The Need for a More Definitive Standard of Fair Representation within the VACA Doctrine

David J. Griffith

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PROTECTION OF INDIVIDUAL RIGHTS IN COLLECTIVE BARGAINING: THE NEED FOR A MORE DEFINITIVE STANDARD OF FAIR REPRESENTATION WITHIN THE VACA DOCTRINE

I. Introduction

The protection of individual rights in the collective bargaining process has recently been the subject of important litigation. In the context of the national labor scheme, accommodation of the interests of the individual employee involves the rather difficult task of reconciling the often conflicting interests of unions, management, society, and employees. The purpose of this Comment is to explore the alternative methods employed by courts to protect individual employee interests in the administration of collective bargaining agreements. Particular emphasis will be placed on the "fair representation" doctrine enunciated by the Supreme Court in Vaca v. Sipes. The starting point for this analysis is the hypothesis that recognition of distinct classes of employees and grievances is a necessary prerequisite to the development of more adequate protective devices for individual employee rights.

II. Historical Perspective

A. The Vaca Decision

Although the suit in Vaca was against the union rather than the employer, the majority discussed at length the problem of when a discharged employee can bring a breach of contract suit against his employer for wrongful discharge under section 301 of the Labor Management Relations Act. The plaintiff in Vaca, a discharged union employee, brought suit against the defendant union in state court alleging that his discharge was in violation of the collective bargaining contract between his employer and union and that the union had "arbitrarily, capriciously, and without just cause" refused to submit his grievance to arbitration. The reason given by the union to justify the refusal was that an examination by a union doctor, while the grievance was being processed

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1. The interest of society may be generally defined as avoidance of industrial strife; union interest is that of maintaining the power inherent in its role as exclusive bargaining agent; the employer's interest is that of reducing the cost of handling grievances by limiting the number of forums available to the individual; and the individual's interest is, of course, redress for contract violations by the employer. See generally Blumrosen, Group Interests in Labor Law, 13 Rutgers L. Rev. 432 (1958); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Comment, Individual Control Over Personal Grievances Under Vaca v. Sipes, 77 Yale L.J. 559 (1968).
3. A very narrow reading of Vaca might lead to the conclusion that the Court's discussion on the conditions for bringing a section 301 suit is dicta. However, both the majority and Justice Black's dissent base most of their opinions on the contrary assumption.

through the final stage of the grievance procedure, revealed that the plaintiff was not fit to work.⁵

On appeal, the Supreme Court found for the defendant union. Justice White, speaking for a majority of five, held: (1) that the state court had concurrent jurisdiction with the National Labor Relations Board over the suit;⁶ (2) that as a matter of federal law, the evidence presented by the plaintiff did not establish a breach of the union’s duty of fair representation;⁷ (3) that if in fact the plaintiff had stated a cause of action against the union, the union could not be held liable for those damages attributable solely to the employer’s alleged wrongful discharge.⁸

The Court further held that in order for an employee to bring a section 301 action against his employer, the employee, in the face of a defense based on failure to exhaust his contractual remedies, must prove that the union violated its duty of fair representation in its handling of the employee’s grievance.⁹ On the other hand, Justice Black, in dissent, proposed that the individual be given the opportunity to obtain redress in court if at any time or for any reason, the union refused to further process the grievance.¹⁰

B. The Employee’s Causes of Action

The employee’s right to sue his employer for breach of contract and the duty imposed upon unions to use good faith in both the negotiation and administration of collective agreements represent two fundamental protective devices of the employee’s rights.

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⁵ There was conflicting medical evidence as to the fitness of the plaintiff. Prior to the examination by the union physician, plaintiff was examined by his own personal physician and was declared fit to work. An examination by a company doctor, upon the plaintiff’s return to work, resulted in a contrary diagnosis. 386 U.S. at 174-75.

⁶ Id. at 183.

In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), the Supreme Court held that when an activity is arguably subject to those sections of the National Labor Relations Act which relate to employee rights (section 7) or unfair labor provisions (section 8), the National Labor Relations Board was to have exclusive jurisdiction. This “preemption” doctrine was justified on the basis of the undesirability of judicial interference with national labor policy. Initially, the National Labor Relations Board did not take jurisdiction of fair representation suits reasoning that the basis of such suits was in section 9 rather than in sections 7 or 8 of the Act. However, in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963), the Board reversed its position holding that denial of fair representation to an employee by his union violated section 8(b)(1)(A), 29 U.S.C. § 158, making it an unfair labor practice for unions to restrain or coerce employees in the exercise of their section 7 rights. Thus, fair representation suits came under the exclusive jurisdiction of the Board consistent with the rule in Garmon. The Court in Vaca specifically declined to overrule the Board’s decision in Miranda, but seriously undercut the applicability of the preemption doctrine to fair representation cases when it concluded:

For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

386 U.S. at 183.

⁷ Id. at 193-95.

⁸ Id. at 197.

⁹ Id. at 186.

¹⁰ Id. at 205-07.
1. *Fair Representation*

The doctrine of fair representation was judicially developed as a counterbalance to the power possessed by the union selected by a majority of employees within a bargaining unit to be their exclusive representative.\(^\text{11}\) The content of the doctrine is framed in terms of a duty on the part of the exclusive representative of a bargaining unit "to bargain fairly in behalf of all the employees, union members and nonmembers, and *without hostile discrimination* among them."\(^\text{12}\) In *Steele v. Louisville & N.R.R.*,\(^\text{13}\) a case arising under the Railway Labor Act\(^\text{14}\) and involving an abuse of power by the designated exclusive representative of both white and Negro employees, the Supreme Court held that the union violated its duty of fair representation to Negro employees by *negotiating* a seniority agreement which gave preference to white foremen.\(^\text{15}\) On the same day the Supreme Court held that the statutory duty of fair representation also applied to bargaining representatives of unions covered by the National Labor Relations Act.\(^\text{16}\)

The period following the *Steele* case witnessed an expansion of the factual situations to which the duty of fair representation was applicable.\(^\text{17}\) Until 1957, it was not clear whether the duty of fair representation extended beyond the original negotiations between union and employer.

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\(^{11}\) Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1964), provides:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .


\(^{13}\) 323 U.S. 192 (1944).


\(^{15}\) 323 U.S. at 199.

\(^{16}\) Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944). The imposition of the duty at first appeared to be limited to those bargaining agents who were certified as representatives by the NLRB. Now it is clear that it also extends to those unions who negotiate collective bargaining agreements "solely by virtue of [their] economic strength or voluntary designation by all employees in the unit." Cox, *supra* note 12, at 153.

\(^{17}\) In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Supreme Court clearly established the principle that a violation of a union's duty of fair representation might occur in a *non-racial* context. Although the Court upheld preferential treatment of veterans within the bargaining unit on the basis that it promoted public policy, it implied that not all types of *economic discrimination* would stand up under the duty of fair representation. In justifying the grant of credit for military service in determining seniority rights, the Court stated in pertinent part:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences *does not make them invalid*. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

*Id.* at 338 (emphasis added). Though this power to place certain employees in a detrimental position is limited to actions of *good faith*, its precise limits have not as
The Supreme Court answered the question in *Conley v. Gibson* 18 a case involving alleged racial discrimination in the processing of employee grievances. In holding that the proscribed union discrimination does not end with the negotiation of the collective bargaining agreement, the Court stated:

Collective bargaining is a continuing process. . . . [I]t involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.19

From this analysis, it would appear that the duty of fair representation now pervades the entire scope of employee-union relations as a check on the abuse of power by unions.

2. Individual Enforcement of Collective Bargaining Agreements

The right of individual employees to bring fair representation suits against their union has been firmly established; it is not clear, however, under what conditions an employee can sue his employer for breach of the employment contract. An indication of the extent to which individual employees may challenge actions of employers concerning wages and working conditions on the basis that these actions violate the employment contract may be obtained by examining the scope of section 301(a) of the Labor Management Relations Act. Section 301(a) provides that

[s]uits for violation of contracts between an employer and a labor organization . . . 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 the citizenship of the parties.20

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19. Id. at 46 (footnotes omitted). The Court further ruled that the fact that, under the Railway Labor Act, aggrieved employees could file their own grievances with the Adjustment Board or sue the employer for breach of contract was no justification for the union's discrimination in processing grievances. Id. at 47.
20. 29 U.S.C. § 185(a) (1964). After the enactment of the Act in 1947, conflicting interpretations developed in lower federal courts as to the scope of section 301(a). One interpretation of the statute held it to be merely jurisdictional in nature, thus providing a federal forum for resolution of collective bargaining agreement disputes applying state law. Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952); Mercury Oil Ref. Co. v. Oil Workers, 187 F.2d 980 (10th Cir. 1951); Amazon Cotton Mill Co. v. Textile Workers, 167 F.2d 183 (4th Cir. 1948). The other interpretation saw the statute as creating substantive rights, thus authorizing the development of federal law to govern the resolution of conflicts under labor contracts. Waialua Agr'l Co. v. United Sugar Workers, 114 F. Supp. 242 (D. Hawaii 1953); Textile Workers v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953). The Supreme Court seemingly resolved this procedural-substantive controversy in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), holding that section 301 did not authorize the federal district courts to entertain an action brought by a union on behalf of employees who claimed they were denied a day's wages by their employer in violation of the collective bargaining agreement and that the action was merely jurisdictional. Two years
On its face, the statute would appear to authorize only suits by labor unions to enforce general provisions of the collective bargaining agreement. The issue of whether suits against the employer by individual employees, or unions on their behalf, for redress of personal grievances is within the scope of section 301(a) first came before the Supreme Court in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.* While the Court concluded that section 301 was jurisdictional in nature, Justice Reed, in a concurring opinion, indicated that suits for the purpose of vindicating uniquely personal rights (wages, seniority, etc.) were not cognizable under section 301(a).

The distinction made in *Westinghouse* between suits by unions to vindicate the personal rights of employees and suits to enforce those terms of the collective agreement running to the obligations of the union (arbitration), with only the latter action being cognizable under section 301, was finally dissipated by the Court in *Smith v. Evening News Ass'n.* In that case, an employer violated a "no-discrimination" clause in the collective bargaining agreement by allowing non-union employees to work during a strike by members of one union, but not affording a similar opportunity to members of a second union not on strike. After ruling that the state court had jurisdiction over the case even though the conduct of the employer might arguably constitute an unfair labor practice, and thus be within the exclusive jurisdiction of the National Labor Relations Board, the Court continued:

The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.
The Court further held that suits brought to enforce contractual rights by individual employees, as opposed to those brought on their behalf by the unions, should also be allowed under section 301(a).\textsuperscript{27} Though \textit{Evening News} established the right of an individual employee to sue under section 301, this right was not unqualified. The case of \textit{Republic Steel Corp. v. Maddox}\textsuperscript{28} involved a section 301 suit by an employee in a state court for severance pay allegedly due under the terms of the collective bargaining agreement. The plaintiff made no attempt to use the three-step grievance procedure provided for in the agreement. The general federal rule prior to \textit{Maddox} required that an aggrieved employee must \textit{attempt to use} established grievance procedure, unless the employment contract stated differently, before pursuing his contractual remedies in court under section 301.\textsuperscript{29} The plaintiff recovered, however, on the theory that state law, which in this case did not require exhaustion of contractual remedies, should be applicable, since, with the termination of the employment contract, "no further danger of industrial strife exists warranting the application of federal labor law."\textsuperscript{30} In support of this proposition, the plaintiff relied on a line of cases decided under the Railway Labor Act which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in court for wrongful discharge.\textsuperscript{31} The majority in \textit{Maddox}, however, held that the rationale of the cases decided under the Railway Labor Act should not be carried over to a suit for severance pay on a contract subject to section 301(a) of the Labor Management Relations Act on the grounds that allowing aggrieved employees to completely sidestep grievance procedures would undermine the position of the union as his \textit{exclusive} representative and would deprive both union and employer of a uniform method for orderly settlement of employee grievances.\textsuperscript{32} Thus, the federal rule under the National Labor Relations Act prior to \textit{Maddox} was reaffirmed, and remains controlling today.

Viewed in the light of the judicial history of individual suits \textit{both} to enforce the bargaining agent's duty of fair representation and to enforce compliance by the employer with terms of the collective agreement, the impact of the decision in \textit{Vaca} becomes more clear. Fair representation and section 301 suits serve, when viewed separately, as practical protective

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\textsuperscript{27} Id.

\textsuperscript{28} 379 U.S. 650 (1965).


\textsuperscript{31} In Moore v. Illinois Central R.R., 312 U.S. 630 (1941), the Court held that a trainman was not required to exhaust the administrative remedies under the Railway Labor Act before suing in state court for wrongful discharge. This ruling was affirmed in Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953).

\textsuperscript{32} It is important to note that even in light of the \textit{Maddox} decision, the Court has refused to overrule the \textit{Moore} and \textit{Koppal} cases. See Walker v. Southern Ry., 385 U.S. 196 (1966).
devices of individual employee rights. The Vaca formulation, however, combines them by conditioning the bringing of a section 301 suit, where remedies have not been exhausted, upon proof of a breach by the bargaining agent of the duty of fair representation. Negative reaction to the Vaca decision has been sharp and varied. Specifically, the rule pertaining to section 301(a) suits has been criticized on the grounds that it places too difficult a prerequisite on the employee, that the rule would be too difficult to administer judiciously, and that it places an unjustifiable limitation on the employee's right to bring a section 301(a) suit.

III. FAIR REPRESENTATION — WHAT IS THE STANDARD?

It is important to note that the Vaca court, from the point of view of creating and defining the limits of a fair representation standard, chose not to distinguish between what might constitute a breach of the duty in the context of an employee suit against a union as opposed to an employee section 301 suit against an employer. The failure of the Court to make this distinction implied that the majority felt that the standard should be the same for both situations.

The decision in Steele v. Louisville & N.R.R. represents the first judicial definition of a standard of fair representation in a racial context. There the Supreme Court held:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislatates.

33. This is not the first time that the duty of fair representation and a section 301 suit have been linked together. It was the opinion of the majority in Humphrey v. Moore, 375 U.S. 335 (1964), that a suit by individual employees against a union for breach of the duty could properly be classified as a section 301 suit. This decision provided a basis upon which to grant state courts jurisdiction over fair representation suits since, previously, in Smith v. Evening News Ass'n, 371 U.S. 195 (1962), the Court held that federal courts had concurrent jurisdiction over section 301 suits even though the actions of the employer constituted an unfair labor practice. Whether or not the Humphrey characterization of fair representation suits as section 301 actions will survive is open to question in light of the Vaca decision which met the preemption problem squarely, giving state and federal courts concurrent jurisdiction with the National Labor Relations Board over fair representation suits without characterizing them as section 301 actions.

34. See Comment, supra note 1, at 559.

35. Professor Wellington has characterized the defects in the Vaca formulation in the following manner:

The Supreme Court in Vaca v. Sipes declined to choose between two routes — contract or fair representation — for protecting the individual during contract time. Rather, it preserved fair representation and individual suits under section 301. In so doing, however, it may have seriously undercut both. While the Court saw the relationship between the duty of fair representation and the section 301 action, it probably did not see clearly enough.


36. Justice Black in his dissent in Vaca argues: "I simply fail to see how it should make one iota of difference, as far as the 'unrelated breach of contract' by Swift is concerned, whether the union's conduct is wrongful or rightful." 386 U.S. at 205. See also Comment, supra note 1, at 578.

37. 323 U.S. 192 (1944).
The Court specifically required that the union, during contract negotiation “represent non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith.”\(^{39}\) While the Court’s reference to the constitutional standards for equal protection has been subject to conflicting interpretations,\(^ {40}\) it is clear that “hostile discrimination” was meant to be the definitive standard. In a racial discrimination context, the standard would appear to be adequate to protect individual rights, for classifications based on race are inherently unfair and easily ascertainable.

The hostile discrimination standard, however, has not been limited to cases involving racial discrimination. In \textit{Gainey v. Brotherhood of Ry. & S.S. Clerks,}\(^ {41}\) union employees brought a class action against both the union and the railroad alleging failure to abide by an equalization of pay clause in the collective bargaining agreement. In affirming the district court’s dismissal of an amended fair representation complaint against the union, the Third Circuit stated:

In order to come within [the fair representation standard’s] ambit, the complaint before us must have more than conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is “hostile discrimination.” An allegation that certain conduct of the Brotherhood or a condition permitted to exist by it is “invidious” and “discriminatory”, without a concomitant identification of lack of good faith, will not set forth a claim sufficient to call for the use of the \textit{Steele} doctrine.\(^ {42}\)

In order to make clearer its application of the “hostile discrimination” standard, the court in \textit{Gainey} listed three categories of factual situations where a breach of fair representation would occur: (1) racial discrimination dealing with a patent disregard of job opportunities and seniority rights of negro employees;\(^ {43}\) (2) arbitrary sacrifice of a group of emp-

\(^{39}\) Id. at 204.

\(^{40}\) One view of the \textit{Steele} doctrine concludes that a labor union is an organ compelled to act more like a legislator than an agent. For an excellent analysis of the theory that the concepts of ordered liberty can be applied to union-management action concerning employees, see \textit{Symposium — Individual Rights in Industrial Self-Government — A “State Action” Analysis}, 63 Nw. U.L. Rev. 4 (1968). Professor Wellington takes a more conservative approach:

\textit{Steele} does not hold that the equal protection clause of the Constitution applies to the Brotherhood of Locomotive Firemen and Enginemen. The equal protection clause regulates state action — including, through the due process clause, the actions of the United States itself. It would require some rather sophisticated doctrinal analysis of the most far-reaching constitutional, and, therefore, fundamentally political, sort to equate Brotherhood action to state action. Perhaps the equation is possible, but the Court was careful not to attempt it. The equal protection clause was employed as an analogy, not as a constitutional requirement.

\(^{41}\) 313 F.2d 318 (3d Cir. 1963).

\(^{42}\) Id. at 323.

ployee’s rights in favor of strong or more politically favored groups; and (3) discriminatory measures taken against an individual for hostile reasons. In each category, bad faith is required to make the complaint actionable.

An indication of the extent to which courts have upheld arbitrary distinctions by unions among employees as long as the element of good faith is present can be found in Union News Co. v. Hildreth. While this case involved a suit by an employee against his employer for wrongful discharge, the court, in judging the employer’s actions, examined the union’s actions with respect to this employee applying in effect what could be considered a fair representation standard. Specifically, the employee claimed that she was illegally discharged in violation of a “just cause” provision in the collective bargaining agreement. Plaintiff was one of about a dozen employees at a lunch counter, the profits from which were not meeting expectations, due apparently to mishandling of funds and goods. The defendant employer suggested to the union that all the employees be replaced. The union agreed to a temporary replacement of five employees to become permanent if improvement was shown. Plaintiff, one of five employees permanently discharged, had a perfect 10-year working record and it was not contended that the plaintiff mishandled merchandise or money. The Sixth Circuit, reversing a judgment in the trial court in favor of the plaintiff, held that the union had authority based on good faith in the collective interest to agree with the employer to discharge temporarily five employees merely on suspicion, and to make the discharge permanent upon a showing of improvement in business operations. Since the union’s action was clearly arbitrary with respect to the plaintiff, it appears that the element of good faith is pervasive.

It is open to question whether the standards of fair representation as enunciated in Steele, Gainey, and Union News were significantly changed by the Vaca decision. The Court expressed the standard as follows: “A breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” One court has suggested that the use of the disjunctive “or” in the Vaca standard indicates that the union’s statutory duty is breached not only if there is a showing of bad faith, but also, in the absence of bad faith, if the union’s conduct is shown to have been arbitrary or discriminatory. Under this view,
it would appear that the agreement between the union and employer in *Union News* would be struck down as arbitrary and discriminatory and thus violative of the fair representation duty, even in the absence of bad faith. Other courts have taken the point of view that the *Steele* standard of hostile discrimination is still controlling in both a racial and economic context.\(^{51}\)

While decisions following *Vaca* do not reveal the difficulties predicted by some,\(^ {52}\) this is not indicative of the fact that the standard is adequate. Even prior to the *Vaca* decision, the duty of fair representation, as a means of protecting individual employee rights, was criticized on the ground that the standards applied could not reach subtle forms of discrimination within the grievance procedure.\(^ {53}\) The courts, in an effort to enhance the efficacy of the standard, have framed it in broad terms, but in so doing have left it largely void of content.

**IV. The Alternatives**

The alleged deficiencies of the fair representation standard created an impetus for development of alternative proposals for the protection of individual rights under collective bargaining agreements. The proposals differ as to (1) the relative weight assigned to the interest of the individual in both the negotiation and administration of collective bargaining contracts, (2) the forum for the adjudication of individual rights, and (3) the emphasis placed on the type of grievances presented in the administration of the contract.

In his dissenting opinion in *Republic Steel Corp. v. Maddox*,\(^ {54}\) Justice Black proposed that the discharged employee have an absolute right to bring a breach of contract action against his employer. In answer to the argument that compliance with established grievance procedures is necessary to effectuate the goals of national labor policy, Justice Black states:

> When a contract provided for arbitration to settle disputes which affected many workers and which could lead to strikes, this Court approved it and held that since both sides — company and union — had agreed to this method of peaceful settlement, federal law would honor and enforce it. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448. But to hold that the union and company can bind themselves to arbitrate a dispute of general importance affecting all or many of the union’s members and vitally threatening the public welfare is a far cry from saying, as the Court does today, that an ordinary laborer whose employer discharges him and then fails to pay his past-due wages or wage substitutes must, if the

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\(^{52}\) See, e.g., Wellington, *supra* note 35, at 182-84; Comment, *supra* note 1, at 578.


\(^{54}\) 379 U.S. 650 (1965).
union's contract with the employer provides for arbitration of grievances, have the doors of the courts of this country shut in his face to prevent his suing the employer to get his own wages for breach of contract. 55 Implicit in this view is the proposition that not all situations require the subordination of the interests of the employee to those of national labor policy. It is important to note that the Court in Vaca, as to when a section 301 suit may be brought, did not make this distinction.

The polar alternative to Justice Black's position is represented in the concurring opinion of Justice Goldberg in Humphrey v. Moore, 58 a case involving a challenge by an individual employee against modification of his seniority rights under the employment contract by joint employer-union action. The majority held against the complaining employees, treating the suit as both one for breach of fair representation and breach of the employment contract. 57 The thrust of Justice Goldberg's opinion was to the effect that individual employees should never be able to sue under section 301 for violation of the contract, for there were "too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties." 58 Thus, employees would be limited to fair representation suits. It is clear that Justice Goldberg assumes that the interests of the employer and union in maintaining a flexible employment contract will always be of a higher order than that of the employees in having the contract terms enforced. The approaches of Justices Black and Goldberg are not concerned with fair representation, the former finding an absolute right to sue the employer under section 301 and the latter finding no such right under any circumstances.

The Supreme Court in Vaca declined to follow either of these approaches, taking an intermediate position. In light of the alternatives discussed above, the Vaca rule appears to be the best approach. It is clear that an unconditional right in the employee to sue his employer would result in unjustifiable harassment of the employer. Moreover, taking from the employee any chance for redress would be equally as unsatisfactory, for the employer clearly owes contractual duties to the employee. By conditioning the right to sue under section 301 upon a breach of fair representation, the Court implicitly recognized the need to balance the competing interests of the employer, union, and employee. The medium chosen for this balancing process was the duty of fair representation. As was noted above, however, the standard is insufficiently defined and is inadequate even where a suit is directed primarily at the union rather than the employer by means of a section 301 suit. The problem therefore becomes one of adding definitiveness to the standard. 59

55. Id. at 663-64 (emphasis added).
57. Id. at 343-44.
58. Id. at 353-54.
V. Expanding the Standard — A Situational Approach

The distinction between negotiation and administration in collective bargaining agreements provides a convenient conceptual tool through which content may be added to the standard. In the negotiation stage there is clearly a need for granting the exclusive representative almost unlimited discretion, for the strength of the bargaining unit depends almost entirely on presenting a uniform set of demands to the employer. Thus, breaches of fair representation would occur only in cases of outright racial discrimination or where there were clearly no valid grounds for favoring one group in the unit over another in making economic distinctions. In the administration of the collective bargaining agreement through the grievance machinery, however, the individual interest, particularly where the complaint is from a single employee or a small group of employees, should be considered primary. The competing interest of avoiding industrial strife by giving the union a monopoly of power does not carry much weight in the administration stage of the agreement, for it is clear that in the usual case the settlement of a single employee grievance will not affect the pattern of industrial relations to any significant degree. While the broad standards enunciated in Vaca and Steele may provide adequate protection for individual rights in the negotiation of collective agreements, they clearly are not adequate to protect what should be the superior position of these rights in the administration stage.

Another method of adding content to the fair representation standard is to distinguish various types of grievances. One commentator has suggested that certain job interests are critical from the employee's point of view and that judicial protection of these rights is a necessity. Under

60. It has been suggested, both implicitly and explicitly, that the distinction between negotiation and administration of collective bargaining agreements is not completely valid since each decision under the grievance procedure has predecendental value for future determinations of like disputes under the contract, and is merely an interpretation of the terms of the contract. Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 625 (1956). This view has been criticized on two grounds: (1) since the resolution of most grievances will turn only on factual issues, the doctrine of precedent will not apply; (2) nothing can prevent the employer and union from agreeing to eliminate the predecendental value of all points of law decided in all grievances not processed by the union. Comment, Individual Control Over Personal Grievances Under Vaca v. Sipes, 77 Yale L.J. 559, 563-64 (1968). It is submitted that the distinction is valid at least for the purpose of demonstrating the need for an expanded concept of fair representation in the administration of grievances under collective bargaining agreements.

61. In J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), the Court held that a collective bargaining agreement between union and employer superseded prior valid contracts between the employer and the employee, even where these terms were more favorable to the employees in question. The decision is indicative of the extent to which the Court has attempted to give exclusive control to the union over contract negotiations.


63. Where, for instance, wage differentials are large between union and non-union members of the same unit for jobs requiring similar skills.

this view, where the dispute involves discharge, compensation, or seniority, and a union refuses to process the grievance, the employee would have the right, if his claim has merit, to obtain a court order compelling arbitration. Although it is open to question whether, from the employee's point of view, arbitration is a more favorable method of redress than a court suit for damages, the proposal has merit in its recognition that the degree to which the individual interest is protected should depend on the job interest involved. Distinctions in job interests could easily be infused in the fair representation standard. Thus, courts, in determining whether a union has breached its duty of fair representation, could hold the union to a higher standard where it refused to process a grievance involving a critical job interest than in the case where the complaint is based merely on a change in job station. In addition, it would not appear that the employer's interests increase commensurately with the type of grievance presented. Therefore, by holding the union to a higher standard of fair representation, the court would merely be realigning the balance among individual, employer, and union interests to reflect the importance of the grievance presented.

The membership status of an employee might also be a convenient guideline along which to expand the content of the fair representation standard. Since the duty of fair representation extends to all members of a bargaining unit, situations will arise where minority union and non-union members of the bargaining unit will present grievances to the majority representative for processing. A refusal to present these grievances may merely be the result of a discriminatory attitude on the part of the majority union. The practical possibility of such a result should be reflected by shifting to the union the burden of showing that a breach of the duty has not occurred. The necessity of varying the burden of proof to account for the type of grievance presented as well as the party presenting it becomes clear in light of the rule in *Vaca* which precludes recovery from either the union or employer for failure to prove a breach of the standard.

65. The need for a higher standard of fair representation is particularly evident in the case of the discharged employee. His absence from the work area seriously undercuts his ability to persuade union representatives to process his grievances through higher stages.

66. In his dissenting opinion in *Maddox*, Justice Black compared the relative merits of arbitration and the court as forums for the adjustment of grievances:

For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record or proceedings need not be complete; and judicial review, it has been held, is extremely limited. To say that because the union chose a contract providing for grievance arbitration an individual employee freely and willingly chose this method of settling any contractual claims of his own which might later arise is surely a transparent and cruel fiction. 379 U.S. 650, 664–65 (1965). For a proarbitration viewpoint, see Summers, supra note 53.
VI. Implementation of an Expanded Standard — The Proper Forum

Having reviewed the guidelines along which the standard may be expanded, the question of the proper forum to implement the standard arises. In holding that the National Labor Relations Board did not have exclusive jurisdiction over fair representation suits, the Vaca Court discussed the relative merits of a judicial as opposed to an administrative forum:

A primary justification for the pre-emption doctrine — the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose — is not applicable to cases involving alleged breaches of the union’s duty of fair representation. The doctrine was judicially developed in Steele and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A. ... [I]t can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have engaged in this type of review since the Steele decision.67

The Court also pointed to the fact that if exclusive jurisdiction was placed in the National Labor Relations Board, the individual employee might be denied assurance of an impartial review of his complaint, since the Board’s General Counsel has unreviewable discretion to institute an unfair labor practice complaint.68

Although the Court’s position has been challenged on the grounds that state judges do not possess the necessary expertise to decide fair representation cases and that concurrent jurisdiction will result in a lack of uniformity in the application of the fair representation standard,69 the judicial forum is probably best able to implement an expanded duty of fair representation. Merely by shifting the burdens of persuasion and proof as previously pointed out, the courts may effect significant changes in the standard. Where, for instance, a non-union employee is attempting to bring a section 301 suit against his employer for wrongful discharge, the initial burden of persuasion should be placed on the union to show that a breach of fair representation has not occurred. Conversely, where a union employee brings suit against his union for an alleged breach of duty in agreeing to a certain contract clause during negotiation of the contract, the burden of proving a breach of fair representation would properly remain with the employee.

67. 386 U.S. at 180–81 (footnote omitted).
68. Id. at 182.
69. H. WELLINGTON, supra note 35, at 173.
VII. Conclusion

Enforcement of the duty of fair representation is only one of several methods of protecting individual rights under collective agreements. Now that the right to a second remedy, individual employee suits against employers for breach of the employment contract, has been conditioned upon a showing of the breach of the duty, it is advisable that the present standards of fair representation be expanded to reflect the multidimensional interests of the individual employee. While the use of the present broad and vague standard, coupled with an undimensional approach to the problem of individual rights, has not resulted in injustice in all cases, this should not be considered indicative of the fact that the standard is adequate or that improvement is not necessary.

David J. Griffith